

OFFICE OF COMPLIANCE
LA 200, John Adams Building, 110 Second Street, S.E.
Washington, D.C. 20540-1999

Office of the U.S. Senate)	
Sergeant at Arms,)	
Employing Office,)	
)	
and)	
)	Case No. 97-LM-3
National Association of Broadcast Employees)	
and Technicians, Communications Workers)	
of America, AFL-CIO,)	
Petitioner.)	

Before the Board of Directors: Glen D. Nager, Chair; James N. Adler; Jerry M. Hunter; Lawrence Z. Lorber; Virginia A. Seitz, Members.

DECISION AND DIRECTION OF ELECTION

I.

Petitioner, National Association of Broadcast Employees and Technicians, Communications Workers of America, AFL-CIO ("Petitioner" or "NABET") has duly filed with the Board of Directors of the Office of Compliance ("the Board") a petition to represent employees of the U.S. Senate Recording Studio, which is under the jurisdiction of the Central Operations Department of the Office of the U.S. Senate Sergeant at Arms ("Employing Office" or "SAA"). In response to the petition, the Board, acting pursuant to its authorities under Chapter 71 of title 5, United States Code, as applied by section 220 of the Congressional Accountability Act of 1995 (the "CAA"), 2 U.S.C. § 1351, and the regulations of the Office of Compliance, has investigated the petition. Finding that there is a question concerning representation, the Board held a pre-election investigatory hearing to develop a record upon which to make a decision.

II.

NABET seeks to represent a group of employees of the U.S. Senate Recording Studio. The Recording Studio provides the Senate with television, radio, and videotape services, including live and videotaped gavel-to-gavel coverage of Senate floor and committee proceedings, as well as field coverage of press conferences and other events which occur at sites other than the Senate floor or the Recording Studio. Record at I:115-16. (All Record references are to the Official Transcript of the Pre-Election Investigatory Hearing, Volumes I-VI, referring to the transcript of the hearing conducted on October 23, 1997 and November 4, 10, 12, 17, and 18, 1997, respectively.) The Recording Studio operates two television studios and two radio stations and also offers post-production editing services. *Id.* The Director of the Recording Studio, now

termed the Branch Manager, is responsible for the overall management of the Studio. *Id.* at I:112-13, 125-26. A number of employees including the Production Manager, Administrative Manager, and the LAN Administrator report directly to him. *Id.* at I:119.

The Studio is divided into five different workgroups: production, taperoom, electronic newsgathering (“ENG” or “field operations”), radio, and video engineering. Each workgroup is directed by one or more levels of supervisor who oversee the work of a variety of Production Technicians, who are classified as level I, II or III, depending on their technical proficiency with the requisite equipment and their performance evaluations. Record at I:142-43. Production, the largest of the workgroups, is headed by the Production Supervisor, to whom a Graphic Artist, a Production Technician, a Staff Assistant, three Technical Directors, and three Production Directors report directly. This workgroup is divided into two shifts, which rotate between providing live television coverage and studio videotape work. Record at I:120-21; Employing Office Exhibit No. 5. Each shift contains one or two Technical Directors, who handle personnel and technical aspects of the work, one or two Production Directors, who handle the artistic direction, and a number of Production Technicians, who, along with the Technical Directors, operate the equipment needed for the production. Record at V:1084-91. The taperoom consists of the Taperoom Supervisor and up to five other employees, including Tape Production Technicians and a Staff Assistant. The taperoom provides post-production services such as videotape editing, dubbing, and graphics, and also makes master recordings of all Senate proceedings. The Taperoom Supervisor reports to the Production Manager. Record at I:133-34; IV:1025-26. The field operations unit consists of a Manager, a Supervisor and up to four permanent employees, who are responsible for covering all field events, such as committee hearings and press briefings by individual Senators. Other regular production employees are assigned temporarily to this unit as needed by these events. Record at I:276. The radio group has two employees, the Radio Supervisor and a Radio Production Technician, who together run the two Senate Radio Studios. Record at V:1251-52.

The final unit in the Recording Studio is video engineering. At the time at which the original representation petition was filed, video engineering was part of the Recording Studio. In October 1997, the unit was moved to the Network Engineering Branch of Technical Operations as part of the SAA’s reorganization. However, it was returned to the Recording Studio in February 1998, during the pendency of these proceedings. *See* Employing Office’s Withdrawal of Objection (Feb. 4, 1998). The unit, directed by an Engineering Manager, consists of an Engineering Supervisor and four video Engineering Technicians, who provide video support for the Recording Studio, as well as assisting other parts of the U.S. Senate with their needs for video equipment and related engineering expertise. Record at IV: 958-68.

III.

Petitioner seeks to represent all but the supervisory and administrative employees of the

Recording Studio. The petition, as amended,¹ describes the appropriate unit as consisting of employees in the following positions: Production Technician I, Production Technician II and Production Technician III (production, tape, radio and ENG/field operations); Production Director; Production Staff Assistant (production, tape); Graphics Artist; Taperoom Supervisor; Radio Supervisor; ENG/field operations Supervisor; and Engineering Supervisor; Engineering Technician II, and Engineering Technician III. *See* Petitioner's Exhibit No. 1; Petitioner's Motion to Amend Unit Description (Feb. 25, 1998). The petition proposes to exclude from the proposed unit nonsupervisory employees in the following positions: "Administrative Manager; LAN Administrator; Office Manager; Assistant LAN Manager [Administrator]; and Staff Assistant (administrative)." Petitioner's Exhibit No. 1. The petition, as amended in the Hearing, recognizes that, under the statute, the Engineering Manager position "is properly excluded as supervisory," *id.*, while Petitioner's February 25, 1998 motion withdraws from the unit the position of Technical Director which the Employing Office argued was also statutorily excluded as supervisory. The positions of "Manager, Production Manager, and Production Supervisor," which the Employing Office contends are supervisory, Employing Office Brief at 2, were omitted from the unit description without discussion and are therefore not included in the proposed unit.

The Employing Office originally opposed the inclusion of the positions of Engineering Technician II and III in the proposed unit on the grounds that, since the reorganization of the SAA, the technicians were no longer organizationally part of the Recording Studio, and thus did not share a community of interest with the rest of the employees in the proposed unit. Employing Office Brief at 36-42. However, on February 4, 1998, the Employing Office withdrew its objection to the inclusion of the Engineering Technician II and III positions when "the employees in the positions of Engineering Supervisor, Engineering Technician II and Engineering III [were] reassigned from the Network Engineering Branch of the Technical Operations Department of the SAA to the Recording Studio." Employing Office Withdrawal of Objection at 2. Therefore, the parties no longer disagree about the appropriateness of the unit proposed by the petition. The Board concludes that such a functional unit consisting of the above-named positions is appropriate within the meaning of section 7112(a)(1) of title 5, as applied by section 220(c)(1) of the CAA. *See Office of Communications Media, Office of the Chief Administrative Officer, Employing Office and Nat'l Association of Broadcast Employees and Technicians, Communications Workers of America, AFL-CIO, Petitioner*, No. 96-LM-2 at 2-3 (March 17, 1997) (citations omitted).

However, the Employing Office opposes the inclusion of the following positions: Taperoom Supervisor, Field Operations Supervisor, Radio Supervisor, and Engineering Supervisor on the grounds that they are supervisory positions within the meaning of section

¹ Petitioner has twice sought by motion to amend the unit description portion of the Petition. The first motion made during the Hearing in the form of Petitioner's Exhibit No. 1 was granted by the Hearing Officer. Record at I:12-17. The second motion, addressed to the Board on February 25, 1998, and opposed by the Employing Office by motion on March 4, 1998, is hereby granted.

7103(a)(10) of title 5, as applied by section 225(f)(1) of the CAA, 2 U.S.C. § 1361(f)(1). *See* Employing Office Brief at 2. For the reasons set forth below, the Board has determined that the individuals in these positions are statutory supervisors and therefore must be excluded from the unit.

IV.

Section 7112(b)(1) of title 5, as applied by the CAA, provides that a bargaining unit is not appropriate if it includes a supervisor. Section 7103(a)(10) defines a “supervisor” as:

an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment

.....

An employee need only exercise or effectively recommend any one of the supervisory criteria set forth in the statute to be found a supervisor, as long as the employee consistently uses the requisite independent judgment in connection with the exercise or effective recommendation of that criterion. *See, e.g., U.S. Dep’t of the Navy, Portsmouth Naval Shipyard, Portsmouth, N.H.*, 38 F.L.R.A. 764, 766, 768-69 (1990); *U.S. Dep’t of Veterans Affairs, Veterans Admin. Medical Ctr., Allen Park, MI*, 35 F.L.R.A. 1206, 1211 (1990); *Dep’t of the Navy, Naval Undersea Warfare Eng’g Station, Keyport, WA*, 7 F.L.R.A. 526, 527 & n.1 (1981). This is so, moreover, even if another individual also exercises or makes recommendations concerning the same statutory criterion. *See, e.g., Veterans Admin. Medical Ctr.*, 35 F.L.R.A. at 1211. Accordingly, “where an individual exercises independent judgment in evaluating employee performance, and where that evaluation is relied on by upper-level management in taking an action listed among the indicia of supervisory authority specified in section 7103(a)(10), thereby constituting the effective recommendation of that action, a sufficient basis exists to conclude that the individual constitutes a supervisor within the meaning of section 7103(a)(10) of the Statute?” *U.S. Dep’t of the Interior, Bureau of Indian Affairs, Navajo Area Office, Gallup, NM*, 45 F.L.R.A. 646, 650 (1992). The evaluation need not be the sole factor in upper-level management’s decision, so long as it is a significant factor. *Id.* at 656-57.

The Employing Office contends, on a number of grounds, that the positions of Taperoom Supervisor, Field Operations Supervisor, Radio Supervisor, and Engineering Supervisor are supervisory within the meaning of the statute. *See, e.g.,* Employing Office Brief at 10-14 (arguing that Taperoom Supervisor uses independent judgment to assign and direct work; arrange employee schedules and leave; perform performance evaluations; resolve grievances and recommend disciplinary measures; make hiring and transfer recommendations; as well as pointing out that he attends meetings and training for supervisory personnel). The Board addresses only the claim that these positions are supervisory because the individuals at issue perform

performance evaluations that require the consistent exercise of independent judgment and that are relied on by upper-level management in awarding or withholding pay increases, including within grade and other promotions, as well as in making decisions respecting probationary status.

The Taperoom Supervisor, Field Production Supervisor, Radio Supervisor, and Engineering Supervisor play a central role in the performance evaluation process used by the Recording Studio. The Recording Studio evaluates all probationary employees on a three or six month basis and all nonprobationary employees annually on the anniversary date of their hiring, using forms developed by the SAA. The current form evaluates nonsupervisory employees on 11 factors: (1) quality of work; (2) quantity of work (3) attendance and punctuality (4) initiative and resourcefulness; (5) job knowledge; (6) judgment and analytical ability; (7) work organization; (8) dependability/reliability; (9) interpersonal relations and cooperation (10) communication; and (11) compliance with organizational policies and procedures. *See* Employing Office Exhibit No. 7. Employees are awarded one of the following three “grades” on each factor: “exceeds standards,” “meets standards,” “needs improvement.” *Id.* In addition, in the current form there is a section provided for narrative comments by the “Immediate Supervisor,” as well as a separate section for comments by “Mid-level Supervisors, Director,” *id.*, while in the previous form there was space for narrative comments next to each factor, *see* Employing Office Exhibit No. 6. It is undisputed that, apart from time and attendance, *see* Record at I:215, the current incumbents of the positions of Taperoom Supervisor, Field Production Supervisor, Radio Supervisor, and Engineering Supervisor (hereinafter collectively “Immediate Supervisors”) evaluate the performance of the nonsupervisory employees in their respective units on the above factors, complete the section for narrative comments by the “Immediate Supervisor,” Employing Office Exhibit No. 7, sign the evaluation in the space for the “Supervisor’s Signature,” *id.*, and generally go over the completed evaluation in person with the employees in their units, *see, e.g.*, Record at I:134-38 ; *see also* Office of Compliance Exhibit No. 3. The completed evaluation form becomes part of the individual’s personnel file. Record at I:137-38.

Completing these evaluations requires that the Immediate Supervisors consistently make independent judgments that are not routine or clerical in nature. *See U.S. Dep’t of the Interior, Bureau of Indian Affairs*, 45 F.L.R.A. at 657 (individual’s evaluations and recommendations constituted an exercise of independent judgment where supervisor did not tell him how to evaluate the employees, but relied on his independently formed assessment of their performance); *U.S. Dep’t of the Navy, Portsmouth Naval Shipyard*, 38 F.L.R.A. at 766-67 (affirming Regional Director’s finding of consistent exercise of independent judgment in the performance appraisal process and in effectively recommending for awards “because of the limited direction and guidance from higher level management”); *cf. U.S. Dep’t of the Army, Army Aviation Systems Command*, 36 F.L.R.A. 587 (1990) (collecting cases on exercise of independent judgment in making and evaluating assignments and finding 5 out of 7 engineers supervisors based on their independence in assessing and assigning work). Testimony established that there are no set standards or guidance from upper level management for determining whether an employee “meets,” “exceeds,” or “needs improvement” in any area; the Immediate Supervisors must use

their own judgment to make that determination for each factor. *See, e.g.*, Record at II:338; IV:1028. Moreover, in their narrative comments, the Immediate Supervisors independently assess areas such as the employee's overall proficiency, progress in his or her craft, interpersonal skills, contribution to the work of the unit, and fitness for promotion and or pay increases. *See, e.g.*, Employing Office Exhibit Nos.16, 19, 48. These comments are also used by the Director in determining the overall evaluation of an employee as "exceeds" "meets" or "needs improvement" and in deciding whether to give a merit salary increase or within-grade promotion. Record at I:146.

Because upper-level management relies on the Immediate Supervisor's evaluations in making pay, promotion, and retention decisions and almost always accepts their evaluations without change, the Immediate Supervisors' role in the evaluation process constitutes the effective recommendation of actions specified in section 7103(a)(10) as indicia of supervisory authority. *See U.S. Dep't of the Interior, Bureau of Indian Affairs*, 45 F.L.R.A. at 657; *see also USA DARCOM Materiel Readiness Support Activity (MRSA), Lexington, KY*, 8 F.L.R.A. 46, 50 (1982). Record evidence established that evaluations are determinative in the decision whether to award a pay increase: receiving an overall rating of "meets" is the prerequisite for consideration for any type of pay increase and a very high rating without more constitutes an effective recommendation for a pay increase to the extent such increases are authorized by the budget process. *See, e.g.*, Record at II:715, 855, 993-95; II:358-59; IV:1019; *see also* Office of Compliance Exhibit No. 3. These evaluations are also used for within-grade promotions, as well as other promotions. *See, e.g.*, Record at I:141-42, 256; II:357-58; III:872-74. The Immediate Supervisors' evaluation of probationary employees is given great weight in determining whether those employees will be taken off probationary status, kept on probationary status, or terminated. *See, e.g.*, Record at I:144-46; II:345. A very poor evaluation can result in an employee being placed on probationary status. Record at I:145-66. Notwithstanding Petitioner's vigorous objection to the contrary, *see* Petitioner Brief at 11-16, the Board concludes that the Hearing Officer provided Petitioner with a fair opportunity to examine the evaluations relied on by the Employing Office to demonstrate that the Immediate Supervisor's evaluations are rarely altered by senior supervisors, *see* Record at VI:134-36. Petitioner's examination yielded only one additional example of an evaluation altered by upper level management out of the many evaluations on the record. *See Order Directing Inclusion of Proposed Stipulation of Facts in Record, Ruling on Exhibits and Closing the Record* (November 24, 1997). This is insufficient to contradict the Employing Office's testimony that these evaluations are generally accepted and relied upon by senior supervisors without change. *See, e.g.*, Record at I:146; II:358-60; VI:98, 113.

The Board concludes, based on the above Record evidence, that the Taperoom Supervisor, Field Operations Supervisor, Radio Supervisor, and Engineering Supervisor perform evaluations that require the consistent exercise of independent judgment and that are relied on by upper level supervisors in determining whether or not to award pay increases, making within-grade promotions, and making determinations respecting probationary status. These individuals are therefore supervisory personnel within the meaning of section 7103(a)(10) of title 5, as

applied by the CAA and must therefore be excluded from the unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among employees in the following unit, as early as possible, but not later than 40 days from the date of this decision:

All employees of the U.S. Senate Recording Studio of the Office of the U.S. Senate Sergeant at Arms, including employees of the production, tape, radio, field/ENG, and engineering groups, but **excluding** employees in the positions of Technical Director; Taperoom Supervisor; Radio Supervisor; Field/ENG Supervisor; Engineering Supervisor; Engineering Manager; Administrative Manager; Director; LAN Administrator; Office Administrator; Assistant LAN Administrator; Staff Assistant (administrative); and those employees excluded by statute.

The Executive Director of the Office (or her designee) shall supervise and conduct the election, subject to the Office's rules and regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation, or on furlough, including those in military service who appear in person at the polls. Ineligible to vote are employees who have quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible to vote within the appropriate unit shall vote whether or not they wish to be represented for the purpose of exclusive recognition by the National Association of Broadcast Employees and Technicians, Communications Workers of America, AFL-CIO, or no labor organization.

Issued, Washington, D.C., March 5, 1998