

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

**OPAL ENVIRONMENTAL JUSTICE
OREGON**

Employer

and

Case 19-UC-261765

**COMMUNICATIONS WORKERS OF
AMERICA, LOCAL 7901**

Petitioner

DECISION AND ORDER

The above-captioned matter is before the National Labor Relations Board (“the Board”) upon a petition duly filed under § 9(b) of the National Labor Relations Act (“the Act”), as amended. Pursuant to the provisions of § 3(b) of the Act, the Board has delegated its authority in this proceeding to me.

Opal Environmental Justice Oregon (“Employer”) has voluntarily recognized Communications Workers of America, Local 7901 (“Petitioner”) as the exclusive collective bargaining representative of all its employees, excluding its confidential, supervisory, and managerial employees (“Unit”). Petitioner seeks to have the unit description clarified to affirmatively include the advocacy and policy manager classification (“APM”). The Employer maintains this position is confidential, supervisory, and managerial, and properly excluded.

A hearing officer of the Board held a hearing in this matter on July 16, 2020.¹ Petitioner and the Employer filed briefs after the hearing. Based on the record evidence, the parties’ arguments, and the applicable Board law, I do not find there is a basis to clarify the recognized Unit. As described, the Unit includes “all employees,” and as such the APM is already included. To the extent either party seeks a finding regarding exclusion of the APM as a confidential, supervisory, or managerial employee, at the time of the hearing the position had only existed for a few weeks. Further, there is no history of this position, or any equivalent position, within the organization. Any such finding would therefore be based purely on speculative plans and be premature. Absent any basis to clarify the Unit, I have dismissed the Petition.

¹ All dates 2020 unless otherwise indicated.

A. RECORD EVIDENCE

i) Background

The Employer is a non-profit environmental advocacy organization founded in 2006 and located in Portland, Oregon. The organization currently employs approximately a dozen employees, with an executive director being the most senior manager in the organization.

Early this year employees presented the executive director with proof of majority support and, on January 22, the Employer recognized Petitioner as the exclusive bargaining representative of “all employees, excluding supervisors, managerial employees, confidential employees and contractors.” An attachment to the recognition document affirmatively identified five employees, three organizers, an operations coordinator, and a grants coordinator as being included in the unit. The parties have begun negotiating a collective bargaining agreement, but no contract has been reached at this time.

The Employer employs three contractors that are excluded from the Unit. Between the executive director, clearly excluded from the unit, and the five organizers and coordinators, clearly included in the unit, their currently exists a middle layer of employees. The classification at issue in this case, the APM, is one of the three positions in that layer, which also includes the alliance director and organizing director classifications.

ii) Development of Current Organization Structure

Until recently, two of the current positions in this middle layer did not exist: the APM position at issue herein and the organizing director. In December of 2019, the Employer posted a job listing seeking a political director, a new position. The position description for the political director addressed several areas of responsibility, ranging from political strategy and policy research to fundraising and communications. It also stated, in part:

The Political Director is part of the organization’s senior leadership and will support a growing, seasoned team of member-leaders and paid staff working to win concrete change in environmental justice-related policy in Oregon.

The Employer, in reviewing the applicants, determined that while none of the applicants were ideally suited for the job as posted, that two of the applicants were well-qualified for parts of the political director position. One applicant, Akash Singh (“Singh”) had skills focused on legal policy research, while another had an organizing and communications background. In response, the Employer set aside the political director position and created two new positions, the APM position for Singh and the campaign and communications manager position for the individual with the organizing background.

The campaign and communications manager position was filled in February, and in July the campaign and communications manager position was converted to organizing director. At hearing, the executive director testified the APM was also created with the intention of converting that position to a director level position once Singh had some experience with the Employer.

At approximately the same time as the Employer recognized the Union and hired the campaign and communications manager it also sought to hire a development director, although the position's title was subsequently changed to development manager. That position does not appear on the Employer's organizational chart and is either unfilled or has been eliminated. The evidence suggests this position would have also been in the middle level of the organization, between the Unit employees and the executive director. The Employer also employed a director of narrative strategy at some point in late 2019, in what appears to be another position in this middle layer of employees, but this individual left their employment and the position has since been eliminated.

The Employer maintains that the executive director and the current middle layer of employees – the alliance director, the organizing director, and the APM – are managers and constitute a senior management team.² The employees in this group have a weekly meeting, a Slack channel, and a group text thread for communication. When questioned regarding what topics are addressed by this group, the executive director provided the example of developing an agenda for a retreat for the Employer's employees. The executive director testified it is also his intention to address personnel and labor-management information, as well as collective bargaining strategy, with this senior management team in the future, but he has not done so to date because of the pending unit clarification petition.

iii) The APM Position

As noted above, having reviewed the applicants for the political director position, the Employer decided to create the APM position for Singh. The record indicates that Singh was verbally offered a position in February and he accepted verbally. However, at the time Singh applied for the political director position, he was enrolled in law school in Vermont and was unable to immediately start work with the Employer in Portland.

As his start date neared, on May 27, the Employer provided Singh a written offer of employment for the APM position.³ That offer letter includes the language originally utilized in the political director position description:

² The executive director testified that the current alliance director will be leaving their employment soon and accordingly the senior executive team will only consist of three members.

³ At various points in the record the APM position is referred to as the "Advocacy and Policy Manager" (the Employer's organizational chart) and at other points it is referred to as the "Policy and Advocacy Manager" (the May 27 written offer of employment). There is no evidence of a substantive difference and this appears to be an error or a stylistic change. Accordingly, I have referred to both as APM for consistency.

The [APM] is part of the organization's senior leadership and will supervise a growing team of member-leaders and paid staff working to win concrete change in environmental justice-related policy in Oregon.

Attached to the offer letter was the position description for the APM position, which also contains the above language.⁴ Under the "Environmental Justice Policy Development, Analysis, and Research" section of position description are four bullet points. One bullet point identifies as a responsibility:

Recruits, hires, and supervises legal, advocacy, and policy fellows and volunteers in support of all program areas.

The "Environmental Justice Policy Development, Analysis, and Research" section is identified as 40 percent of the position's responsibilities. The "Organizational Leadership" section of the position description is identified as 15 percent of the position's responsibilities. One of the bullet points in that section states:

Supervise and manage full-time staff, providing professional guidance and training to interns and volunteers when necessary.

The position description contains a total of 17 bullet points, many of which describe responsibilities related to organizational strategy and policy.

Singh began work on June 1. The record indicates that Singh will not graduate law school and be eligible for the bar examination until an externship requirement is completed. Singh's employment with the Employer is either completing this requirement or Singh is seeking to have his employment with the Employer accepted as an externship. As of the date of the hearing, Singh had been employed for approximately six weeks.

The executive director and Singh testified generally consistently regarding the work Singh has performed to date. This includes a research project whereby Singh examined an executive order issued by Oregon's governor addressing climate change and made a report. Singh also examined a police reform initiative the Employer was invited to support, performed research, and made a recommendation regarding whether to accept the invitation. Singh testified that only about half of the 17 bullet points in the APM job description actually reflect his current responsibilities as he understands them. Asked specifically about the two bullet points referenced above regarding supervision, Singh stated he does not recruit, hire or supervise any employees. The Employer agrees Singh has not performed any supervisory functions to date.

The Employer maintains the confidential, supervisory and managerial functions of the APM position will be introduced in the future. The executive director testified the Employer intends to hire an unidentified number of part-time policy advocacy and legal fellows prior to the 2021 Oregon legislative session, a session that begins in January of

⁴ In the past, the Employer has utilized a position called advocacy coordinator, and to create the APM position description, the executive director combined elements of the advocacy coordinator and political director position descriptions.

2021. The record does not indicate whether the Employer has employed policy advocacy fellows in the past, and if it has, who supervised these employees. The Employer takes the position the APM will be responsible for recruiting and hiring these individuals, consistent with the language in the position description. The executive director also stated at hearing that as APM, Singh may supervise a yet-to-be hired full-time communications staffer or communications manager, and that Singh will be responsible for the recruiting and hiring of this employee. The record does not indicate whether the Employer has employed a communications staffer or communications manager in the past, and if it has, who supervised this employee.

The executive director also stated the APM will, in the future, have the authority to develop policies for the Employer, and will have the authority to implement those policies, up to and including budgetary authority. Although the Employer admits it has not yet included Singh on any decisions involving personnel, labor-management concerns, or collective bargaining strategy, it maintains it intends to do so once the unit clarification petition is resolved. As noted above, the executive director also testified that Singh was hired with the intention of converting his APM position to an as-yet-unidentified director position and eliminating the APM position.

B. ANALYSIS

i) Unit Clarification Standard

It is a well-established principle of Board law that the Board's authority to issue certifications under § 9(c)(1) of the Act carries with it an implied authority to police such certifications, and to clarify them as a means of effectuating the policies of the Act. As such, the Board has developed procedures for a petition allowing clarification of a bargaining unit, a UC petition, to resolve ambiguities concerning the unit placement of individuals. *Union Electric Co.*, 217 NLRB 666, 667 (1975). The Board has extended these functions to bargaining units that are not certified because national labor policy requires the Board to take all positive action available to eliminate industrial strife and encourage collective bargaining. *Brotherhood of Locomotive Firemen & Enginemen*, 145 NLRB 1521, 1524 (1964)

Unit clarification petitions are not intended to upset an agreement, or established practice, between a union and an employer regarding the placement of individuals. *Union Electric*, supra. However, where there is a certified or currently recognized bargaining representative and no question concerning representation exists, the UC petition mechanism allows for the Board to resolve doubt regarding placement. *United Electric*, supra, § 102.60(b) of the Board's Rules and Regulations.

Here, the scope and composition of the recognized unit is clear from the recognition document and there is no contract currently in place. While there is no ambiguity in the unit description, the parties are simply in dispute regarding placement of the APM classification due to a question of whether the APM classification fits within the articulated exclusions.

ii) Confidential Status

“Confidential employees” are defined as employees who (1) share a confidential relationship with managers who “formulate, determine, and effectuate management policies in the field of labor relations,” and (2) assist and act in a confidential capacity to such persons. *Waste Management de Puerto Rico*, 339 NLRB 262, 262 fn. 2 (2003). The party asserting confidential status has the burden of providing evidence to support its assertion. *Crest Mark Packing Co.*, 283 NLRB 999, 999 (1987).

Here, the Employer contends the APM is a confidential employee because the APM will, in the future, spend a significant amount of time on labor relations matters, including the weekly meetings with the senior management team, drafting proposals and counterproposals for bargaining, and otherwise being privy to confidential communications via the senior management Slack channel and group text.

The Board’s definition of a confidential employee applies to those who *assist* management; it does not apply to the managerial employees who are developing policy themselves. Those individuals are properly analyzed under the Board’s managerial standard, addressed in a following section. Here, the Employer has introduced no evidence that distinguishes between the APM as a confidential employee assisting management and the APM as a manager. At no point in the record is it suggested that the APM provides administrative support or otherwise assists management. The Employer argues, and the record evidence addresses, the APM as a member of the senior management team. The Employer’s evidence, from the executive director’s testimony about the APM position description, asserts the APM participates in the senior management team as a member. As such, I find the question of confidential status is entirely subsumed in the question of managerial status, and there is no independent basis for finding the APM is a confidential employee as defined by the Board.

iii) Supervisory Status

Section 2(11) of the Act defines the term “supervisor” as those employees having the “authority; in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action.” Possession of any one of these factors will confer supervisory status if the authority is exercised with independent judgment and not in a routine manner. *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006); *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711 (2001). The burden of establishing supervisory status rests on the party asserting that status. *Id.*

While the party asserting supervisory status need not show that the authority has been exercised, it must show that the employee “actually possesses” the authority at issue. *Mountaineer Park*, 343 NLRB 1473, 1474 (2004). “[P]urely conclusory” evidence is not sufficient to establish the existence of supervisory authority. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006).

Supervisory status in the present case is based on future responsibility. The executive director acknowledged at hearing that the APM has not, as of the hearing, supervised any employees, a point Singh also made in his testimony. However, the Employer argues the APM is a supervisor because Singh will have the authority to hire staff, the advocacy and legal fellows, as well as the communications staffer and/or manager, will direct the work of these employees, and will be accountable for their performance. Although this argument focuses on Section 2(11) factors such as “hire” and “assign,” the description of the APM’s future supervisory role in the record is expansive and could potentially cover any or all of the Section 2(11) factors.

The question then is whether the Employer’s plans are specific enough to support a finding regarding any factor, or whether these plans constitute purely conclusory evidence. While the executive director described assigning expansive supervisory authority to the APM position in the future, I find the circumstances surrounding that authority are vague. Ultimately, because the APM position is newly created, there are no other comparable positions to draw inferences from, the APM position may not be the position that has the hiring authority described, and because Singh has only been in the APM position for six weeks, it is impossible to draw any conclusions about what authority will exist in the future.

Taking these problems in turn I find as follows. It is undisputed the APM position is newly created and there are no comparable positions. In short, there are no former APM’s or a demonstrated comparable that can show what authority the Employer invests in the position. The Employer cites to *Fred Meyer Alaska, Inc.*, 334 NLRB 646 (2001) for the principle that possession of supervisory authority is the critical element, not that the authority has actually been used, and that case is illustrative of this issue. In *Fred Meyer*, the Board found a meat department manager, who had not actually hired or approved a transfer, was a supervisor in the same manner as a deli manager and a seafood manager, the other sub-department managers in the store, who had actually exercised their hiring authority. *Id.* at 647. In reaching this conclusion, the Board referenced the testimony of meat managers at other locations and the food manager that supervised the sub-department managers, who described the meat department manager’s role in the employer’s overall hiring process. *Id.* at 647-648.

In *Fred Meyer*, the food manager testified that the meat manager would have the authority to hire in the future, but this testimony was bolstered by other evidence. A comparison could be drawn between the meat manager and the deli and seafood managers, equivalent positions in a stable organizational structure. Further, the Employer had an established hiring procedure with a well-defined role for the meat manager to fill. Finally, the Employer had employed many meat managers in the past, at the location at issue and other locations.

This type of evidence is absent in the present case. Here, the only evidence is the testimony of the executive director and the position description recently created by the executive director. The Employer has never employed an APM previously, it does not have an established hiring structure for the APM to operate within, and there is no

evidence of anyone other than the executive director hiring anyone for the Employer.⁵ I find the difficulty in assessing the situation is exacerbated because the positions that would be subject to the APM's supervision are also newly created and lack a comparable for analysis.

Another point that raises more questions than it answers is the executive director's contention that he hired Singh with the intention to promote him out of the APM position to a new director position. Questioned when this would occur, the executive director essentially stated he would do so when Singh was ready. This makes it impossible to know whether Singh, when exercising this hiring and supervision authority in the future, will be the APM or will hold some other unidentified director position. It's the Employer's choice to promote Singh as it sees fit, but this makes me extremely reluctant to rely on the APM position description as evidence clarifying future intent.

Finally, Singh has only been in the APM position for six weeks. The Employer may intend to make the changes described in the future, but any plans related to a new hire, especially supervisory plans for a new hire with no supervisory experience, must be viewed as having a large degree of variance. The Employer acknowledges all these plans are entirely subject to the authority of the executive director. Taken together, I find the record does not create a basis for finding the APM must be excluded from the Unit as a statutory supervisor consistent with Section 2(11).

iv) Managerial Status

The Act makes no provision for "managerial employees;" this category of personnel has been excluded from the protection of the Act by Board policy. Managerial status is reserved for those in executive-type positions, the true representatives of management who formulate and effectuate high-level employer policies or "who have discretion in the performance of their jobs independent of their employer's established policy." *General Dynamics*, 213 NLRB 851, 857 (1974). The Supreme Court defines managerial employees as those who "formulate and effectuate management policies by expressing and making operative decisions of their employer." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). The Court has further clarified that an employee may only be excluded as managerial if he or she "represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy." *NLRB v. Yeshiva University*, 444 U.S. 672, 683 (1980). The party seeking to exclude an individual as managerial bears the burden of proof. *LeMoyne-Owen College*, 345 NLRB 1123, 1128 (2005); *Waste Management de Puerto Rico*, 339 NLRB 262, 279 (2003).

⁵ Petitioner places significant weight on Singh's lack of supervisory experience and that one of his references allegedly suggested that he was not ready to supervise employees as a recent graduate. I do not find this point to be particularly important, and I have not relied upon the job reference evidence. Whether it is a good idea to invest Singh with supervisory authority is a decision for the Employer and not a question facing me; that question is only whether the Employer's plans can support a finding of supervisory status.

The executive director acknowledged at hearing that the APM has not, as of the hearing, taken part in any managerial decision-making, including policy development, beyond attendance at the weekly management meeting. Even then, these meetings have not addressed managerial issues such as labor negotiations or personnel matters. The Employer's contention that the position is managerial is, as with supervisory status, a future intent, not a present reality. Additionally, as was also the case with supervisory status, the executive director also acknowledged the intention to include the APM in senior management is at the Employer's discretion and could change.

All of the reservations expressed above regarding the evidence of future supervisory status also apply to the contention of a managerial finding. That said, the Employer's plans to make the APM part of the senior management team are better defined; Singh already attends the weekly management meetings and is included in the communication channels of management. The problem with this evidence, however, is that the Employer admits it is not including him in any of the decision-making that would demonstrate the APM is a managerial position. This returns the analysis to the same point as the supervisory issue: the testimony of the executive director that he alone will decide when to move forward with a plan that has no historical or comparable examples to provide additional support. As with the supervisory question, I do not find the record creates a basis for a managerial finding.

C. CONCLUSION

Ultimately, the Employer will either include the APM in managerial decision making, invest Singh with the authority to hire, or take some other action that would actually create a basis for arguing he has managerial or supervisory status. However, at the time of the hearing, all that exists is future plans, and for the reasons stated above these future plans are not the type that would allow for a finding of supervisory or managerial status. Until that time, the APM classification is included in the "all employees" language of the recognition agreement. As no further clarification is necessary, I am dismissing the instant petition.

D. ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.

E. 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. The request for review must conform to the requirements of Section 102.67(d) and (e) of the Board's Rules and Regulations and must be filed by **September 10, 2020**.

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.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. ⁶ A party filing a request for review must serve a 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 Seattle, Washington on the 27th day of August, 2020.



Ronald K. Hooks, Regional Director
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⁶ On October 21, 2019, the General Counsel (GC) issued Memorandum GC 20-01, informing the public that Section 102.5(c) of the Board's Rules and Regulations mandates the use of the E-filing system for the submission of documents by parties in connection with the unfair labor practice or representation cases processed in Regional offices. The E-Filing requirement went into immediate effect on October 21, 2019, and the 90-day grace period that was put into place expired on January 21, 2020. 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, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden.