United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

S.A.M. DATE: November 20, 2014

TO: Joseph F. Frankl, Regional Director
Region 20

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Adams & Associates, Inc. and
McConnell Jones Lanier & Murphy, LLC
Case 20-CA-130613

177-1650-0100-0000
530-4825-5000-0000

The Region submitted this case for advice as to whether Adams & Associates, Inc. ("Adams") and McConnell Jones Lanier & Murphy, LLC ("MJLM") are joint employers of the resident advisors at the Sacramento Job Corps Center either under the Board's current joint employer standard or under the new standard proposed by the General Counsel. We conclude that, under either standard, MJLM is a joint employer of the resident advisors with Adams. Thus, the Region should amend the complaint to name MJLM as a joint employer.

FACTS

Job Corps is a residential program for at-risk youth that provides them with vocational training and secondary education. It is funded by contracts with Federal Government agencies, including the Department of Labor ("DOL"), which are ordinarily awarded for five years. There are Job Corps locations throughout the United States, and each is operated under a separate government contract. This case involves the Job Corps program in Sacramento, California.

Until March 2014, Horizons Youth Services had the DOL contract to operate the Sacramento Job Corps Center. Horizons had negotiated a collective-bargaining agreement with Sacramento Job Corps Federal Teachers, American Federation of Teachers Local 4986 ("the Union"), covering a bargaining unit of about 21 resident advisors at that location. That agreement was effective, with extensions, through March 10, 2014, the last day that Horizons operated the center.

In mid-March 2014, MJLM and Adams took over operation of the program pursuant to a DOL contract that MJLM successfully had bid for in December 2013. DOL awarded MJLM the contract with the understanding that Adams would subcontract to operate part of the services to be provided. Under its subcontract with MJLM, Adams performs the Student Services and Wellness Services components of

the master DOL contract. Among other things, these services include providing student counseling, career transition assistance, social development assistance, dorm life and recreational activities, and access to healthcare professionals. Adams directly employs all of the resident advisors in the bargaining unit.[1]

The Center Director is the highest ranking MJLM official on-site, and the Deputy Center Director is the highest ranking Adams official on-site. According to the subcontract between MJLM and Adams, "Adams' Deputy Center Director shall report directly to the MJLM Center Director and indirectly to Adams & Associates." The Adams' Deputy Center Director states that she consults with MJLM's Center Director on operational matters, but not on personnel or labor-relations matters, as to which she reports to Adams' Executive Director.

The MJLM-Adams subcontract specifies that MJLM has the right to suspend or remove Adams employees from the center for willful violations of rules or policies, but there is no evidence that MJLM actually has done so, nor does the agreement give MJLM the right to terminate any Adams employee. The subcontract states that MJLM will provide Adams with "[c]enter policies, procedure and operating instructions" and will "[c]oordinate overall prime contract responsibilities with Adams' staff." The subcontract requires Adams to adhere to the holiday schedule set by MJLM. The staff listing on the Sacramento Job Corps website does not distinguish between Adams and MJLM staff.

According to Adams' Executive Director, MJLM and Adams jointly determined the pay scale to be implemented at the facility, creating a system of pay grades. MJLM and Adams determined the wage rates based on DOL and internal wage surveys, the government's service contract wage rates, and the wage rate template Adams used at other facilities where it operated. The Executive Director also stated that MJLM and Adams jointly determined the staffing levels that were proposed and implemented at the facility.

ACTION

We conclude that, under either the Board's current joint employer standard or the General Counsel's proposed new standard, MJLM is a joint employer with Adams of the resident advisors at the Sacramento Job Corps program. Thus, the Region should amend the complaint to name MJLM as a joint employer.

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[1] Adams reduced the number of resident advisors to 15.

A. MJLM and Adams are Joint Employers of the Resident Advisors under the Board's Current Standard.

Under the Board's current standard, two separate entities will be held to be joint employers of a single workforce if they "share or codetermine those matters governing the essential terms and conditions of employment."[2] To establish such status, a business entity must meaningfully affect matters relating to the employment relationship "such as hiring, firing, discipline, supervision and direction."[3] As recently noted by the Board in *CNN America*, however, those five aspects of the employment relationship are not the only relevant areas of consideration when making a joint employer determination. Rather, "the relevant facts involved in this determination [of joint-employer status] extend to nearly every aspect of employees' terms and conditions of employment and must be given weight commensurate with their significance to employees' work life."[4] Thus, the Board has considered a putative joint employer's ability to meaningfully affect such core employment terms as wages, the number of job vacancies to be filled, work hours, the assignment of work and equipment, and employment tenure.[5] The Board also has relied on evidence that the relevant employees work exclusively for the putative joint employer in providing a service that is a core function of its business,[6] and that the putative joint employer

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[2] *CNN America, Inc.*, 361 NLRB No. 47, slip op. at 3 (2014) (citing *TLI, Inc.*, 271 NLRB 798, 798 (1984), citing *NLRB v. Browning-Ferris Industries of Pennsylvania*, 691 F.2d 1117, 1123-24 (3d Cir. 1982)).

[3] *Id.* (citing *Laerco Transportation*, 269 NLRB 324, 325 (1984)).

[4] *Id.* (citing *Aldworth Co.*, 338 NLRB 137, 139 (2002), *enforced sub nom., Dunkin' Donuts Mid-Atlantic Distribution Center, Inc. v. NLRB*, 363 F.3d 437 (D.C. Cir. 2004)).

[5] *Id.*, 361 NLRB No. 47, slip op. at 3 & n.7 (citing *D&F Industries, Inc.,* 339 NLRB 618, 640 (2003) (putative joint employer controlled number of job vacancies)). *See also Quantum Resources Corp.,* 305 NLRB 759, 760 (1991) (putative joint employer had to approve the creation or elimination of any job positions).

[6] *See CNN America,* 361 NLRB No. 47, slip op. at 7. *See also Painting Co.*, 330 NLRB 1000, 1007 (2000) (subcontractor painters did painting for a painting company), *enforced*, 298 F.3d 492 (6th Cir. 2002); *G. Heileman Brewing Co. v. NLRB,* 879 F.2d 1526, 1531 (7th Cir. 1989) (subcontracted maintenance electricians at brewery only worked at that location, having previously been directly employed by putative joint employer).

holds the employees out to the public as its own.[7] These additional indicia can show that the putative joint employer considers the employees to be working for it.[8]

Under the current standard, the Board "looks to the actual practice of the parties," and will not find that an entity is a joint employer based on its potential, contractually-retained right to control the aspects of the employment relationship listed above.[9] Rather, the putative employer must demonstrate actual control over employment matters that is not "limited and routine" in nature.[10] The Board has defined "limited and routine" as "where a supervisor's instructions consist primarily of telling employees *what* work to perform, or *where* and *when* to perform the work, but not how to perform the work."[11] At the same time, a putative joint employer need *not* have direct and immediate control over employment matters to meaningfully affect them.[12]

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[7] *See, e.g., CNN America, Inc.*, 361 NLRB No. 47, slip op. at 7; *Texas World Service Co. v. NLRB*, 928 F.2d 1426, 1433 (5th Cir. 1991) (contractor employees wore uniforms and used stationary containing putative joint employer's name), *enforcing Whitewood Oriental Maintenance Co.*, 292 NLRB 1159, 1162 (1989).

[8] *See, e.g., Browning-Ferris Industries of Pennsylvania*, 259 NLRB 148, 150 (1981) (finding joint employer status where putative joint employer not only repeatedly discharged and rehired drivers, but "also treated the drivers as its own employees in a number of other respects," such as providing them with coveralls bearing its logo), *enforced*, 691 F.2d 1117, 1124-25 (3d Cir. 1982); *Painting Co.* 330 NLRB at 1007 (finding joint employer status where putative joint employer TPC "treated the arrangement with Quality as one in which Quality provided employees for TPC's use"); *CNN America, Inc.*, 361 NLRB No. 47, slip op. at 7.

[9] *See, e.g., AM Property Holding Corp.*, 350 NLRB 998, 1000 (2007) (stating that contractual provision giving putative joint employer right to approve contractor's hires insufficient to show existence of joint employer relationship); *Goodyear Tire & Rubber Co.*, 312 NLRB 674, 677 (1993) (operational control clause stating putative joint employer was "solely and exclusively responsible for maintaining operational control, direction and supervision" of relevant employees was not evidence of actual control).

[10] *See, e.g., AM Property Holding Corp.*, 350 NLRB at 1001.

[11] *Id.*

[12] *See CNN America, Inc.*, 361 NLRB No. 47, slip op. at 3, n.7.

Applying these principles, we conclude that MJLM is a joint employer along with Adams of the resident advisors at the Sacramento Job Corps Center because both entities codetermine a number of their essential terms and conditions of employment. Initially, MJLM and Adams jointly determined the wages and staffing levels for the resident advisors. The Board repeatedly has recognized that the ability to determine whether a job exists and how much it pays is a key indicator of joint employer status.[13] In *CNN*, for example, putative joint employer CNN exerted control over the wages of its contractor's employees by informing and advising the contractor employer on what salaries to pay them, as well giving permission to its contractor to agree to wage proposals during bargaining for successor collective-bargaining agreements.[14] Here, MJLM went further by actually codetermining wages for Adams' employees, rather than merely informing and advising on wage rates or being consulted during contract negotiations. Further, as in *CNN*, if Adams wants to increase its employees' wages, it would have to convince MJLM to pay it more under the DOL contract, thereby implicating MJLM in the employment relationship.[15] MJLM's codetermination of staffing levels also demonstrates its ability to meaningfully affect matters related to the employment relationship.[16] Thus, even if MJLM may not have

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[13] *Id.*, slip op. at 3, 6 (finding CNN to be a joint employer where it could make its contractor change staffing levels, could inform and advise its contractor regarding the wages to pay its employees, and was the sole source for the contractor employees' wages); *see also Continental Group, Inc.*, 353 NLRB 346, 356 (2008) (joint employer relationship found where putative joint employer had final say over wages of contractor employees), *affirmed*, 357 NLRB No. 39 (2011); *D&F Industries*, 339 NLRB at 640 (putative joint employer established the rate of pay for contractor employees and determined when overtime was allowed). *See generally Parexel Intl., Inc.*, 356 NLRB No. 82, slip op. at 3 (2011) (in determining whether discharged employee had engaged in protected concerted activity, Board stated that wage discussions are a core Section 7 right because wages are "probably the most critical element in employment").

[14] *CNN America Inc.,* 361 NLRB No. 47, slip op. at 6. *See also Aldworth Co.*, 338 NLRB at 173 (contractor's control of wages and benefits established in "cost-plus" agreement with subcontractor).

[15] 361 NLRB No. 47, slip op. at 6. *See also Continental Group, Inc.*, 353 NLRB at 356 (putative joint employer reimburses contractor and so would have final say over any wage increases).

[16] *See, e.g.*, *CNN America, Inc.*, 361 NLRB No. 47, slip op. at 3 (putative joint employer CNN demanded staffing changes, which contractor complied with); *D&F Industries*, 339 NLRB at 640 (putative joint employer controlled how many new vacancies were available for contractor); *Quantum Resources Corp.*, 305 NLRB 759,

selected who was hired for a particular position, it partially decided whether that position existed, which is an indispensable part of the hiring process.

Second, MJLM alone determined the holiday schedule for the resident advisors. What days and hours employees must work is another core aspect of the employment relationship.[17] Adams' subcontract with MJLM requires it to adhere to MJLM's holiday schedule; thus, MJLM is directly setting another employment term for the resident advisors.

Third, MJLM's operational control over Adams provides further support for a joint employer finding. A putative joint employer's supervision and direction of a subcontractor's employees is a strong indicator of joint employer status.[18] The contract between MJLM and Adams requires the top manager for Adams at the Sacramento site, the Deputy Center Director, to directly report to MJLM's top manager at the site, the Center Director, and the parties in fact follow that process regarding operational matters. Given that the resident advisors are providing career and social counseling services to Job Corps students, it is reasonable to infer that these operational matters concern *how* they will provide those services, rather than the limited and routine matters of what, where, and when to perform those services.[19]

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760 (1991) (putative joint employer controls creation or deletion of contractor unit jobs).

[17] *See, e.g.*, *Quantum Resources Corp.*, 305 NLRB at 760 (finding Florida Power was joint employer where it "also authorizes overtime, signs weekly timesheets, and, through its contract with Quantum, codetermines hours, holidays, and benefits"); *D&F Industries*, 339 NLRB at 640 (finding D&F to be a joint employer where it, among other things, "decided when overtime was required and the number of temporary employees necessary for such work"); *CNN America, Inc.*, 361 NLRB No. 47, slip op. at 3-4 (finding CNN to be a joint employer where, among other things, its service agreement with contractor employer defined full- and part-time status and required that CNN approve any overtime, to which contractor adhered).

[18] *See, e.g., CNN America, Inc.,* 361 NLRB No. 47, slip op. at 6; *Aldworth Co.*, 338 NLRB at 140 (putative joint employer enmeshed itself in the contractor's management processes, including decisions related to employment tenure, discipline, assignment of work and equipment, recognition and awards, and day-to-day direction of the contractor's employees); *G. Heileman Brewing Co.*, 290 NLRB 991, 999 (1988) (putative joint employer's employees were closely involved in directing the work of the contractor's employees), *enforced*, 879 F.2d 1526 (7th Cir. 1989).

[19] While not necessary to decide the joint employer issue here, the Region should attempt to obtain additional information about the kind of operational matters

Finally, the resident advisors work solely at the Sacramento Job Corps Center providing core student counseling services pursuant to MJLM's contract with DOL that are necessary for the residential program to function. This type of exclusive work arrangement demonstrates MJLM's control over the resident advisors.[20] Moreover, the Sacramento Job Corps website does not distinguish between MJLM employees and Adams employees. By holding the resident advisors out as its own employees, MJLM is indicating that the resident advisors are actually under its control.[21]

Taken together, all of the preceding indicia of control by MJLM over the resident advisors employed by Adams at the Sacramento Job Corps Center establish that MJLM is a joint employer of those employees under the Board's current standard.

B. In the Alternative, MJLM and Adams are Joint Employers of the Resident Advisors under the General Counsel's Proposed Standard.

Recently, the General Counsel has urged the Board to return to its traditional joint employer standard.[22] Under that standard, the Board finds joint-employer status where, under the totality of the circumstances, including the way the separate entities have structured their commercial relationship, the putative joint employer wields sufficient influence over the working conditions of the other entity's employees such that meaningful bargaining could not occur in its absence. This approach makes no distinction between direct, indirect, and potential control over working conditions and results in a joint employer finding where "industrial realities" make an entity essential for meaningful bargaining.

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covered by the Deputy Center Director's reports to the Center Director. Any additional evidence of how MJLM's Center Director has affected the working conditions of the resident advisors, even indirectly, would bolster a joint employer finding.

[20] *See, e.g., CNN America, Inc.*, 361 NLRB No. 47, slip op. at 7 (finding CNN to be a joint employer where, among other things, contractor's employees' worked exclusively for CNN and performed work at the core of CNN's business). See also the cases cited at footnote 6, above.

[21] See the cases cited at footnotes 7 and 8, above.

[22] (b) (7)(A) [redacted].

Applying the General Counsel's proposed standard, we conclude that MJLM and Adams clearly are joint employers of the resident advisors. As discussed in Section A., above, MJLM is exercising direct control over the resident advisors' terms and conditions of employment by codetermining their wages and staffing levels, and by unilaterally setting their holiday schedule. Given MJLM's direct control over wages, staffing levels, and holidays, meaningful collective bargaining between Adams and the Union over these core terms and conditions of employment could not occur in MJLM's absence.[23]

Beyond these indicia of control, MJLM also has significant indirect and potential control over the resident advisors' terms and conditions of employment. MJLM and Adams run a seamless operation at the Sacramento site with Adams providing part of the essential services of the Job Corps program. Under the traditional joint employer standard, the Board has found that in such situations the primary contractor "in some manner will retain sufficient control over the operations" of its subcontractor "so that it will be in a position to take those steps necessary to remove the causes for the disruption in . . . operations."[24] And, in fact, MJLM has retained such control. According to the contract between MJLM and Adams, the top manager for Adams is required to report directly to MJLM's top manager at the site and only indirectly to Adams, MJLM will provide Adams with "[c]enter policies, procedure and operating instructions," and MJLM will "[c]oordinate overall prime contract responsibilities with Adams' staff."[25] That allows MJLM to indirectly and/or potentially control various aspects of the resident advisors' working conditions.[26]

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[23] *See Floyd Epperson*, 202 NLRB 23, 23 (1973) (user firm that had indirect control over wages of supplier firm's employees was joint employer where the evidence established that when the supplier firm received a raise from the user firm, it raised the wages of the drivers), *enforced*, 491 F.2d 1390 (6th Cir. 1974); *Carillon House Nursing Home*, 268 NLRB 589, 591 (1984) (joint employer determined the number of employees employed); *Jewel Tea Co.*, 162 NLRB 508, 510 (1966) (license agreement required licensee to follow licensor's policies regarding paid vacations and holidays).

[24] *Thriftown, Inc.*, 161 NLRB 603, 606 (1966).

[25] *Id.* at 606-07 (finding joint employer status where putative joint employer had retained sufficient control over appearance and general operation of department store in operating agreement with shoe department operator). *See also Jewell Smokeless Coal Corp.*, 170 NLRB 392, 393 (1968) (finding joint employer status where putative joint employer retained "considerable control over the manner and means by which the operators extract the coal control" in oral agreements between it and mine operators); *Globe Discount City,* 171 NLRB 830, 830-32 (1968) (licensor was joint employer of its licensee's employees where the licensor retained substantial

Finally, the "industrial realities" of the relationship between MJLM and Adams establish that MJLM is essential to meaningful collective bargaining between Adams and the Union. Without MJLM at the bargaining table, the Union will not be able to negotiate meaningfully with regard to those terms and conditions of employment that MJLM codetermines.

Based on the above, whether under the Board's most recent articulation of the joint employer standard in *CNN*, or the standard recently proposed by the General Counsel, we conclude that MJLM is a joint employer of the resident advisors with Adams. Accordingly, the Region should amend the underlying complaint to include MJLM.

/s/
B.J.K.

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contractual power to control the labor policies of the licensees and to terminate the license for default which ensured its desires would be followed).

[26] To the extent that MJLM or Adams relies on *Hychem Constructors*, 169 NLRB 274 (1968), to assert that MJLM is not a joint employer under the General Counsel's proposed standard, the Region should be prepared to reject that argument. In *CNN America*, the Board recently called into question *Hychem*'s continued validity. *See* 361 NLRB No. 47, slip op. at 7, n.17. Moreover, joint employer determinations are fact-intensive and, notwithstanding the high level of involvement by the putative joint employer in *Hychem*, there are factual differences that support finding joint employer status here, e.g., that Adams' Deputy Center Director reports directly to MJLM's Center Director on operational matters likely affects a much broader range of the resident advisors' employment terms.