

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 5**

PYRAMID ACQUISITION II  
MANAGEMENT, LLC,  
d/b/a THE FAIRFAX AT EMBASSY ROW<sup>1</sup>  
Employer

and

Case 05-RC-095207

INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL 99<sup>2</sup>  
Petitioner

**DECISION AND DIRECTION OF ELECTION**

Pyramid Acquisition II Management, d/b/a The Fairfax Embassy Row, a Massachusetts L.L.C., hereafter referred to as the Employer, specializes in hospitality hotels and resorts. On December 19, 2012, the International Union of Operating Engineers, Local 99, hereafter referred to as the Petitioner, filed a petition in the above-captioned case pursuant to Section 9(c) of the National Labor Relations Act, seeking an election to represent all full-time and regular part-time employees employed by the Employer at The Fairfax at Embassy Row engaged in engineering and maintenance, including engineers and painters, excluding all clerical employees, all managerial employees, all guards, and all supervisors as defined by the Act. On January 4, 2013, a hearing on the petition was held before a hearing officer of the National Labor Relations Board. The Employer and Petitioner appeared at the hearing.

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<sup>1</sup> The Employer's name appears as amended at the hearing.

<sup>2</sup> The Petitioner's name appears as amended at the hearing.

Three witnesses testified at the hearing: Jan Weis, Regional Director of Human Resources; Asoka Seneviratne, Director of Facilities; and Felix Terrazas, Painter. The Petitioner stated at the hearing that it is prepared to proceed to an election in any unit found appropriate by the Regional Director. The Employer and Petitioner filed post-hearing briefs which I have fully considered.

## **I. ISSUES**

The issues in this proceeding are:

1. Whether Riery Carrasco<sup>3</sup> is a supervisor according to Section 2(11) of the Act.
2. Whether the petitioned-for unit is an appropriate unit.

The Employer's position is that Carrasco is a supervisor within the meaning of the Act, and that the painter does not share a sufficient community of interest with the petitioned-for unit. The Petitioner contends that Carrasco is not a supervisor and that the petitioned-for unit, including the painter, is an appropriate unit. I have carefully considered the evidence and arguments made by the parties at the hearing and in their post-hearing briefs. For the reasons set forth below, I find that the record is insufficient to allow me to determine Carrasco's supervisory status, and therefore I shall direct that he vote under challenge. I further find that the petitioned-for unit is an appropriate unit, and that the painter may properly be included in the unit.

## **II. FACTS**

### **A. ORGANIZATIONAL FACTS**

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<sup>3</sup> Carrasco did not testify at the hearing.

In 2006, the Employer became the contracted operator of The Fairfax on Embassy Row hotel in Washington, D.C., hereafter referred to as the Hotel. The Hotel is a two building complex with approximately 259 hotel rooms.

A Managing Director is at the head of the Hotel's supervisory structure. The Hotel's human resources are managed by both a Regional Director of Human Resources and a local Director of Human Resources. At the hearing, the Employer provided an internal contact list for each department's managers and supervisors, including the Engineering Department.<sup>4</sup> Under the heading of Engineering, the list identifies Asoka Seneviratne as the Director of Facilities, and Riery Carrasco as the Engineering Supervisor.

## **B. ENGINEERS**

Seneviratne testified that he is the head of the Engineering Department.<sup>5</sup> His responsibility is to maintain the Hotel's building, property, and machinery. Seneviratne has been employed as the Director of Facilities since December 2010. He possesses a bachelor's degree in mechanical engineering and has a master's license in HVAC. Seneviratne supervises five engineers and one painter.<sup>6</sup> Seneviratne testified that he spends approximately 60% of his time performing administrative tasks, and 40% performing manual and technical tasks. He described his typical day arriving to work at approximately 7:00 a.m. First, he checks his computer to monitor the HVAC systems to ensure operation. Then, he will check temperatures throughout the building. Around, 8:00 a.m. he tries to conduct meetings with the engineers and painter. At the meetings the engineers and painter

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<sup>4</sup> Despite the Employer's contention that the painter Felix Terrazas works in the Painting Department, there is no Painting Department on the contact list.

<sup>5</sup> The parties stipulated that Asoka Seneviratne is a supervisor according to Section 2(11) of the Act.

<sup>6</sup> Riery Carrasco, whose supervisory status is at issue, is counted in the five engineers.

will review the night manger's report which reflects issues that the Engineering Department must repair. Along with the night manager's report they will review a logbook to see what the engineers from the nightshift performed, and if there are instructions for task to be completed. The Engineering Department maintains a project binder where engineers and the painter record completed tasks such a battery replacement and caulking. Seneviratne testified that throughout the day many issues and tasks arise that require communication and coordination between the supervisors and engineers.

Engineers are separated into two groups: maintenance employees and technical employees. A maintenance employee is mainly responsible for cosmetic upkeep such as maintaining carpet, wallpaper, painting, and bathroom fixtures. Seneviratne testified that engineers will occasionally perform painting touch-ups. Maintenance employees respond to guests' complaints or issues. A guest will contact the telephone operator about an issue concerning his/her hotel room, and then the operator will contact the maintenance engineer to perform repairs. The repairs needed may be a stopped toilet, or a non-working television, or a flood in the room, etc. Typically, the maintenance employees do not possess advanced technical training, HVAC licenses, or CFC (chlorofluorocarbons) certifications. Technical employees have more formal education and training in particular machinery. Examples of this education are HVAC training and CFC (chlorofluorocarbons) certifications. Technical tasks include replacing a thermostat in a room, running copper pipeline or PVC pipeline, and troubleshooting control problems in the machinery.

The average engineer's hourly wage rate is \$18.12 per hour with the highest engineer's wage rate being \$20.00 per hour and the lowest being \$17.00 per hour.<sup>7</sup> The engineers work 40 hours per week - Monday through Friday. The engineers use common workspaces. "The shop" is where engineers do hands-on work such as drilling, cutting, and grinding. There, the engineers have lockers to store personal belongings and storage cabinets to store power tools. The other common workspace is where parts such as locks, electronics, and maintenance supplies are kept. Engineers always carry tools such as wrenches, screwdrivers, and hammers to complete their work. They wear navy blue pants and white shirts with charcoal stripes as their uniforms.

### **1. Riery Carrasco**

Carrasco was employed as an engineer at the Hotel prior to the Employer's management contract. He was retained by the Employer as an engineer. Both Jan Weis,<sup>8</sup> Regional Director of Human Resources, and Seneviratne testified that in January 2011 Carrasco was promoted to Engineering Supervisor. In support of this contention, the Employer provided Personnel Action Forms that demonstrate that Carrasco received a promotion. In January 2011 he received a \$2.00 per hour raise. Again, in June 2012, the Employer changed Carrasco's hourly wage rate from \$28.13 per hour to \$28.83 per hour. The Personnel Action Form states that the raise was to be applied retroactively to January 15, 2012. Seneviratne testified that Carrasco filled the position after the prior supervisor left the Hotel. He stated that Carrasco was chosen because of his strong technical skill (HVAC licenses), prior experience as a chief engineer at a different hotel, and his familiarity and experience at the Hotel. Carrasco's salary prior to his promotion was \$26.13 per

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<sup>7</sup> These figures do not include Riery Carrasco's wage rate.

<sup>8</sup> At hearing the parties stipulated that Jan Weis is a supervisor according to Section 2(11) of the Act.

hour. Prior to his promotion to Engineering Supervisor, Carrasco's responsibilities were maintaining and repairing machinery related to heating, ventilation, air conditioning, and refrigeration. After his promotion, Carrasco's job responsibilities included administrative and personnel work. Both Weis and Seneviratne testified that there is no written job description for Engineering Supervisor. Weis did not meet with Carrasco to discuss the position, and Seneviratne testified that he met with Carrasco prior to Carrasco assuming the position of Engineering Supervisor, but could not recall what they discussed. Carrasco works 40 hours per week from Friday through Monday. According to the schedules provided at hearing, Carrasco is rarely scheduled to work while another engineer is working. Seneviratne testified that Carrasco serves as the person between him and the rest of the personnel, and that Carrasco as the Engineering Supervisor takes some of the weight off him on both technical issues and personnel issues. Seneviratne testified that every Friday the two meet to discuss what occurred during the last week and the needs of the department. Seneviratne estimates that Carrasco performs 60% technical work and 40% administrative work. The record is unclear regarding what administrative work Carrasco performs.

As Engineering Supervisor, Carrasco has his own office where he stores his tools and personal belongings. He has a company-issued Blackberry with email capability. Other engineers have Blackberrys, but their Blackberrys do not have email capability. Seneviratne and Carrasco are the only engineers who have separate offices. At the hearing the Employer provided emails that demonstrate that Carrasco has a company issued email address. In the Engineering Department only Seneviratne and Carrasco have a company email address. Employer Exhibit 6 is an email in which Weis contacted several department

managers and supervisors, including Carrasco, in order to notify them that several employees within their respective departments had not completed their employee satisfaction surveys. Weis included the names of both engineers and the painter under the heading of "Engineering". Carrasco's emails include a signature line with the title of Engineering Supervisor. Carrasco is one of three employees who have access to all restricted areas and access codes. The other two are Seneviratne and the Rooms Director.

Because the Engineering Department has a small and relatively stable work force there are limited examples of hired, suspended, fired, or transferred employees within the department. The Employer did provide several examples where it believes Carrasco acted independently by recommending certain actions.

Seneviratne testified that three engineers have been hired within the past two years. Initially, applicants are interviewed by a supervisor within the Engineering Department. Then, the Engineering Department makes a recommendation to the Human Resources Department. Typically, the General Manager will interview all potential employees before hiring an individual. Seneviratne stated that Carrasco interviewed two of the three applicants who were hired as engineers.<sup>9</sup> The interviews were described as formal interviews in which Carrasco questioned applicants regarding their technical skills, experience, and resume. There is no record testimony that Seneviratne interviews applicants after Carrasco. After the interview, Seneviratne and Carrasco will meet to discuss the applicants and decide whom to recommend to Human Resources and the General Manager. The record is unclear regarding the form of recommendation offered, or

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<sup>9</sup> Seneviratne testified that Carrasco did not interview the other applicant because a decision to hire that individual had already been made.

specific detail about Seneviratne and Carrasco's collaborative decision making process concerning whom to recommend. Seneviratne provided an example where Carrasco interviewed applicants and then suggested that the Employer hire a less experienced, less costly technician, rather than the more experienced technician seeking a higher wage. Ultimately the less experienced technician was hired. The record does not, however, contain any specific detail about the reasons for that engineer's hiring, or detail about the interviews conducted after Carrasco's interview. Nor was a written recommendation presented at hearing.

Since Carrasco's promotion to Engineering Supervisor, one engineer has received discipline. The written discipline was prepared and signed by Seneviratne. Prior to the discipline being issued, Seneviratne testified that he spoke with Carrasco. The testimony about what Carrasco told Seneviratne is vague. Carrasco told Seneviratne that an engineer either has to have the hands for the work or the intelligence. How Carrasco's input factored into the engineer's discipline is unclear.

Engineers receive annual evaluations. The evaluations are used to counsel employees on areas of improvement and to commend employees for proficiency and excellence. The evaluations are drafted and signed by Seneviratne, and then he meets with the specific employee to discuss his or her evaluation. Prior to drafting the evaluation, Seneviratne speaks with Carrasco regarding each engineer's performance. For instance, Seneviratne testified that Carrasco has informed Seneviratne that an employee did not fix a vacuum cleaner and that it had been sitting in the shop awaiting repair. Such negative feedback could be included in employees' evaluations. However, the record contains no specifics about an employee's evaluation reflecting negative feedback offered by Carrasco.

Nor does the record contain testimony whether Seneviratne performs his own investigation after receiving Carrasco's input. Seneviratne testified that employees can and occasionally do receive pay raises in excess of the regular annual raise. Carrasco in the past has recommended employees for raises in excess of the Employer's annual raise. The Employer provided no examples of employees receiving pay raises due to Carrasco's recommendation.

Engineers work fairly regular shifts. Seneviratne stated that he consults with Carrasco when completing the schedule. Seneviratne testified that on one occasion he was going to schedule an engineer to work the weekend shift, which requires more skill and efficiency because the weekend engineer works alone. Carrasco recommended that Seneviratne not schedule that engineer due to the engineer's inability to work alone. The engineer was not scheduled to work weekends.

Carrasco, having higher technical skills, is often responsible for larger projects. Recently, Carrasco was responsible for running cables throughout the Hotel. In order to complete the job Carrasco called in an engineer to help. Because the engineer had worked 40 hours already, the engineer received overtime pay. Sometime after requesting the engineer to help on the project, Carrasco called Seneviratne to inform him. There is little evidence as to why Carrasco chose the engineer that he did. Seneviratne testified that Carrasco has the authority to decide which engineers are needed to complete projects or tasks, and to assign overtime pay so long as it does not exceed the department's budget. In this case, Seneviratne testified that the engineer received somewhere between two and eight hours of overtime. This was the only example provided where Carrasco assigned overtime to an engineer.

## **C. PAINTER**

### **1. Felix Terrazas**

Felix Terrazas has been employed as a painter for approximately three years. He is the Hotel's only painter. He is paid \$18.00 per hour. At the hearing the Employer provided a Maintenance Department work schedule. The Maintenance Department schedule lists only the engineers' and painter's schedules. He works from 7:00 a.m. to 3:30 p.m., Monday through Friday. During those same hours, two engineers are scheduled to work. Terrazas testified that he performs painting task approximately 70% of his work time. There is a separate workspace where Terrazas keeps his painting materials. Terrazas testified that he carries many of the same tools as the engineers. Terrazas wears white pants with a white shirt as his uniform.

Terrazas is supervised by Seneviratne<sup>10</sup> and Carrasco. Seneviratne completes Terrazas' evaluation and meets with him to discuss the evaluation. Terrazas receives work assignments either by phone or in person while in the Engineering office. He attends the Monday meetings with the engineers. He testified that he sometimes receives his work instructions at the same time as the engineers. When asked what department he is in, he replied the Engineering Department. Terrazas picks up his pay check from Seneviratne's office. Several of Terrazas's work assignments are listed and recorded in the same work binder as the engineers' assignments. Terrazas testified that along with painting assignments, he will often complete minor repairs throughout the Hotel and hotel rooms. For example, Terrazas will often tighten screws when he notices that they require tightening.

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<sup>10</sup> Seneviratne admitted that he supervises Felix Terrazas.

Terrazas stated that his typical day starts by sweeping the streets, blowing leaves, shoveling snow, or watering plants. He completes these assignments with the engineers' help, all using the same tools. Terrazas testified that after completing these initial tasks he will receive a list from the front desk identifying issues that need repair or painting in the hotel rooms. He stated that it is not uncommon to work in these rooms at the same time as an engineer. Recently, Terrazas completed a painting assignment in a room while an engineer worked on a television. Then, he helped the engineer by holding his ladder steady while the engineer completed his task. Sometimes Terrazas will be assigned to check a light bulb, which is the engineers' responsibility.

### **III. ANALYSIS**

#### **A. The Supervisory Status of Riery Carrasco**

Supervisors are defined in Section 2(11) of the Act as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To meet the definition of a supervisor, an individual need only have one of the 12 criteria listed above, or the authority to effectively recommend such action. *Ohio Power Co, v. NLRB*, 176 F.2d 385 (6<sup>th</sup> Cir. 1949), cert. denied, 338 U.S. 899 (1949). The exercise of that authority, however, must involve independent judgment. *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000). Thus, the exercise of "supervisory authority" in merely routine, clerical, perfunctory or

sporadic manner does not confer supervisory status. *Chrome Deposit Corp.*, 323 NLRB 961, 963 (1997). The burden of establishing supervisory status rests on the party asserting that status. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711 (2001). Conclusory evidence, “without specific explanation that the [disputed person or classification] in fact exercised independent judgment,” does not establish supervisory authority. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991). Similarly, it is an individual’s duties and responsibilities that determine his or her status as a supervisor under the Act, not his or her job title. *New Fern Restorium Co.*, 175 NLRB 871 (1969). Nonstatutory indicia can be used as background evidence on the question of supervisory status but are not themselves dispositive of the issue in the absence of evidence indicating the existence of one of the primary or statutory indications of supervisory status. See *Training School of Vineland*, 332 NLRB 1412 (2000).

The Employer asserts that Riery Carrasco is a supervisor within Section 2(11) of the Act. Therefore, it has the burden to establish Carrasco’s supervisory status. At first glance there appears to be many examples of secondary indicia that Carrasco is a supervisor. However, when examined closely, the evidence is less obvious. Carrasco receives approximately \$9.00 more per hour than the other engineers. Personnel Action Forms show that he received a promotion in January 2011. However, at the time of his promotion he already earned approximately \$6.00 more than any other engineer. He has his own office where he performs administrative work and keeps his tools and personal belongings. But the record is unclear as to how he spends the approximately 40% of his work time performing administrative work. He has an Employer-issued BlackBerry with email capability. But he works alone on the weekend, and may need that extra function. Carrasco is one of three employees in the Hotel with access to all areas and access codes. But an engineer that works alone on the weekend would need access to all areas.

Finally, if Carrasco was determined to be a supervisor, the ratio of supervisors to nonsupervisors would be one supervisor for every two engineers. The ratio of supervisors to rank-and-file employees is a background factor which may enter into Board consideration when resolving a supervisory issue, but it is not itself statutory indicia. *Ken-Crest Services*, 335 NLRB 777 (2001). The schedules provided at hearing show that Carrasco almost never works at the same time as any other engineer. The strongest secondary indicia is that Carrasco is widely referred to as the Engineering Supervisor. All three witnesses referred to Carrasco as a supervisor—those witnesses span from upper management to a member of the maintenance department. Carrasco’s emails include a signature that refers to himself as the Engineering Supervisor. Where the employees looked on the individual in question as a supervisor and “there is a valid basis for such judgment on their part,” this was given some weight in the resolution of the supervisory question. *Bama Co*, 145 NLRB 1141 (1964).

The Employer presented several examples in which it believes Carrasco independently acted with authority on behalf of the Employer, which satisfied one or many of the 2(11) indicia. I will deal with those examples here. First, the Employer presented witnesses to testify regarding Carrasco’s participation in hiring engineers. There is evidence that Carrasco has served as the initial interviewer of several applicants. After the interviews, Carrasco met with Seneviratne to discuss the applicants. Then, either Human Resources or the General Manager interviewed the applicant. The record is unclear regarding exactly what role Carrasco has in hiring, and what role the Engineering Department’s collaborative recommendation plays in the ultimate hiring decision. The record suggests that Carrasco is an initial interviewer to determine technical skill, but his role is only one phase in a several step hiring process. The assessment of an applicant’s technical skill is not an effective recommendation to hire that individual. *Aardvark Post*, 331

NLRB 320 (2000). Nor does the record demonstrate to what degree Carrasco's recommendation is free from the control or superseding of Seneviratne. See *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006). The evidence is insufficient to demonstrate that Carrasco effectively recommended applicants for hire.

As to assignment of work, the testimony is that Seneviratne consults with Carrasco regarding scheduling of employees. The only example provided as to Carrasco's involvement with the scheduling of employees is that Carrasco told Seneviratne that one engineer was incapable of working the weekend shift, and that engineer was not thereafter scheduled for weekend work. Without more detail, it appears Carrasco was merely expressing his opinion on the quality of another engineer's work. Whether Seneviratne had to follow Carrasco's input, or investigate Carrasco's input on his own, is unknown. This example is not sufficient evidence that Carrasco assigns work. Felix Terrazas testified that when he runs out of work he will often seek more work from Carrasco. How often this occurs is unknown, considering that Terrazas and Carrasco's work schedule only overlaps one hour per week. There is little testimony regarding the nature of the assignments, so there is no way of knowing if the assignments are routine in nature.

As to discipline, the record evidence is insufficient to demonstrate that Carrasco effectively recommended an engineer for discipline. The testimony reveals that at some point prior to issuing the discipline, Seneviratne spoke with Carrasco about the engineer. Both the reasons for the discipline and the degree to which Seneviratne sought Carrasco's input are vague. The record is unclear if Carrasco was aware that he was being consulted with the possibility that the engineer would receive discipline. Based on the evidence in the record, at most, Carrasco gave Seneviratne his opinion about the quality of the engineer's work. There is no testimony in

the record regarding if, and to what extent, Seneviratne or Human Resources conducted their own investigation into the engineer's performance before issuing the discipline. Although an individual's duties may include relaying to management complaints against other employees, or reports of inefficiency, if these are investigated independently by higher management, he is not a supervisor within the meaning of the statutory definition. *Pepsi-Cola Bottling Co.*, 154 NLRB 490, 493-494 (1965).

The authority to evaluate is insufficient alone to establish supervisory status if the evaluation does not affect employee status or tenure. *Williamette Industries*, 336 NLRB 743 (2001). Again, the record is unclear regarding the degree to which Carrasco's input affected engineers' wages, hours, or working conditions. There is testimony that Seneviratne speaks with Carrasco prior to completing employee evaluations, but the record has little detail about the nature or significance of Carrasco's input. Also, Seneviratne testified that the evaluations are used to identify areas of improvements or proficiency. There is little testimony about what effect evaluations have on engineers' wages or tenure. Seneviratne stated that Carrasco has recommended that employees receive higher pay raises, but provided no specific examples of an employee receiving a pay raise based to Carrasco's recommendation.

As to responsible direction, the record testimony is that Carrasco requested an engineer to return to work to help Carrasco complete a task. Because the engineer had already worked 40 hours, the job required overtime pay. The engineer went back to work and completed the assignment and received overtime pay. Seneviratne testified that he was not notified about the assignment until after Carrasco requested the employee to return to work. Exactly when Seneviratne was informed is not clear. Nor is it clear if Carrasco requested or required the employee back to work. Seneviratne stated that Carrasco has the authority to assign overtime

when needed, and to choose which engineer he wants to complete the assignment. However, without more detail regarding the project and why Carrasco chose the engineer that he did, the record remains unclear if Carrasco used independent judgment. The record contains testimony that the engineer called into work was a more skilled technician. If he was the only technician capable of performing the task, Carrasco may not have exercised independent judgment. The Board majority in *Oakwood* defined “independent judgment” to be “at a minimum” the authority to “act or effectively recommend action, free of the control of others” and to “form an opinion or evaluation by discerning and comparing data.” 348 NLRB at 692. The record does not make clear if Carrasco was free to decide which engineer would or could complete the project. Further, Seneviratne testified that Carrasco would not have authority to assign overtime to employees beyond a limited number of hours. This one vague and isolated example of Carrasco allegedly directing work and assigning overtime is not sufficient to establish Carrasco is a statutory supervisor. Occasional or isolated instances of actions which might otherwise be indicative of supervisory authority are generally insufficient to predicate a finding of supervisory status. *Volair Contractors, Inc.*, 341 NLRB 673 (2004). Further, Seneviratne testified that if a job was not completed or poorly completed, Carrasco would be held responsible. “For direction to be responsible, the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other such that some adverse consequence may befall the one providing the oversight if the tasks are not performed properly.” *Id.* There is no evidence concerning how Carrasco would be held responsible or if in fact he has in the past been held responsible for the completion or failure to complete a project.

In light of the inconclusive record evidence regarding hiring, assigning work, disciplining, and directing work, I find that the record is unclear as to whether Carrasco is a

supervisor within the meaning of Section 2(11) of the Act. Certainly he is widely regarded as a supervisor by management and employees. His pay is significantly greater than that of other employees, and he has some involvement in supervisory or managerial tasks such as hiring, discipline, and recommending wage increases. Therefore, I direct that Carrasco be permitted to vote under challenge.

### **B. Appropriateness of the Petitioned-for Unit**

The Board's procedure for determining an appropriate unit under Section 9(b) is to examine first the petitioned-for unit. If that unit is appropriate, then the inquiry into the appropriate unit ends. If the petitioned-for unit is not appropriate, the Board may examine the alternative units suggested by the parties, but it also has the discretion to select an appropriate unit that is different from the alternative proposals of the parties. See, e.g. *Overnite Transportation Co.*, 331 NLRB 662 (2000). There is nothing in the statute which requires that the unit for bargaining be the *only* appropriate unit, or the *ultimate* unit, or the *most* appropriate unit; the Act requires only that the unit be "appropriate"; that is, appropriate to insure to employees in each case "the fullest freedom in exercising the rights guaranteed by this Act." *Bartlett Collins Co.*, 334 NLRB 484 (2001). In its analysis of the hotel/motel industry, the Board has often found a maintenance department to be an appropriate unit. See, e.g. *Omni International Hotel*, 283 NLRB 475 (1987). The Board reaffirmed that unit determinations in the hotel/motel industry are made on a case-by-case basis, utilizing the same traditional community-of-interest criteria used in other industries. *Id.*

The facts of *Omni International Hotel* are similar to those in the present case. In *Omni*, the petitioned-for unit was for an engineering department. The engineers were responsible for

the maintenance and repair of the hotel. The engineering department included five general maintenance engineers and one painter. *Id.* The engineers performed many, if not all, of the same maintenance and technical tasks as the engineers in the present case. In holding the maintenance unit an appropriate unit, the Board stated that the employees within the engineering department had common supervision, common work schedules, common wages, and common tasks and work assignments. *Id.*

In the present case, Seneviratne supervises the engineers and painter. He holds departmental meetings in which both classifications are in attendance. He assigns both classifications work assignments. Both classifications are listed on the same schedule; which is listed as the Maintenance Department schedule. The painter has a similar wage rate as the engineers. He wears and carries the same tools; and often works beside engineers and helps them complete their tasks – which are both recorded in the same binder.

Despite the Employer's claim that the engineers and painter are in separate departments, the evidence clearly supports a contrary finding. Seneviratne testified that he does not present himself as supervising two separate departments. Weis' email to Carrasco requested that employees within the Engineering Department complete a survey. Terrazas is listed within the Engineering Department. When asked what department he works in, Terrazas answered that he works in the Engineering Department. And, as stated above, the painter is included on the Engineering Department's work schedule and, at times, works with other Engineering Department employees. Accordingly, I find that the petitioned - for unit is an appropriate unit, and that Terrazas is properly included in the unit and eligible to vote in the election.

### C. CONCLUSIONS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is an employer as defined in Section 2(2) of the Act and is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.<sup>11</sup>
3. The International Union of Operating Engineers, Local 99, is a labor organization within the meaning of Section 2(5) of the Act.
4. 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.
5. There is no prior history of collective bargaining between the Union and the Employer at The Fairfax on Embassy Row, Washington D.C.
6. I find the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time Engineering Department employees  
employed by the Employer at The Fairfax at Embassy Row in Washington,

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<sup>11</sup> The Employer, Pyramid Acquisition II Management LLC d/b/a The Fairfax at Embassy Row, a Massachusetts limited liability company, with an office and place of business in Boston, Massachusetts, and a place of business in Washington, DC, is engaged in the business of providing hotel services, including at The Fairfax at Embassy Row currently located at 2100 Massachusetts Ave NW, Washington, DC, the only location involved in these proceedings. During the past 12 months, a representative period, the Employer, in conducting its business operations described herein, derived gross revenues in excess of \$500,000.

D.C., including engineers and painters, but excluding all office clerical employees, managerial employees, guards, and supervisors as defined in the Act.

#### **D. DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the International Union of Operating Engineers, Local 99. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

##### **A. Voting Eligibility**

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any 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 which 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.

**B. Employer to Submit List of Eligible Voters**

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966), *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within seven (7) days of the date of the issuance of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall, or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, National Labor Relations Board, Region 5, Bank of America Center - Tower II, 100 South Charles Street - Suite 600, Baltimore, MD 21201, on or before **January 25, 2013**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the

election whenever proper objections are filed. The list may be submitted to the Regional Office by mail, by electronic transmission through the Agency website, [www.nlr.gov](http://www.nlr.gov), or by facsimile transmission at (410) 962-2198. The burden of establishing the timely filing and receipt of this list will continue to be placed on the sending party.

### **C. Notice of Posting Obligations**

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

### **I. RIGHT TO REQUEST REVIEW**

**Right to Request Review:** Pursuant to the provisions of Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may obtain review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1099 14th Street NW, Washington, D.C. 20570-0001. This request for review must contain a complete statement setting forth the facts and reasons on which it is based.

**Procedures for Filing a Request for Review:** Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, D.C., by close of business on **February 1, 2013**, unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically.** If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website **is accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.<sup>12</sup> 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.

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, select the E-Gov tab and then click on the E-filing link on the pull down menu. Click on the "File Documents" button under the Board/Office of the Executive Secretary and then follow the directions. 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

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<sup>12</sup> A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Issued at Baltimore, Maryland this 18th day of January 2013.

(SEAL)

/s/ Wayne R. Gold

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Wayne R. Gold, Regional Director  
National Labor Relations Board, Region 5  
Bank of America Center - Tower II  
100 South Charles Street – Suite 600  
Baltimore, Maryland 21201