

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

YOUR PUBLIC RADIO CORPORATION
Employer

and

Case 05-RC-130206

SCREEN ACTORS GUILD – AMERICAN
FEDERATION OF TELEVISION AND
RADIO ARTISTS, WASHINGTON -
MID ATLANTIC LOCAL, AFL-CIO
Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein called the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein called the Board. Screen Actors Guild – American Federation of Television and Radio Artists, Washington- Mid Atlantic Local, AFL-CIO (the Petitioner or the Union) filed the petition seeing to represent the following unit of employees at Your Public Radio Corporation¹ (the Employer or WYPR): all full-time, part-time, and freelance hosts, reporters, producers, analysts, and new media professionals, excluding all office-clerical employees, managerial employees, guards, and supervisors as defined by the Act. The petition asserts there are approximately 21 employees in the proposed unit. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act, and

¹ By stipulation of the parties, the petition was amended at the hearing to reflect the Employer's correct legal name.

that there is no history of collective bargaining between the parties for the petitioned-for employees.

I. ISSUE AND POSITION OF THE PARTIES

The sole issue presented at hearing is whether hosts Daniel Rodricks and Sheila Kast are supervisors as defined in Section 2(11) of the Act. The Employer argues that Rodricks and Kast are supervisors as defined in Section 2(11) of the Act because they have several of the indicia of supervisory authorities enumerated in Section 2(11). The Petitioner argues that neither Rodricks nor Kast is a Section 2(11) supervisor.

For the reasons that follow in this Decision, and after careful consideration of the entire record evidence and the parties' post-hearing briefs, I find that Rodricks and Kast are supervisors as defined in Section 2(11) of the Act, and not eligible to vote in the election.

II. FACTS AND ANALYSIS

A. The Employer's Business Operations

Your Public Radio Corporation, a Maryland non-profit corporation with an office and place of business located at 2216 North Charles Street, Baltimore, Maryland, is engaged in the operation of a radio station. Andrew Bienstock is the Employer's vice president and program director. Bienstock is responsible for the Employer's broadcasting, including the scheduling of programs. He ensures that operators are on duty and that the Employer is broadcasting its programs at all times. Bienstock is directly supervised by Tony Brandon, the Employer's president and general manager. Brian Cromptwell is the Employer's business manager, overseeing all of the Employer's human resources work.

B. Daniel Rodricks and “Midday”

Daniel Rodricks is employed by WYPR as the host of the station’s mid-day show. Called “Midday,” the program—a talk show covering topics including current affairs, news, politics, and culture—airs each weekday from 12:00 p.m. until 2:00 p.m. Rodricks and the Employer executed an employment agreement in 2009 regarding his role at the station.² (Pet. Exh. 2). That agreement has been renewed each year since 2009. The terms of the agreement state that WYPR hired Rodricks “for the purpose of hosting an on-air call-in radio show,” and that “Rodricks will devote such additional time as is necessary to prepare for and assist with the production of each show.” The agreement also includes an obligation for the Employer to provide Rodricks with a production team. The agreement states as follows:

Production Support: To support the production of Rodricks’ on-air show, WYPR shall hire and pay the salaries and benefits for two full-time producers. Such producers, as employees of WYPR, shall be directly accountable and report to the Program Director of WYPR, but in the performance of their duties, they are expected to have a close working relationship with Rodricks. (Pet. Exh. 2)

There are currently two such producers employed by WYPR for Rodricks’ show: Nikki Gamer and Jonathan Ehrens. The Employer also employs an additional part-time producer for the show, Michael Himowitz. Rodricks is directly supervised by Bienstock.

The format of the mid-day show was established by the program director; the format was in place when Rodricks was hired to host the show. Although the format was established prior to Rodricks’ employment with WYPR, Rodricks works with the producers to develop content for the show. This entails deciding which topics to address and who to invite onto the show to talk about those topics. Rodricks is also involved in the preparation for the show by reading newspapers and other materials

² At hearing, Rodricks testified that he was first hired in 2008.

concerning the content of the show. During the show's runtime, Rodricks hosts the show by interviewing guests, taking phone calls, and moderating discussions.

To select topics for the show, Rodricks meets with his producers each Tuesday at 2:30 p.m. to plan the following week's shows. Rodricks, Gamer, and Ehrens contribute ideas at these meetings, and each is responsible for bringing ideas to the show. These meetings were in place when Rodricks was hired to host the show. When Rodricks was hired, WYPR retained Marcus Charleston as the mid-day show's producer. Charleston informed Rodricks of the weekly meetings, and Rodricks settled on a new day and time for those meetings.

Producers on the mid-day show usually volunteer for their assignments, and usually volunteer for topics they themselves introduced at weekly meetings. When Rodricks raises an idea, one of Gamer, Ehrens, or Himowitz will produce it. Rodricks and his team of producers have had disagreements about the show's content; in some cases, the producers defer to Rodricks, and in others, he defers to the producers. Rodricks testified that he recently deferred to a producer on a particular show topic. Rodricks testified that he would not be subject to discipline for the mistake of another employee. If Rodricks disagreed with the producers about a decision the producers felt strongly about, Rodricks would ask Bienstock for his opinion. He provided a recent example of an instance in which Bienstock agreed with the producers about a topic Rodricks did not want to cover on the show, and recommended that Rodricks air the content. However, Rodricks conceded that at that time, Bienstock—as he always does, according to Rodricks—indicated that the decision was Rodricks's to make.

Rodricks claimed that he has never hired an employee, does not have the authority to hire, and does not have the authority to post a job position. Rodricks believes that the authority to post positions belongs to the Employer's business manager, Brian Cromptwell. However, Rodricks has been involved in the hiring of employees at WYPR. Rodricks reviews job applications, cover letters, and resumes

submitted by applicants for producer positions on the mid-day show. Rodricks obtains these materials either by receipt of printouts from Cromptwell, or by accessing the Employer's e-mail account to which the applications are sent. Rodricks also interviews some candidates, in conjunction with a producer for the show. Rodricks and that producer select a candidate to recommend to Bienstock for hire. According to Rodricks, he asks candidates questions based on specific criteria, which are based on his general instincts. Rodricks looks for producers who are news-savvy, know the local community, have some relevant experience, can convince people to appear on the show, and can write well. Rodricks said such qualities go to the nature of the show.

When Vanessa Eskridge, a "Midday" producer, announced she was leaving the Employer, Rodricks contacted a producer, Sean Yoes, about replacing Eskridge. Rodricks, who had previously worked with Yoes, asked Yoes if he was interested in applying for the job, and recommended Yoes to Bienstock. Rodricks also recommended Yoes not be named executive producer. Bienstock followed both recommendations. Bienstock testified that he subsequently met with Yoes to discuss salary. Bienstock did not meet with any other candidate for this position, nor did he interview anyone else for this position; when asked at hearing how much weight he placed on Rodricks's recommendation to hire Yoes, Bienstock replied 100 percent. The Employer produced e-mails from Rodricks to Bienstock containing Rodricks' recommendations concerning Yoes. (Er. Exh. 1) In another instance, Bienstock hired Jonathan Ehrens as a board operator, and Rodricks recommended Ehrens for promotion to a vacant producer position on "Midday;" Bienstock followed Rodricks' recommendation. Additionally, Rodricks recommended Michael Himowitz for hire to Bienstock; Bienstock hired Himowitz without ever having met Himowitz.

Rodricks admitted that he interviewed and recommended the hire of at least four other producers to Bienstock and Brandon: Vanessa Eskridge; Nikki Gamer; Geoffrey Brown; and Claire Kaplan. The

Employer hired each of those four individuals. Bienstock confirmed that Rodricks has recommended employees to Bienstock for hire who Bienstock has subsequently hired, based on Rodricks' recommendations. Bienstock stated that in such cases, hosts are free to make their own job postings, make the announcement for that posting, interview candidates, and decide who they want to be hired. According to Bienstock, once he receives a recommendation from Rodricks, Bienstock's participation is limited to discussing salary with the candidates, and making job offers based on financial considerations.

Rodricks testified that he has never terminated an employee at WYPR, and that he does not believe he has such authority. Rodricks and Bienstock testified about former employee Marcus Charleston, the producer the Employer had retained on the mid-day show when Rodricks began hosting the show. In Rodricks' opinion, Charleston was not a good producer. After a while, Rodricks complained to Bienstock about Charleston's work performance. According to Rodricks, Bienstock asked Rodricks to create a paper trail addressing Rodricks' dissatisfaction with Charleston. On March 4, 2009, Rodricks wrote an e-mail to Charleston regarding Charleston's recent job performance:

[M]ake sure you read over the job description I gave you last fall.³ Please re-read it. Also, please delegate more responsibility to Brett and Clare, as I have repeatedly suggested. . . . Do not rely on WYPR contributors to carry shows. We need more. We need opposing viewpoints—and we are not getting them. . . . Make sure we have good quiz questions today

On December 2, 2009, Rodricks wrote another e-mail to Charleston regarding his job performance:

³ Rodricks testified that he created the job description mentioned in the email because he thought there should be a job description in place. The position was already occupied by Charleston when Rodricks created the description.

Marcus—you're relieved of the duty of producing this hour. Provide me with the contacts and I will take it from here. You booked this show without any real understanding of the topic, and apparently explained the angle we wanted to pursue on it poorly to the guests on the guests' contacts. Just pass along the information you have and move on to another topic. This is my last warning to you: Please do not book shows unless you fully understand the nature of the topic and make a judgement, in consultation with me, as to whether it will make a good hour of Midday. Thanks, Dan.

Rodricks testified that Charleston had done such a poor job of producing that hour of the show that Rodricks just took it over in order to get it done by airtime.

On May 27, 2010, Rodricks wrote to Charleston:

Thank you for all your efforts in learning to direct and engineer Midday. . . . you seem to be getting the hang of it, though there are certain mistakes that seem to be getting repeated. Please keep at it. . . . I also want to implore you to communicate better with me and with Vanessa Eskridge and Geoff Brown. You are part of the Midday team. . . . It is ESSENTIAL that you cooperate and communicate with Geoff, Vanessa, and me. . . . Please, make an extra effort to pitch in, to volunteer ideas and to communicate. . . . Make sure Geoff knows what you are working on at all times, and offer to take assignments from him or author prep from Vanessa.

However, on April 30, 2011, Rodricks sent an e-mail to Bienstock regarding Charleston's work performance:

Andy—Vanessa and I have reached the end with Marcus. We need to find another producer/ board operator I've given this three years, with numerous warnings, etc., and it still doesn't work—he barely speaks to his coworkers, comes up with virtually no ideas for the show, complains about having to sometimes read a book, gets easily overwhelmed by chores, is poorly organized, does little advance work on topics/guests assigned to him, and generally doesn't seem to have much of an investment in a radio program we want to make the best in the region. I thought giving him a raise would help.⁴ It didn't. He doesn't speak to Vanessa; it's a very unpleasant day to day experience. I've tried to be nice and encouraging. But I'm done. The sooner we move on the better. Dan.

⁴ There is no further evidence in the record related to the raise Rodricks mentions in the April 30, 2011 e-mail.

On May 1, 2011, Tony Brandon sent Rodricks' April 30 email to Crompwell, asking Crompwell to put the e-mail in Charleston's file. On June 22, 2011, Rodricks wrote to Brandon, identifying errors that Charleston had made that day. That same day, Brandon sent Rodricks' e-mail to Crompwell, asking Crompwell to put the e-mail in Charleston's file.

Five days later, on June 27, Bienstock terminated Charleston's employment. Rodricks testified that, to his knowledge, Bienstock had taken it upon himself to try to rehabilitate Charleston or instruct Charleston on what he needed to do. Bienstock testified that he had concerns about discharging one of WYPR's few African-American employees, and asked Rodricks to create a paper trail documenting Rodricks' concerns. Bienstock stated that he had not wanted to discharge Charleston at all, but did so because Rodricks thought Charleston was incompetent and could not do the job. Bienstock testified that the decision to fire Charleston was entirely Rodricks', and that Rodricks' problems with Charleston had existed for some time before Bienstock terminated Charleston's employment. Bienstock also explained the importance of hosts being completely comfortable with the people who work for them; according to Bienstock, if a host is not comfortable with such people, those people need to be fired.

Rodricks testified that he does not have the authority to reward employees at WYPR.

Finally, WYPR holds weekly meetings at which representatives from each show and department attend and discuss their respective departments. Each week, Rodricks and Sheilah Kast attended these meetings, which Bienstock testified were considered to be managers' meetings.

C. Sheilah Kast and "Maryland Morning"

Like Rodricks, Sheilah Kast hosts a show at WYPR. Her show, "Maryland Morning," airs three days a week from 9:00 a.m. to 10:00 a.m. "Maryland Morning" is an interview show, covering between three and five topics per day. When Kast was negotiating with WYPR prior to her hire, Bienstock

indicated to Kast that he did not want her show to be a call-in show, and that he wanted the show to include a segment called Writer's Almanac.

The production process on "Maryland Morning" is similar to that on "Midday." There are two producers assigned to the show, as well as an individual named Tom Hall who acts as co-host and culture editor. Kast works with the producers in deciding the content of the show. Kast testified that her duties include conducting research, communicating with people in the community, speaking to public relations people, pitching story ideas, and hosting the show during airtime. Topics for each show are selected at weekly meetings. The producers contribute most of the ideas for the first half of each show. Hall meets with the production team in separate meetings to plan the second half of "Maryland Morning." These weekly meetings were in place before Kast was hired to host. Producers are usually assigned to stories that they have volunteered for; the assumption is that producers will handle the ideas that they themselves pitched at the weekly meetings.

Bienstock testified that Kast has recommended employees for hire who Bienstock has subsequently hired according to Kast's recommendations. He explained that Kast writes job descriptions for prospective producers on her show, and presents her choices to Bienstock. Bienstock indicated that, after Kast presents her recommendations for hire to him, he then proceeds to discuss salary with Kast's choices. According to Bienstock, Kast presents him with a list of her favorite candidates, and he makes a job offer to the best candidate whose salary expectations accord with WYPR's budgetary considerations..

Bienstock testified that Kast and Rodricks are the only people who make recommendations to him regarding candidates for hire as producers on their respective shows. The Employer presented documentary evidence, including three e-mails Kast wrote to the production staff on "Maryland Morning" between 2010 and 2013. In each of the e-mails, Kast announces the departure of the then-

current senior producer and the acceptance of the senior producer role by another producer on the team. (Er Exhs. 7A–7C.) Promotion to senior producer is accompanied by a pay raise. Rodricks and Kast testified that, to their knowledge, the position of senior producer on each show has been occupied by the producer with the longest tenure on the show at the time the position is available. Rodricks testified that he let Marcus Charleston be senior producer based on his longevity at the station and that Nikki Gamer is his show’s current senior producer based on the time she has been there. Kast testified that each time a senior producer has departed from her show, she has approached the remaining producer to inquire about that person’s interest in filling the position. Her recommendations to Bienstock have not departed from this pattern.

Matt Purdy is employed by the Employer as a senior producer on “Maryland Morning.” Prior to holding this position, he had been hired part-time in the newsroom in March 2012, after spending about a year at the station on a freelance basis. Purdy testified that he applied for his current position by sending materials to an e-mail address at the station. Purdy was interviewed by a group of four that included Kast. Following the group interview, Bienstock briefly discussed salary with Purdy before offering Purdy the position. Purdy testified that he reports to Bienstock, and that when he requested a pay raise, he requested the raise from Bienstock and not Kast because Kast is not Purdy’s supervisor. Bienstock testified that Kast selected Purdy for hire and subsequently promoted Purdy; Bienstock’s role in those decisions was to agree with Kast and come to a financial agreement with Purdy.

D. Analysis

Based on the record evidence and relevant Board law, I find that both Sheilah Kast and Dan Rodricks are Section 2(11) supervisors.

Section 2(11) of the Act defines a supervisor 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 merely of a routine or clerical nature, but requires the use of independent judgment.

Accordingly, under Section 2(11), individuals are deemed to be supervisors if they have authority to engage in any one of the above Section 2(11) indicia; their exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment; and their authority is held in the interest of the employer. *See NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 712–13 (2001) (citing *NLRB v Health Care & Retirement Corp. of America*, 511 U.S. 571, 573–74 (1994)).

Section 2(11)'s definition is read in the disjunctive, and thus the Board considers possession of any one of its enumerated powers, if accompanied by independent judgment and exercised in the interest of the employer, sufficient to confer supervisory status. *Kentucky River*, 532 U.S. at 713. Supervisory status may likewise be established if the individual in question has the authority to effectively recommend one of the powers. *See, e.g., Children's Farm Home*, 324 NLRB 61, 65 (1997). The Board has held that an effective recommendation requires the absence of an independent investigation by superiors and not simply that the recommendation be followed. *Id.*

The burden of proving supervisory status rests on the party asserting that status. *See, e.g., Kentucky River*, 532 U.S. at 711; *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). Since supervisors are excluded from the Act's protection, the Board has been careful to avoid construing the statutory language too broadly. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1058 (2006) (citing *Oakwood Healthcare, Inc.*, 348 NLRB at 686). The Board requires supervisory status be established by a preponderance of the evidence. *Dean and DeLuca New York, Inc.*, 338 NLRB 1046, 1047 (2003). Lack of evidence is construed against the party asserting supervisory status. *Id.* at 1048.

To meet this standard, the party bearing the burden must establish that an individual “actually possesses” a supervisory power; mere inferences or conclusory statements of such power are insufficient. *See, e.g., Golden Crest*, 348 NLRB 727, 731 (2006). Moreover, where evidence is in conflict or otherwise inconclusive for a particular Section 2(11) indicium, the Board will decline to find supervisory status for that indicium. *See, e.g., Dole Fresh Vegetables, Inc.*, 339 NLRB 785, 793 (2003). Accordingly, job titles, job descriptions, or similar documents are not given controlling weight and will be rejected as mere paper, absent independent evidence of the possession of the described authority. *Golden Crest*, 348 NLRB at 731 (citing *Training School at Vineland*, 332 NLRB 1412, 1416 (2000)).

Here, the Employer argues that Rodricks and Kast are supervisors because each has the authority to exercise the following Section 2(11) powers: (1) the power to effectively recommend discharge of employees; (2) the power to hire and effectively recommend hire of employees; (3) the power to effectively recommend promotion of employees; and (4) the power to assign and responsibly to direct employees. I will address the sufficiency of the relevant evidence for each of these assertions in turn.

i. Discharging and effectively recommending discharge of employees:

The Employer presented evidence intended to demonstrate that Rodricks exercised the power to discharge or to effectively recommend discharge in one situation involving Marcus Charleston, a former “Midday” producer. The documentary evidence—the 2009, 2010, and 2011 e-mails—and testimony on the record shows instead that Rodricks was not immediately successful in his efforts to correct an employee’s poor conduct, and to have the Employer replace Charleston. Bienstock knew by April 30, 2011—when Rodricks sent an e-mail to Bienstock regarding Charleston’s performance—that Rodricks wanted Charleston removed from his staff. The April 30 e-mail suggests that if Rodricks had possessed the authority to fire Charleston himself at that point, he would have done so. Given Rodricks’ un rebutted testimony on his own lack of authority to fire an employee, I find that the Employer failed to

satisfy its burden regarding Rodricks. The Employer did not present evidence that Kast exercised the authority to discharge employees.. As for its assertion that Rodricks and Kast had the authority to effectively recommend the termination of an employee, the evidence is more substantial as to Rodricks. Where a recommendation regarding discipline of an employee did not result in actual discipline “without resort to individual investigation by higher authority,” the Board has found that the individual in question was not a Section 2(11) supervisor. *Hawaiian Telephone Company*, 186 NLRB 1 (1970). Here, the evidence indicates that Bienstock had long known of Rodricks’s dissatisfaction with Charleston, and that Bienstock had asked Rodricks to make sure there was a “paper trail” documenting Charleston’s shortcomings. Furthermore, Rodricks’ June 22 e-mail to Brandon suggests Rodricks’ role in detailing Charleston’s unsatisfactory performance for the Employer. However, there is insufficient evidence as to whether Bienstock and/or Brandon conducted any independent investigation into Rodricks’s concerns. As the burden of establishing supervisory status is on the party asserting such status, I conclude that the Employer likewise failed to meet its burden of establishing that either Rodricks or Kast had the authority to effectively recommend the termination of an employee.

ii. Hiring and effectively recommending hiring of employees.

The record contains insubstantial evidence that either Rodricks or Kast has the authority to hire employees, and thus I similarly find that the Employer failed to satisfy its burden. However, the record contains ample evidence of the authority of Rodricks and Kast to effectively recommend the hiring of employees. Accordingly, I find that the Employer has satisfied its burden of proving by a preponderance of the evidence that Rodricks and Kast are able to effectively recommend the hiring of employees at WYPR, and I find that each is a supervisor under Section 2(11) of the Act.

In *J.C. Penney Corp.*, 347 NLRB 127, 129 (2006), the Board explained that:

[T]he power to effectively recommend a hire. . . contemplates more than the mere screening of applications or other ministerial participation in the interview and hiring process. *See e.g., Bowne of Houston*, 280 NLRB 1222, 1225 (1986) (assistant foreman who interviewed applicants and advised management of the experience of at least one of them did not make hiring decisions or effective recommendations to hire, as management also interviewed all applicants and had final hiring authority); *The Door*, 297 NLRB 601, 601–02 (1990) (finding that an employee lacked authority to effectively recommend hire where his role in the hiring process was limited to screening resumes, making recommendations with respect to technical qualifications, and participating, along with others, in applicant interviews).

Instead, the Board analyzes supervisory status by determining whether an individual’s hiring recommendations are in fact effective. Accordingly, the Board examines the amount of weight the employer affords the recommendation. *See, e.g., USF Reddaway, Inc.*, 349 NLRB 329, 340 (2007). Specifically, the Board has found recommendations effective when “management is prepared to implement the recommendation without an independent investigation of the relevant circumstances.” *Chevron USA*, 309 NLRB 61, 65 (1992). In the absence of such a requirement, an employer’s reliance on word-of-mouth referrals could confer supervisory status on the entire staff, since it is not uncommon for employers to expect their more experienced employees to recommend someone for hire. *See NLRB v. Adco Electric, Inc.*, 6 F.3d 1110, 1117 (5th Cir. 1993). Finally, an individual does not “effectively recommend hiring” unless there was “delegated authority to participate in the hiring process” and not merely an employer’s respect for an individual’s opinion on an applicant. *See, e.g., Plumbers Local 195*, 237 NLRB 1099, 1102 (1978).

In the instant case, the record evidence establishes that both Rodricks and Kast have the authority to effectively recommend hire at WYPR. Bienstock testified that both Rodricks and Kast create job descriptions for their prospective producers, screen application materials received from prospective producers, interview prospective producers, and make recommendations to Bienstock regarding their preferred candidates. At times, Rodricks and Kast have submitted a single name to Bienstock; other

times, Bienstock receives a list of candidates. Once Rodricks or Kast has made their recommendation to Bienstock for the hiring of an employee, Bienstock's role is limited to discussing salary and making job offers to those candidates whose salary demands accord with the Employer's budget. Bienstock's role is hardly that of an independent review of the recommendation from either Rodricks or Kast. Bienstock defers to Rodricks and Kast, and has relied exclusively on their recommendations when making job offers. Thus, contrary to the Petitioner's assertion in its brief that no evidence exists in the record showing what weight the Employer gives these recommendations, there is clear evidence that the recommendations of both Rodricks and Kast are afforded significant weight. I therefore find that the Employer has met its burden to show that both Rodricks and Kast effectively recommend the hire of certain producers employed at WYPR, and that each is a supervisor under Section 2(11) of the Act.

iii. Promoting and effectively recommending promotion of employees:

Although I conclude that Rodricks and Kast are Section 2(11) supervisors based on their authority to effectively recommend the hiring of employees, I shall consider the remaining issues raised by the parties. Turning to the argument that Rodricks and Kast have the authority to promote and effectively recommend the promotion of employees, I find that the Employer did not meet its burden of establishing either authority by a preponderance of the evidence. For this Section 2(11) indicium, the record evidence was relatively insubstantial. Bienstock testified that Kast promoted Matt Purdy to his current position of senior producer.. Documentary evidence shows Kast's announcements of staff changes, including announcements that certain producers had agreed to assume the role of each outgoing senior producer. However, the evidence also shows that the role of senior producer on both "Midday" and "Maryland Morning" appears to be determined by longevity in the position. Rodricks testified without contradiction that he allowed Charleston to "be the senior producer" immediately after explaining that Charleston was, in terms of longevity at the station, "the senior producer." Rodricks also

stated that Nikki Gamer “would be the senior producer because - - in terms of the time that she’s been there.” For her part, Kast explained that, at WYPR, “generally when one senior producer leaves for another opportunity, the person who succeeds them is the person who has been in place the longest, knows the show best. . . that’s why I return and ask that person are you interested in stepping into this job.” While the evidence is not overly clear as to the criteria for assuming the role of senior producer on a given show, the Employer did not establish an alternative basis for selection, evidence that would have been well within the Employer’s control and ability to adduce. Furthermore, the limited record evidence suggests that the recommendations for promotions were based on tenure of service, and not on any exercise of independent judgment. Accordingly, I find that the Employer failed to establish that Kast has the power to promote, or to effectively recommend promotion, of other employees.

Regarding Rodricks, the evidence establishes that he recommended to Bienstock that Jonathan Ehrens be promoted from board operator to producer on “Midday.” Furthermore, Bienstock admitted that he considered no other factor in making the promotional decision, and this admission was uncontroverted. However, this is the only instance reflected in the record of Bienstock following such a recommendation for promotion by Rodricks. The Board has declined to find individuals to be supervisors based on alleged authority that they were never notified that they possessed and where its exercise was sporadic and infrequent. *See Greenspan, D.D.S., P.C.*, 318 NLRB 70, 76 (1995) enfd. 101 F.3d 107 (2d Cir. 1996); *see also Tree-Free Fiber Co.*, 328 NLRB 389, 392–393 (1999) (citing *Greenspan* for the proposition that, “[w]hen an individual has not been notified, orally or in writing, that he is vested with a supervisory power, the frequency of exercise of the authority is relevant to a determination of whether in fact the authority has been delegated to him by management”) Thus, in light of the limited nature of evidence, I find that the Employer did not satisfy its burden of

proving that Rodricks has the authority to effectively recommend the promotion of employees at WYPR.

iv. Assignment of work and responsible direction of employees:

Finally, I conclude that the Employer failed to meet its burden of proving that either Rodricks or Kast is a Section 2(11) supervisor based on the indicia of assignment of work and responsible direction of employees. In *Oakwood Healthcare, Inc.*, 348 NLRB 686, 689 (2006), the Board defined “assign” to mean:

The act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee. That is, the place, time, and work of an employee are part of his/her terms and conditions of employment.

In *Oakwood*, the Board emphasized that an individual must assign *significant overall duties*, rather than merely issue an ad hoc order to perform a discrete task, especially when the task is within a larger assignment. *Id.* The *Oakwood* Board also interpreted the term “responsibly direct” to mean an individual’s decision to decide “what job shall be undertaken next or who shall do it.” *Id.* at 691. An individual who has this power is a supervisor, provided that the direction is both “responsible,” and carried out with independent judgment. *Id.* at 691–92. 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 performed by the employee are not performed properly.” *Id.* at 692. Therefore, an individual is not a supervisor solely because of his ability to direct an employee’s work; there must be an element of accountability as well. Additionally, to be carried out with independent judgment, the judgment cannot be dictated or controlled by detailed instructions. *Id.* at 693.

The Employer did not introduce evidence regarding Kast's job description. However, Rodricks' employment agreement indicates that his role at WYPR is defined as host. The agreement lists among Rodricks's responsibilities the devotion of "such additional time as is necessary to prepare for and assist with the production of each show." The agreement stresses that the team of producers that the Employer charges Rodricks with assisting "shall be directly accountable and report to the Program Director of WYPR."

On this limited evidence, I conclude that the Employer has not established by a preponderance of the evidence that either Kast or Rodricks has the authority to assign or responsibly direct other employees in their duties. The record does not include evidence indicating that either host is accountable to upper management for the performance of any other WYPR employee. Nor was evidence adduced suggesting that Kast or Rodricks are in danger of suffering "adverse consequences" should the employees to whom they assign tasks fail to perform those tasks properly. Rodricks testified to exactly the opposite. Furthermore, the record does not contain evidence establishing that either Rodricks or Kast have been reprimanded—or rewarded—as a result of anything that other employees have done or failed to do. Thus, I find that the Employer has failed to demonstrate that either Rodricks or Kast have the power to assign or responsibly direct other employees.

III. CONCLUSIONS AND FINDINGS

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

1. The hearing officer's rulings made at the hearing are free from prejudicial error and 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 2(7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case;

3. The Petitioner 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 2(7) of the Act;
5. Your Public Radio Corporation, a Maryland non-profit corporation with an office and a place of business located at 2216 North Charles Street, Baltimore, Maryland, is engaged in the operation of a radio station. During the preceding twelve months, a representative period, Your Public Radio Corporation, in the course and conduct of its business operation described herein, has purchased and received at its Baltimore, Maryland facility goods and services valued in excess of \$50,000 directly from points outside the state of Maryland;
6. Dan Rodricks and Sheilah Kast are supervisors within the meaning of 2(11) of the Act; and
7. 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, part-time, and freelance hosts, reporters, producers, analysts, and new media professionals, employed by the Employer in Baltimore, Maryland, but excluding all office-clerical employees, managerial employees, guards, and supervisors as defined by the Act

IV. 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 **Screen Actors Guild – American Federation of Television and Radio Artists, Washington – Mid Atlantic Local, AFL-CIO**. 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 7 days of the date 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, Maryland 21201, on or before **July 14, 2014**. 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 by facsimile transmission at (410) 962-2198. Since the list will be made available to all parties to the election, please furnish a total of two copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

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 the date 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 non-posting of the election notice.

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, N.W., Washington, DC 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, DC by close of business on **July 21, 2014 at 5 p.m. (ET)**, 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.⁵ A copy of the request for review must be served on each of the

⁵ 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.

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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. Once the website is accessed, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Issued at Baltimore, Maryland on this 7th day of July 2014.

(SEAL)

/s/ Charles L. Posner

Charles L. Posner, Regional Director
National Labor Relations Board, Region 5
Bank of America Center – Tower II
100 South Charles Street, 6th Floor
Baltimore, MD 21201