

No “Finite Fellows” in the Bargaining Unit – the Board Weighs in on Temporary Workers

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When it comes to fellowship—and collective bargaining—it looks like “fellows” aren’t treated the same as their permanent status co-workers. In [*Phoenix News Times, LLC and The Newsguild–CWA*](#), 370 NLRB No. 84 (Feb. 10, 2021), the National Labor Relations Board (the “Board” or “NLRB”) found that workers employed at a Phoenix newspaper in a fellowship program of finite duration were temporary workers who could not be included in a bargaining unit.

Phoenix News and the Fellows

The Employer Phoenix News Times (the “Employer” or “Phoenix News”) is a news organization. The owner of the Employer maintains a fellowship program to which journalism students and/or recent graduates can apply, and selected candidates (the “Fellows”) are assigned to one of the organization’s six publications. Phoenix News employs the Fellows through that program.

Fellows and permanent writers on staff (the “Staff Writers”) are similar in many respects: they use the same procedures, undergo the same review and editing process, receive the same benefits, work in the same location, use the same break rooms, and attend the same weekly staff meetings. Both Fellows and Staff Writers also report directly to the News Editor.

However, Fellows and Staff Writers are also quite different. Importantly, unlike Staff Writers, Fellows typically are only employed for a six-month fellowship period. While the fellowship can be extended if the Fellow shows promise and there is a “reasonable expectation” that a permanent Staff Writer position will soon become available, these extensions were rare. Of the 27 Fellows who worked for the owner of Phoenix News since 2013, only five had their fellowships extended for brief, finite periods of time. Further, of the nine Fellows who completed fellowships at Phoenix News, fewer than half went on to work at Phoenix News in permanent positions.

The union filed a petition to represent a unit of Phoenix News employees, including the Fellows. In response, Phoenix News contended that the Fellows are temporary employees who could not be

properly included in the bargaining unit.

The Regional Director's Decision

The Regional Director issued a Decision and Direction of Election, finding that the Fellows could be appropriately included in the unit. According to the Regional Director, the Fellows should be included in the unit because they “share a community of interest with the other petitioned-for employees,” and also “have a vested interest in the terms and conditions of Staff Writers’ employment.” In reaching his decision, the Regional Director relied on [*Boston Medical Center Corp.*](#), 330 NLRB 152 (1999) and similar cases, and analogized the Fellows to apprentices or medical residents who are frequently included in bargaining units.

The Board Reverses, Concludes Fellows are Temporary Employees Who are Not Appropriately Included in the Bargaining Unit

Phoenix News filed a request for review. The Board reversed the Regional Director’s determination, finding that—as a general rule—“temporary employees” are not included in bargaining units. The Board concluded the circumstances did not negate this general rule. The Board focused extensively on the fact that the Fellows have a “finite” tenure with a “readily ascertainable” end date. For example, the Board distinguished the medical residents in *Boston Medical* from the Fellows at issue here on the grounds that the medical residents’ tenures typically lasted a number of years, whereas the Fellows have a finite “apprenticeship period” of only 6 months.

The Board further noted that the circumstances here did not implicate any of the well-established exceptions to the general rule against including temporary employees in bargaining units. For example, the Fellows are not akin to seasonal or recurring employees who have a reasonable expectation of year-to-year employment. Further, if Fellows are employed beyond their six-month tenure at Phoenix News, they generally only remain on payroll for short, finite periods of time.

In sum, the Board found that the Fellows were nothing more than temporary employees who could not be properly included in the bargaining unit. Accordingly, the Board reversed and remanded the case to the Regional Director for action consistent with the Board’s decision.

Important Takeaways

This case offers a good illustration of a tension that has existed in NLRB doctrines since the passage of the NLRA: which employees truly comprise an appropriate bargaining unit? A broader interpretation of the community of interest test can result in a bargaining unit with more employees. A narrower interpretation can result in some employees—like the Fellows here—who are disenfranchised from the process and will not participate in any vote or subsequent bargaining in the event of a union victory. This decision is one of those that likely would have a different outcome with different Board members.

The Board’s decision in *Phoenix News Times* makes clear that regardless of whether temporary employees have terms and conditions of employment similar to that of their full-time co-workers, the finite nature of their employment is a key factor—at least for now—in determining whether those employees can participate alongside their permanent counterparts in a bargaining unit.

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