Columbia College *and* Illinois Education Association (IEA). Case 13–RC–21249

March 31, 2006

DECISION AND DIRECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The National Labor Relations Board has considered objections to and determinative challenges in an election held October 14, 2004, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 138 for and 158 against the Union, with 60 challenged ballots.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the record in light of the exceptions and briefs, and has adopted the hearing officer's findings[1] and recommendations[2] as modified.

We agree with the hearing officer's recommendation to overrule the Employer's challenges to the ballots of employees Cory Plazak, Cynthia Martinez, Lott Hill, Lisa Butler, Emily Reible, and Matthew Green. The Employer failed to adduce sufficient evidence to prove that these employees are either excluded supervisors or ineligible managerial employees.[3] Further, as explained below, we agree with the hearing officer's conclusion that the Employer's tutors are not excluded from the unit by virtue of the parties' Stipulated Election Agreement. While we do not adopt the hearing officer's finding that part-time tutors who also hold part-time teaching positions are not dual-function employees, we find that they are eligible to vote as dual-function employees with a substantial interest in the working conditions of the unit.

Facts

The Employer is a private university located in Chicago, Illinois, enrolling approximately 10,000 undergraduate and graduate students. The Union seeks to represent a unit of full-time and regular part-time staff employees working in 72 different academic and administrative departments. Since March 1998, the Union has represented a unit of the Employer's part-time faculty. The Board conducted an election on October 14, 2004, pursuant to the parties' Stipulated Election Agreement.[4] Of the approximately 422 eligible voters, 138 cast ballots in favor of the Union and 158 cast ballots against representation. There were 60 challenged ballots, a number sufficient to affect the results of the election.

The Employer argues that all of the challenged voters are ineligible. The Employer's arguments supporting the ineligibility of those casting challenged ballots fall into three general categories: (1) the individuals are ineligible tutors, (2) the employees are either managerial or supervisors, and (3) the employees are ineligible for various specific reasons. On October 21, 2004, the Petitioner filed four timely objections.

The hearing officer recommended that 42 of the 60 ballot challenges be overruled and recommended sustaining Objection 1, which alleged that the Employer failed to supply a complete *Excelsior* list. The hearing officer recommended overruling Objections 2, 3, and 4.[5]

Much of the dispute in this matter revolves around approximately 24 nonstudent tutors in the English department's writing center and approximately 12 nonstudent tutors in the math and science department's learning center. All of the learning center tutors and most of the writing center tutors also hold part-time faculty positions in their respective departments. Eleven writing center tutors and 5 learning center tutors voted in the election but were challenged because their names did not appear on the *Excelsior* list.[6]

All of the tutors work a part-time schedule in their respective centers and are hired on a semester-by-semester basis. However, as a matter of practice, the Employer has rehired all of the tutors for each following semester if

[1] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[2] We find it unnecessary at this time to pass on the hearing officer's recommendation to sustain the Union's Objection 1 alleging that the Employer failed to comply with the *Excelsior* requirement. We shall direct the Regional Director to open and count the challenged ballots consistent with our findings here. This will alter the tally of ballots and, possibly, moot Objection 1 if the Union receives a majority of ballots cast. Alternatively, Objection 1 could become unsustainable if the Employer substantially increases its margin of victory. If, however, the revised tally of ballots shows that the Union has not received a majority of ballots cast, the Regional Director immediately shall transfer the case back to the Board for further proceedings. See *Laneco Construction Systems,* 339 NLRB 1048, 1051 (2003).

[3] No party excepted to the hearing officer's remaining supervisory and managerial findings.

[4] The stipulated bargaining unit consists of "all full-time and regular part-time staff employees," excluding, in relevant part, "all persons who are primarily students," "music tutors," "independently contracted tutors," and "faculty."

[5] No party excepted to the hearing officer's recommendation to overrule Objections 2, 3, and 4.

[6] Erin Hellweg, Tameka Hemmons, and Sarah Willis are graduate or specialty writing center tutors who do not hold part-time faculty positions and voted without challenge because they were included on the eligibility list. Of the remaining writing center tutors, 11 voted under challenge and 10 did not vote and were not included on the eligibility list.

they wish to continue tutoring. Writing center tutors are supervised by a nonfaculty staff supervisor while the learning center tutors are directed by a part-time faculty member who also holds a tutoring position and who is in turn supervised by the chair of the math and science department.[7]

Employees in both centers apply separately to work as tutors. Their tutoring work is not a requirement of their part-time faculty positions. Tutoring work is compensated at a much lower rate than teaching. The tutors are paid between $12 and $13 an hour, while teachers are paid between $2400 and $4300 for three-credit, one-semester courses. Tutors work regularly scheduled hours in their respective centers and receive two separate paychecks—one for teaching and one for tutoring. Tutors in the learning center may occasionally see students from their classes during their tutoring hours while tutors in the writing center do not tutor their own students.

Hearing Officer's Findings and the Employer's Exceptions

The hearing officer recommended, in part, that the challenges to the tutors' ballots be overruled. The hearing officer found that the tutors did not fall within the Stipulated Election Agreement's exclusion of "independently contracted tutors" from the unit. In so finding, the hearing officer applied the Board's independent contractor test and determined that the learning center and writing center tutors are not independent contractors within the meaning of Section 2(3) of the Act, but rather are statutory employees of the college. Further, the hearing officer found that the tutors have a community of interest with the other staff employees. This finding was based on similar job functions, wage rates, lack of benefits, and a lack of evidence in the record that the tutors do not have a community of interest with the other staff employees. Moreover, the hearing officer found that part-time faculty members holding part-time tutoring positions are not dual-function employees because they have separate and distinct employment relationships for each position. He concluded that, as tutors, they have a community of interest only with the part-time staff employees. However, to the extent that these tutors are considered to be dual-function employees, the hearing officer found that they have a sufficient community of interest with the other staff employees to permit their inclusion in the unit.

In its exceptions, the Employer argues that the tutors are not eligible to vote because they are excluded from the unit under the "faculty" and "independently contracted tutors" exclusions or because they are dual-function employees covered by a current collective-bargaining agreement and they do not spend at least 50 percent of their time performing tutoring work. The Employer also argues that the hearing officer erred in failing to find that six individuals are either supervisors or managerial employees, and that three employees are ineligible to vote based on their lack of work as of the eligibility date or due to their student status. The Employer further argues that it substantially complied with the *Excelsior* requirements and that a new election is not warranted.

As noted above, we find merit only in the Employer's argument that employees holding both part-time faculty and part-time tutoring positions are dual-function employees. Nonetheless, we find that they are eligible to vote because they are not specifically excluded from the stipulated unit and because they have a substantial community of interest with the other employees in the unit so as to permit their inclusion under the Board's dual-function employee analysis.

Analysis

A. Application of the Stipulated Election Agreement

In adopting the hearing officer's recommendation that the challenged tutors are not covered by the parties' stipulation that "independently contracted tutors" and "faculty" be excluded from the unit, we note that the hearing officer's analysis is consistent with *Caesar's Tahoe*, 337 NLRB 1096, 1097 (2002). Under *Caesar's Tahoe*, the Board applies a three-part test to determine if a challenged voter is properly included in or excluded from a stipulated bargaining unit. First, the Board must determine whether the stipulation is ambiguous. If the objective intent of the parties is expressed in clear and unambiguous terms, the Board will simply enforce the agreement. Second, if the stipulation is ambiguous the Board will seek to determine the parties' intent through normal contract interpretation, including the use of extrinsic evidence. Third, if the parties' intent still cannot be discerned, the Board will determine the proper bargaining unit by employing its traditional community-of-interest analysis.

We agree with the hearing officer (1) that the "independently contracted tutors" exclusion does not apply to the challenged tutors and (2) that the "faculty" exclusion does not apply to individuals holding both a faculty position and an included position.

1. Applying the *Caesar's Tahoe* test here, we note that the term "independently contracted tutors" is open to differing reasonable interpretations, which cannot be

[7] No party excepted to the hearing officer's finding that Nathan Linshield, who is a part-time faculty member and part-time tutor, is not a statutory supervisor of the learning center tutors.

resolved by reference to the language of the stipulated election agreement alone. The exclusion could reasonably be read to apply to tutors who work under separate and independent semester-long agreements (as argued by the Employer); or instead to tutors who meet the Board's standards for independent-contractor status. Thus, the hearing officer properly looked next to the second prong of *Caesar's Tahoe* to resolve the issue.

Under this second prong, we infer that the parties intended to give the words "independently contracted" the meaning used by the Board and the courts in related contexts. Under general principles of contract interpretation, "technical terms and words of art are given their technical meaning unless the context or usage which is applicable indicates a different meaning." Restatement (First) of Contracts § 235(b). Here, the hearing officer correctly found that the parties intended to exclude those who met the test for independent-contractor status, as defined by both the Board and the courts. The record contains no evidence that the parties intended the term "independently contracted" to be given anything other than its technical meaning. Having found that the tutors in question did not fall into the classification of "independently contracted tutors" as interpreted, the hearing officer correctly determined their eligibility without resorting to the third prong, viz. the Board's community of interest analysis.[8]

2. The Stipulated Election Agreement's exclusion of "faculty" is also ambiguous. The exclusion of faculty reasonably could be read to apply to any faculty member, irrespective of whether that faculty member is also a part-time employee, i.e., a tutor. Under this view, the tutors here would be excluded. Alternatively, the exclusion could reasonably be read to apply only to faculty members who are not part-time staff employees. In support of the latter view, we note that the unit includes part-time staff employees, and the tutors are part-time staff employees. Because the stipulation is ambiguous, we look next for other evidence of the parties' intentions.

The record contains no evidence of the parties' intent in crafting the exclusion, and general principles of contract interpretation do not resolve the issue. And, there is nothing in our law which would suggest than an employee who holds two positions—one included in a stipulated unit and one excluded from that unit—must as a matter of law be excluded from the unit. See *Alpha School Bus Co.*, 287 NLRB 698 (1987) (finding that employee who worked as both an excluded mechanic and an included bus driver was eligible to vote).

Thus, we turn to the third prong. Based on the Board's community-of-interest test we find that employees holding both an otherwise eligible staff position and a part-time faculty position are properly included in the unit. When working their nonfaculty positions, these employees are paid hourly wages comparable to other staff employees, receive no benefits (just as the other staff employees receive none), work specific and limited schedules like other staff employees, work under separate supervision from faculty, and perform nonclassroom teaching functions. We recognize that these dual-function employees hold higher degrees than most staff employees, sometimes work with students who they teach, and sometimes work with students to fulfill requirements of their academic courses. However, these differences do not outweigh the factors showing a community of interest with the staff employees. While we agree with the Employer that these individuals have a community of interest with the faculty while they are working in their faculty positions, there is no evidence in the record to suggest that this community of interest is so overwhelming that it would negate their substantial community of interest with the staff employees.[9]

B. Tutors as Eligible Dua-Function Employees

While we adopt the hearing officer's ultimate conclusion that the tutors are eligible to vote, we do not rely on his conclusion that the tutors holding part-time faculty positions are not dual-function employees. The Board has generally considered an employee with job responsibilities encompassing more than one position to be a dual-function employee, and has done so without regard to the seemingly separate nature of the employment relationships giving rise to the multiple job functions. See *Marine Petroleum Co.*, 238 NLRB 931, 932 (1978) (finding it "apparent" that an employee who worked full time as an accountant and part time as a dispatcher with different terms and conditions of employment, salaries, and benefits was a dual-function employee); *Alpha School Bus*, supra, 287 NLRB at 699 (finding dual-

[8] Member Schaumber agrees that the phrase "independently contracted tutors" is ambiguous. He further agrees that tutors are properly includable in the unit, but based solely on the hearing officer's alternative finding that the tutors share a community of interest with the other petitioned-for staff employees.

[9] Member Schaumber finds that the Stipulated Election Agreement's exclusion of "faculty" is plain on its face and not ambiguous. With respect to stipulated election agreements, the Board expects that "the parties are knowledgeable as to the employees' job title, and intend their description in the stipulation to apply to those job titles." *Kim/Lou, Inc.*, 337 NLRB 191 (2001) (citation and internal quotations omitted). Here, the stipulation excluded the title of "faculty," without reservation. Had the parties intended to exclude all faculty members except those who also are working in an otherwise eligible staff position, they plainly could have said so. He therefore finds that faculty should be excluded from the staff unit, including faculty members who may also hold tutor positions.

function status where an employee working as a bus driver and as a mechanic for the employer: wore different uniforms for each position, had different supervisors for each position, punched in with different timecards, and received different pay and benefits). Accordingly, the touchstone of dual-function employee status is the fact that a single employee performs multiple job functions covered by one or more of the employer's job classifications. Here, the tutors who also hold part-time faculty positions fall squarely within the scope of the Board's traditional definition of dual-function employees.

While we disagree with the hearing officer's recommendation that the tutors are not dual-function employees, we do not disagree with his conclusion that they are eligible to vote in the stipulated unit. The unit placement of dual-function employees is determined by a variant of the Board's traditional community-of-interest test. *Berea Publishing Co.*, 140 NLRB 516, 519 (1963). The Board has long held that employees who perform more than one function for the same employer may vote, even though they spend less than a majority of their time on unit work, if they regularly perform duties similar to those performed by unit members for sufficient periods of time to demonstrate that they have a substantial interest in working conditions in the unit. Id. at 518–519.

Under this definition, we agree with the hearing officer's determination that the dual-function tutors have a community of interest with the employees in the stipulated unit. Like the computer lab assistants who aid students with computer problems and who are included in the unit, the tutors assist students outside of class with math, science, and writing problems. While working in their tutoring positions, the employees are paid an hourly wage similar to that of other staff employees. This wage is separate from their teaching compensation. The tutors receive no other benefits for their tutoring work. Further, the tutors work a regular schedule and have tutored semester-after-semester for years.[10] As found by the hearing officer, the Employer, as the party seeking to exclude the tutors, has failed to present sufficient evidence to prove that the tutors do not have a community of interest with the staff unit. See *Regency Service Carts, Inc.*, 325 NLRB 617, 627 (1998) (citing *Golden Fan Inn*, 281 NLRB 226, 230 fn. 24 (1986)) ("party seeking to exclude an individual from voting has the burden of establishing that the individual is, in fact, ineligible to vote").[11]

The Employer relies on *Otasco, Inc.*, 278 NLRB 376 (1986), to support its argument that the current collective-bargaining agreement covering the part-time faculty bars the dual-function tutors' inclusion in the stipulated staff unit. Such reliance is misplaced. In *Otasco*, the Board found that a current collective-bargaining agreement covering the employer's "local drivers" barred the inclusion of the dual-function local/over-the-road drivers in a separate unit of "over-the-road drivers." Importantly, the petitioned-for unit sought to include not only the classification of "over-the-road drivers" but also that of "local drivers"—a classification that was explicitly included under a current collective-bargaining agreement. The Board noted that the employer argued that the current collective-bargaining agreement barred the "inclusion of the local truck drivers *classification* within the over-the-road truck drivers." Id. at 376 (emphasis added).

Here, the stipulated bargaining unit does not include any classifications covered by the existing part-time faculty collective-bargaining agreement. To the contrary, the stipulated bargaining unit excludes faculty positions which are covered by that agreement. Further, the part-time faculty/tutors here are not akin to the dual-function drivers in *Otasco*. There, the employees' local truckdriv-

[10] In its exceptions, the Employer argues that Susan Miller should be excluded from the unit because her 3 hours of service a week as a tutor is insufficient to make her a regular part-time employee under *Davison-Paxson Co.,* 185 NLRB 21 (1971) (noting that a minimum of 4 hours work per week in the preceding quarter is necessary for an employee to be considered a regular part-time employee). However, *Davison-Paxson's* 4-hour requirement does not apply to dual-function employees. See *Syracuse University*, 325 NLRB 162, 163 (1997). Miller has tutored every Monday for 3 hours during the last 5 years. While the actual hours spent tutoring lends support to the argument that she lacks a substantial community of interest with the employees in the stipulated unit, the fact that she has performed such work on a regular basis for over 5 years demonstrates that she is an eligible dual-function employee. Such regularity of unit work distinguishes this case from ones in which the Board excluded employees who spent an insufficient amount of time performing unit work. See *Davis Transport, Inc.*, 169 NLRB 557, 562–563 (1968), enfd. 433 F.2d 363 (6th Cir. 1970) (employees performing apparently unscheduled driving work for less than 3 percent of their working time not eligible to vote in drivers unit); *McMor-Han Trucking, Inc.*, 166 NLRB 700, 702 (1967) (employee who primarily worked as a mechanic excluded from unit of drivers where he drove a truck on 20 days during the year with no apparent consistent schedule or regularity).

[11] Likewise the Employer has failed to present sufficient evidence that Ryan Kulefsky was not performing tutoring work as of the eligibility date. Arlene Green, the director of the writing center, testified that Kulefsky was "hired and then decided that he couldn't tutor because he had been given teaching responsibility." Based on this testimony, the Employer argues that it is "undisputed that Kulefsky did not work as a tutor in the fall of 2004." Contrary to the Employer's interpretation, Ms. Green did not state, and the record contains no evidence, regarding *when* Kulefsky decided that he could no longer tutor. While it may be possible that he reached such a decision before the eligibility cutoff and the date of the election, it is also possible that he made this decision sometime thereafter. The record simply indicates that Kulefsky was no longer tutoring as of December 21, 2004, the date of the hearing. Without more specific evidence, the Employer has failed to meet its burden of proving that Kulefsky is ineligible to vote.

ing job included responsibilities that were also included in the over-the-road position. Here, the dual-function tutors' job duties as part-time faculty are separate and independent from their duties as tutors. Instead of holding a single, integrated job with responsibilities spanning multiple classifications and potentially multiple collective-bargaining agreements, their duties as faculty and as tutors are easily contained within their separate and independent positions.[12] Accordingly, the part-time faculty collective-bargaining agreement does not bar the inclusion of part-time faculty employees holding part-time tutoring positions in the petitioned-for staff unit.

[12] Likewise, the Employer's reliance on *Bentson Contracting Co. v. NLRB*, 941 F.2d 1262 (D.C. Cir. 1991), is misplaced. In *Bentson Contracting*, the court found that the Board improperly placed "combination employees" in both a unit of drivers and a unit of laborers. The court noted that two unions "simply cannot be the 'exclusive' bargaining representative of the same employees with respect to the same conditions of employment." Id. at 1266. The court's concern centered on the fact that the combination employees would be covered under two contracts during the same working hours and would be forced to join two unions and pay dues twice in order to maintain their jobs. Here, the same concerns are not raised. The individuals in question do not hold a single integrated position. The coverage of the two collective-bargaining agreements would not extend to the same working hours and would not cover the same working conditions. In essence, these employees hold two separate jobs. If chosen, the Union will be their representative in two separate units. There is no rational reason to deny the Union the opportunity to receive dues for each separate representation. In addition, it is entirely speculative whether the Union will be selected, whether it will secure a union-security clause, and whether it will be unwilling to give these employees a partial "pass" on their union-security obligation.

DIRECTION

The Regional Director for Region 13 shall, within 14 days from the date of this Decision and Direction open and count the ballots of employees Jessica Alverson, Steven Bithos, Erica Breyer, Lisa Butler, Shayna Connelly, Jane DeGrado, Bill Drendel, Shannon Epplett, Jennifer Friedrich, Sallie Gordon, Matthew Green, Joseph Haberfeld, Lott Hill, Mike Humphreys, Peter Insley, Ryan Kulefsky, Daniel LaCloche, Eric Laschinski, Nathan Linshield, David Maina, Edwin H. Manning, Cynthia Martinez, Dirk Matthews, Sherlene McCoy, Susan Miller, John J. Murray, Christine Pfeiffer, Corey Plazak, Maeve Price, Emily Reible, Nancy Rinehart, Dian Ruben, Greg Sato, Shawn Sheehy, Rachel Slavick, Damon Smith, Kim Sommario, Benjamin Steger, John Tooke, Brent Walker, Ann Weins, and Greg Weiss at a time and place set by him. The Regional Director shall then prepare and serve upon the parties a revised tally of ballots. If the revised tally of ballots shows that the Union has received a majority of the valid ballots cast, the Union's Objection 1 will be moot and the Regional Director shall issue a certification of representative. If, however, the revised tally of ballots shows that the Union has not received a majority of the ballots cast, then the Regional Director immediately shall transfer the case back to the Board for further proceedings.