

**DEPARTMENT OF LABOR AND REGULATION
DIVISION OF LABOR AND MANAGEMENT**

**COMMUNICATIONS WORKERS OF
AMERICA, LOCAL 7500 AFL-CIO,**

HF No. 1 E, 2011/12

Petitioner,

v.

DECISION

**RANDALL COMMUNITY WATER
DISTRICT,**

Respondent.

This matter came before the Department of Labor and Regulation when Petitioner, Communication Workers of America, Local 7500 filed a Petition for Election dated August 1, 2011, pursuant to SDCL 3-18-4. Petitioner seeks certification as the exclusive representative of a bargaining unit consisting of nine employees of the Randall Community Water District.

Respondent, Randall Community Water District filed an Answer to Petition for Election on September 14, 2011, objecting to Petitioner's certification and challenging the size of the bargaining unit. Respondent ultimately challenges the inclusion of five of its employees in the Petitioner's bargaining unit. As a result, a hearing was conducted on December 15, 16, 2011 and January 12, 2012, before Donald W. Hageman, Administrative Law Judge. Petitioner was represented by Steven V. Sandven. Respondent was represented by Kenneth W. Cotton.

Issues:

The legal issue presented at hearing is stated as follows:

Whether five of Respondent's employees, Robert Durham, Terry Van Zee, Tracey Jacobson, Georgia Andersh, and Cynthia Mushitz, should be excluded from Petitioner's proposed bargaining unit?

Facts:

The Department finds the following facts by a preponderance of the evidence:

The District:

1. Randall Community Water District (District) is a political subdivision of the State of South Dakota organized under state law in 1974.

2. The District distributes potable water taken from the Missouri River, to a significant portion of southern and central South Dakota east of the Missouri River including Charles Mix County, about half of Douglas County, all of Davison County except the City of Mitchell, and half of Aurora County as well as small portion of Brule and Bon Homme Counties.
3. The District serves 2,500 rural customers and 15 bulk users including a number of small towns.
4. The District generates revenue by charging for the water that it supplies to its customers.
5. The District is governed by a Board of Directors.
6. The District's business office is located in Lake Andes, South Dakota. It holds an extensive infrastructure including two intake units and treatment plants, tank sites and many miles of underground pipeline. One intake unit and treatment plant is located near Pickstown, South Dakota. The other is located southeast of Platte, South Dakota.
7. The District has ten employees: Alvin Van Zee, Robert Durham, Terry Van Zee, Terry Koupal, Chad Anderson, Corey Bartunek, Troy Mattis, Tracey Jacobson, Georgia Andersh and Cindy Mushitz.
8. The District does not have an organizational chart and only one of its employee's positions has had a written job description in the last 22 years.

Alvin Van Zee:

9. Alvin Van Zee (Alvin) is the general manager of the District. He has held that position for the last 22 years. He oversees all aspects of the District's business and is solely responsible for reporting to the Board of Directors.
10. Alvin is the only District employee authorized to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline the District's other employees. Alvin approves all time cards, conducts all personnel evaluations and deals with all personnel complaints.
11. Alvin is the only employee of the District who has a written employment contract. Alvin negotiates that contract every three years with the Board of Directors. He is the only employee who receives family health insurance from the district. Alvin negotiates with the Board every year on behalf of the other employees for benefits and wages. Alvin's contract and the other employees' benefits are negotiated separately.

12. Alvin is the District's only salaried employee. All others are hourly employees. Alvin neither reports nor tracks his vacation or sick leave. The other employees must have their vacation time approved by Alvin and report their sick leave to him.
13. The District's Employee Handbook applies to all employees except Alvin.
14. Alvin must approve all over-time for the other employees.
15. Alvin must grant approval before any other employee can remove District information from the business.
16. All employees must show any required certification to Alvin when asked to do so.
17. All requests from employees for assistance are made to Alvin unless he is unavailable.
18. All emergencies are reported to Alvin unless he is unavailable.
19. Alvin pre-approves all non-routine purchases. While Tracey Jacobson, Terry Vann Zee and Robert Durham can order chemicals and supplies they routinely use, Alvin reviews the invoices before payment and only Alvin authorizes the payments of such purchases.
20. Alvin approves and signs all District checks.
21. Alvin is the only employee who can come and go as he likes.
22. Alvin opens and reads all mail delivered to the District office even if it is addressed to another employee.
23. No other employee is designated to be in charge when Alvin is unavailable.

Robert Durham and Terry Vann Zee:

24. Robert Durham (Robert) has worked for the District for 26 years. He holds a Water Distribution and Operator (Distribution Operator) Class II license and a Water Treatment Plant Operator (Treatment Operator) Class II license which are both issued by the South Dakota Department Environment and Natural Resources (DENR).
25. During the years that Robert and Terry began to work for the District, Alvin has only begun to refer to them as the plant managers or supervisions

since the recent union activity began. Their positions do not have a written job description.

26. Terry Van Zee has been employed by the District for more than 33 years. Terry holds a Distribution Operator Class II license and a Treatment Operator Class II license.
27. Robert and Terry are the primary plant operators of the Pickstown and Platte water treatment plants and adjoining intake equipment. Robert is assigned to the Pickstown plant and Terry is assigned to the Platte plant. A Treatment Operator's Class II license is required to operate these plants. They spend the vast majority of their time at work alone in these treatment plants.
28. The plant operators have to monitor all of the equipment in the intake, the water treatment plant and the booster stations in their area. They need to adjust chemicals on a daily basis, make sure they order chemicals and supplies they routinely use in the plants.
29. The plant operators take water samples and conduct tests of the water as required by the DENR. They complete and sign laboratory reports for the DENR.
30. The plant operators write notes in a log regarding the operation of the plant. These notes are used to alert other employees who may cover the plants on weekends, or while the usual plant operators are on vacation, as to the status of the plant and potential problems that may arise.
31. The plant operators maintain the plant equipment and make repairs when needed. If they require assistance to make a repair, they call Alvin and request help. Alvin will then assign other employees, usually distribution operators to assist them. If the repair is electrical in nature, they may request Terry Koupal who is an electrical contractor. If they cannot reach Alvin, they call other employees directly for assistance. The plant operators require help about 10 or 12 times per year. They call other employees directly for assistance about 30% of the time or about 3 or 4 times per year.
32. All of the duties that the plant operators perform in their position are within the scope of those duties that a Treatment Operator Class II licensee is expected to perform.

Tracey Jacobson:

33. Tracey Jacobson (Tracey) has been employed by the District for 14 years. Tracey holds a Treatment Operator Class II license.

34. At the hearing, Alvin testified that Tracey is the District's quality control manager and supervisor. However, Alvin has only referred to Tracey as a manager or supervisor since the recent union activity began. Her position does not have a written job description.
35. Tracey monitors and reports all the water tests and results, plant results, and makes sure that they are in compliance with state requirements. She also reviews the Environmental Protection Agency (EPA) rules and regulations that might be "coming down" and keeps Alvine informed of any possible changes.
36. Tracey sometimes works in the field doing bacteria tests for new construction and existing pipelines.
37. Tracey reviews all of the plant monthly and quarterly reports, makes sure that they're done right and puts them together and sends them to Pierre.
38. Tracey also takes water samples, at her discretion, in the distribution system for regulatory and non-regulatory tests of the water.
39. If Alvin cannot be reached, Tracey has called other employees to help in emergency situations to assist with chemical leaks, water leaks, and water main breaks. She has done this once in the last year and she only has the authority to call in closest employees.
40. In October of 2011, Tracey suggested to Alvin the District temporarily change the disinfectant used in the water. Tracey discussed this change with Robert, Terry and Alvin. After the discussion, Alvin made the decision to make the change.
41. Occasionally, Tracey takes phone calls from customers, who require the services of a District employee for repairs, leaks, faulty meters, change of ownerships, etc. When Tracey takes these calls, she fills out a work order. She then takes the work order into the room where the distribution operators (Terry Koupal, Chad Anderson, Corey Bartunek and Troy Mattis) have their desks. There she places the work order on a table where the operators sort through them and take the work orders located in the area they will be working that day.
42. In a "handful" of these cases, Tracey hands the work orders to a distribution operator, rather than laying it on the table in the operator's room. She usually does this when the work has to be done within a certain time frame, like a change of ownership.

43. All the duties that Tracey performs in her position are within the scope of those duties that a Treatment Operator Class II licensee is expected to perform.

Georgia Andersh:

44. Georgia Andersh (Georgia) has been employed by the District for 28 years as its bookkeeper and administrative assistant. Her position does not have a written job description.

45. Georgia does all of the District's bookkeeping for income and expenses.

46. The District gets audited every year. Georgia works closely with the auditors to provide them with all of the information they require.

47. Georgia is the contact person for the District's South Dakota Retirement plan. She is the contact person for the District's TASC, which is a health insurance cafeteria plan.

48. Alvin has an eighth grade education and is dyslexic. Consequently, Georgia helps him with correspondence. She takes dictation and writes letters for him. Alvin relies on her to assist him to put those letters together in proper form.

49. When Alvin wants to make a wage and benefit proposal for all of the employees to the Board of Directors. He will have Georgia make reports for wages paid during the last five to ten years.

50. The District's personnel records are stored in her desk where anyone can access them.

51. At one time, Georgia took notes at the Board of Director's meetings but she no longer does so.

52. Occasionally, Georgia takes phone calls from customers, who require the services of a District employee for repairs leaks, faulty meters, change of ownerships, etc. When Georgia takes these calls, she fills out a work order. She then takes the work order into the room where the distribution operators have their desks. There she places the work order on a table where the operators sort through them and take the work orders located in the area they will be working that day.

53. In a small percentage of these cases, Georgia hands the work orders to a distribution operator, rather than laying it on the table in the operator's room. She usually does this when the work has to be done within a certain time frame, like a change of ownership.

54. Georgia's work duties are routine and clerical in nature.

Cindy Mushitz:

55. Cindy Mushitz (Cindy) has worked for the District for 5 years. During her employment she has worked as a billing clerk and meter reader. Cindy also mows grass around the tank sites. Her position does not have a written job description.

56. Cindy reads the customer water meters which are not self-read by the customer.

57. Cindy records all money received from customer by entering the receipts into the computer. When they're all entered, she gives a report to Georgia, the bookkeeper.

58. Cindy will also mail out all billing tickets for meters that are self-read. The customers need 12 billing tickets for the year. The customers are required to fill out the tickets monthly and return them to the District.

59. Cindy has the authority to adjust a customer's bill for a few well defined reasons. For example, when there has been a leak or when she instructs the customer to "flush" the water line.

60. Cindy also takes most of the phone calls from customers, who require the services of a District employee for repairs leaks, change of ownerships, etc. When Cindy takes these calls, she fills out a work order. She then takes the work order into the room where the distribution operators have their desks. There she places the work orders on a table where the distribution operators sort through them and take the work orders located in the area they will be working that day. When the work is completed, the distribution operators return the work orders to Cindy who enters the materials used into the computer.

61. In about 2% of these cases, Cindy hands the work orders to a distribution operator, rather than laying it on the table in the distribution operator's room. She usually does this when the work has to be done within a certain time frame, like a change of ownership.

62. Cindy's work duties are routine in nature.

63. Additional fact may be discussed in the analysis below.

Analysis:

Legal Authority:

During the course of the hearing, a discussion arose concerning the appropriate legal authority in this case. This case hinges on the whether certain employees of the District should be excluded from the bargaining unit the Petitioner wishes to represent because they do not fall within the definition of public employee as set forth in SDCL 3-18-1. That statute provided:

The words “public employees” as used in this chapter shall mean any person holding a position by appointment or employment in the government of the State of South Dakota or in the government of any one or more of the political subdivisions thereof, or in the service of the public schools, or in the service of any authority, commission, or board, or any other branch of the public service. The term does not include ... (2) Administrators except elementary and secondary school administrators, administrative officers, directors, or chief executive officers of a public employer or major divisions thereof as well as chief deputies, first assistants, and any other public employees having authority in the interest of the public employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other public employees, or the responsibility to direct them, or to adjust their grievances, or to effectively 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.

SDCL 3-18-1 (emphasis added). This statute has a federal counterpart at Section 2(11) of the National Labor Relations Act (NLRA). The NLRA excludes supervisors from the bargaining units protected by the NLRA Section 2(11) defines ‘supervisor’ as:

Any 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

NLRA, Section 2(11).

The similarity between the statutes is unmistakable and the National Labor Relations Board (NLRB) and the federal courts have interpreted the federal statute on numerous occasions. As such, they can provide valuable guidance when interpreting the state statute.

In addition, the South Dakota Supreme Court stated in Stricker v. Swift Bros., 1977 SD 88, 260 NW2d 500 (SD that “[a] large body of decisional law has been established by the National Labor Relations Board and the federal courts recognize the Board’s expertise in the field of labor law.” Accordingly, the Court has followed the president of the NLRB in numerous cases.

Supervisors:

It is well established that the employer, as the party contending that supervisory status exists, bears the burden of proving such status. Tucson Gas & Electric Company, 241 NLRB 181 (1979); Midland Transportation Co., 304 NLRB 4 (1991).

While discussing the definition of supervisor, The Second Circuit Court of Appeals has found that the first portion of Section 2(11) is stated in the disjunctive; thus, an employee's possession of any one of the enumerated powers may signify supervisory status. Superior Baking, Inc. v. NLRB, 893 F.2d 493, 496 (2nd Cir. 1990). Accordingly, employees are supervisors if: "(1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (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." Kentucky River, 532 U.S. at 713, 121 S.Ct. 1861.

In this case, the District contends that all five of the employees at issue in this case are supervisors because they "assign" work. It contends that Robert, Terry and Tracey call employees directly when they require assistance. It also argues that Tracey, Georgia and Cindy "assign" work when they hand work orders to the distribution operators. The NLRB, provides guidance when considering whether work is "assigned" for purposes of Section 2(11) in In re Oakwood Healthcare, Inc., 348 NLRB 686, 692–93 (2006), In that case, the Board stated:

The ordinary meaning of the term "assign" is "to appoint to a post or duty." Webster's Third New International Dictionary 132 (1981). Because this function shares with other 2(11) functions—i.e., hire, transfer, suspension, layoff, recall, promotion, discharge, reward, or discipline—the common trait of affecting a term or condition of employment, we construe the term "assign" to refer 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. That is, the place, time, and work of an employee are part of his/her terms and conditions of employment.

Id. at 689. The Board then stated:

The assignment of an employee to a certain department (e.g., housewares) or to a certain shift (e.g., night) or to certain significant overall tasks (e.g., restocking shelves) would generally qualify as "assign" within our construction. However, choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers) would not be indicative of exercising the authority to "assign." To illustrate our point in the health care setting, if a charge nurse designates an LPN to be the person who will regularly administer medications to a patient or a group of patients, the giving of that overall duty to the LPN is an

assignment. On the other hand, the charge nurse's ordering an LPN to immediately give a sedative to a particular patient does not constitute an assignment. In sum, to "assign" for purposes of Section 2(11) refers to the charge nurse's designation of significant overall duties to an employee, not to the charge nurse's ad hoc instruction that the employee perform a discrete task.

Id.

The District has a relatively small number of employees who provide a significant service to a large customer base over a very large area. These employees are responsible individuals and are self-motivated. There has been only one disciplinary action taken, if it can be called that, within anyone's memory. In that instance, Robert accidentally let his Treatment Operator license to expire. There is very little employee turnover and most of these individuals have worked for the District for many years. Many of these individuals have technical expertise who requires very little supervision. These attributes are a testament to both the employees and the management of this organization.

When Terry and Robert require assistance, they typically call Alvin who in turn will assign someone to help. When they cannot reach Alvin they call other employees directly. The Department is not convinced in these situations that Terry and Robert are "ordering" or "directing" those individuals to assist them. The employees that are called understand that it is within the scope of their duties to assist in these situations. Consequently, when they are made aware of the fact that assistance is necessary, there is no reason to believe that help would not willingly be forthcoming without direction or orders.

Even if Terry and Robert's actions rise to the level of an assignment, they only constitute the assignment of discrete tasks as discussed in the Oakwood Healthcare case. The incidents would not create a supervisory relationship. Therefore, the District has failed to carry its burden of proving that Terry and Robert are supervisors within the meaning of SDCL 1-18-1.

There is more evidence that Tracey directs employees to assist in emergencies when she cannot reach Alvin. However, there was only one of these events in the last year and it was an "ad hoc instruction" for the employees to perform a "discrete task." Consequently, Tracey, like Robert and Terry, cannot be categorized as a supervisor.

The analysis of Tracey, Georgia and Cindy's actions when handing work orders to the distributor operators is the same as that discussed about Terry and Roberts calls for assistance. When these ladies hand the work orders to the distribution operators, it is nothing more than alerting them that the work must be done with a certain time frame. The women are not assigning work.

Like the situation with Terry and Robert, even if it had been shown that the women assigned the work they would only constitute a discrete task.

In addition, Tracey, Terry and Robert as Treatment Operator Class II licensees are part of a professional or technical class. The NLRB has stated:

In Kentucky River, supra at 713, the Supreme Court took issue with the Board's interpretation of "independent judgment" to exclude the exercise of "ordinary professional or technical judgment in directing less skilled employees to deliver services." That is, in the Board's then extant view, even if the Section 2(11) function is exercised with a substantial degree of discretion, there was no independent judgment if the judgment was of a particular kind, namely, "ordinary professional or technical judgment in directing less-skilled employees to deliver services.

Id. at 692. No evidence has been presented to indicate that Tracey, Terry and Robert have exercised any independent judgment other than the technical judgment excised by any other licensed Treatment Plant operator. The District has failed to show that any of the five employees at issue in this case assign other employees within the meaning of Section 2(11) and SDCL3-18-1.

Managers:

The District next argues that the five employees at issue in this case should be excluded from the bargaining unit because their inclusion would leave the District's without any supervisors in Alvin's absence. This argument also fails. It is not the Department who has left the District without supervisors in Alvin's actions. It is Alvin and the Board who have failed to provide supervision.

Alvin has been in charge for 22 years. There is no evidence that either he or the Board of Directors have made any effort to assign another to be in charge in Alvin's absence. As suggested before, this group of employees appears to be self-motivated and professional and require no supervision during such absences.

One manager for nine employees seems to be reasonable business model in this case. The same cannot be said for the District's position. In effect, the District is proposing that six of its ten employees are supervisors and managers. Under this proposal, all the office personal and both treatment plant operators would be supervisors. However, the four distribution operators would have no supervisors among them. The Department is not aware of any modern business model which would look like that proposed by the District.

Alvin and the Board of Directors have created a "bright line" between Alvin as manager and the rest of the employees. He is the only salaried employee. He is the only employee who can make or change policy. The handbook and the rules contained within are applicable to all employees except Alvin. Alvin is the only

employee who deals with the Board and he is the only employee to negotiate his own written contract. Alvin approves all time cards, etc.

Only Alvin has the authority to hire, transfers, suspend, layoff, recall, promote, discharge, assign, reward, or discipline the District's other employees.

Indeed, Alvin runs a "tight ship". He reads all incoming mail to the District even when it is addressed to other employees. The Department will not create managers of the other employees in this case when Alvin and the Board have not.

Confidential:

Finally, the District argues that Georgia should be excluded from the bargaining unit because she is a confidential employee. The rationale for the exclusion of confidential employees from the bargain unit is as follows:

[M]anagement should not be forced to negotiate with a union which has among its member's employees with access to advance information on the company's collective bargaining negotiating position grievances and other labor relations matters.

NLRB v. Meenan Oil Co., 139 F.3d 311 (2nd Cir. 1998)

There is insufficient evidence that Georgia holds this type of position. As bookkeeper and administrative assistant, her duties are routine and clerical. While she does perform some secretarial duties for Alvin, she has never dealt with employee complaints and does not assist Alvin during Board meetings. The act of printing payroll reports does not give her access to labor negotiation tactics or strategies.

Alvin has successfully negotiated his own contract for many years without Georgia's assistance. There is no doubt that Alvin, with the help of able counsel, can successfully negotiate with the union without the assistance of Georgia. Georgia is not a confidential employee and should not be excluded from the bargaining unit.

Conclusion:

The five employees at issue in this case shall be included in the bargaining unit and the Department will conduct an election as provided by statute. Petitioner's attorney shall submit Proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within 20 days from the date of receipt of this Decision. Respondent's attorneys shall have 20 days from the date of receipt of Petitioner's Proposed Findings of Fact and Conclusions of Law to submit objections and/or Proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and

if they do so, Petitioner's attorney shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 22nd day of May, 2012.

/s/ Donald W. Hageman
Donald W. Hageman
Administrative Law Judge