

**Modesto Radiology Imaging, Inc. and General Teamsters Union Local No. 386, Petitioner.** Case 32–RC–098291

October 31, 2014

DECISION AND DIRECTION

BY MEMBERS MISCIMARRA, HIROZAWA, AND SCHIFFER

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in an election held March 27, 2013, 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 33 votes for and 31 votes against the Petitioner, with 5 challenged ballots, a sufficient number to affect the results.

The Board has reviewed the record in light of the Employer's exceptions, the Petitioner's limited cross-exceptions, and the supporting briefs, and has adopted the hearing officer's findings<sup>1</sup> and recommendations only to the extent consistent with this Decision and Direction. As discussed below, we find, contrary to the hearing officer, that the Petitioner failed to establish that the five team leaders at issue in this case are supervisors under Section 2(11) of the Act. We therefore overrule the Petitioner's challenges to their ballots and direct the Regional Director to open and count those ballots.

I. BACKGROUND AND THE HEARING OFFICER'S REPORT

The Employer is a radiology imaging facility in Modesto, California. John Schaper is the highest level manager at the facility and supervises two of the facility's 10 departments. The remaining departments have team leaders or supervisors who report directly to Schaper. The five team leaders whose status is at issue are Bradley Bacich, Melanie Gikas, Cruz Rodriguez, Lori Skustad, and Kim Taylor. The Petitioner (the Union) challenged the ballots of these five team leaders on the basis that they are supervisors within the meaning of Section 2(11) of the Act.<sup>2</sup>

<sup>1</sup> 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 have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> The parties' Stipulated Election Agreement listed six team leaders of unresolved status who would be allowed to vote "subject to challenge." At the election, the Employer's observer initially challenged the ballots of five of the six team leaders, claiming that they were supervisors. The Board agent also challenged those ballots, on the basis that the status of the employees casting those ballots was unresolved. The supervisory status of the sixth team leader, Deanna Campbell of the transcription department, is not at issue here.

After the vote count resulting in the Union's victory, but before the tally was completed, the Employer reversed its position, withdrew its

Addressing supervisory authority she found common to all team leaders, the hearing officer found that all five team leaders at issue were statutory supervisors because they create and adjust work schedules using independent judgment, effectively recommend pay increases through their role in the evaluation process, and grant time off. As to team leaders Kim Taylor and Melanie Gikas, the hearing officer found that Taylor has authority to assign overtime and that both Taylor and Gikas have reassigned employees to specific work duties, which actions the hearing officer concluded "indicate supervisory responsibility." Based on her findings, the hearing officer found all five team leaders to be supervisors and recommended that the Board sustain the challenges to their ballots and exclude them from the unit. For the reasons discussed below, we find merit in the Employer's exceptions to the hearing officer's findings and recommendations and conclude, contrary to the hearing officer, that the record evidence does not establish that the five team leaders are supervisors under Section 2(11) of the Act.

II. ANALYSIS

Individuals are statutory supervisors if (1) they hold the authority to engage in any one of the supervisory functions listed in Section 2(11) of the Act;<sup>3</sup> (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and (3) their authority is held in the interest of the employer. See *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). To exercise independent judgment, an individual must "at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." *Id.* at 693. A judgment is not independent "if it is dictated or controlled by detailed instructions, whether set

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challenges, and sought to include the five team leaders in the unit. The Union, in turn, reversed its position and challenged the ballots of the five team leaders as supervisors. In its limited cross-exceptions, the Union makes the unsupported argument that the Board should apply a form of judicial estoppel to prevent the Employer from creating delay by reversing the position it held throughout the election and now arguing that the team leaders are not statutory supervisors. There is no support for this argument. The Stipulated Election Agreement established that the status of team leaders was undetermined, and a party is permitted to withdraw its challenge, which the Employer did here, with the Regional Director's approval. See NLRB Casehandling Manual (Part Two), Representation Proceedings, Sec. 11340.3(b) and Sec. 11361.2; see also *Mountaineer Park, Inc.*, 343 NLRB 1473, 1481 (2004) (resolving the supervisory status of two challenged voters where the parties "switched positions" on their eligibility after the tally).

<sup>3</sup> The supervisory functions listed in Sec. 2(11) are the authority 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." 29 U.S.C. § 152(11).

forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” Id. The party asserting supervisory status, in this case the Union, has the burden of establishing such status by a preponderance of the evidence. See, e.g., *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711–712 (2001). Conclusory evidence does not satisfy that burden. See, e.g., *Lynwood Manor*, 350 NLRB 489, 490 (2007).

#### A. Authority Common to All Team Leaders

##### 1. Create and adjust schedules

Based on credited portions of Schaper’s testimony and the Employer’s Policy and Procedure section HR-503-F, which governs work schedules, the hearing officer found that all five team leaders create and adjust work schedules within their respective departments. She found that the schedules generally remain unchanged, but must be adjusted to accommodate leave and unscheduled sick leave. Based on these findings, the hearing officer concluded that the team leaders use independent judgment to prepare and adjust work schedules and thus are statutory supervisors. In its exceptions, the Employer asserts that there is no record evidence of how any of the team leaders other than Melanie Gikas created and adjusted work schedules, or that they did so with independent judgment, and that, even under the facts specific to Gikas, her scheduling authority was routine. We find merit in the Employer’s arguments.

There is no dispute that the five team leaders at issue have the authority to create and adjust work schedules. Under *Oakwood Healthcare*, such authority constitutes the authority to assign. 348 NLRB at 689 (assignment refers to “the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee”).

As to Bacich, Rodriguez, Skustad, and Taylor, the Union presented no evidence regarding how they create or adjust work schedules, or what information they consider in doing so. Absent such evidence, we find that the Union has failed to establish that these team leaders create and adjust work schedules using independent judgment. Regarding Gikas, the Union presented evidence that she is responsible for creating the schedule assigning employees to the machines in the MRI/CT department. Gikas makes this schedule using a regular weekly rotation, but sometimes must alter the schedule to accommodate leave requests. In similar circumstances, the Board has found no independent judgment where a team leader assigns work using a rotational system. See *Pacific Coast*

*M.S. Industries*, 355 NLRB 1422, 1424 (2010). Moreover, to the extent the record establishes that Gikas makes adjustments to the machine assignments, the Union presented no evidence regarding frequency, how such adjustments are carried out, or that in doing so, Gikas acts using independent judgment.

##### 2. Evaluations and the authority to recommend wage increases

According to the hearing officer, each year in March, team leaders prepare a performance evaluation of each employee in their department and present it to that employee in a meeting. The hearing officer found that the team leaders independently evaluate employees in their department based on their daily observation of the employees’ work performance. She also found that, in 2012 and 2013, employees received merit increases based in part on these evaluations. The hearing officer acknowledged that the record was insufficient to establish the exact role evaluations play in determining pay increases, but relying on Schaper’s testimony that the evaluations play “some role” and the lack of evidence that Schaper or anyone else independently investigates employees’ work before wage increases are granted, she concluded that the team leaders effectively recommend pay raises. The Employer excepts to the hearing officer’s conclusions based on the absence of evidence addressing the precise role evaluations play in the process of granting increases. We find merit in this exception.

The authority to evaluate is not one of the indicia of supervisory status set out in Section 2(11) of the Act. See *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 (1999). Nevertheless, the Board analyzes the evaluation of employees to determine whether it is an “effective recommendation” of promotion, wage increase, or discipline. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). If the evaluation does not, by itself, directly affect the wages and/or job status of the individual being evaluated, the Board will not find the individual performing the evaluation to be a statutory supervisor on that basis. See *Williamette Industries, Inc.*, 336 NLRB 743, 743 (2001). There must be a direct correlation between the employees’ evaluation and their wage increases and/or job status. See, e.g., *Ten Broeck Commons*, 320 NLRB 806, 813 (1996).

In concluding that the team leaders effectively recommend pay raises by preparing the evaluations, the hearing officer did not properly apply the above principles. Although recognizing that the record was insufficient to establish the exact role of the evaluations in determining the employees’ pay raises, she concluded that, because the appraisals “play a role” and are “one of the criteria considered” in determining employees’ wage increases, a

finding of supervisory authority was warranted. We disagree. The record fails to establish a direct correlation between the evaluation scores and increased wages. Nor does it indicate what weight evaluations are given in the decision to award increases. See *Williamette Industries*, above, 336 NLRB at 743. As a result, we find the evidence relied on by the hearing officer insufficient to support a conclusion that the team leaders possess the authority to recommend wage increases.<sup>4</sup>

*B. Authority Specific to Team Leaders Gikas and Taylor*

1. Taylor's authority to grant overtime

The hearing officer found that the Employer's overtime policy is set forth in Employer Policy HR-505-F. That policy requires team leaders to "plan, schedule, and approve overtime in advance" and "[c]ounsel employees who refuse to work scheduled overtime, or who work overtime without prior authorization." Relying on this policy as described by Schaper, the hearing officer found that employees are expected to work overtime to complete patient care or customer service and, in such circumstances, Schaper had granted "blanket approval" for employees to do so. As for specific evidence regarding the assignment of overtime, employee Joyce Coey testified that Taylor approved "on the spot," and without consulting anyone, Coey's request for overtime to catch up on paperwork. Employee Sabrina Cox testified that Taylor once counseled her for refusing to work overtime to complete a call after her shift ended. The hearing officer concluded that Taylor exercised her authority to approve and assign overtime, which indicated Taylor's "supervisory responsibility." We disagree.

Both of the above-described situations appear to involve overtime necessary to complete a customer service function. The hearing officer found that this type of overtime is subject to "blanket approval." Absent evidence that Taylor was doing more than acting in a routine manner by authorizing the overtime consistent with her "blanket approval" to do so, the use of independent judgment by Taylor in assigning overtime has not been established. Further, the single incident of Taylor counseling employee Cox for refusing to work overtime to finish a call is insufficient to establish the exercise of

<sup>4</sup> The hearing officer also found the team leaders to be supervisors based on their authority to grant time off. Such authority is a secondary indicium of supervisory status. See *Sam's Club*, 349 NLRB 1007, 1014 (2007). Absent evidence that an individual possesses any one of the statutory indicia, secondary indicia alone are insufficient to establish supervisory status. See *Golden Crest Healthcare Center*, 348 NLRB 727, 730 fn. 10 (2006). As the record does not support a finding that the team leaders possess statutory supervisory authority, we need not consider the hearing officer's analysis of the team leaders' authority to grant time off.

supervisory authority to require employees to take overtime on a regular, and not just sporadic, basis. See *Pacific Coast M.S. Industries*, above, 355 NLRB at 1424; and *Oakwood Healthcare*, above, 348 NLRB at 694.<sup>5</sup>

2. Gikas's and Taylor's authority to reassign employees to specific duties

The hearing officer found that Gikas reassigns employees to specific work duties within her department, and that Taylor assigns employees to cover each others' work when someone is out of the office. Based on these findings, the hearing officer found that both team leaders have "reassigned employees to specific work duties in order to accommodate the workload in their department." She thus concluded that these actions "indicate supervisory responsibility." Again, we disagree.

According to employee Jamie Lynn Ramirez, employees in the MRI/CT department are assigned to machines on a regular, weekly rotation. Ramirez also testified that, on one occasion, Gikas reassigned her to a different machine so that Gikas could work with new applications on the machine that Ramirez had been using. There is no evidence, however, that this action required Gikas to weigh Ramirez's relative skills and training before deciding whether to move her to a different machine. The record establishes that MRI/CT team members are equally familiar with all machines due to the Employer's regular practice of rotating employees to achieve that goal. Thus, reassigning Ramirez to a different machine would not require Gikas to exercise independent judgment. In addition, the record reflects that Gikas merely moved Ramirez because she wanted to use the machine Ramirez was working on. Such an occasional shifting of tasks performed by employees does not establish supervisory status. See *Croft Metals, Inc.*, 348 NLRB 717, 722 (2006).

Regarding Taylor's reassignment of work among team members to cover each others' absences, the Union presented no evidence of the procedures she uses or the factors she takes into account in doing so, and hence we are unable to conclude that she uses independent judgment here. See *Croft Metals*, *id.* (finding no supervisory status where "the record [wa]s largely devoid of testimony concerning the factors, if any, taken into account by the

<sup>5</sup> Member Miscimarra notes that Sec. 2(11) requires only possession of authority to carry out an enumerated supervisory function, not its actual exercise. *Sheraton Universal Hotel*, 350 NLRB 1114, 1118 (2007). In finding that Taylor's counseling of Cox does not establish statutory supervisory status, Member Miscimarra relies solely upon the absence of proof that Taylor exercised independent judgment, as opposed to routinely enforcing the Employer's expectation that employees work overtime to complete a customer service function and Manager Schaper's "blanket approval" of overtime for this purpose.

leads in reallocating work” to finish projects or achieve production goals). Even assuming Taylor uses independent judgment to reassign work within the scheduling department, there is no evidence of how often she does so without consulting Schaper. See *Pacific Coast M.S. Industries*, above, 355 NLRB at 1424.<sup>6</sup>

### III. CONCLUSION

Based on the foregoing, we find, contrary to the hearing officer, that the Union has failed to prove that the team leaders at issue here exercise supervisory authority

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<sup>6</sup> Again, Member Miscimarra notes that Sec. 2(11) requires only possession of authority to carry out an enumerated supervisory function, not its actual exercise. *Supra* fn. 5. In finding that Taylor’s authority to reassign work among team members does not establish statutory supervisory status, Member Miscimarra relies solely upon the absence of proof that Taylor uses independent judgment in making those reassignments.

using independent judgment. We therefore reject the hearing officer’s recommendation to sustain the challenges and to exclude the five team leaders from the unit as statutory supervisors. Accordingly, we shall overrule the challenges to the ballots of Bradley Bacich, Melanie Gikas, Cruz Rodriguez, Lori Skustad, and Kim Taylor, include these employees in the appropriate unit, and direct that their ballots be opened and counted.

### DIRECTION

It is directed that the Regional Director for Region 32 shall, within 14 days from the date of this decision, open and count the ballots of team leaders Bradley Bacich, Melanie Gikas, Cruz Rodriguez, Lori Skustad, and Kim Taylor. The Regional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification.