

**Legal Aid Society of Alameda County and National Organization of Legal Service Workers, District 65, United Automobile, Aerospace, and Agricultural Implement Workers, AFL-CIO.**  
Cases 32-RM-657 and 32-RC-3375

October 21, 1997

**DECISION ON REVIEW AND ORDER**

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

The issue presented in this case is whether four of the Legal Aid Society's attorneys should be excluded from the petitioned-for unit of attorneys on the ground that they exercise statutory supervisory authority over nonunit law clerks, paralegals and/or clericals, or otherwise exercise statutory supervisory authority.

Following a hearing, on May 14, 1991, the Regional Director for Region 32 issued a Decision and Direction of Election. The Regional Director found that one of the four subject attorneys, senior attorney Evelyn Frank, did not possess any statutory supervisory authority. With respect to the other three subject attorneys, managing attorneys Carolyn Leftridge and Dwight Dickerson, and staff attorney Susan Spelletich, the Regional Director found that they did possess statutory supervisory authority with respect to nonunit employees, but that such authority did not warrant their exclusion from the unit under the standards set forth in *Adelphi University*, 195 NLRB 639 (1972), and *New York University*, 221 NLRB 1148 (1975), as subsequently clarified in *Detroit College of Business*, 296 NLRB 318 (1989), since it was exercised over nonunit support personnel and was merely ancillary to their primary responsibilities as attorneys. Accordingly, the Regional Director found that all four of the disputed attorneys were properly included in the unit.<sup>1</sup>

Thereafter, by Order dated June 25, 1991, the Board granted the Employer's request for review of the Regional Director's decision with respect to the status of the four attorneys as it raised substantial issues warranting review.<sup>2</sup> Having reviewed the entire record, we affirm the Regional Director's findings that Dickerson, Frank, and Spelletich are properly included in the unit, but reverse his finding that Leftridge is properly included in the unit.

<sup>1</sup>The Employer also contended that two other attorneys—Managing Attorney and Litigation Director Steve Ronfeldt and Managing Attorney Paul Rose—are statutory supervisors. In agreement with the Employer, the Regional Director found that these two individuals were statutory supervisors and therefore excluded them from the unit. The Union did not seek review of this finding.

<sup>2</sup>The Employer also requested review of the Regional Director's findings that three of the Employer's contract attorneys—Kim Card, Laurie Gong, and Mary Appel—were not temporary employees and were therefore included in the unit. The Board, however, denied the Employer's request for review with respect to these findings.

1. We agree with the Regional Director that Leftridge's authority to evaluate and effectively recommend retention and termination of the paralegals in her unit constitutes supervisory authority within the meaning of Section 2(11) of the Act.<sup>3</sup> Managing attorneys evaluate the job performance of paralegals working under them and recommend whether the paralegals be retained or terminated. Clifford Sweet, the Employer's executive director, testified that he gives "substantial weight" to the evaluations performed of paralegals by managing attorneys, and that during the last 2 years he followed all but one of eight such evaluations. Sweet testified that he makes his decision based solely on whether the managing attorney supplied enough reasons or documentation for the recommendation in the evaluation. If there is not enough documentation to support the recommendation, Sweet informs the managing attorney that the recommendation cannot be effectuated; he does not ask the managing attorney to redo the evaluation. From this testimony, it appears that Sweet bases his decision solely on the managing attorney's evaluation and does not conduct an independent investigation.

Further, the record indicates that within a year prior to the hearing, Sweet actually terminated a paralegal for inadequate performance based on Leftridge's recommendation. In these circumstances, we find that the Employer has carried its burden of establishing that Leftridge possesses statutory supervisory authority based on her authority to evaluate and to effectively recommend the termination of paralegals.<sup>4</sup>

We disagree, however, with the Regional Director's finding that the exercise of this supervisory authority over nonunit paralegals did not warrant Leftridge's exclusion from the unit under the Board's decisions in *Adelphi University* and *New York University*, as subsequently clarified in *Detroit College of Business*. In

<sup>3</sup>Sec. 2(11) defines a supervisor as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, 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, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

<sup>4</sup>Contrary to the Regional Director's finding, however, we find that the Employer failed to demonstrate that Leftridge has similar authority with respect to clericals. Sweet testified that the managing attorneys evaluate clericals and that he gives those evaluations "substantial weight." However, he also testified that he did not follow the recommendations in three of eight, or almost 40 percent, of clerical evaluations prepared in the last 2 years. Further, no specific evidence was introduced regarding any clerical evaluations prepared by Leftridge or any recommendations made by her regarding retention or termination of clericals. Finally, we note that the evaluations of clericals by other managing attorneys that were introduced into evidence do not contain any recommendations. Under these circumstances, we find the record evidence insufficient to establish that Leftridge's evaluation of clericals constituted supervisory authority.

those cases, the Board drew a distinction between supervisory authority exercised over unit employees and such authority exercised over nonunit employees, finding that in the latter situation the Board must evaluate whether the supervisory functions being exercised “so allied the individuals with management as to establish a differentiation between them and other employees in the unit.” *Detroit College*, 296 NLRB at 320 (quoting *Adelphi*, 195 NLRB at 644). The Board reasoned that such an inquiry was necessary due to the relative imprecision of the supervisory question in professional settings and the fact that professional employees frequently require the “ancillary services” of nonprofessional “support personnel” in order to carry out their professional duties. *Id.* (quoting *New York University*, 221 NLRB at 1156).

As indicated in *Detroit College*, this inquiry led the Board in *Adelphi* to conclude that the university’s director of admissions should not be excluded from the petitioned-for unit of faculty members because he had the authority to hire, fire, and direct his secretary. The Board found that because the director’s professional duties were of the same character as those of the unit employees, and he exercised supervisory authority over his secretary only infrequently (i.e., less than 50 percent of the time), he was not so allied with management as to create a conflict of interest warranting his exclusion from the unit.

As discussed in *Detroit College*, the Board in *New York University* and other subsequent cases cited *Adelphi* as establishing a so-called “50 percent” rule in such circumstances, and, accordingly, held that any individual who supervised nonunit employees less than 50 percent of the time was not a supervisor. The Board in *Detroit College*, however, rejected such a “short-hand” approach and instead held that a complete examination of all the factors present must be made to determine the nature of the individual’s alliance with management. The Board stated that relevant factors to be considered would include, but not be limited to, the business of the employer, the duties of the individuals exercising supervisory authority and those of the bargaining unit employees, the particular supervisory functions being exercised, the degree of control being exercised over the nonunit employees, and the relative amount of interest the individuals at issue have in furthering the policies of the employer as opposed to those of the bargaining unit in which they would be included. *Id.* at 321.

The Regional Director reasoned that Leftridge was hired as an attorney and that her primary work product was to provide legal services in the area of family law to indigent clients. Since the paralegals did research, drafted briefs and pleadings for her signature, and processed temporary restraining orders under her close direction, the Regional Director found that Leftridge’s

supervision of paralegals was “merely ancillary to her professional duties as an attorney.” We disagree.

Contrary to the Regional Director, we find Leftridge’s supervision of the paralegals more analogous to the supervision by the coordinators in *Detroit College* of the part-time faculty members than to the supervision by the admissions director in *Adelphi* or the librarians in *New York University* of clerical employees. In performing such work as drafting briefs and pleadings for Leftridge’s signature, the paralegals are not performing work that is “merely adjunct to that of the professional and is not the primary work product.” *New York University*, 221 NLRB at 1156. Rather, they are directly and substantively engaged in producing part of Leftridge’s primary work product. Neither can it be said that Leftridge’s supervision of employees engaged in writing briefs and pleadings which will be filed in court under her signature is merely ancillary to her professional duties as an attorney. We note, in addition, that the record also establishes that paralegals handle their own cases “completely independently” of and with no regular input from Leftridge. Under these circumstances, we find that the paralegals are not support personnel similar to the secretaries in *Adelphi* and *New York University*, who engaged in no substantive work of the professionals who supervised them. Accordingly, we find that Leftridge’s supervision of paralegals requires her exclusion from the unit.

2. We agree with the Regional Director that Spelletich is properly included in the unit. We make that finding, however, not for the reasons stated by the Regional Director but because we find that Spelletich does not in fact exercise any supervisory authority over unit or nonunit employees. Specifically, we find as a factual matter that the record does not support the Regional Director’s finding that Spelletich had authority to hire law clerks.

Although Spelletich is involved in interviewing and hiring the law clerks, it is clear that other attorneys, including Ronfeldt, are also involved in hiring the law clerks. Spelletich testified that she consults with Ronfeldt and other attorneys in deciding which applicants to interview, and that at least one other attorney (or paralegal) will participate in the interviews. Further, Ronfeldt testified that Spelletich discusses with him the law clerks she wants to hire before hiring them. Thus, we find that Spelletich does not independently hire law clerks.<sup>5</sup> Accordingly, since the Employer has failed to establish that Spelletich exercises any statutory supervisory authority, we find that the Regional Director properly included her in the unit.

<sup>5</sup> Although the Regional Director found to the contrary based on the conclusory testimony of Sweet, as indicated above the record evidence does not support that finding.

3. We agree, for the reasons stated by the Regional Director, that Frank exercises no statutory supervisory authority and is thus properly included in the unit. Similarly, we agree with his finding that Dickerson exercises no statutory supervisory authority over unit employees and that his sporadic exercise of supervisory authority of nonunit employees is insufficient to warrant his exclusion from the unit.<sup>6</sup> See *Greenspan, D.D.S., P.C.*, 318 NLRB 70 (1995); *Commercial Fleet Wash, Inc.*, 190 NLRB 326 (1971); *Meijer Supermarkets, Inc.*, 142 NLRB 513, 517 fn. 8 (1963). Accordingly, we find, in agreement with the Regional Director, that Frank and Dickerson are properly included in the unit.<sup>7</sup>

### ORDER

The Regional Director's finding that Leftridge is properly included in the unit is reversed; the Regional Director's finding that Dickerson, Frank, and Spelletich are properly included in the unit is affirmed; and the proceeding is remanded to the Regional Director for further appropriate action.

CHAIRMAN GOULD, concurring and dissenting.

I agree with my colleagues that managing attorney Dwight Dickerson does not exercise statutory supervisory authority over contract attorney Mary Appel. However, contrary to my colleagues, I find it unnecessary to reach the question of whether any or all of the disputed attorneys exercise Section 2(11) supervisory

authority over paralegals, law clerks, or clericals. Even assuming that all of these attorneys possess statutory supervisory authority over such employees, I would nevertheless include them in the petitioned-for professional unit because their supervision extends only to nonunit support personnel. Consequently, I agree with the majority's inclusion of managing attorney Dwight Dickerson, senior attorney Evelyn Frank, and staff attorney Susan Spelletich but disagree with the exclusion of managing attorney Carolyn Leftridge.

Salaried professionals, who possess substantial expertise and technical knowledge based upon a specialized and lengthy education, are a vital and expanding part of the contemporary work force. The issue raised in this case—whether the Board should exclude from a professional bargaining unit a professional who has no supervisory authority over other professionals but only oversees the work of nonunit employees—is difficult as it involves both the Act's exclusion of supervisors and its inclusion of professionals who in providing the very services for which they are trained and hired often find it necessary to supervise the work of nonprofessional employees. To accommodate the tension between these provisions, the Board in certain circumstances has refused to exclude professional employees from a professional unit merely because they exercised supervisory authority over nonunit employees such as secretaries, clerks, etc.<sup>1</sup> In explaining its rationale, the Board stated in *Adelphi University*, 195 NLRB 639, 644 (1972):

[A]n employee whose principal duties are of the same character as that of other bargaining unit employees should not be isolated from them solely because of a sporadic exercise of supervisory authority over nonunit personnel. No danger of conflict of interest within the unit is presented, nor does the infrequent exercise of supervisory authority so ally such an employee with management as to create a more generalized conflict of interest of the type envisioned by Congress in adopting Section 2(11) of the Act.

This rationale was elaborated on in *New York University*, 221 NLRB 1148, 1156 (1975), where the Board stated:

Professionals, as well as supervisors, exercise discretion and judgment, and professional employees frequently require the ancillary services of nonprofessional employees in order to carry out their professional, not supervisory, responsibilities. But that does not change the nature of their work from professional to supervisory, nor their relation

<sup>6</sup> Although Dickerson testified in conclusory fashion that he had the authority to hire his own law clerks, the record indicates that Dickerson has not actually hired a paid law clerk since 1986, and there were no law clerks working under Dickerson at the time of the hearing. Further, there is no record evidence of the duties of Dickerson's law clerks when they worked under him. Under these circumstances, we find the record insufficient to establish that Dickerson's hiring authority, which has not been exercised since 1986, "so allie[s] [him] with management as to establish a differentiation between [him] and other employees in the unit." *Detroit College*, 296 NLRB at 320.

We further find that, in light of the fact that Dickerson's evaluations of his clericals do not contain any recommendations, Sweet's testimony that he did not follow the recommendations of managing attorneys in a substantial number of cases, and Dickerson's testimony that he was not aware of his evaluations of clericals having any impact on the clericals' compensation or tenure, the Employer did not establish that Dickerson exercised supervisory authority in his evaluations of his clericals. See fn. 4, *supra*.

<sup>7</sup> The Chairman would overrule the *Detroit College* test and replace it with a test which focuses solely on whether the nonunit employee being supervised is a "support" person. In our view, such a "shorthand" approach is too simplistic and fails to take into account the complexity of the issues presented by the "tension between the Act's exclusion of [supervisory and] managerial employees and its inclusion of professionals . . ." *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571, 581 (1994) (quoting *NLRB v. Yeshiva University*, 444 U.S. 672, 686 (1980)). We decline to overrule *Detroit College*. We also note that no party has sought in this case to overrule the *Detroit College* test, and thus the issue has not been briefed or litigated.

<sup>1</sup> *Adelphi University*, 195 NLRB 639 (1972); *New York University*, 221 NLRB 1148 (1975); *Detroit College of Business*, 296 NLRB 318 (1989).

to management. They are not hired as supervisors but as professionals. The work of employees that may be “supervised” by professionals in this category is merely adjunct to that of the professional and is not the primary work product. In short, we do not believe that any teacher, lawyer, architect, doctor, editor, etc., whose employer provides him with the services of a typist, secretary, draftsman, or similar support personnel, was intended by Congress to be excluded from the Act by the rote application of the statute without any reference to its purpose or the individual’s place on the labor-management spectrum.

In some respects, I agree with the approach taken in *Adelphi* and *New York University*, and therefore, I would include in a professional unit those professionals who supervise nonunit employees if the work of the nonunit employees is to provide ancillary support to professionals in the performance of their professional duties. To meet this test the support staff must function in a “personal” capacity to the professionals. The standard would not be met if the professionals’ alleged supervisory responsibilities extended to support staff generally. For example, under this standard, an attorney in this case would not be included in the unit if that attorney exercised supervisory authority over all the Employer’s secretarial staff rather than secretaries who personally worked for the professionals.<sup>2</sup> Cf. Finkin, *The Supervisory Status of Professional Employees*, 45 Fordham L. Rev. 805 (1977).

Contrary to the majority, I am of the view that *Adelphi*, *New York University*, and *Detroit College* should be overruled for the following reasons. In *Adelphi* and *New York University*, the Board used a 50-percent test to determine whether professionals who supervise nonunit employees are statutory supervisors, finding that professionals would be included in a professional unit if their supervision amounted to less than 50 percent of their worktime. That formula was rejected by the Board in *Detroit College*. There, the Board established a multifactor approach with emphasis on whether the nonunit supervision being performed by the professional was part of his primary work product which would align the professional with management or whether such supervision was only incidental. However, I find *Detroit College* confusing as it is unclear how the separate factors were to be analyzed, and, unlike the support test described above, *Detroit College* improperly focused on the work of the professional rather than the work of the employee being supervised.

<sup>2</sup> Similarly, for example, aides allegedly supervised by a charge nurse would not be employees hired to perform as personal support staff, at least in the limited sense of my use of the term here; instead the aide and the charge nurses work as a team to provide primary care.

*Detroit College* is thus inconsistent with our efforts during these past 3-1/2 years to diminish wasteful or unnecessary litigation. See, for instance, *Management Training Corp.*, 317 NLRB 131 (1995); my concurring opinion in *Fountainview Care Center*, 323 NLRB 990 (1997); *Glass Depot, Inc.*, 318 NLRB 766 (1995); my concurring opinion in *Smith’s Food & Drug Centers, Inc.*, 320 NLRB 844 (1996); and *Douglas-Randall, Inc.*, 320 NLRB 431 (1995). The same policies have been espoused and promoted in the Board’s Notice of Proposed Rulemaking on the Appropriateness of Requested Single Location Bargaining Units in Representation Cases, 60 Fed. Reg. 50, 146 (proposed September 28, 1995).

Consequently, I would overrule the primary v. incidental standard utilized in *Detroit College*. I do not, however, reject the premise underlying the Board’s decisions in *Adelphi*, *New York University*, and *Detroit College*, namely that professionals who only supervise nonunit employees may nevertheless be included in a professional bargaining unit. Indeed, I endorse the rationale for the inclusion of professionals in these circumstances as set forth by the Board in *Adelphi* and *New York University*.

Indeed, as noted in *New York University*, professionals often need the services of employees such as “a typist, secretary, draftsman, or similar support personnel” (221 NLRB at 1156, emphasis added) to perform their professional responsibilities. Since it is this performance of professional duties which qualifies professionals for inclusion in a professional unit, it is irrational to then exclude such employees simply because they supervise support personnel who assist them in the performance of their professional duties. Professionals are employed for their professional expertise, not to supervise the employees with whom they work.

Moreover, the supervisory authority of the professional in these circumstances is exercised only with respect to a separately organizable and differently oriented group of employees who are wholly outside the scope of the unit. Thus, there is no “divided loyalty” problem as the professionals’ supervisory authority is set apart from their primary interest as employees in professional matters and concerns. And since professionals often must use and supervise the services of nonunit support personnel—whether they be secretaries, draftsmen, clerks, lab employees, or paralegals—I do not think it was Congress’ intention to thereby deny such professionals the protections of the Act.

Nor do I think that the Court’s opinion in *NLRB v. Health Care & Retirement Corp.*, 114 S.Ct. 1778 (1994), requires a finding that the supervision of nonunit employees be treated the same as the supervision of unit employees. The Court in *Health Care & Retirement* rejected the Board’s interpretation and ap-

plication of the statutory phrase “in the interest of the employer” in finding that the employer’s nurses, who exercised certain responsibilities over nurses’ aides, were not statutory supervisors. The Court, however, made clear the limited nature of its holding. Thus, in response to Justice Ginsburg’s dissent in that case, which cited and expressed concern about the effect of the Court’s opinion on various other Board decisions (including *Detroit College* and *New York University*) involving other types of professionals, the Court emphasized that its decision was limited to the Board’s interpretation and application of the statutory phrase “in the interest of the employer” and cast no doubt on other Board decisions which do not turn on the Board’s interpretation of the foregoing statutory phrase. 114 S.Ct. at 1785.

Moreover, in rejecting the Board’s use of “in the interest of the employer” the Court’s concern was also directed at the fact that the Board had devised a test that had a different meaning in the health care industry than it had in other industries. 114 S.Ct. at 1785. Here, the inclusion of professionals who only supervise nonunit employees is not industry specific; it applies to all professionals in all industries. Consequently, in my opinion the underlying principle of *Adelphi*, *New York University*, and *Detroit College* was not rendered invalid by the Court’s *Health Care & Retirement* decision.

Here, managing attorney Leftridge is assisted by paralegals who interview clients, perform research, and draft briefs and pleadings for Leftridge’s signature. One of these paralegals also works independently with respect to certain public benefits programs since she is the only person in that office with any public benefits experience. Staff attorney Frank also works with paralegals who, like Leftridge’s paralegals, handle cases and prepare briefs. Frank reviews their work because she could at some point “inherit” the case from the paralegal. Managing attorney Dickerson is assisted by one full-time and one part-time clerical who perform various clerical services with respect to Dickerson’s professional duties. Staff attorney Spelletich is responsible for coordinating the Employer’s law clerk program. In this capacity, Spelletich organizes the law clerk’s initial orientation and training and assigns them on a rotating basis to the attorneys in her office, including herself. The law clerks assist the various attorneys with their assigned cases.

All of these paralegals, law clerks, and clericals clearly provide support for attorneys in the performance of their professional responsibilities. Both Leftridge’s and Frank’s paralegals assist in the preparation of legal documents with respect to cases these attorneys are currently handling or are ultimately responsible for. Although one of Leftridge’s paralegals also performs some independent work, this work not only

directly supports the Employer’s legal operation as a whole but also indirectly supports Leftridge since she would have to handle those cases if there were no paralegal available for such work. Spelletich’s law clerks not only provide support for Spelletich but for all of the attorneys in the office. The fact that the law clerks are pooled and thus do not work exclusively for Spelletich (although only Spelletich is alleged to be their supervisor) does not remove the clerks from the definition of support personnel. The critical factor is whether the law clerks provide support services to professional employees. Since the clerks assist Spelletich and the other attorneys in the handling of their legal cases, the clerks are clearly providing support to professionals as they perform their professional duties. Similarly, even though the paralegals and law clerks perform work that is similar or identical to work that is normally handled by attorneys, they are still considered support personnel. In fact, since the attorneys need only review the work of their paralegals and clerks rather than do it entirely by themselves, these employees provide invaluable support to the attorneys in carrying out their professional responsibilities.<sup>3</sup>

I would, therefore, affirm the Regional Director and find that attorneys Leftridge, Dickerson, Frank, and Spelletich are not supervisors within the meaning of Section 2(11) and thus are included in the petitioned-for professional unit.<sup>4</sup> The decision of my colleagues

<sup>3</sup>None of the four attorneys in dispute has general, overall supervisory authority. Although two of the four attorneys have the title managing attorney, they are not the managing attorney for any of the Employer’s five offices but rather are only in charge of specific areas of law, i.e., Leftridge is the managing attorney of the family law clinic in both the Hayward and the Oakland office and Dickerson is the managing attorney of the landlord tenant clinic in the Oakland office. Thus, their title managing attorney does not confer any general supervisory authority over the Employer’s entire support staff; instead, their authority extends only to the nonunit paralegals and clericals who provide personal support to them in carrying out their professional duties.

<sup>4</sup>This result is in line with other Board cases wherein the Board has declined to confer supervisory status on employees even though they meet the literal definition of supervisor. For example, an employee will not be considered a statutory supervisor although the employee may have exercised a 2(11) supervisory indicia if such authority is exercised only sporadically or intermittently. *Meijer Supermarkets, Inc.*, 142 NLRB 513, 517 fn. 8 (1963); *J. J. Newberry Co.*, 249 NLRB 991, 991 (1980); *Greenspan D.D.S., P.C.*, 318 NLRB 70 (1995). Also, an employee who possesses statutory supervisory authority while substituting for a supervisor will not be considered a supervisor unless such substitution is regular and substantial. *Hexacomb Corp.*, 313 NLRB 983, 984 (1994); *Aladdin Hotel*, 270 NLRB 838, 840 (1984). See also *Westinghouse Electric Corp.*, 163 NLRB 723 (1967), *affd.* 171 NLRB 1239 (1968), *enfd.* 424 F.2d 1151 (7th Cir. 1970), *cert. denied* 400 U.S. 831 (1970), where professional engineers who exercised statutory supervisory authority over nonunit employees during certain portions of the work year were nevertheless included in a unit of engineers and granted representational rights for those work periods in which they performed as nonsupervisory employees.

to apply *Detroit College* to exclude Leftridge will deprive many professionals of their rights and protections under the

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<sup>5</sup>Though the majority characterizes this dissent as “simplistic,” in fn. 7 of the majority opinion, *supra*, the fact is that the formulated demarcation line takes into account the competing tensions under the statute. The approach set forth in my opinion is a statutorily appro-

Act and thus is contrary both to the spirit of the Act and the sound administration of the Act’s provisions.<sup>5</sup>

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priate reconciliation of both principles involved here, i.e., exclusion of supervisors, on the one hand, and inclusion of professionals on the other.