

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 28**

**PHOENIX NEW TIMES, LLC**

**Employer**

**and**

**Case 28-RC-254936**

**THE NEWSGUILD-CWA**

**Petitioner**

**DECISION AND DIRECTION OF ELECTION**

The above-captioned matter is before the National Labor Relations Board (the Board) upon a petition duly filed under Section 9(c) of the National Labor Relations Act (the Act), as amended. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me. Upon the entire record in this proceeding, I make the following findings and conclusions.<sup>1</sup>

**I. SUMMARY**

The Employer is engaged in the operation of a news media outlet which publishes through its online magazine and weekly print edition. The Employer employs an Editor in Chief, Editorial Operations Manager, News Editor, Food Editor, Culture Editor, Social Media Editor, Creative Director of Print, Staff Writers, Fellows, and an Intern. The Employer contends that the petitioned-for unit is inappropriate because the Editorial Operations Manager, News Editor, Food Editor, Culture Editor, Social Media Editor, and Creative Director of Print are all supervisory or managerial employees, or in the alternative, do not share a community of interest with the Staff Writers. The Employer further contends that the petitioned-for unit is inappropriate because the Fellows are temporary employees and should be excluded from the unit on that basis.

I have carefully reviewed and considered the record evidence and the arguments of the parties both at the hearing and in their memoranda of points and authorities. I find that, based on the record evidence, the Culture Editor is a statutory supervisor and should be excluded from the unit. Pursuant to a stipulation by the parties during the hearing in this matter, the News Editor and Editorial Operations Manager will also be excluded as statutory supervisors. I find that the

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<sup>1</sup> The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein. The Petitioner, a labor organization within the meaning of the Act, claims to represent certain employees of the Employer, and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

remaining job classifications in the proposed unit – Food Editor, Social Media Editor, Creative Director of Print, Staff Writer, and Fellow – constitute an appropriate unit. The petitioner agreed on the record to move forward to an election should the Regional Director find an alternative unit to be appropriate in this matter. Thus, I have directed an election for the job classifications in the petitioned-for unit which were not excluded on the basis of supervisory status.

Below, I have set forth the record evidence relating to the Employer’s operations and the factors relevant to supervisory, managerial, and temporary employee status and community of interest; an analysis of the Board’s standards regarding supervisory, managerial, and temporary employee status and community of interest, as applied to the facts of this case and my conclusions in that regard; and the details of the directed election and the procedures for requesting review of this decision.

## **II. RECORD EVIDENCE**

### **A. Background**

The Employer publishes the *Phoenix New Times*, a news media publication, which has both an online platform and a weekly print edition. The content published on the website and in the print edition are produced by a combination of freelancers, fellows, and staff writers. That content is published in News, Food, or Culture sections of the *Phoenix New Times*. The Food and Culture sections are referred to as verticals and maintain their own social media accounts separate from the Employer’s primary social media accounts.

There are approximately 9 employees in the petitioned-for unit once the News Editor and Editorial Operations Manager are excluded pursuant to the parties’ stipulation that those employees are Section 2(11) supervisors. All of those employees attend a weekly editorial meeting on Monday afternoons, at which time they discuss potential cover stories. On Fridays, the Editor in Chief, News Editor, Food Editor, Culture Editor, and Social Media Editor also attend a weekly editors’ meeting.

All of the editors also do some writing, although they are not required to produce a specific number of articles each week. The staff writers, fellows, and News, Food, Culture, and Social Media Editors all work out of the same office space and share the same break room.

### **B. Supervisory Status<sup>2</sup>**

#### **1. The Social Media Editor**

The Employer has accounts on several social media platforms, including Facebook and Twitter. Its primary social media accounts are operated by a Social Media Editor, who drafts social media posts, publishes those posts, and interacts with the Employer’s followers in the comments and replies to posts on social media platforms.

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<sup>2</sup> The parties stipulated on the record that the News Editor and Editorial Operations Manager are supervisory or managerial employees under Section 2(11) of the Act and should be excluded from the Unit.

When the Social Media Editor is out of the office, or otherwise unable to post to the Employer's social media accounts, several other employees, including several staff writers, have access to those platforms and are able to post content without the Social Media Editor's approval. The Employer's marketing department is also able to post content to the Employer's social media accounts without discussing, coordinating, or clearing that content with the Social Media Editor.

The Employer also has social media accounts for its Food Vertical and Culture Vertical, which are managed by the Food Editor and the Culture Editor respectively. The Social Media Editor does not have the authority to direct the posting or removal of content from the Food Vertical and Culture Vertical's social media accounts.

Neither party presented any evidence to indicate that the Social Media Editor has any direct reports, or the ability to hire direct reports.

## **2. The Food Editor**

The Food Editor testified at the hearing in this matter and detailed her daily responsibilities, workflow, and the editorial process that the Employer uses for its Food Vertical. The Food Editor writes articles each month, edits articles filed by other writers, and hires freelance writers for the Food Vertical. The Food Editor's workflow appears to fluctuate throughout the year, with the busiest season being the summer. She is encouraged to write articles herself but is not required to write a set number of articles per week.

In addition to her responsibilities for producing content for the Food Vertical, the Food Editor is also responsible for administering the Food Vertical's freelance budget, fielding pitches from freelancers, and hiring freelancers for each issue.

The record shows that the Food Editor does not have any direct reports, but instead relies on freelancers to provide content for the Food Vertical. Many of these freelancers have longstanding relationships with the Employer and reach out to the Food Editor with pitches. The Food Editor can, and does, on occasion reach out to regular freelancers with a pitch for an article if there is a specific piece that the Employer is looking to include in the Food Vertical.

The Food Editor often receives pitches from staff writers, but those pitches are frequently kicked back over to the News Vertical rather than the Food Vertical.<sup>3</sup> There are no Staff Writer dedicated to working exclusively on the Food Vertical, and the Food Editor has never hired a Staff Writer. In fact, neither party presented any evidence to show that the Food Editor was ever told that she could hire a direct report generally, or a full time Food Critic.

Neither party presented any evidence to show that anyone employed in the Food Editor position has ever had a direct report. While the Editor in Chief did testify that the Food Editor could technically hire a Food Critic, there was no evidence suggesting that the Employer had ever notified the Food Editor of that possibility.

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<sup>3</sup> The Food Editor testified specifically about a pitch for an article about a sexual harassment case involving a local restaurant.

### **3. The Culture Editor**

The Culture Editor testified at the hearing in this matter that he is responsible for reviewing and editing articles that are published in the Culture Vertical. The Culture Vertical publishes about twenty articles per week, ten articles about music and ten articles about art.

The Culture Editor works with both full time staff and freelancers to produce content for the Culture Vertical. This includes a number of regular freelancers who routinely provide content for the Culture Vertical. The Culture Editor receives about seven pitches per day for prospective articles for the Culture Vertical. He accepts many of these pitches, but he estimates that he rejects at least one pitch per day.

The Culture Editor also testified that there is a Staff Writer who regularly pitches and writes articles for the Culture Vertical, in addition to writing news articles. Neither party presented any evidence that shows that the Culture Editor has the authority to discipline or terminate that Staff Writer.

In addition to the freelance writers and Staff Writers who write articles for the Culture Vertical, the Employer has an Intern who writes for the Culture Vertical. The current Intern is the second Intern who has been employed by the Employer during the Culture Editor's tenure. Interns are hired as part of a partnership with the Cronchite School at Arizona State University. The Employer's relationship with the Cronchite School predates the Culture Editor's tenure. Interns write articles and listicles, attend staff meetings, and are paid through the Employer's payroll system. The Culture Editor hired the Employer's current Intern, reviews all of the articles that the Intern writes, and handles any administrative requirements to ensure the Intern receives academic credit.

### **4. The Creative Director of Print**

The Creative Director of Print is responsible for the layout of the print edition, including the cover art. She coordinates with freelance photographers and artists to provide any photos and art for each print edition of the *Phoenix New Times*. The Creative Director of Print reports to the Editorial Operations Manager and to the Editor in Chief.

There is no evidence that the Creative Director of Print has any direct reports. While she does work with all of the artists who provide photographs and cover art for the print edition of the *Phoenix New Times*, all of those individuals are freelancers. The Creative Director of Print works in the same space as other employees of the print magazine but does not work directly with Staff Writers unless they need photographs for a particular story, or are working on the cover story for the upcoming print edition of the magazine.

The Creative Director of Print works directly with whichever Staff Writer wrote the cover story for the weekly print edition, to get a sense of the writer's vision before commissioning cover art from a freelancer. This usually takes the form of a memo and questionnaire that Staff Writers fill out after writing the cover story, which she uses to figure out what artwork would be appropriate for the cover.

## **C. Management Status**

### **1. The Social Media Editor**

The Social Media Editor is the face of the *Phoenix New Times* on social media,<sup>4</sup> and has a lot of discretion on what to include in her posts. She is required to post every article that is published on the website to the Employer's social media channels, but she is free to write whatever she chooses in the comment or tweet sharing each article. Her work is not reviewed by anyone else before she posts on social media. Posts on the Employer's social media accounts are all unsigned.

The Employer does not have an editorial guide or social media guide that the Social Media Editor is required to follow. At the hearing, she testified that when she was first hired she received a best practices sheet from a Social Media Editor in Miami, and that she works closely with the Editor in Chief when crafting tweets or social media posts that do not include sharing an article from the Employer's website.

In addition to sharing articles from the Employer's website to its social media platforms, the Social Media Editor also publishes other content on social media and engages with followers on social media platforms. These types of posts comprise less than 5 percent of the Social Media Editor's work. This other content includes posts like an April 20, 2019 thread on Twitter which showed photos of Arizona politicians and the bongs that they look like. This type of content is created in consultation with the Editor in Chief, and the Social Media Editor testified that she would not publish this type of content without first consulting the Editor in Chief.

The Social Media Editor also controls what other accounts the Employer follows on Twitter, and engages with followers on social media posts. She chooses who to follow and who to engage with in the comments or replies on each post. When choosing which accounts to unfollow on Twitter, however, the Social Media Editor consulted with the Editor in Chief before making any changes to the account's "following" list.

Finally, the Social Media Editor does not have exclusive control over the Employer's main social media accounts. While she is authorized to post to those accounts, the Employer's Marketing Team also has access to those accounts and the ability to post new content without consulting with the Social Media Editor. The Social Media Editor does not have the authority to remove or alter content posted by the Marketing Team.

### **2. The Food Editor**

The Food Editor attends the weekly editors' meeting but testified that she mostly just floats ideas for cover stories in those meetings. If she wanted to do a cover story or a feature, she would need to discuss that with the Editor in Chief.

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<sup>4</sup> The Employer has a Facebook page, and three Twitter accounts – a primary account, an account for the Food Vertical, and an account for the Culture Vertical. The accounts for the Food Vertical and Culture Vertical are controlled by the Food Editor and Culture Editor respectively. The Social Media Editor does not have authority to direct any of the content on the Food Vertical or Culture Vertical's Twitter accounts.

The Food Editor also coordinates with the Editor in Chief about the budget available for the Food Vertical and must consult with the Editor in Chief to obtain additional funds for Food Vertical projects that exceed the Food Vertical's budget.

Lastly, the Food Editor operates the Food Vertical's Twitter account, which sends unsigned tweets. She does not need approval or authorization from anyone else in order to publish tweets on the Food Vertical's Twitter account.

### **3. The Culture Editor**

In addition to his responsibilities for coordinating with freelancers and editing articles for the Culture Vertical, the Culture Editor writes articles for the Culture Vertical. All of the articles he writes are edited by the Editor in Chief. He testified that he usually writes about two articles each week.

The Culture Editor testified that he is not subject to any particular editorial policy, he simply decides if a pitch is a good idea. He attends Friday Editorial Meetings but testified that policy is not made at those meetings. Instead, the Culture Editor testified that the Editorial Meeting is largely used to keep people up to date on what's happening, discuss budgets, and set deadlines.

### **4. The Creative Director of Print**

The Creative Director of Print indirectly reports to both the Editorial Operations Manager and the Editor in Chief. She coordinates with the Staff Writer responsible for that week's cover story before commissioning cover art for the print edition. The Creative Director of Print does not establish any policies for the Employer. She relies on the art memo prepared by the Staff Writer who wrote the cover story, and the contents of the story, to commission cover art. She does not determine the subject matter or editorial stance of cover articles.

### **D. The Fellowship Program**

The Employer employs several fellows through the Corporate Voice Media program. Journalism students or recent graduates apply through the Corporate Voice Media website and, if selected, are assigned to one of six locations.

Fellows write three stories per week and are paid \$500 per week. They receive the same benefits as permanent staff writers. Fellows pitch article ideas to editors according to the same procedure used by Staff Writer. They submit their work directly to their editor, just like permanent Staff Writers.

Fellows expect to be retained as permanent staff writers after completing their six-month fellowship, if they do a good job. Approximately 64% of fellows have been hired on as permanent Staff Writer. They do not compete against one another for positions – there is no guarantee that a position will be available when they complete the program – but those who meet the Employer's standards get first priority for entry level positions after completing the program. The Employer has frequently extended the six-month fellowship period for fellows. In at least

some instances, the Employer has granted these extensions in anticipation of job openings for permanent Staff Writer positions shortly after a promising fellow's six-month fellowship ended.

### **E. Community of Interest**

All of the employees in the proposed bargaining unit participate in the production of the Employer's weekly print magazine and do at least some writing. All employees except the Creative Director of Print<sup>5</sup> are salaried. All employees work out of the same location, use the same break room, and receive the same benefits. Employees also share a common chain of supervision – all employees in the proposed bargaining unit report to the Editor in Chief, and the Staff Writers and Fellows report to the News Editor, who reports to the Editor in Chief.

## **III. ANALYSIS**

### **A. Supervisory Status**

The burden of proof to show supervisory status lies with the party asserting such status. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711-712 (2001). Moreover, any lack of evidence in the record is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 fn. 8 (1999). Finally, purely conclusory evidence is not sufficient to establish supervisory status. *Volair Contractors*, 341 NLRB 673, 675 (2004); *Sears, Roebuck & Co.*, 304 NLRB 193, 194 (1991).

Assigning work within the meaning of Section 2(11) of the Act is the act of designating an employee to a work at a certain place, shift or overtime, or to perform a task which involves significant overall duties. *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006). Where individuals have the authority only to request rather than require that employees work in certain areas, they are not found to have the authority to assign work. *Golden Crest Healthcare Center*, 348 NLRB 727 (2006). The fact that individuals were the highest-ranking employee on site during the night shift and every other week end was insufficient to confer supervisory authority in the absence of any of the primary indicia of supervisory authority. *Id.*

In *King Broadcasting*, 329 NLRB 378 (1999), news producers were not found to be statutory supervisors although the news producers selected stories, decided on visual and audio presentation of stories, assigned story writing to reporters, compiled rundowns, made changes in the rundowns, and directed others in the production activities of daily newscasts, including asking reporters to revise scripts, requesting photographers to use certain segment lengths and camera angles, and having editors alter the length of videos. The Board found such that the interactions of the news producers were part of a "collaborative effort" of news producers with reporters, photographers, and others. The Board characterized the relationship of news producers to other news department employees as one of "co-workers involved in separate but sequential functions in the development of a single product."

Similarly, in *McGraw-Hill*, 329 NLRB 454 (1999), the Board held that although news producers gave direction to reporters, photographers and editors, that directions such as camera angles, video length, and script edits were "incidental to the producers' ability to perform their

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<sup>5</sup> The Creative Director of Print is hourly and works 29 hours per week.

own work” and were insufficient to establish supervisory status because the directions were simply incidental to the news producer’s ability to perform their own work, and the news producers were part of an interconnected production team, with each member independently responsible for his assignment.

### **B. Conclusions Regarding Supervisory Status**

The Culture Editor has sufficient authority over the Employer’s Intern(s) to establish that he is a Section 2(11) supervisor. The Employer’s Interns are paid, write for the magazine, and perform duties similar to those performed by full-time employees, including Staff Writers and Fellows. The Culture Editor plays an active role in hiring the Intern, assigns work to the Intern, and handles all the administrative oversight to ensure that the Intern receives academic credit for work for the Employer. In light of the Culture Editor’s supervisory authority with respect to the Intern(s), I find that the Culture Editor is a Section 2(11) supervisor and should be excluded from the bargaining unit. While there is also evidence that the Culture Editor does substantive editing of Staff Writers’ work when they write for the Culture Vertical, the Board has not historically treated substantive editing or revision or copy as dispositive of supervisory status in the news media context.

While the Employer presented witnesses who assert that the Food Editor theoretically has the authority to hire a direct report, there was no evidence presented that the Food Editor has ever had a direct report or that the Food Editor was ever notified of her authority to hire a direct report. The Employer similarly failed to present any evidence that any previous Food Editor had a direct report, was specifically authorized to hire a direct report, or sought to hire a direct report. Additionally, while the Food Editor clearly does substantive editing of writers’ work, the writing in the Food Vertical is produced by freelancers rather than employees.

Finally, the Employer failed to present any evidence to suggest that the Social Media Editor or the Creative Director of Print has ever had a direct report or has any supervisory responsibilities. The evidence shows that both the Social Media Editor and Creative Director of Print work with staff writers to promote the magazine’s content and to produce the Employer’s online and print magazine. There is no evidence, however, that show that either the Social Media Editor or Creative Director of Print meet even one of the Section 2(11) supervisory indicia.

Given this lack of evidence, I find that the Employer failed to meet its burden of proof to establish that the Food Editor, Social Media Editor, and Creative Director of Print are Section 2(11) supervisors.

### **C. Managerial Status in News Media Organizations**

The Board has consistently evaluated the managerial status of staff members in news media organizations, and particularly editorial staff, by looking at whether individuals in those roles are setting policy for the news organization. *The Washington Post Co.*, 254 NLRB 168 (1981). Specifically, the Board defines a managerial employee as someone who has the authority to formulate, determine, or effectuate employer policies by expressing and making operative the decisions of their employer, and someone who has discretion in their job independent of their employer’s established policy. *See, e.g., General Dynamics Corp.*, 213 NLRB 851, 857 (1974);

*Eastern Camera and Photo Corp.*, 140 NLRB 569 (1963). The Board has found that in a news media context, that includes employees who formulate editorial policy on behalf of the news media organization. *The Republican Company*, 361 NLRB 93 at 96 (2014) (finding that an editor who was responsible for the content on the newspaper's editorial page, including unsigned editorials, was a managerial employee).

#### **D. Conclusions Regarding Managerial Status**

The evidence presented in this matter shows that the Social Media Director, Food Editor, Culture Editor, and Creative Director of Print all attend weekly editorial meetings, at which they discuss possible cover stories, deadlines, and the other logistics of producing an online and print magazine. There was no evidence that editorial policy was established at these meetings, or that these employees set editorial policy for the Employer. Each of these employees testified that they consult with the Editor in Chief about messaging for the magazine, and none are drafting unsigned editorials on behalf of the Employer – instead they are making choices like which freelance pitches to accept, when to publish them, which article should be the cover story for the weekly print edition, or what artwork should accompany the cover story. While each of these choices sets a tone for the magazine, that tone is more akin to that established by an advice columnist, opinion columnist, or pundit, than that set by the editorial board of a news media organization.

This is particularly true of the Social Media Editor, who is in many ways the public face of the magazine. Her tweets and Facebook posts from the Employer's social media accounts are unsigned, and she responds directly to other social media users from the Employer's social media accounts. But, the Social Media Editor also works with the Editor in Chief and News Editor before making significant changes to the list of accounts that the Employer follows on Twitter. She has similar conversations with the Editor in Chief before posting content that is not related to the promotion of articles from the online magazine but which could be controversial or politically inflammatory. There was no evidence presented to indicate that the Social Media Editor has the authority to take these actions without first consulting with the Editor in Chief, but, even if she had such authority, this ability to independently post content would not establish managerial status.

Furthermore, while there was evidence that the Social Media Editor is the primary employee responsible for the Employer's social media accounts, the evidence clearly showed that she does not establish any policies with respect to the Employer's social media accounts and is not in a position to enforce her own judgment about the Employer's social media practices with other employees who have the independent ability to post on the Employer's social media platforms. The record also clearly shows that the Social Media Editor does not have authority to dictate the content posted to the Food Vertical or Culture Vertical's independent social media platforms.

For the foregoing reasons, I find that the Food Editor, Culture Editor, Social Media Editor, and Creative Director of Print are not managerial employees.

### **E. Employees Engaged in Time Limited Training Positions**

The Board's approach to seasonal and temporary employees has historically rested on the question of whether the employees in question share a community of interest with the permanent employees in the bargaining unit. The Board will include seasonal employees in a unit of permanent full- and part-time employees where "seasonal employees... share sufficient interests in employment conditions with the other employees to warrant their inclusion in the unit." *Kelly Bros. Nurseries, Inc.*, 140 NLRB 82, 85-86 (1962). In determining whether seasonal and permanent employees share a sufficient community of interest, the Board will consider such factors as: wages and compensation; benefits; supervision; qualifications, training, and skills; difference in job functions; degree of contact with other employees; and the degree of integration with the work functions of other employees or interchange between them. *See, Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962). The Board will, however, exclude employees who, because of the casual or temporary nature of their employment, do not share a community of interest with permanent employees. *See, E.F. Drew & Co.*, 133 NLRB 155 (1961) (employees excluded as temporary where they hired from employment agency for one production job estimated to last ten to twelve weeks).

When dealing with employees who are employed in time limited training positions, for example apprentices or medical residents, the Board has not required that all employees in the training classification successfully complete the training program in order to be included in the bargaining unit. Instead the Board looks at whether the majority of employees successfully complete the training program, and whether those employees are retained in permanent positions following completion of their training. *See, Boston Medical Center Corporation*, 330 NLRB 152 (1999). *See also, General Electric Co.* 131 NLRB 100 (1961). The Board looks at how many hours or weeks of training the employees are required to complete in their training role, what type of work the employees are performing while in the program, and whether the majority of training program graduates are retained upon graduation from the program. *General Electric Co., supra*. Where a majority of apprentices or trainees are retained in permanent positions upon completion of the program, the Board has found that the apprentices or trainees have an interest in the working conditions of the permanent employees whom they hope to join upon completion of the program as well as in their own working conditions and training, and that the Union has a legitimate interest in representing the apprentices or trainees who are more likely than not to become permanent employees and members of the bargaining unit upon completion of their training program. *See, General Electric Co., supra*.

### **F. Conclusions Regarding Fellows' Temporary Training Status**

The record in this matter shows that the fellows are a group of employees who are in a training phase of their careers and from whom the Employer plans to hire, although many of the Fellows may move on to other positions after completing their training. In many ways the Fellows are comparable to apprentices or medical residents, having recently completed their education and entered into an on-the-job phase of their training.

Fellows apply to work for the Employer during their last term of journalism school and are hired for a six month fellowship period. That period can be extended at the Employer's discretion. The evidence shows that more than 60 percent of the Fellows hired by the Employer

are ultimately hired on as full time Staff Writers. While the evidence does show that some of the Fellows are hired on to work at one of the Employer's other print media outlets, many remain with the publication where they completed their fellowship.

Fellows work side by side with Staff Writers and other permanent employees, work out of the same location, attend the same meetings, pitch to the same editors, carry a similar workload, and receive the same employee benefits as Staff Writers. Several of the current staff writers employed by the Employer started their careers as Fellows for one of the Employer's print media outlets.

For these reasons, I find that the Fellows have a vested interest in the terms and conditions of Staff Writers' employment, and that the Union has a vested interest in representing the interests of Fellows as prospective members of the profession and potential future permanent employees, and that it is appropriate to include Fellows in the bargaining unit.

### **G. Community of Interest Standard**

Section 9(a) of the Act gives employees a right to be represented by a union "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes." The unit need not be the only appropriate unit, or even the most appropriate unit. *PCC Structurals, Inc.*, 365 NLRB No. 160, slip op. at 3 (2017), citing *American Hospital Association v. NLRB*, 499 U.S. 606, 610 (1991), and *Serramonte Oldsmobile, Inc. v. NLRB*, 86 F.3d 227, 236 (D.C. Cir. 1996).

In determining whether a unit is appropriate, the Board applies the traditional community-of-interest test, in which it assesses "whether the employees in the petitioned-for group share a community of interest sufficiently distinct from the employees excluded from the petitioned-for group to warrant a finding that the proposed group constitutes a separate appropriate unit." *PCC Structurals, Inc.*, 365 NLRB No. 160 at slip op. at 5. In making this determination, the Board considers the following factors:

whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

*Id.*, citing *United Operations, Inc.*, 338 NLRB 123, 123 (2002).

In considering whether a group of employees shares "a community of interest sufficiently distinct" from the interests of excluded employees, the Board determines whether "excluded employees have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members." *PCC Structurals, Inc.*, 365 NLRB No. 160 at slip op. at 11 (emphasis supplied), citing *Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d 784 (2d Cir. 2016). This "analysis must consider guidelines that the Board has established for specific industries with regard to appropriate unit configurations." *PCC Structurals, Inc.*, 365 NLRB No. 160 at slip op. at 11.

## H. Conclusions Regarding Community of Interest

The Creative Director of Print, Social Media Editor, Food Editor, Staff Writers, and Fellows all play an active role in the production of the Employer's online and print magazine.<sup>6</sup> All of these employees work out of the same location and have frequent contact with one another. When the Social Media Director is out of the office, several Staff Writers have access to login information to sign on and post from the Employer's social media accounts, providing coverage for that role.

All of these employees have identical employment benefits. The Creative Director of Print is an hourly employee. All of the other employees in the proposed unit are salaried employees. All of these employees are supervised either directly or indirectly by the Editor in Chief.

For these reasons, I find that the Creative Director of Print, Social Media Editor, Food Editor, Staff Writers, and Fellows share a community of interest with each other. Further, I find that the evidence does not establish that any employees outside this grouping share sufficient interests with the employees within this grouping that they must also be included in any appropriate unit. Accordingly, I find that the Creative Director of Print, Social Media Editor, Food Editor, Staff Writers, and Fellows constitute an appropriate unit.

## IV. CONCLUSION

I find that the petitioned-for unit of all full-time and regular part-time news department employees employed by the Employer does not constitute an appropriate unit. Having excluded the Culture Editor from the unit on the basis that he is a statutory supervisor, I find that the unit of all full-time and regular part-time Food Editors, Social Media Editors, Creative Directors of Print, Staff Writers, and Fellows employed by the Employer constitutes an appropriate unit.

For these reasons, and in view of the record evidence, I shall direct an election in the following appropriate unit (the Unit):

**Included:** All full-time and regular-part time Food Editors, Social Media Editors, Creative Directors of Print, Staff Writers, and Fellows employed by the Employer

**Excluded:** All other employees, including managers, guards, and supervisors as defined by the Act

There are approximately eight employees in the Unit found appropriate.

## V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by The Newsguild-CWA.

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<sup>6</sup> Having already determined that the Culture Editor is a statutory supervisor, I will not evaluate the question of whether he shares an appropriate community of interest with the other employees in the proposed bargaining unit.

### **A. Election Details**

I have determined that a mail ballot election will be held. Although, at the hearing, both parties requested a manual election, after the hearing closed, it became known that community spread of COVID-19 was occurring throughout the United States, including in Maricopa County, Arizona, where the parties requested that the manual election be held. Moreover, the Governor of the State of Arizona issued State of Arizona Executive Order 2020-18, "Stay Home, Stay Healthy, Stay Connected, Physical Distancing to Mitigate COVID-19 Transmission," requiring that people limit their time away from their place of residence or property except to conduct or participate in certain essential activities or functions or to use services or products provided by essential business services, with certain limited exceptions. The conduct of a mail ballot election is necessary to allow the Unit employees to express their preferences concerning union representation without delay while also ensuring the health and safety of the Unit employees, the party representatives, Agency employees, and the community at large.

The ballots will be mailed to employees employed in the appropriate collective-bargaining unit. At 2:00 p.m. on Wednesday, April 22, 2020, ballots will be mailed to voters by an agent of Region 28 of the National Labor Relations Board. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by Wednesday, April 29, 2020, should communicate immediately with the National Labor Relations Board by either calling the Region 28 Office at (602) 640-2160 or our national toll-free line at 1-866-667-NLRB (1-866-667-6572).

All ballots will be commingled and counted by an agent of Region 28 of the National Labor Relations Board on Wednesday, May 6, 2020, at 3:00 p.m. (local time). In order to be valid and counted, the returned ballots must be received at the Regional Office, prior to the counting of the ballots. Each party may have one representative attend the count by video conference. A meeting invitation for the video conference will be sent to counsel for the parties prior to the count. No party may make a video or audio recording or save any image of the count.

### **B. Voting Eligibility**

Eligible to vote are those in the unit who were employed as of April 8, 2020, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

### C. Voter List

As required by Section 102.67(1) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **April 17, 2020**. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at [www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015](http://www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015).

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at [www.nlr.gov](http://www.nlr.gov). Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

### D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be

posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

## **VI. RIGHT TO REQUEST REVIEW**

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

**Pursuant to Section 102.5 of the Board's Rules and Regulations, a request for review must be filed by electronically submitting (E-Filing) it through the Agency's web site ([www.nlr.gov](http://www.nlr.gov)), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden.** A request for review filed by means other than E-Filing must be accompanied by a statement explaining why the filing party does not have access to the means for filing electronically or filing electronically would impose an undue burden. Section 102.5(e) of the Board's Rules and Regulations does not permit a request for review to be filed by facsimile transmission. A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations, and must be accompanied by a certificate of service.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at [www.nlr.gov](http://www.nlr.gov). Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated at Phoenix, Arizona this 15<sup>th</sup> day of April 2020.

*/s/ Cornele A. Overstreet*

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Cornele A. Overstreet, Regional Director