

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

**BECHTEL MARINE PROPULSION CORPORATION**

**Employer**

**and**

**Case 03-RC-130422**

**LOCAL I 91 KNOLLS ATOMIC POWER LABORATORY  
PROFESSIONAL FIREFIGHTERS ASSOCIATION, IAFF**

**Petitioner**

**DECISION AND DIRECTION OF ELECTION**

The Employer designs ship and submarine nuclear reactor power plants and propulsion systems for the Naval Nuclear Propulsion Program. The Employer also trains propulsion plant operators, and operates a reactor core examination facility at multiple locations throughout the United States. At issue here, is the Knolls Atomic Power Laboratory (KAPL) which has two locations, the Knolls Laboratory at 2401 River Road in Schenectady, New York (Knolls) and the Kesselring Site at 350 Atomic Project Road in Ballston Spa, New York (Kesselring).

Both Knolls and Kesselring maintain their own emergency support services. At Knolls, the individuals who perform emergency support services work are referred to as Emergency Support and Services Operators (operators). At Kesselring, they are called Incident Prevention Inspectors (inspectors). The operators and inspectors are members of IUE-CWA, The Industrial Division of the Communications Workers of America, AFL-CIO, CLC.

Operators and inspectors work in platoons or teams led by Work Group Leaders. The Work Group Leader titles at issue here are: Captain Emergency Support and Services (ESS), Administrative Captain / Fire Marshall, Captain Incident Prevention, and Administrative Captain

in Training (collectively referred to as captains). Captains are responsible for the operation and maintenance of site systems including but not limited to HVAC, cooling towers, steam and condensate, site supply air and gases, site water supply and fire water supply. They also provide the initial response to medical, fire, radiological and rescue emergencies, and continuously inspect and monitor facilities, work areas, and construction projects to identify and correct deficiencies and report abnormal conditions.

The Petitioner filed a petition seeking to represent a unit comprised of captains with the job titles stated above. The Employer maintains that the captains are supervisors under Section 2(11) of the National Labor Relations Act (Act) because they exercise the following supervisory authority over the operators and inspectors: effectively recommend hiring and transfers, effectively recommend discipline and rewards, adjust grievances, discharge, assign and responsibly direct work.<sup>1</sup> The Employer also contends that captains are managers. In addition, if captains are found not to be supervisors or managers under the Act, the Employer seeks to exclude the Administrative Captain / Fire Marshall from the petitioned-for unit because he does not share a sufficient community of interest with the employees sought by Petitioner. The Petitioner argues that captains do not possess supervisory or managerial authority and should be included in the unit. Petitioner also asserts that the Administrative Captain / Fire Marshall is appropriately included in the petitioned-for unit because he primarily performs the same job as the other captains.

As discussed below, based on the record and relevant Board law, I find that captains are not supervisors or managers under the Act. I also find that the Administrative Captain / Fire Marshall is appropriately included in the petitioned-for bargaining unit.

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<sup>1</sup> While the Employer asserted at the hearing that the captains are involved in the transfer of employees, adjusting of grievances and discharge, no evidence was elicited at the hearing to support these contentions.

## **I. Supervisory Status**

### **A. Board Law**

Section 2(11) of the Act defines a supervisor as any individual with “ the authority, in the interest of the employer to hire, transfer, suspend, layoff, 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.”

The burden of proof rests with the party asserting supervisory status. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006) (citing *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001)). To establish that individuals are supervisors, the asserting party must show: (1) that the purported supervisors have the authority to engage in any one of the twelve enumerated supervisory functions; (2) that their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;” and (3) that their authority is exercised “in the interest of the employer.” *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 710-713 (2001). The absence of evidence in the record is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 fn. 8 (1999). The Board has also long recognized that purely conclusory evidence is not sufficient to establish supervisory status. *Community Educations Centers, Inc.*, 360 NLRB No. 17, slip op. at 11 (2014); *Volair Contractors*, 341 NLRB 673, 675 (2004).

## **B. Application of Board Law to this Case**

In reaching the conclusion that captains are not statutory supervisors, I rely on the following analysis and record evidence.

### **1. Effectively Recommend Hiring and Transfers**

The Employer contends that captains are statutory supervisors based on their ability to effectively recommend hiring. Based on the record evidence, I find that the Employer has failed to establish that captains effectively recommend hiring within the meaning of Section 2(11) of the Act.

The record establishes that after an open position is posted, the hiring manager reviews the applications and confirms that they meet the minimum requirements. The hiring manager then meets with the interview team, which includes at least one captain and an operator or inspector, to determine which applicants should be interviewed. The interview team conducts the first round of interviews and submits a form to the hiring manager listing the strengths and weaknesses of each candidate. The hiring manager then conducts a final interview and uses the interviewing team's assessment to "probe those weaknesses." After the final interview, the hiring manager meets with the interview team and considers the team's input. The Employer's post-hearing brief points to the fact that the hiring managers give great weight to the interviewing teams' recommendations and input regarding candidates. Regardless, Manager of Operations and Maintenance at the Knoll's Laboratory Chris Obos, testified that the hiring manager makes the final decision, pending approval by human resources and a background check.

The authority to "effectively recommend" an action "generally means that the recommended action is taken without independent investigation by superiors, not simply that the

recommendation is ultimately followed.” *DirectTV*, 357 NLRB No. 149, slip op. at 3 (2011), citing *Children's Farm Home*, 324 NLRB 61 (1997); see also *ITT Corp.*, 265 NLRB 1480, 1481 (1982); *Wesco Electrical Co.*, 232 NLRB 479 (1982). Thus, in order to establish that an alleged supervisor possesses the authority to effectively recommend hiring, the party asserting supervisory status must demonstrate that the management official made the decision to hire based solely on the recommendation from the alleged supervisor, without further inquiries or investigation. See *Waverly-Cedar Falls Health Care*, 297 NLRB 390, 392 (1989), *enfd.* 933 F.2d 626 (8th Cir. 1990). Mere participation in the hiring process, absent the authority to effectively recommend hire, is insufficient to establish supervisory authority. *Training School at Vineland*, 332 NLRB 1412, 1417 (2000); *North General Hospital*, 314 NLRB 14, 16 (1994).

Here, the captains’ participation in the hiring process is done as part of a team which includes bargaining unit members.<sup>2</sup> The hiring manager identifies the initial candidates to be interviewed, performs a final interview, and makes the final hiring decision. The Board has found that where an admitted supervisor also participates in the interview process, it cannot be said that employees whose status is at issue have authority to effectively recommend hiring within the meaning of Section 2(11). *Ryder Truck Rental*, 326 NLRB 1386, 1387-88, *fn.* 9 (1998).

Here, the record contains no evidence that the interviewing team’s recommended action is taken without independent investigation by superiors or that the team’s recommendation is ultimately followed without review. Accordingly, I find that the captains do not have authority to effectively recommend hiring. See *DirectTV*, 357 NLRB No. 149, slip op. at 3 (2011), citing

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<sup>2</sup> The Board has found that “compatibility recommendations” are insufficient to support a finding of hiring authority with the meaning of Section 2(11) of the Act. *Anamag*, 284 NLRB 621, 623 (1987). See also *Tree-Free Fiber Co.*, 327 NLRB 389, 391 (1999) (team leaders not supervisors where management “turn[ed] that applicant over to the team leaders...to find out whether or not they thought that they would make a good employee to work on their teams”).

*Children's Farm Home*, 324 NLRB 61 (1997); *Training School at Vineland*, 332 NLRB 1412, 1417 (2000); *North General Hospital*, 314 NLRB 14, 16 (1994).

## **2. Effectively Recommend Discipline and Rewards**

The Employer maintains that captains effectively recommend discipline and rewards.

### Discipline

Of the four classifications of captains in the petitioned for bargaining unit, the Employer provided examples only where the Incident Prevention Captains and the Administrative Captain in Training were involved in discipline. Any lack of evidence in the record is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 fn. 8 (1999). The Board has long recognized that purely conclusory evidence is not sufficient to establish supervisory status. *Community Educations Centers, Inc.*, 360 NLRB No. 17, slip op. at 11 (2014); *Volair Contractors*, 341 NLRB 673, 675 (2004).

In addition, where the alleged supervisor's role in the disciplinary process is reportorial, the Board has held this does not prove supervisory status. *Rest Haven Living Center, Inc.*, 322 NLRB 210 (1996) (LPNs whose involvement in the disciplinary process was to report problems to management not 2(11) supervisors); see also *Ken-Crest Services*, 335 NLRB 777 (2001) (program managers were not supervisors because their "limited role in the disciplinary process is nothing more than reportorial"); *Fleming Cos.*, 330 NLRB 277 fn. 1 (1999) (supervisory status not found where employee communicated discipline only pursuant to management's directive; employee's role as a "mere conduit" for management was insufficient evidence of independent judgment); *Ohio Masonic Home*, 295 NLRB 390 (1989) (disciplinary warnings were not issued by alleged supervisor until after they contacted their supervisor about the particular infraction); *Ferralloy West Co.*, 277 NLRB 1083, 1084 (1985) (employee who recorded employee

attendance and brought employee records to management for a decision on whether to reprimand for attendance violations was not a supervisor).

The Employer provided four examples where an Incident Prevention Captain (IP Captain) or Administrative Captain in Training (Admin Captain) was allegedly involved in an inspector's receipt of discipline. In the first incident, an inspector left early without reporting to another inspector and completing his end of shift report before leaving. The IP Captain reported this to the manager and the next day the inspector was given a verbal warning by the IP Captain and manager. The IP Captain's role in this incident was thus merely reportorial and did not involve the use of independent judgment.

In the second incident, an inspector failed to complete an assigned task in the allotted time and reported the failure to the IP and Admin Captains. They recorded the inspector's mistake in a log and gave the inspector a "memo of discussion." There is nothing in the record that explains the memo of discussion's significance and there is no record evidence that it could serve as a basis for future discipline. In the third incident relied on by the Employer, an inspector reported 95 minutes late. Upon arrival, the IP Captain and Admin Captain spoke to the inspector about the expectation that he report on time and recorded the incident in the log. In both of these instances, the record does not establish that the captains exercised any independent judgment or that their involvement in the discipline process was anything more than reportorial. In such circumstances, the mere recording of relatively minor transgressions and addressing the issues with employees informally, without more, is considered little more than a reporting function and is insufficient to establish supervisory status. See *Crittenton Hospital*, 328 NLRB 879, 880 (1999) (pointing out and correcting deficiencies in employees' work does not establish authority to discipline); *Passavant Health Center*, 284 NLRB 887, 889 (1987) ("merely issuing

verbal reprimands is too minor a disciplinary function to be statutory authority”); see also *Children's Farm Home*, 324 NLRB 61, 61 (1997); *Azusa Ranch Market*, 312 NLRB 811, 812, 813 (1996); *Ten Broeck Commons*, 320 NLRB 806, 812 (1996); *Northcrest Nursing Home*, 313 NLRB 491, 497-498 (1993); *Ohio Masonic Home*, 295 NLRB at 393-394 (1989).

In the final incident upon which the Employer relies, Kesselring Site Facilities Operations Manager Alex Feguer learned of a system failure and, after conferring with Human Resources, assigned the Admin Captain to investigate the matter. The Admin Captain discovered the inspector responsible for the failure and reported it to the manager. Feguer testified that, after consulting with Human Resources, he instructed the Admin Captain to issue a record of discussion to the employee. In its post-hearing brief, the Employer relies on the following language in the record of discussion: “I expect you to improve this behavior immediately. Please be aware that any future violation of BMPC’s Rules of Conduct could result in disciplinary action up to and including termination.” Feguer, who oversaw the investigation, however, testified that this language routinely appears in letters of this nature.

The Admin Captain’s role in this incident does not establish supervisory status. Rather, he conducted the investigation and issued the discipline only at the direction of management and the record reveals no basis to conclude that he used any independent judgment in doing so.

In its post-hearing brief, the Employer contends that “records of discussion,” are part of the progressive discipline process. As noted above, however, none of the incidents upon which the Employer relies, demonstrate that the captains exercised any independent judgment in issuing a record of discussion. Furthermore, it is not apparent that the Employer has a formal progressive discipline process. The record contains no evidence that there is a formal written policy of which employees are aware, and although the collective-bargaining agreement that

applies to the employees the captains allegedly supervise vaguely refers to the possibility that progressive discipline may be utilized, the agreement does not set forth a formal progressive discipline process. Feguer described a discipline policy that “typically starts off with verbal discussions” and indicated that a verbal discussion could be strictly verbal or end up in the “record of discussion.” According to Feguer, if the verbal discussion results in a “record of discussion” then a note is made in the employee’s personnel file. Feguer explained that if the behavior continues, “we’d issue warning notices, typically, up to three, with the third being a final warning notice, with the next warning notice being grounds for termination.” Thus, it is apparent that the Employer does not have an established formal progressive disciplinary policy in which the records of discussion play a pre-defined role.

Where an employer exercises discretion in utilizing forms of discipline, the Board has found that it did not have a progressive disciplinary system and that the alleged supervisors’ reports were not indicative of supervisory status. *Lucky Cab Company*, 360 NLRB No. 43, slip op. at 4 (2014); see also *Ken-Crest Services*, 335 NLRB 777, 778 (2001) (verbal warnings did not establish supervisory authority; there was “no formal policy concerning how many verbal warnings will warrant issuance of a written warning,” and thus “no automatic progression from a verbal warning to a written warning.”)

Based on the above, I conclude that the Employer has not established that the captains effectively recommend discipline within the meaning of Section 2(11) of the Act. *Lucky Cab Co.*, 360 NLRB No. 43 (February 20, 2014); *DirectTV*, 357 NLRB No. 149, slip op. at 3 (2011); see also *Ken-Crest Services*, 335 NLRB 777, 778 (2001).

## Reward

Manager of Operations and Maintenance at the Knoll's Laboratory Chris Obos, testified that captains possess supervisory authority because they can grant time off awards. This testimony was contradicted, however, by the Employer's other witnesses and the Petitioner's witnesses, who all testified that the captains cannot grant time off awards. Obos also testified that the captains could recommend operators or inspectors for "Spot Awards." While the basis for receipt of a "Spot Award" was not explained, the record clearly reveals that any employee can nominate any employee for a "Spot Award" and it is not merely a supervisory or managerial function. Furthermore, there is no evidence that the captains play any role in determining who receives a "Spot Award" or that they have ever actually nominated an employee for such an award.

Given the contradicted and incomplete evidence, I conclude that the Employer has not established that captains possess the authority to effectively recommend rewards. *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 fn. 8 (1999) (nurses found not to effectively recommend rewards which affect employees wages or job status); see also *Community Educations Centers, Inc.*, 360 NLRB No. 17, slip op. at 11 (2014); *Volair Contractors*, 341 NLRB 673, 675 (2004).

### **3. Assign Work**

The Employer asserts that captains assign work by directing the operators and inspectors to perform certain tasks throughout the day, by assigning overtime, and by designating employees to switch work locations.

In *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), the Board clarified the criteria for finding that an alleged supervisor "assigns" or "responsibly directs" the work of others, and uses

“independent judgment” in doing so. The Board held that the authority to assign refers to “the act of designating an employee to a place (such as a location, department, or wing), assigning an employee to a time (such as a shift or overtime period), or assigning significant overall duties as opposed to discrete tasks. *Id.* at 689. The authority to make an assignment, by itself, does not confer supervisory status. The alleged supervisor must also use independent judgment when making such assignments. *Id.* at 692-693.

In *Oakwood Healthcare, Inc.*, the Board found that a charge nurse exercised independent judgment when she made assignments based on her “analysis of an available nurse’s skill set and level of proficiency at performing certain tasks, and her application of that analysis in matching that nurse to the condition and needs of a particular patient.” *Id.* at 695. The supporting evidence must be sufficient to establish that nurses “make assignments that are both tailored to patient conditions and needs and particular [employees’] skill sets.” *Id.* Merely conclusory testimony that staffing needs are based on an assessment of “patient acuity” is insufficient to establish independent judgment. *Lynwood Manor*, 350 NLRB 489 (2007).

Finally, the Board has stated that in order to exercise independent judgment, the direction “must be independent [free from the control of others], it must involve a judgment [forming an opinion or evaluation by discerning and comparing data], and the judgment must involve a degree of discretion that rises above the ‘routine or clerical.’” *Oakwood Healthcare, Inc.*, 348 at 693.

I find that the Employer has not met its burden to demonstrate that captains assign operators and inspectors within the meaning of Section 2(11) of the Act.

### Daily Assignments

The Employer maintains that the ESS Captains and Administrative Captain / Fire Marshall assign the daily work of the operators and that the Incident Prevention Captains and Administrative Captain in Training assign the daily work of the inspectors.

At the Knolls site, the operators work eight hour shifts and the ESS Captains and Administrative Captain / Fire Marshall work 12 hour shifts. At the beginning of the first shift in the morning, first shift and third shift operators and captains meet and exchange information. Six to seven operators, two captains, the Operations Acting Manager, the Operations and Maintenance Manager and the Facilities Manager are on duty for the entire first shift. The number of operators drops to two for the second shift and the managers leave two hours after the second shift starts, but remain available by telephone. At 6:00 p.m., the second shift captain reports and staffing is reduced to one captain and usually two operators. Two new operators work the third shift.

At the Kesselring site, the Incident Prevention Captains, Administrative Captain in Training, and inspectors work one of three shifts. First shift is from 7:00 a.m. to 3:00 p.m. and has two captains and two managers working. The second (3:00 p.m. to 11:00 p.m.) and third shift (11:00 p.m. to 7:00 a.m.) each have one captain working and managers are available by telephone. At least two inspectors work each shift.

The evidence establishes that at both sites the operators or inspectors split up the known duties for the day, which include on-site inspections, looking at equipment, taking temperatures, and checking fire alarm panels and the heating and cooling systems throughout the facility. On the day shift, one of the operators or inspectors staffs the console and answers the telephone, takes emergency calls, monitors the environmental computer and answers fire alarms. The job

duties and responsibilities of captains are governed by a series of 80 guidelines and instructions (which are based on government regulations, historical practices and the collective-bargaining agreement). The guidelines and instructions contain precise instructions regarding, for example, emergency response requests, drills and training, confined space entry permits, and advanced life support intercept.<sup>3</sup> While the operators / inspectors are performing these duties, the captains are walking the facility performing their own inspection tours.

The Employer's witnesses asserted that the captains give operators their assignments each day. The witnesses failed however, to particularize their testimony by describing actual incidents where captains assigned operators / inspectors using independent judgment. See *Golden Crest Healthcare*, 348 NLRB 727, 731 (2006) ("purely conclusory evidence is not sufficient to establish supervisory status; instead, the Board requires evidence that the employee actually possesses the Section 2(11) authority at issue"); *Chevron Shipping Co.*, 317 NLRB 379, 381 fn. 6 (1995) (conclusory statements without supporting evidence do not establish supervisory authority). The record evidence establishes that the captain is responsible for making a rotation sheet that lists the rotation of duties such as the monthly inspection of fire extinguishers, daily multi gas meter inspections or fire alarm sprinkler system inspections. Captain Graves' uncontested testimony is that the captain utilizes no independent judgment or discretion in creating these assignments. The assignments are based on a historical rotation within the platoon and then each platoon rotates the duties quarterly. Graves testified that the rotation is so pre-ordained that an operator or inspector could determine months or years in

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<sup>3</sup> As discussed in greater detail below, the captains maintain the guidelines and instructions. However, the guidelines and instructions were created by the captains, operators and inspectors.

advance what his basic duties would be on any given day.<sup>4</sup> Based on this uncontested testimony and the record evidence, I find that captains do not exercise independent judgment in assigning work and that they assign daily work in a routine, clerical and perfunctory manner in accordance with detailed guidelines and instructions. See *Ten Broeck Commons*, 320 NLRB 806, 811 (1996) (assignments made on a monthly basis with routine rotation did not indicate the exercise of independent judgment); *Evangeline of Natchitoches, Inc.*, 323 NLRB 223 (1997) (rotation of tasks among employees is not independent judgment); *Washington Nursing Home*, 321 NLRB 366 fn. 4 (1996) (authority to make adjustments to the assignments and to take corrective action based on patient needs was routine); *Ohio Masonic Home*, 295 NLRB 390, 396 (1989) (balancing work assignments among staff members or using other equitable methods does not require the exercise of supervisory independent judgment).

The Employer contends that the captains' role in the "call back" system reflects the authority to assign work. If a serious incident occurs, such as a fire, and additional operators / inspectors are needed, the "callback system" is activated. The captain can activate the system himself, or if he is busy assisting with the incident, he will radio the security police or instruct an operator / inspector to initiate the call back system. An automated message stating, "return to the site for an emergency" goes out to all the operators or inspectors depending on the site. The employees then "call back" to the security police console operator. The security police update the captain as to the number of people who call back.<sup>5</sup> When the employees arrive, the captain or acting incident manager, which may be a bargaining unit member, directs the employees in

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<sup>4</sup> This testimony was corroborated by the Edward Pierce. Pierce is an independent radiological auditor at the Kesselring site but formerly held Chris Obos' position, Manager of Operations and Maintenance at the Knoll's site. Pierce has worked with the captains at both the Knoll's site and Kesselring site.

<sup>5</sup> It does not appear from the record that employees are ever told the incident is under control and there is no need to report.

accordance with established protocol. The recognition that an emergent situation requires additional personnel based on the captains' experience and expertise is not reflective of supervisory authority. In addition, the record contains no evidence that there is any consequence for employees who do not respond to a call back initiated by a captain. If captains cannot require employees to report when a call back is initiated, it is inappropriate to characterize their role in this process as the assignment of duties. *Entergy Mississippi, Inc.*, 357 NLRB No. 178, slip op. at 10 (2011) citing *Golden Crest Healthcare*, 348 NLRB 727, 729 (“the party seeking to establish supervisory authority must show that the alleged supervisor has the ability to require that a certain action be taken; supervisory authority is not established where the alleged supervisor has the authority merely to request that a certain action be taken”); see also *Oakwood Healthcare, Inc.*, 348 NLRB 686, 689 (2006); *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 311-312 (6th Cir. 2012).

Although the Employer asserts that the captains exercise supervisory authority by assigning work, it is noteworthy that the record reveals that non-supervisory bargaining unit employees occasionally designate employees to perform certain tasks in the same fashion. For example, if day shift operators or inspectors discover a broken pipe, they call the console operator, a unit employee. The console operator determines which operator / inspector can provide the fastest assistance and sends that person to assist. On the second and third shifts, operators, inspectors and captains essentially self-assign by determining who is most proximate to the emergent situation and responding accordingly.

In *Ten Broeck Commons*, 320 NLRB 806 (1996), the Board found that licensed practical nurses (LPN) who directed certified nursing assistants (CNAs) to attend to a patient's needs or to a job that was not properly done were not supervisors because their direction did not involve the

use of independent judgment, but rather was routine in nature because the CNAs performed the same care, in the same manner, for the same people. The Board stated that to some degree, the greater skill and experience of the LPN may be involved as the LPN may more quickly recognize a situation that needs immediate attention, but that the greater skill and experience did not raise the LPN to the level of supervisor. *Id.*; see also *Loyalhanna Health Care Associates*, 352 NLRB 863, slip op. at 2 (2008) (nurse managers who reassigned staff based on resident acuity did not exercise independent judgment where there was no evidence that they considered aides' skill sets and matched those skills to the condition and needs of particular patients). Similarly in *Masterform Tool Co.*, 327 NLRB 1071 (1999), where the alleged supervisors made assignments based on staffing needs and production requirements and provided direction and guidance based on their greater skill and experience, the Board held there was no showing that any assignment and direction of work involved any exercise of independent judgment.

Similarly herein, the duties of operators and inspectors are determined pursuant to a set procedure, and any direction by the captains is the result of their experience and knowledge of the procedure. Thus, the assignment of duties by the captains to the operators or inspectors does not involve the exercise of independent judgment and thus does not implicate the authority to assign. *St. Petersburg Limousine Service*, 223 NLRB 209, 210 (1976); see also *Oakwood Healthcare*, 348 NLRB 686, 693 (2006) (action not independent “if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.”).

#### Assign Overtime

The Employer argues that captains are Section 2(11) supervisors because they assign overtime. The record shows, however, that overtime is filled in accordance with the collective-

bargaining agreement which provides that overtime is granted to the individual with the highest seniority and lowest hours.<sup>6</sup> Employees' overtime hours and level of seniority are tracked on an Excel spreadsheet that is maintained by the captains. The determination that overtime is needed is made in one of two ways – either pursuant to a set procedure during an emergency or in consultation with management for an upcoming project. While the Employer asserts in its post-hearing brief that captains are tasked with using good judgment to balance “the needs of 365/24/7 operation” by fairly distributing overtime and minimizing its use, the Employer failed to support this conclusory statement with specific examples where the captains exhibited any independent judgment. See *Golden Crest Healthcare*, 348 NLRB 727, 731 (“purely conclusory evidence is not sufficient to establish supervisory status; instead, the Board requires evidence that the employee actually possesses the Section 2(11) authority at issue”); *Chevron Shipping Co.*, 317 NLRB 379, 381 fn. 6 (1995) (conclusory statements without supporting evidence do not establish supervisory authority). Thus, the evidence fails to establish that the assignment of overtime requires the captains to use independent judgment.

Additionally, the record evidence reveals that captains cannot mandate that employees work overtime. The Board has held that to establish that the authority to assign overtime is supervisory, the evidence must also show that the alleged supervisors can require employees to work the overtime assigned to them. *Entergy Mississippi, Inc.*, 357 NLRB No. 178, slip op. at 10 (2011) citing *Golden Crest Healthcare*, 348 NLRB 727, 729 (2006) (“the party seeking to establish supervisory authority must show that the alleged supervisor has the ability to require

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<sup>6</sup> In its post-hearing brief, the Employer states that overtime is determined in accordance with the collective-bargaining agreement and “Captain Riley’s Instructions.” As stated above, the captains maintain the guidelines and instructions; however, the guidelines and instructions were created through a joint effort by the captains, operators and inspectors.

that a certain action be taken; supervisory authority is not established where the alleged supervisor has the authority merely to request that a certain action be taken”).

Based on the record, I find that captains’ assignment of overtime is routine, clerical and perfunctory in nature and is insufficient to establish supervisory status. See *S.D.I. Operating Partners, L.P.*, 321 NLRB 111 (1996) (Board found that leadman was not a supervisor under the Act even though he was involved in the decision making process regarding staffing needs and assigned work based in part on his past observations concerning the employees’ qualifications); See, e.g., *Jordan Marsh Stores*, 317 NLRB 460, 467 (1995); *North Shores Weeklies*, 317 NLRB 1128 (1995); *Brown & Root, Inc.*, 314 NLRB 19, 21-22 (1994); *Hydro Conduit Corp.*, 254 NLRB 433 (1981).

#### Designate Location

In its post-hearing brief, the Employer asserts that because the captains have sent Knolls ESS crews to Kesselring to support emergent issues, fire responses and environmental issues, and in some instances on-going operations, they have designated employees to a place such as a location, department or wing. *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006). At the hearing, Kesselring Site Facilities Operations Manager Feguer testified that on one occasion, during an emergency situation in July 2013 when problems arose in a storm water ditch system, “we called for support from Knolls site.” Feguer explained that Captain Harris made the call but it appears from the record testimony that Harris was acting in conjunction with Manager Feguer. Feguer was unable to state with particularity who Harris talked to at the Knolls site or what steps were taken at the Knolls site to provide support to the Kesselring site. See *Chevron Shipping Co.*, 317 NLRB 379, 381 fn. 6 (1995) (conclusory statements without supporting evidence do not establish supervisory authority).

Even assuming that Captain Harris spoke to a Knolls Captain and coordinated support for the Kesselring site, I do not find this supports a finding that the captains assign employees. The Board has held that where the transfer, or as the Employer characterizes it – assignment, is temporary in nature, its duration being only the time needed to assist during the emergency or absence, the transfer of employees is insufficient to confer supervisory status. *Greenpark Care Center*, 231 NLRB 753 (1977); see also *Loparex LLC*, 353 NLRB 1224 (2009); *PPG Aerospace Industries*, 353 NLRB 223 (2008) (authority is not supervisory where the putative supervisor serves as a conduit relaying assignments from management); *Croft Metals, Inc.*, 348 NLRB 717, 718 (2006) (leadperson a nonsupervisor where, inter alia, the lead person's supervisor is the one who decides whether it is necessary to temporarily transfer an employee to the crew from another part of the plant); *Children's Farm Home*, 324 NLRB 61, 67 (1997) (Board affirms finding of no supervisory status where purported supervisors can arrange temporary transfers of employees, but have no authority to permanently transfer employees). Additionally, the Employer only provided this single example where captains allegedly designated operators / inspectors to a location. It is well-established that the sporadic exercise of supervisory authority does not confer supervisory status. *Greenspan, D.D.S., P.C.*, 318 NLRB 70 (1995), enfd. mem. 101 F.3d 107 (2d Cir. 1996), cert. denied 519 U.S. 817 (1996) (isolated exercise of authority is insufficient to establish supervisory status); see also *Shaw Inc.*, 350 NLRB 354 (2007) (isolated incidents of discipline insufficient to render foremen statutory supervisors); *Volair Contractors*, 341 NLRB 673, 675 (2004) (sporadic and infrequent authority insufficient to establish supervisory status).

#### 4. **Responsibly Direct Work**

The Board has held that for the direction of others to be “responsible,” the person performing the oversight must be held accountable for the actions of others. “Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct work and the authority to take corrective action, if necessary....and a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.” *Oakwood Healthcare, Inc.* 348 NLRB 686, 692 (2006); see also *Croft Metals, Inc.*, 348 NLRB 717 (2006).

The Employer submitted the 2013 performance appraisals of all the captains and elicited testimony from Manager of Operations and Maintenance at the Knoll’s Laboratory Chris Obos that suggested an ESS Captain had received a lower rating on his appraisal because he did not properly supervise the training of a new operator by a senior operator. A reading of the ESS Captain’s appraisal, however, fails to support this assertion. Rather, the appraisal shows that the Employer relied upon the ESS Captain’s logs in handling a situation that arose with two operators, and the ESS Captain was not held accountable for the operators’ mistake. Furthermore, while the evidence shows that there were at least three occasions where an operator’s or inspector’s negligence could have led to safety issues, harm to the facility, or additional work, there were no comments in the other captains’ appraisals that showed they were held accountable for these or other mistakes of the operators or inspectors who allegedly report to them. The performance appraisals reveal that the captains all received the same overall rating of “Successful Contributor.” While the performance appraisals contain positive feedback to the captains for certain actions undertaken with their crews, they reveal no evidence that the

Employer even mentioned any of the captains' deficiencies with respect to the job performance of inspectors/operators, much less the prospect of adverse consequences.

Accordingly, I find that captains do not possess the authority to responsibly direct the work of operators or inspectors within the meaning of Section 2(11) of the Act. See *Croft Metals, Inc.*, 348 NLRB 717 (2006).

## 5. Secondary Indicia<sup>7</sup>

Captains' job descriptions designate them as supervisors for the operators or inspectors, and the job descriptions for the operators or inspectors lists their captains as their direct report. However, job descriptions, without more, do not establish actual supervisory authority. *Training School at Vineland*, 332 NLRB 1412, 1416 (2000) ("Job descriptions or other documents suggesting the presence of supervisory authority are not given controlling weight. The Board insists on evidence supporting a finding of actual as opposed to mere paper authority.")

The captains are paid at the same level as supervisors in other departments and receive a base salary. However, the captains are paid overtime and are non-exempt employees, unlike the supervisors in other departments. The record also demonstrates that while operators / inspectors punch a time clock, captains log their total hours worked each day.<sup>8</sup> *K.G. Knitting Mills*, 320 NLRB 374 (1995) (fact that some employees who perform unit work receive a salary, do not punch a time clock, and receive different health insurance benefits from other unit employees are not reasons to exclude them from a unit of production employees). In its post-hearing brief, the Employer notes that the captains do not receive the same benefits as the employees they

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<sup>7</sup> While secondary indicia can be a factor in establishing statutory supervisory status, it is well established that where, as here, putative supervisors are not shown to possess any of the primary supervisory indicia, secondary indicia alone are insufficient to establish supervisory status. *Golden Crest Healthcare*, 348 NLRB 727 at 730 n. 10 (2006); *Ken-Crest Services*, 335 NLRB 777, 779 (2001).

<sup>8</sup> Managers do not log their hours and exempt supervisors, who do not receive overtime, do not seem to log their hours either although this was unclear in the record.

allegedly supervise. What the Employer failed to note, however, is that the captains receive the same benefits as all non-union employees, regardless of supervisory status.

The Employer provided evidence that captains attend the morning management meeting; however, operators and inspectors also attend these meetings.

The Employer also relies on the captains' involvement in editing the payroll system. Because the system cannot capture the various levels of pay for the operators / inspectors, the captains are responsible for ensuring that employees' overtime and premium pay have been correctly recorded in the system. Once the captains have completed this task, the payroll records are sent to management for approval. The captains do not have the authority to approve payroll. The Board has held that this type of reportorial authority does not establish supervisory status. Based on the record, I find that the captains' handling of payroll is routine, clerical and perfunctory. See *Screen Guard*, 311 NLRB 109 (1993); *Waterbed World*, 286 NLRB 425 (1987).

The Employer also provided evidence that operators and inspectors submit requests for time off to the captains. The record evidence failed to reveal any instances however, where a captain denied a time off request or exercised independent judgment in granting a request. Rather, the captain merely completes the necessary paperwork to facilitate the time off. Given the routine nature of this task and the absence of evidence that the captains exercise any independent judgment in granting time off, their "approval" of time off requests does not establish supervisory status. See *Screen Guard*, 311 NLRB 109, 110 (1993); see also *Loyalhanna Health Care Associates*, 342 NLRB 863, slip op. at 3 (2008) (nurse managers authority to release subordinates early in cases of illness or family emergency did not demonstrate that nurse managers exercised independent judgment); *Shaw, Inc.*, 350 NLRB 354,

357 (2007) (finding authority to allow employees to leave work shortly before the end of their workday insufficient to show independent judgment).

Based on the above, I find that the Employer has not met its burden of showing that the captains are supervisors within the meaning of Section 2(11) of the Act.

## **II. Managerial Status**

At the hearing, the Employer took the position that the captains were managers. The Employer however, failed to address this issue in its post-hearing brief. In *NLRB v. Yeshiva University*, 444 U.S. 672, 682-683 (1980), Supreme Court described managerial employees as those who “‘formulate and effectuate management policies by expressing and making operative the decisions of their employer.’ These employees are ‘much higher in the managerial structure’ than those explicitly mentioned by Congress, which ‘regarded [them] as so clearly outside the Act that no specific exclusionary provision was thought necessary.’ Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management. Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy.”

The Employer elicited insufficient evidence to establish the managerial status of the captains. There is no evidence that captains are involved in policymaking, management meetings, labor relations, the Employer’s finances or credit, or determinations regarding production or scheduling. While the Employer contends that the captains are responsible for creating the instructions that dictate how each situation in the facility should be addressed, the record evidence demonstrates that these instructions were created by the captains in conjunction

with the operators / inspectors. The captains update the instructions to conform to government regulations. The Employer also points to the captains' involvement in training as evidence of managerial responsibility. The record evidence shows that each captain and a large percentage of the operators and inspectors are responsible for training modules that must be completed by a new operator or inspector and routinely provided to employees. Accordingly, I find that the captains are not managers.

### **III. Appropriate Bargaining Unit**

When deciding whether a group of employees shares a community of interest, the Board considers whether the employees sought are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

*Casino Aztar*, 349 NLRB 603 (2007); *United Operations, Inc.*, 338 NLRB 123 (2002).

Particularly important in considering whether the unit sought is appropriate are the organization of the plant and the utilization of skills. *Gustave Fisher, Inc.*, 256 NLRB 1069, fn. 5 (1981).

With regard to organization of the plant, the Board has made clear that it will not approve of fractured units — that is, combinations of employees that are too narrow in scope or that have no rational basis. *Seaboard Marine*, 327 NLRB 556 (1999). However, all relevant factors must be weighed in determining community of interest.

The Employer provided no evidence to support its position that the Administrative Captain / Fire Marshall position should be excluded from the bargaining unit and made no arguments in its post-hearing brief. According to the testimony of Captain Veltman and the

Acting Operation Manager in Operations and Maintenance at the Knoll's site, forty to sixty percent of the Fire Marshall duties directly overlap with the ESS Captain duties. In addition to his ESS Captain's duties, the Fire Marshall is also responsible for assisting in the coordination of the Employer's fire drill program at the Knoll's site and running trainings. The Fire Marshall works in the same department, has the same job title and pay of captains, has the same skills and training, reports to the same managers and is functionally integrated with the other employees. When the Fire Marshall works overtime, he is working as an ESS Captain.

Therefore, I find that the position of Administrative Captain/Fire Marshall is properly included in the unit.

### **CONCLUSIONS AND FINDINGS**

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

1. The hearing officer's rulings are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The Petitioner is a labor organization with the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.
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. 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 Captains Incident Prevention, Captains Emergency Support and Services, Administrative Captains in Training, Administrative Captains / Fire Marshalls employed by the Employer at its 2401 River Road, Schenectady, New York and 350 Atomic Project Road, Ballston Spa, New York locations; excluding all guards, and professional employees and supervisors as defined in the Act.

There are approximately 11 employees in the bargaining unit found appropriate herein.

### **DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **Local I 91 Knolls Atomic Power Laboratory Professional Firefighters Association, IAFF**. The date, time and place of the election will be specified in the Notice of Election which will issue shortly.

#### **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). The 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.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **August 1, 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 to the Regional Office by electronic filing through the Agency's website [www.nlr.gov](http://www.nlr.gov),<sup>9</sup> by mail, by hand or courier delivery, or by

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<sup>9</sup> To file the eligibility list electronically, go to [www.nlr.gov](http://www.nlr.gov) and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Regional, Subregional and Resident Offices** and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the eligibility list, and click the Submit Form button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's web site, [www.nlr.gov](http://www.nlr.gov).

facsimile transmission at (716) 551-4972. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **four** copies of the list, unless the list is submitted by facsimile or e-mail, in which case only one copy need be submitted. If you have any questions, please contact the Regional Office.

### **C. Notice 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 at least three 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 stops employers from filing objections based on non-posting of the election notice.

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14<sup>th</sup> Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington, DC by 5 p.m. EDT **August 8, 2014**. The request

may be filed electronically through the Agency's web site, [www.nlr.gov](http://www.nlr.gov),<sup>10</sup> but may not be filed by facsimile.

**DATED** at Buffalo, New York this 25th day of July, 2014.

/s/Paul J. Murphy  
**Paul J. Murphy**, Acting Regional Director  
National Labor Relations Board - Region 3  
Niagara Center Building – Suite 630  
130 S. Elmwood Avenue  
Buffalo, New York 14202

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<sup>10</sup> To file the request for review electronically, go to [www.nlr.gov](http://www.nlr.gov) and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Board/Office of the Executive Secretary** and click on the “File Documents” button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the “Accept” button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the Submit Form button. Guidance for E-Filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under “E-Gov” on the Board's web site, [www.nlr.gov](http://www.nlr.gov).