Phoenix New Times, LLC *and* The Newsguild—CWA Petitioner. Case 28–RC–254936

February 10, 2021

DECISION AND ORDER

BY MEMBERS KAPLAN, EMANUEL, AND RING

On January 21, 2020, the Petitioner filed a petition to represent a unit of employees working at the Employer's news publication in Phoenix, Arizona. The Employer contended, in part, that the petitioned-for Food Editor, Lauren Cusimano, is either a supervisor or a managerial employee, and that the petitioned-for Fellows are temporary employees who may not be appropriately included in the unit.[1] On April 15, 2020, the Regional Director issued a Decision and Direction of Election, finding, in relevant part, that Food Editor Cusimano is not a supervisor or a managerial employee, and that the Fellows may be appropriately included in the unit because they are temporary trainees who share a community of interest with the other petitioned-for employees. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, as amended, the Employer filed a request for review solely with respect to the supervisory or managerial status of Food Editor Cusimano and the inclusion of the Fellows in the unit. The Petitioner filed an opposition.

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

The Employer's Request for Review of the Regional Director's Decision and Direction of Election is granted, in part, as it raises substantial issues warranting review. Having carefully examined the record,[2] and for the reasons explained below, we find, contrary to the Regional Director, that the petitioned-for Fellows are temporary employees who may not be appropriately included in the unit. We deny review in all other respects.[3] Accordingly, we remand this case to the Regional Director for further appropriate action consistent with this decision.

I. FACTS

The Employer publishes the Phoenix New Times, a news-media publication with both an online platform and a weekly print edition. A combination of freelancers, Fellows, and Staff Writers produce the content that is published in the Employer's print edition and on its website. The Employer is owned by Voice Media Group, a digital-media company that owns and operates six news websites in different media markets around the country, including the Employer's publication.

The Employer employs Fellows through the corporate Voice Media Group fellowship program. Journalism students or recent graduates of a journalism program apply to the fellowship program through the corporate Voice Media Group website and, if selected, are assigned to one of the six Voice Media Group publications, including the Employer's newspaper. Fellows write three stories per week and are paid $500 per week. The Fellows submit their pitches and articles to the News Editor, using the same procedures as the petitioned-for Staff Writers and undergoing the same review and editing process leading up to publication. Additionally, the Fellows and the Staff Writers receive the same benefits; work in the same location; use the same break rooms; attend the same weekly staff meetings on Mondays; and report directly to the News Editor, who reports to the Editor in Chief. It appears that, at the time of the hearing, only two Fellows were working for the Employer's publication.

The fellowship officially lasts for 6 months, but the Employer or another Voice Media Group publication has occasionally extended it, especially if the Fellow shows promise and there is a "reasonable expectation" that a permanent Staff Writer position will open up soon. An exhibit introduced by the Employer, which lists all the Fellows who have worked at any of the Voice Media Group publications since 2013, indicates that, of 27 Fellows, only five have had their fellowships extended. These extensions lasted for fixed periods ranging from 3 weeks to 3.5 months. A sixth Fellow accepted a second fellowship after completing their first fellowship. At the time of the hearing, one of the two Fellows then with the Employer

[1] The Employer further contended that several more of the petitioned-for classifications constituted either supervisory or managerial employees, including the Editorial Operations Manager, News Editor, Culture Editor, Social Media Editor, and Creative Director of Print, and that, in the alternative, these classifications did not share a community of interest with the petitioned-for Staff Writers. The Employer has not sought review of the Regional Director's findings on those contentions.

[2] See Sec. 102.67(e) of the Board's Rules and Regulations (the Board may, in its discretion, examine the record in evaluating the request for review).

[3] We find that the Employer failed to introduce sufficient evidence to meet its burden to prove that Food Editor Cusimano is either a supervisor or a managerial employee. Regarding Cusimano's alleged supervisory status, the Employer relies heavily on *Henry Colder Co.*, 163 NLRB 105 (1967), but it has not presented evidence of supervisory authority comparable to the facts of that case. Similarly, regarding Cusimano's alleged managerial status, the Employer's reliance on *Republican Co.*, 361 NLRB 908 (2014), is unavailing in the absence of record evidence that Cusimano has authority to determine the Employer's editorial positions or otherwise control its editorial content in the manner that the newsroom editor there did. Rather, the evidence presented by the Employer depicts Cusimano's duties as more analogous to those of sub-section editors who were found not to be managers in *Washington Post Co.*, 254 NLRB 168 (1981).

was working on an extended fellowship, which had been extended for 3 months.

Fellows do not compete against each other for positions, as there is no guarantee that any position will be available when they complete the program. However, if a position is available at any of the six publications under the Voice Media Group umbrella, Fellows who meet Voice Media Group's standards get first priority for entry-level positions after completing the program. Since 1999, approximately 64 percent of the Voice Media Group Fellows have eventually been hired on as Staff Writers at one of the Voice Media Group publications. More recently, however, the Fellows' chances of continued employment are lower: since 2013, only 11 of 27 Voice Media Group Fellows (approximately 40 percent) have been hired at one of the Voice Media Group publications, with only six (22 percent) going to the Employer. Of the nine Fellows who completed fellowships at the Phoenix New Times, four (44 percent) have gone on to work as Staff Writers, all of them at the Phoenix New Times. In their testimony, the two Fellows then with the Employer acknowledged that while they have "reason to be hopeful" that they would obtain a permanent position, they understand that there is no guarantee that a spot will open up.

II. ANALYSIS

"It is established Board policy that a temporary employee is ineligible to be included in [a] bargaining unit." *Pen Mar Packaging Corp.*, 261 NLRB 874, 874 (1982). To determine temporary-employee status, the Board examines whether "the employee's tenure is finite and its end is reasonably ascertainable, either by reference to a calendar date, or the completion of a specific job or event, or the satisfaction of the condition or contingency by which the temporary employment was created." *Marian Medical Center*, 339 NLRB 127, 128 (2003). Even though temporary employees may share terms and conditions of employment with permanent employees, they will be excluded from the bargaining unit if they do not have a reasonable expectation of reemployment, such as when they are employed for a brief period of time and given no promise of permanent employment. See, e.g., *United Telecontrol Electronics, Inc.*, 239 NLRB 1057, 1057–1058 (1978); *E. F. Drew & Co., Inc.*, 133 NLRB 155, 156–157 (1961); *Sealite, Inc.*, 125 NLRB 619, 619–620 (1959); *Individual Drinking Cup Co., Inc.*, 115 NLRB 947, 949 (1956).

Here, the Regional Director concluded that the Fellows may be appropriately included in the unit because they "have a vested interest in the terms and conditions of Staff Writers' employment," and because "the Union has a vested interest in representing the interests of Fellows as prospective members of the profession and potential future permanent employees." In this regard, the Regional Director observed that over 60 percent of the Voice Media Group Fellows have gone on to permanent positions at a Voice Media Group publication, including "many" who remained at the Phoenix New Times itself. The Regional Director further found that the Fellows are "comparable to apprentices or medical residents," who are frequently included in bargaining units. See, e.g., *Boston Medical Center Corp.*, 330 NLRB 152 (1999); *General Electric Co.*, 131 NLRB 100 (1961).

We disagree with the Regional Director's conclusion. There is no dispute that the Fellows here have a "finite" tenure with a "readily ascertainable" end date. See *Marian Medical Center*, 339 NLRB at 128. Although the Regional Director relied on several cases in which medical residents or apprentices were appropriately included in bargaining units, those cases are distinguishable. For example, although the Board found, in *Boston Medical Center*, that medical residents are statutory employees who may be appropriately included in bargaining units, it observed that this holding did not implicate cases where "the issue has been the eligibility of student workers based on community of interest considerations." 330 NLRB at 161. To the extent that the Board *did* address the eligibility of the medical residents in *Boston Medical Center*, it relied on the long tenure of the medical residents to find that they were not temporary employees at all. Id. at 166 ("[T]he Board has never applied the term 'temporary' to employees whose employment, albeit of finite duration, might last from 3 to 7 or more years, and we will not do so here."). Similarly long apprenticeship periods have been present in other cases where the Board has included apprentices in bargaining units, although, generally speaking, these cases have not directly raised the issue of whether the apprentices at issue were temporary employees—perhaps due, in part, to their lengthy tenures. See, e.g., *General Electric Co.*, 131 NLRB at 104–105, cited by the Regional Director (apprenticeship period of more than 3 years); see also *UTD Corp.*, 165 NLRB 346, 346 (1967) (4-year apprenticeship period); *Riverside Memorial Chapel, Inc.*, 92 NLRB 1594, 1595 fn. 5 (1951) (explaining that, under Florida law, an apprentice embalmer must complete "3 years' apprenticeship under a licensed embalmer" before receiving his or her license, among other requirements). The Fellows here, by contrast, have a finite apprenticeship period of only 6 months. The apprenticeship precedent relied on by the Regional Director is therefore readily distinguishable.

Furthermore, the present dispute does not implicate any other of the well-established exceptions to the Board's general rule against including temporary employees in bargaining units. While some of the Fellows have been

retained beyond their original term of employment, they were retained for fixed, as opposed to indefinite, periods of time. Cf. *MJM Studios of New York, Inc.*, 336 NLRB 1255, 1257 (2001) (including in a unit "employees originally hired as temporary employees, retained beyond the original term of their employment, and subsequently employed for an indefinite period") (citing *Orchard Industries*, 118 NLRB 798, 799 (1957)). Nor is this a case involving seasonal or other recurring employees who have a reasonable expectation of reemployment from year to year based on the Employer's practices, such as hiring from the same labor pool on a yearly basis or incentivizing employees to return annually. Cf. *Trans World Airlines, Inc.*, 211 NLRB 733, 734–735 (1974) (employer provided salary increase to employees who returned for a third year, demonstrating that the employer "encourage[d]" and "count[ed] on" repeat employees); *The F. A. Bartlett Tree Expert Co.*, 137 NLRB 501, 502 (1962) (including temporary employees where they were "drawn from the same labor force, [were] employed every year in substantial numbers for substantial periods of time, [were] composed primarily of former employees, and work[ed] with and [did] the same kind of work as the permanent employees"); *Tol-Pac, Inc.*, 128 NLRB 1439, 1440 (1960) (observing that "[t]he Employer has a policy of recalling laborers who have worked for it in previous years," such that "of the laborers whose names appear on the 1960 payroll, only one of them did not appear on the 1959 payroll"). Although a significant percentage of Fellows may eventually be hired into a permanent position as a Staff Writer for one of the six Voice Media Group publications, that is fundamentally different from a situation in which the Fellows could reasonably expect to be recalled as Fellows on an annual or regular basis.[4]

In sum, the Fellows here have a finite, readily ascertainable tenure of 6 months, with the possibility of only a short and finite extension. Thus, they are temporary employees under Board law, and they do not fall within any of the exceptions to the Board's general policy of excluding temporary employees from units of permanent employees.

CONCLUSION

For the foregoing reasons, we find that the petitioned-for Fellows are temporary employees who are not appropriately included in the bargaining unit. Accordingly, we remand this case to the Regional Director for further appropriate action.

ORDER

The Regional Director's Decision and Direction of Election is reversed in part, and the case is remanded to the Regional Director for further appropriate action consistent with this Decision.

Dated, Washington, D.C. February 10, 2021

Marvin E. Kaplan, Member

William J. Emanuel, Member

John F. Ring, Member

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[4] Along these lines, we further observe that the Fellows are not probationary employees who can reasonably expect that their term of employment will continue after the probationary period if they perform adequately. Cf. *Gulf States Telephone Co.*, 118 NLRB 1039, 1041 (1957) ("beginners," who were without prior experience and worked for 90 days or less, were included in the unit because they had "a reasonable expectancy of permanent employment after their trial period").