

**68 FLRA No. 71**

UNITED STATES  
DEPARTMENT OF THE NAVY  
NAVY UNDERSEA WARFARE CENTER  
KEYPORT, WASHINGTON  
(Agency)

and

INTERNATIONAL ASSOCIATION  
OF MACHINISTS  
AND AEROSPACE WORKERS  
LOCAL LODGE 282  
AFL-CIO  
(Petitioner/Exclusive Representative)

SF-RP-14-0008

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ORDER DENYING  
APPLICATION FOR REVIEW

March 27, 2015

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Before the Authority: Carol Waller Pope, Chairman, and  
Ernest DuBester and Patrick Pizzella, Members

**I. Statement of the Case**

The Petitioner (Union) filed an application for review (application) of the attached decision of Federal Labor Relations Authority Regional Director Jean M. Perata (RD). The Union petitioned the RD to clarify the bargaining-unit status of about 100 employees occupying several positions in an approximately 280-employee professional unit at the Agency. After the parties stipulated to exclude a majority of the employees, the RD considered the remaining sixteen disputed employees occupying nine positions. She clarified the bargaining unit to exclude fifteen employees occupying eight of the nine positions. The Union challenges the RD's rulings concerning ten of the fifteen employees.

As relevant here, the RD concluded that nine employees occupying four of the positions are supervisors under § 7112(b)(1) of the Federal Service Labor-Management Relations Statute (the Statute)<sup>1</sup> and an employee occupying another position is a confidential employee under § 7112(b)(2) of the Statute.<sup>2</sup> There are two questions before us.

The first question is whether the RD failed to apply established law in finding that one disputed employee is a confidential employee and the remaining disputed employees are supervisors. Because the RD's conclusions are consistent with Authority precedent, the answer is no.

The second question is whether the RD committed clear and prejudicial errors concerning substantial factual matters in finding that one disputed employee is a confidential employee and the remaining disputed employees are supervisors. Because the Union does not directly challenge any of the RD's factual findings as unsupported by the record, and the Union's challenge to the weight that the RD attributed to certain evidence does not provide a basis for finding that the RD committed clear and prejudicial errors in her factual findings, the answer is no.

**II. Background and RD's Decision**

The Agency is one of fifteen research, development, test, and evaluation laboratories within the U.S. Department of the Navy. As relevant here, the Union petitioned the RD to clarify the bargaining-unit status of sixteen employees occupying nine positions: one contracting-officer-representative position, six engineer positions, and two strategic-planner positions.

The RD clarified the bargaining unit to include employees occupying the contracting-officer-representative position, and to exclude employees occupying two engineer positions and one strategic-planner position variously as supervisors, management officials, or as employees engaged in personnel work in other than a purely clerical capacity. Because the Union does not except to the RD's determinations as to these positions, we do not discuss them further.

Regarding the nine employees occupying the remaining four engineer positions (the engineers) – specifically, (1) four lead engineers, (2) two advanced-skills-management-system lead engineers (ASM lead engineers), (3) one advanced-skills-management-system-test lead engineer (ASM-test lead engineer), and (4) two lead-systems engineers – the RD analyzed whether the engineers should be excluded from the bargaining unit because they are supervisors under § 7112(b)(1). She also analyzed whether one employee occupying the remaining strategic-planner position should be excluded as a confidential employee under § 7112(b)(2).

Analyzing the § 7112(b)(1) exclusion as it relates to the engineers, the RD identified the pertinent

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<sup>1</sup> 5 U.S.C. § 7112(b)(1).

<sup>2</sup> *Id.* § 7112(b)(2).

legal framework. As the RD analyzed the case, “an employee will be found to be a supervisor if the employee consistently exercises independent judgment with regard to the supervisory indicia set forth in”<sup>3</sup> § 7103(a)(10) of the Statute.<sup>4</sup> The RD noted that the supervisory indicia include directing and assigning work, and that an employee needs to consistently exercise independent judgment with regard to any *one* of the supervisory indicia.<sup>5</sup> She also relied on Authority case law finding that team or project leads were excluded as supervisors where they “exercised independent judgment either in selecting the employees who would participate on a team or [assigning work] based on [employees’] experience[,] skill level,”<sup>6</sup> or “capabilities and competency.”<sup>7</sup>

Applying this framework, the RD determined that the engineers are supervisors under § 7103(a)(10) because they consistently exercise independent judgment in directing and assigning work. Specifically, the RD found that the lead engineers provide input on selecting employees for projects, assign tasks, and schedule and prioritize employees’ work based on who they “think[] is best suited” to perform the task.<sup>8</sup> Regarding the ASM lead engineers, the RD concluded that they assign and prioritize work based on employees’ “skills and abilities,”<sup>9</sup> and “based on the level of the work and the expertise of the employees.”<sup>10</sup> The RD also determined that the ASM-test lead engineer assigns and prioritizes work based on employees’ performance and “his personal knowledge of [employees’] experience and strengths.”<sup>11</sup> As to the lead-systems engineers, the RD found that they assign work based on their “assessment of [employees’] expertise and skills” and “prioritize work based on the team’s schedule and workload.”<sup>12</sup>

Considering the § 7112(b)(2) exclusion as it relates to the strategic planner, the RD applied the Authority’s test for establishing that an employee is a confidential employee. The Authority will find that an employee is a confidential employee where: “(1) there is evidence of a confidential working relationship between

an employee and the employee’s supervisor; and (2) the supervisor is significantly involved in labor-management relations.”<sup>13</sup> The RD also relied on Authority precedent holding that an employee is a confidential employee when, “in the normal performance of their duties[,] they obtain advance information regarding management’s position with regard to contract negotiations, the disposition of grievances, or other labor[-]management [-]relations matters; or if they have access to and prepare materials related to labor relations.”<sup>14</sup>

Applying this framework, the RD concluded that the strategic planner is a confidential employee. Specifically, she found that the strategic planner obtains advance information, has access to, and prepares materials related to labor-management-relations matters. The RD noted, for example, that this employee assists management in developing positions and strategies for negotiating with the Union over employee-workspace moves. And she also determined that the strategic planner represents management in, and prepares materials for, discussions with the Union concerning these workspace moves.

Accordingly, the RD clarified the bargaining unit to exclude the engineers and the strategic planner.

The Union filed an application for review of the RD’s decision. The Agency filed an opposition to the Union’s application.

### III. Preliminary Matter: Sections 2422.31(b) and 2429.5 of the Authority’s Regulations bar one of the Union’s arguments.

In its application, the Union argues that the RD “failed to account for the professional identifiable community of interest represented by the [Union’s] professional bargaining unit, as is required by [§] 7112(b)(1).”<sup>15</sup> Specifically, the Union asserts that the community of interest shared by the bargaining unit includes employees who inherently “assign work[] as professionals, but perform no other supervisory functions.”<sup>16</sup> The Union also cites Authority decisions relied on by the RD<sup>17</sup> to argue that “[t]he community of

<sup>3</sup> RD’s Decision at 7 (internal quotation marks omitted) (citing *Nat’l Mediation Bd.*, 56 FLRA 1, 7-8 (2000) (*NMB*) (citations omitted)).

<sup>4</sup> 5 U.S.C. § 7103(a)(10).

<sup>5</sup> RD’s Decision at 7 (citing *NMB*, 56 FLRA at 8); *see also id.* at 10, 12, 14, 16.

<sup>6</sup> *Id.* (citing *SSA*, 60 FLRA 590, 592 (2005)).

<sup>7</sup> *Id.* (citing *U.S. Dep’t of the Army, Army Aviation Sys. Command & Army Troop Support Command, St. Louis, Mo.*, 36 FLRA 587, 593-96 (1990) (*Army*)).

<sup>8</sup> *Id.*; *see id.* at 6.

<sup>9</sup> *Id.* at 10.

<sup>10</sup> *Id.* at 12.

<sup>11</sup> *Id.* at 13; *see id.* at 14.

<sup>12</sup> *Id.* at 15.

<sup>13</sup> *Id.* at 24 (citing *U.S. Dep’t of Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Ariz.*, 37 FLRA 239, 244 (1990) (*Yuma*)).

<sup>14</sup> *Id.* (citing *U.S. DOL, Office of the Solicitor, Arlington Field Office*, 37 FLRA 1371, 1376-77 (1990) (*DOL*)).

<sup>15</sup> Application at 2 (internal quotation marks omitted).

<sup>16</sup> *Id.* at 4 (internal quotation marks omitted); *see also id.* at 7.

<sup>17</sup> *Id.* (citing *Army*, 36 FLRA 587; *U.S. Army Materiel Dev. & Readiness Command, Automated Logistics Mgmt. Sys. Activity, St. Louis, Mo.*, 16 FLRA 248 (1984); *Dep’t of the Navy, Naval Undersea Warfare Eng’g Station, Keyport, Wash.*, 7 FLRA 526 (1981); *U.S. DOJ, BOP, U.S. Penitentiary, Lewisburg, Pa.*, 7 FLRA 126 (1981)).

interest represented by the [Union's p]rofessional bargaining unit is substantially different than the units examined in th[ose] cases."<sup>18</sup> However, we note that demonstrating that employees in a unit "share a clear and identifiable community of interest" is a criterion in the legal standard under § 7112(a) of the Statute for establishing that a unit is appropriate for exclusive recognition;<sup>19</sup> it is not a criterion in the legal standard under § 7112(b)(1). But, to the extent that the Union is arguing that the disputed positions should not be excluded under § 7112(b)(1), because the "community of interest" shared by the unit includes the supervisory function of "assign[ing] work," the Authority's Regulations bar the Union's argument.<sup>20</sup>

Section 2422.31(b) of the Authority's Regulations precludes "[a]n application [for review from] rais[ing] any issue or rely[ing] on any facts not timely presented to the [h]earing [o]fficer or [the RD]."<sup>21</sup> Section 2429.5 of the Regulations likewise prevents a party from raising any "evidence, factual assertions, [or] arguments . . . that could have been, but were not, presented in the proceedings before the [RD or the h]earing [o]fficer."<sup>22</sup>

The record does not indicate that the Union argued, before the RD, that the disputed positions should not be excluded under § 7112(b)(1) because the "community of interest" shared by the unit includes the supervisory function of "assign[ing] work."<sup>23</sup> Because the Union could have raised this argument before the RD, but failed to do so, §§ 2422.31(b) and 2429.5 of the Authority's Regulations preclude it from doing so now.<sup>24</sup> Accordingly, we do not consider this argument.

#### IV. Analysis and Conclusions

The Union argues that the RD erred in concluding that the engineers are supervisors under § 7112(b)(1), and that the strategic planner is a confidential employee under § 7112(b)(2).<sup>25</sup> As discussed below, to the extent that the Union argues that the RD failed to apply established law<sup>26</sup> and committed clear and prejudicial errors concerning substantial factual

matters<sup>27</sup> in reaching these conclusions, the Union does not support either basis for its challenge to the RD's findings.

A. The RD did not fail to apply established law.

The Union contends that the RD failed to apply established law because the evidence demonstrates that: (1) the engineers' supervisory functions do not require the consistent exercise of independent judgment under § 7112(b)(1);<sup>28</sup> and (2) the strategic planner is not significantly involved with labor-management-relations matters under § 7112(b)(2).<sup>29</sup>

The RD did not fail to apply established law when she determined that the engineers are supervisors, and that the strategic planner is a confidential employee. Looking to pertinent Authority precedent regarding supervisors under § 7112(b)(1),<sup>30</sup> the RD found that the engineers consistently exercise independent judgment in assigning and prioritizing employees' work. The RD further found that, in making these determinations, the engineers consider either who they "think[] is best suited"<sup>31</sup> to perform the task, the "level of the work,"<sup>32</sup> "the team's schedule and workload,"<sup>33</sup> or employees' skills, abilities, expertise, experience, or strengths.<sup>34</sup>

The RD's determinations are likewise aligned with Authority precedent regarding confidential employees under § 7112(b)(2). Applying Authority precedent,<sup>35</sup> the RD found that the strategic planner is a confidential employee because he obtains advance information, and has access to and prepares materials related to labor-management-relations matters.<sup>36</sup> Also consistent with Authority precedent, the RD found that the employee represented management in discussions related to labor-management-relations matters.<sup>37</sup>

The legal framework applied and the issues resolved by the RD in reaching these conclusions accurately reflect Authority precedent. Regarding supervisors, the Authority has held that an employee is a

<sup>18</sup> *Id.*

<sup>19</sup> *U.S. Dep't of the Army, Army Corps of Eng'rs, Directorate of Contracting, Sw. Div., Fort Worth Dist., Fort Worth, Tex.*, 67 FLRA 211, 214 (2014).

<sup>20</sup> Application at 4; *see also id.* at 2.

<sup>21</sup> 5 C.F.R. § 2422.31(b).

<sup>22</sup> *Id.* § 2429.5.

<sup>23</sup> Application at 4; *see also id.* at 2.

<sup>24</sup> *USDA, Nat'l Fin. Ctr., New Orleans, La.*, 68 FLRA 206, 208 (2015) (citing *SSA, Office of Disability Adjudication & Review, Nat'l Hearing Ctr., Chi., Ill.*, 67 FLRA 299, 301 (2014)).

<sup>25</sup> Application at 2.

<sup>26</sup> 5 C.F.R. § 2422.31(c)(3)(i).

<sup>27</sup> *Id.* § 2422.31(c)(3)(iii).

<sup>28</sup> Application at 2-3, 6-7, 9-24.

<sup>29</sup> *Id.* at 25-29.

<sup>30</sup> RD's Decision at 7 (citing *SSA*, 60 FLRA at 592; *NMB*, 56 FLRA at 8; *Army*, 36 FLRA at 593-96); *see also id.* at 10, 12, 14, 16.

<sup>31</sup> *Id.* at 7; *see id.* at 6.

<sup>32</sup> *Id.* at 12.

<sup>33</sup> *Id.* at 15.

<sup>34</sup> *Id.* at 10, 12, 13, 15.

<sup>35</sup> *Id.* at 24 (citing *DOL*, 37 FLRA at 1383; *Yuma*, 37 FLRA at 244).

<sup>36</sup> *Id.* at 25.

<sup>37</sup> *Id.*

supervisor when: (1) the employee has the authority to engage in any of the supervisory functions listed in § 7103(a)(10); and (2) the employee's exercise of such authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment.<sup>38</sup> The Authority has also concluded that employees who assign work to team members based on an evaluation of employees' experience, expertise, competence, workload, or skill level consistently exercise independent judgment and are supervisory employees under § 7103(a)(10).<sup>39</sup>

Regarding confidential employees, the Authority has held that an employee is not "confidential" unless: (1) there is evidence of a confidential working relationship between an employee and the employee's supervisor; and (2) the supervisor is significantly involved in labor-management relations.<sup>40</sup> The Authority has also found that employees are confidential when, in the normal performance of their duties, they may: (1) obtain advance information regarding management's position with regard to contract negotiations and the disposition of grievances and other labor-management-relations matters; (2) overhear discussions of labor-management-relations matters; and (3) have access to and prepare materials related to labor relations.<sup>41</sup>

The Union does not argue that the RD failed to apply the correct legal framework. In fact, the Union does not identify any recognized legal standard that the RD failed to apply in her discussion of the engineers' exercise of independent judgment or the strategic planner's confidential involvement in labor-management-relations matters – both set forth above. Thus, for these reasons, we find that the Union does not demonstrate that the RD incorrectly applied the legal standard.

We therefore reject the Union's contention that the RD failed to apply established law.<sup>42</sup>

B. The RD did not commit clear and prejudicial errors concerning substantial factual matters.

The Union contends that the RD committed clear and prejudicial errors concerning substantial factual matters because the evidence demonstrates that: (1) the engineers' supervisory functions do not require the consistent exercise of independent judgment under § 7112(b)(1);<sup>43</sup> and (2) the strategic planner is not significantly involved with labor-management-relations matters under § 7112(b)(2).<sup>44</sup>

We reject the Union's claims as unsupported. The RD made extensive factual findings supporting her determinations concerning the engineers' consistent exercise of independent judgment in performing supervisory functions,<sup>45</sup> and the strategic planner's involvement with labor-management-relations matters under § 7112(b)(2).<sup>46</sup>

Moreover, the record supports the RD's factual findings that the engineers consistently exercise independent judgment in directing and assigning work.<sup>47</sup> For example, the record discloses that the lead engineers assign work based on their independent evaluation of an employee's availability and expertise.<sup>48</sup> And the record provides comparable support for the RD's findings on this question concerning the ASM lead engineers,<sup>49</sup> the ASM-test lead engineer,<sup>50</sup> and the lead-systems engineers.<sup>51</sup>

Similarly, the RD's finding that the strategic planner has significant confidential involvement in labor-management-relations matters within the meaning of § 7112(b)(2) is supported by the record.<sup>52</sup> The record discloses, for example, that the strategic planner consults with management on decisions and prepares materials related to changes in working conditions prior to Union notification.<sup>53</sup> The record also discloses that he assists management in developing positions and strategies for negotiating with the Union over these changes.<sup>54</sup>

<sup>38</sup> 5 U.S.C. § 7103(a)(10); *see SSA*, 60 FLRA at 592; *U.S. Dep't of Energy, W. Area Power Admin., Lakewood, Colo.*, 60 FLRA 6, 8-9 (2004) (*Dep't of Energy*); *Army*, 36 FLRA at 592-96.

<sup>39</sup> *See SSA*, 60 FLRA at 592 (assigned work based on employees' experience or skill level); *Dep't of Energy*, 60 FLRA at 8-9 (assigned work based on experience and expertise, workload availability, and work priorities); *Army*, 36 FLRA at 593-96 (assigned work based on priority of assignments, competence or capability of team members, expertise and experience of team members, equity of workload distribution, and availability of team members).

<sup>40</sup> *Yuma*, 37 FLRA at 244; *U.S. Army Plant Representative Office, Mesa, Ariz.*, 35 FLRA 181, 186 (1990).

<sup>41</sup> *DOL*, 37 FLRA at 1383.

<sup>42</sup> *U.S. Dep't of VA, Charles George VA Med. Ctr., Asheville, N.C.*, 68 FLRA 28, 32 (2014) (holding that regional director did not fail to apply established law where union fails to identify

any recognized legal standard that his discussion of employees' exercise of independent judgment fails to meet).

<sup>43</sup> Application at 2-3, 6-7, 9-24.

<sup>44</sup> *Id.* at 25-29.

<sup>45</sup> RD's Decision at 6-7, 10, 12-15.

<sup>46</sup> *Id.* at 25.

<sup>47</sup> *Id.* at 6-7, 10, 12-15.

<sup>48</sup> Tr. at 409, 420-22; *see also id.* at 406-408, 414-15, 418.

<sup>49</sup> Tr. at 753-54, 757, 761, 763-64, 769-71, 776-77, 788-89.

<sup>50</sup> Tr. at 797, 805-7, 809-10, 821-22, 828.

<sup>51</sup> Tr. at 841-42, 856, 859.

<sup>52</sup> RD's Decision at 25.

<sup>53</sup> Tr. at 714, 719, 722, 726.

<sup>54</sup> *Id.* at 726-28.

The Union does not directly challenge any of the RD's factual findings as unsupported by the record. Instead, rearguing the case that it presented to the RD, the Union relies on assertedly contrary evidence to substantiate its claim that the RD erred. The Union claims, for example, that the ASM lead engineers do not base their decisions to direct and assign work on independent discretion.<sup>55</sup> Rather, the Union argues, they are "dictated more by the skill[] set that each employee bring[s] to a multidisciplinary team, [and] existing processes and policies."<sup>56</sup> As another example, the Union relies on evidence that the strategic planner did not act in a confidential capacity regarding labor-management-relations matters because, when participating in labor-management meetings, he "does not possess any unique skills or provide inputs to negotiations or negotiating strategies other than answering questions as a subject[-]matter expert."<sup>57</sup> But the Union's disagreement with the weight the RD attributed to certain evidence does not provide a basis for finding that the RD committed clear and prejudicial errors in making substantial factual findings.<sup>58</sup> For these reasons, we conclude that the Union has not demonstrated that the RD committed clear and prejudicial errors concerning substantial factual matters.

## V. Order

We deny the Union's application for review.

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<sup>55</sup> Application at 15-20.

<sup>56</sup> *Id.* at 19 (citing Tr. at 770, 783, 785, 788).

<sup>57</sup> *Id.* at 27 (citing Tr. at 583, 586-87, 719).

<sup>58</sup> *E.g., U.S. DOD, Pentagon Force Prot. Agency, Wash., D.C.*, 62 FLRA 164, 170-71 (2007) (disagreement over evidentiary weight not sufficient to find that RD committed clear and prejudicial error concerning substantial factual matter); *Nat'l Credit Union Admin.*, 59 FLRA 858, 862 (2004) (Chairman Cabaniss dissenting) (same).

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL LABOR RELATIONS AUTHORITY  
SAN FRANCISCO REGION

DEPARTMENT OF THE NAVY  
NAVAL UNDERSEA WARFARE CENTER  
KEYPORT, WASHINGTON  
(Activity)

and

INTERNATIONAL ASSOCIATION OF MACHINISTS  
AND AEROSPACE WORKERS, DISTRICT 160,  
LOCAL LODGE 282, AFL-CIO  
(Petitioner/Exclusive Representative)

SF-RP-14-0008

DECISION AND ORDER

**I. STATEMENT OF THE CASE**

On December 5, 2013, the Union filed the petition in this case seeking to clarify the bargaining unit status of certain professional employees of the Naval Undersea Warfare Center, Keyport, Washington (NUWC Keyport).<sup>1</sup> Based on a post-hearing stipulation and the Union’s post-hearing brief, there are sixteen employees whose positions still need to be clarified. The Activity claims these employees are excluded from the bargaining unit for various reasons, including assertions that they are supervisors within the meaning of § 7103(a)(10)<sup>2</sup> of the Statute; management officials within the meaning of § 7103(a)(11)<sup>3</sup> of the Statute; engaged in personnel work

<sup>1</sup> During the processing of the petition, including prior to, at, and after the hearing, the Union agreed with the Activity that certain employees should be excluded. Employees no longer at issue will not be addressed in this decision.

<sup>2</sup> Section 7103(a)(10) defines a supervisor “an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment,…”

<sup>3</sup> Section 7103(a)(11) defines a management official as “an individual employed by an agency in a position the duties and

in other than a clerical capacity pursuant to § 7112(b)(3); and/or confidential employees within the meaning of § 7103(a)(13).<sup>4</sup> The Union claims that all of the employees should be included in the unit.

Hearing Officers of the Authority held a hearing in this case from June 16-20, 2014. The record was left open pending the Activity gathering additional information on certain positions at issue. Those positions were resolved, the parties entered into a final stipulation, and the record was closed on October 8, 2014.<sup>5</sup> Both parties filed timely briefs that were considered.<sup>6</sup>

The record demonstrates that the contract officer representative is not a management official. However, the Code 42 systems engineers are management officials; one of the blackbelts is a confidential employee; the other blackbelt is engaged in personnel work in other than a clerical capacity; and the remaining employees are supervisors. Therefore I find that all of the positions are excluded from the unit except for the contracting officer representative position.

**II. BACKGROUND**

IAM/AW, District 160, Local Lodge 282 represents a unit of all professional general schedule employees of NUWC Keyport described as follows (Case No. SF-RP-90110, 12/17/99):

- Included: All professional General Schedule employees at the Naval Undersea Warfare Center, Keyport, Washington, working at the Keyport and Bangor sites.
- Excluded: All nonprofessional General Schedule and Wage Grade employees, management officials, supervisors, and employees described in

responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency[.]”

<sup>4</sup> Section 7103(a)(13) defines a confidential employee as “an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations[.]”

<sup>5</sup> The Hearing Officers’ rulings made at the hearing are free from prejudicial error and are affirmed.

<sup>6</sup> To the extent that the Activity’s brief cites to documents and asserted facts not in the record, that information was not considered.

5 U.S.C. § 7112(b)(2), (3), (4), (6) and (7).

NUWC Keyport is part of the Naval Undersea Warfare Centers, which are part of the Naval Sea Systems Command (NAVSEA). NUWC Keyport is one of fifteen Research, Development, Test, and Evaluation laboratories within the Department of the Navy. NUWC Keyport's mission is to provide advanced technical capabilities for test and evaluation, in-service engineering, maintenance and industrial base support, fleet material readiness, logistics support, and obsolescence management for undersea warfare.

NUWC Keyport is divided into codes. Code OO includes the command and command staff. Code 10 is the Operations Services Department, which provides all of the infrastructure-support types of functions that enable the command to perform their mission. Code 18 is the contracting department. Code 20, 30, and 40 are the technical departments. Code 20 is the System Acceptance and Operational Readiness Department. Code 20 basically provides the test and evaluation function, supporting the fleet on testing, training, and data analysis on various events. Code 30 is the Maintenance, Engineering and Industrial Operations Department. Code 30 is the industrial group that provides maintenance activities and repair activities, and custom engineering solutions related to lightweight and heavyweight torpedo systems. Code 40 is the In-Service Engineering Department and provides in-service engineering functions. Code 70 is the Corporate Resources Planning and Customer Advocacy Department.

Within each code there are divisions, and within each division there are branches, e.g. Division 41, Branch 414. Most of the employees at issue work within a specific branch, but some employees work directly for a division or department. The divisions and branches are commonly referred to as codes as well, e.g. Code 421.

Department, division and branch heads are referred to as resource managers. They own the resources, employees, equipment and facilities. Resource managers may also act as project leads, or that duty may be assigned to a subordinate. Many of the employees at issue are project leads, but none of them are resource managers. The project leads manage the tasking and go to the resource managers – across branches and divisions – to get the right personnel they need for a project. Project leads provide direct support to technical project managers by coordinating with department line managers and the organizations' personnel to identify resource requirements for development of project quotes and projects plans for execution. They develop project plans and coordinate approvals by technical project manager and applicable department line managers. Finally, they

distribute project funding received from technical projects managers to performing organizations in accordance with approved project plans.<sup>7</sup>

### III. POSITIONS AT ISSUE AND ANALYSES<sup>8</sup>

#### A. Contracting Officer Representative – Keith Groce

##### 1. Facts

Keith Groce is a contracting officer representative in Code 40.<sup>9</sup> Organizationally, Code 40 CORs are directly under the deputy department head. CORs are appointed by the contracting officers to provide technical and administrative oversight for contracts. They work directly with the specific contractors to make sure that the contractors are meeting the requirements of a contract. They also annually evaluate a contractor's performance. NAVSEA Instruction 4200.17E sets out the responsibilities and duties of a COR and controls how the work is performed. Groce also follows other guides and regulations, such as the COR Deskguide and federal contract regulations.

The contracts Groce works on are all with private industry. Prior to the awarding of contract, Groce provides advice into what types of services can be performed under a contract by analyzing the government's requirements. He provides guidance and expertise to the contracting officer. He then puts together a performance work statement that is incorporated into the contract. Once a contract is in place, Groce takes general topics that are in a statement of work and turns them into technical instructions that the contractors can execute, basically giving contractors specifics on how to comply with the contract. These instructions must be reviewed and approved by the contracting officer to make sure they fit within the general statement of work and Groce does not have signatory authority.

Groce also provides the synthesis among different groups at Keyport, such as the Acquisitions

<sup>7</sup> Some projects are so large that a task lead is assigned to execute particular tasks within a project or sub-project. Task leads are responsible for executing an assigned task and the duties are similar to the project lead within that task.

<sup>8</sup> All of the employees at issue are currently part of the Personal Demonstration Project and are in a different pay system from the general schedule employees. They are all coded as ND rather than general schedule. The Activity stipulated at hearing that if the FLRA found that the employees were not excluded from the Statute they would be removed from the Personal Demonstration Project and recoded as general schedule employees.

<sup>9</sup> His position of record is ND-0801-04 engineer.

Department and the different line codes. He provides them with advice on how to get work accomplished and whether something fits within an existing contract. He represents the contracting officer to the line code to resolve technical or contract issues.

In his seven years in this position, Groce has been on four Source Recommendation Evaluation Boards. SRBs may include department heads, division heads, project leads and a COR. The responsibility of the SRB is to evaluate contractor proposals and select an offer to provide services. The SRB recommends which offers to accept based on the technical proposals. Groce has even acted as the chairperson on the SRB. The chairperson collects the SRB's opinions and makes a report with a recommendation to the contracting officer. Groce testified that as the COR on the SRB, he provides technical expertise on software contracts. Since he has a software background he knows what is possible for a contractor to do easily versus what would be a stretch.

Groce also attends weekly staff meetings for the Code 40 management team. The meetings include the department head, the division heads and the direct staff of the deputy department head. There are discussions in these meetings about how the workload will be executed, what can and should be contracted out, and what the best available options are. During these discussions Groce provides recommendations as it relates to contracts and contracting out within his field of expertise.

In his capacity as a COR, Groce is on a distribution list to review certain Keyport directives. However, in his seven years as COR he has never provided any input on the directives.

## 2. Analysis

The Activity asserted at hearing and in the post-hearing stipulation that Keith Groce is a management official within the meaning of §7103(a)(11) of the Statute. Under Authority precedent, an employee is a management official if he or she: (1) creates, establishes or prescribes general principles, plans or courses of action for an agency; (2) decides upon or settles upon general principles, plans or courses of action for an agency; or (3) brings about or obtains a result as to the adoption of general principles, plans or courses of action for an agency.<sup>10</sup> The Authority has previously found that the term "management official" is reserved for a discrete category of employees whose responsibilities extend

beyond that of a professional or technical expert.<sup>11</sup> For example, the Authority found that a general engineer who oversaw and monitored in-house contract programs, and a procurement analyst who gave advice and recommendations on what types of contracts to use, were experts rendering resource information or recommendations and did not influence agency policy within the meaning of the Statute.<sup>12</sup> Similarly, the Authority found that insurance management specialists who acted as the agency's liaison to companies concerning the administration of agreements and contracts were not management officials.<sup>13</sup> The specialists had no authority to award a contract and only made recommendations about whether a contract should be awarded.<sup>14</sup> Also, although they prepared positions papers, policy options and alternatives with respect to insurance programs, any recommendation for a policy change had to be submitted through supervisory channels to management.<sup>15</sup>

Following this Authority precedent, I find that Keith Groce is a technical expert in the field of contracts and not a management official within the meaning of the Statute. Groce is governed by Navy instructions, local guides, and federal regulations in performing his duties and making recommendations. Groce provides guidance and expertise to both the contractors and Keyport representatives, but he has no authority to award contracts. The technical instructions that he writes for the contractors must be reviewed and approved by the contracting officer. Similarly, his role on Source Recommendation Evaluation Boards and in weekly staff meetings is to provide technical expertise and advice in the field of contracts.<sup>16</sup> The Activity is correct in its brief that Groce does exercise some independent judgment in providing advice and recommendations and writing technical instructions letters. However, his role is still that of a professional expert and comparable to others described above who the Authority found not to be

<sup>11</sup> See e.g., *Nat'l Credit Union Admin.*, 59 FLRA 858, 862 (2004)(NCUA); and *DOE, Headquarters, Wash., D.C.*, 40 FLRA 264, 270 (1991)(DOE).

<sup>12</sup> *United States Army Commc'ns Sys. Agency, Fort Monmouth, N.J.*, 4 FLRA 627, 630-633 (1980)(Fort Monmouth).

<sup>13</sup> *Dep't of Agric., Fed. Crop Ins. Corp., Washington Reg'l Office*, 46 FLRA 1457 (1993)(FCIC).

<sup>14</sup> *Id.* at 1459.

<sup>15</sup> *Id.* at 1459, 1465.

<sup>16</sup> See *DOE* at 269-270 (Authority found that attorneys who served on committees and panels acted as resource persons providing technical expertise rather than formulating or effectively influencing agency policy.)

<sup>10</sup> *Dep't of the Navy, Automatic Data Processing Selection Office*, 7 FLRA 172, 177 (1981)(Navy, ADP).



management officials.<sup>17</sup> Under the circumstances, Groce is not a management official within the meaning of §7103(a)(11) of the Statute and should be included in the bargaining unit.

**B. Lead Engineers – Martin Renken, Joel Galles, Eric Landis, and Quentin Vaira<sup>18</sup>**

1. Facts

Martin Renken is a lead engineer/scientist in Code 20.<sup>19</sup> Within Code 20, he works in the Test and Evaluation Information Systems Branch - Code 234 - which is primarily an information technology team engaged in software development and implementation. Renken spends approximately 40-55 % of his time acting as a project lead. He spends about 20% of his time performing administrative duties and the rest doing technical work. He also sometimes acts as a task lead on larger projects.

Renken acts a project lead on several projects at a time. In this role, he decides where to go forward on the project, both from a technological and programmatic perspective. He is responsible for planning and executing the project. As a project lead, Renken has input into which employees are chosen for the project. He asks for certain employees based on who he thinks are most suited for the tasks and he usually gets those employees for the project as long as they are available. Once work begins on a project, Renken assigns tasks to employees and schedules and prioritizes their work. Assignments are based on his judgment as to who is the best employee to perform a task. He also reviews the employees' work for technical accuracy. Although he provides some input to branch heads on the performance of employees on his projects, he has no involvement in the actual performance appraisal process or with employee bonuses. When he feels an employee is not working out, he does not request them on future projects.

<sup>17</sup> See *Fort Monmouth* and *FCIC*.

<sup>18</sup> The parties stipulated in writing and orally at the hearing that the testimony of Martin Renken is applicable to certain ND4 Lead Engineers in Codes 20, 30, and 40 and that the decision by the FLRA about the bargaining unit eligibility of Martin Renken would be applicable to Joel Galles, Eric Landis, and Quentin Vaira. The Union asserts in its post-hearing brief that it is hard to draw conclusions about Galles, Landis, and Vaira because they were not available for interviews. However, the employees were not called to testify because the parties stipulated at hearing that Renken's testimony was representative.

<sup>19</sup> His position of record is ND-0855-04 engineer.

Renken is also involved in other duties as a lead engineer apart from his project lead duties.<sup>20</sup> For example, he is often involved in interviewing potential employees for Code 23 and assesses their technological fit within the department and branch. He provides recommendations based on his assessment of the candidates and his recommendations are followed most of the time. Another duty involves evaluating employee work proposals and recommending whether the proposals should be funded.

2. Analysis

The Activity asserted at hearing and in the post-hearing stipulation that Martin Renken is a supervisor within the meaning of § 7103(a)(10) of the Statute.<sup>21</sup> The Authority has repeatedly held that "an employee will be found to be a supervisor if the employee consistently exercises independent judgment with regard to the supervisory indicia set forth" in that section.<sup>22</sup> In addition, an employee need exercise only one of the responsibilities set forth in § 7103(a)(10) in conjunction with independent judgment in order to be found a supervisor.<sup>23</sup> The supervisory indicia includes - among other responsibilities - hiring, directing and assigning work, and transferring and disciplining employees. The Authority has previously found that team leads/project leads are supervisors where they exercise independent judgment in assigning and directing work. For example, in one case the Authority found that program experts who served as projects leads were excluded as supervisors where they all exercised independent judgment either in selecting the employees who would participate on a team or determining which cases to assign to employees based on their experience or skill level.<sup>24</sup> Similarly, in another case the Authority found that various engineers who were team leads were supervisors where they assigned work based on their opinion of the capabilities and competency of the

<sup>20</sup> It is unclear whether these roles are performed by the other lead engineers. Since these duties are not relied upon in my ultimate finding, it is not necessary to resolve whether these duties are performed by the other employees.

<sup>21</sup> Although the Activity argued in its post-hearing brief that Renken was excluded as a management official, the Activity did not make this argument at hearing and the parties later stipulated that the issue was whether he was excluded as a supervisor. Thus, I am only addressing whether he is a supervisor within the meaning of the Statute.

<sup>22</sup> *Nat'l Mediation Bd.*, 56 FLRA 1, 7-8 (2000)(citing *Army and Air Force Exch. Serv., Base Exch., Fort Carson, Fort Carson, Colo.*, 3 FLRA 596, 599 (1980)).

<sup>23</sup> *Id.* at 8.

<sup>24</sup> *SSA*, 60 FLRA 590, 592 (2005).

employees, and reviewed the technical accuracy of completed work projects.<sup>25</sup>

In this case, Martin Renken's project lead duties include planning and executing several projects at a time. He requests specific employees for his projects based on who he thinks is best suited for the tasks and usually gets those employees as long as they are available. Once the employees are assigned to his team, he uses his judgment to assign their tasks and schedules and prioritizes their work. Thus Renken consistently exercises independent judgment in providing input into who is on his team and the assignment and direction of work. The Union's brief correctly notes that he does not consistently exercise independent judgment in other supervisory areas such as promotions, awards, discipline, or grievance handling. However, Renken only need exercise independent judgment in one area.<sup>26</sup> Further, whether the projects Renken leads are small or not does not alter the fact that he assigns and directs the work of other employees. Under the circumstances Renken is a supervisor within the meaning of the Statute and should be excluded from the unit on that basis.<sup>27</sup> Based on the parties' stipulation that Renken's testimony was applicable to other lead engineers, Joel Galles, Eric Landis, and Quentin Vaira are excluded for the same reason.

### C. ASM Lead Engineer - Daniel Lowney

#### 1. Facts

Daniel Lowney is a Code 40 systems engineer.<sup>28</sup> He works in Code 414, the Integrated Learning Systems Branch. He is a lead engineer for the Advanced Skills Management System, which is funded by PMA 205, a Naval Air Systems Command (NAVAIR) entity. ASM is a large system that manages the training, qualifications, certifications, and requirements for the Naval aviation community, as well as other customers. It manages tens of thousands of records, and the systems engineers that support that system perform a variety of functions such as design, development, testing, maintenance, and operation.

Lowney's duties involve engineering design and execution. As a lead engineer for ASM, Lowney oversees a team of two database administrators, a systems administrator, and two contractors. Lowney does have influence on the number of people on the team and can

make requests. However these requests are subject to funding restrictions and are not always granted. With respect to hiring, Lowney actually selected two of the employees on his team. The supervisor gave him a stack of resumes and he decided who to interview and conducted the interview with the supervisor present. Lowney then made hiring recommendations and those were accepted by the supervisor. As far as work assignments, Lowney uses independent judgment to assign and prioritize the work based on his knowledge of the employees' skills and abilities. Because work is performed in two week "sprints," Lowney meets with employees every other week and assigns the work that needs to be done for the following two weeks. He also monitors and reviews their work and reassigns work as necessary.

Lowney has provided performance feedback to the supervisors about the employees. However he is not directly involved in performance evaluations. He has made award recommendations to supervisors but is not responsible for deciding who gets an award. He has also recommended overtime for employees and that is usually granted. He has never been involved in grievances or disciplinary actions.

Lowney attends daily management meetings with the technical project manager and customer advocate, both of whom are supervisors. A PMA 205 representative is also present by phone. The meetings basically involve reporting to the program office about what is going on that day. Lowney also attends monthly meetings with the same group, as well as other managers, where they discuss strategies for moving forward.

As the lead engineer for ASM, he has role in programmatic policies related to planning and operation for ASM. He has worked with others to develop processes such as a work order system, but has not developed policies himself. He has also written sections of other documents. However, any policy he has input on goes through his programmatic chain of command to PMA 205. Since Lowney is the engineering authority on his system, he can basically implement programmatic processes to get the work accomplished.

#### 2. Analysis

The Activity asserted at hearing and in the post-hearing stipulation that Daniel Lowney is a supervisor within the meaning of § 7103(a)(10) of the Statute and/or a management official within the meaning of § 7103(a)(11) of the Statute.

<sup>25</sup> *Dep't of the Army, Army Aviations Sys. Command and Army Troop Support Command, St. Louis, Mo.*, 36 FLRA 587, 593-596 (1990)(AASC St. Louis).

<sup>26</sup> *Nat'l Mediation Bd.*

<sup>27</sup> *AASC St. Louis.*

<sup>28</sup> His position of record is ND-1550-04 scientist.

### Management Official

As noted above with respect to Keith Groce, the management official exclusion is reserved for a discrete category of employees whose responsibilities extend beyond that of a professional or technical expert.<sup>29</sup> In *Fort Monmouth*<sup>30</sup> the Authority found that several electrical engineering and general engineering positions should be included in the unit because the employees were technical experts and not management officials. For example, one group of electronics engineers were responsible for planning, programming, organizing, directing and executing assigned tasks in support of the research and development mission.<sup>31</sup> These employees oversaw projects and had total organizational responsibility for those projects. However the Authority found they were simply applying their technical and administrative knowledge and expertise to the projects, and their role was limited to a particular project and did not extend to the point of active participation in the ultimate determination as to policy within the meaning of the Statute.<sup>32</sup> In addition, a data management officer who developed an activity regulation to guide employees in the acquisition of data was an expert rendering resource information in the form of a written guideline and not a management official.<sup>33</sup>

In this case, Lowney's duties similarly involve acting as a technical expert in the field of engineering design for ASM. His responsibilities in overseeing projects do not render him a management official. He does not develop policies himself and policies he does work on or write parts of go through his programmatic chain of command to NAVSEA.<sup>34</sup> To the extent that he develops processes to get the work accomplished – such

<sup>29</sup> See e.g., *NCUA*.

<sup>30</sup> *Fort Monmouth*.

<sup>31</sup> *Id.* at 635.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 629.

<sup>34</sup> See e.g., *DOL, Mine Safety and Health and Safety Admin., Wash., D.C.*, 37 FLRA 1151, (1990)(Authority found that electrical engineer who, among other things, review proposed mine safety policy for conformance with electrical engineering practices and principles was not a management official; and industrial hygienists who assisted in development of safety policies in their field of expertise and recommend technical revisions to safety procedures and policies were not management officials); see also *DOI, U.S. Fish and Wildlife Serv., Patuxent Wildlife Research Ctr., Laurel, Md.*, 7 FLRA 643, 648 (1982)(*DOI*)(employees who provide input into the agency's national hunting regulations are simply experts or professionals rendering resource information).

as a work order system – these are more like the guidelines written by the data analyst in *Fort Monmouth* and are not policies within the meaning of the Statute.<sup>35</sup> Thus, the Activity's arguments to the contrary are unpersuasive, and I find Lowney should not be excluded as a management official under § 7103(a)(11) of the Statute.

### Supervisor

As noted above with respect to Martin Renken, in order to be considered a supervisor under the Statute, Lowney need only consistently exercise independent judgment with respect to one of the supervisory indicia.<sup>36</sup> The Union correctly notes in its brief that Lowney does not exercise authority over employee evaluations, awards, overtime, discipline, etc. However, the evidence revealed that as a lead engineer for ASM, Lowney oversees a team of employees. Although Lowney does not have hiring authority, for two of the employees on his team Lowney selected who to interview, conducted the interviews, and made hiring recommendations that were accepted. Lowney also uses independent judgment to assign and prioritize work for the employees on his team, based on his knowledge of their skills and abilities. He assigns work every two weeks and monitors and reviews the work. Thus Lowney consistently exercises independent judgment with respect to the assignment and direction of work and, to a certain extent, hiring. Under the circumstances, Lowney is a supervisor within the meaning of § 7103(a)(10) of the Statute and should be excluded from the unit on that basis.<sup>37</sup>

## **D. ASM Lead Engineer - David Garcia**

### 1. Facts

David Garcia is a systems engineer in Code 40, Branch 414.<sup>38</sup> Similar to Lowney, Garcia is an ASM Lead. While Lowney is primarily involved with the hardware side of the work, Garcia is responsible for the software. Basically, Garcia is responsible for getting software upgrades developed, tested and out the door.

<sup>35</sup> *Fort Monmouth* at 634-635 (Authority also found that general engineers who wrote "configuration management plans" that provided guidance for management control of particular acquisitions were providing configuration expertise to projects and not formulating, determining, or influencing agency policy within the meaning of the Statute.)

<sup>36</sup> *Nat'l Mediation Board*, 56 FLRA at 8.

<sup>37</sup> See e.g., *AASC St. Louis*.

<sup>38</sup> His position of record is ND-1550-04 scientist.

As a lead, Garcia oversees a team of fifteen government employees, including six software developers, three testers and support personnel. He schedules all their work and assigns the day-to-day tasks. The work is done in two week sprints and Garcia uses independent judgment to decide what tasks employees will work on. He bases the work assignments on the level of the work and the expertise of the employees. Garcia monitors and reviews employees' work products and reassigns work as necessary. He is responsible for the work products they produce and making sure they follow policies. Garcia has requested overtime for employees and it has been granted as long as funding was available.

Garcia provides performance feedback to supervisors but he is not involved in the actual performance reviews. He has recommended that employees receive awards and those recommendations are usually followed, but the decision is the supervisor's. He has never been involved in grievances or disciplinary actions.

Although normally part of the job, Garcia has specifically asked not to be involved in hiring decisions. However his supervisor has asked him to review resumes and he provides input as to whether he thinks the applicant would be a good fit. His advice is usually followed. He also has input into how many employees it will take to do a particular project and what type of individuals are needed.

Also, similar to Lowney, Garcia attends daily meetings with supervisors and managers involved with ASM where they look at work progress and any issues blocking performance. He also attends monthly meetings where they discuss the status of projects with the program office. Finally, every month or two there is a review by the department head where they assess how they are doing on a project and if they are meeting milestones. Garcia's role is to report on his projects.

As far as policies, Garcia has had input into internal and external policies. Garcia has established processes and policies for his work unit at Keyport. He was the initiator and writer of Agile CONOPS (used for the software development process) and policies established for software development. These policies are reviewed by his supervisor and the program office. He also participates on the integrated product team for software upgrades and develops any necessary software requirement specifications for new software implementation. Finally, he is reviewing a local policy written by an employee that will ultimately be approved by the program office.

## 2. Analysis

The Activity asserted at hearing and in the post-hearing stipulation that David Garcia is a supervisor within the meaning of § 7103(a)(10) of the Statute and/or a management official within the meaning of § 7103(a)(11) of the Statute.

### Management Official

Garcia's duties and responsibilities as an ASM lead are similar to Lowney's. He is essentially a technical expert and not a management official within the meaning of the Statute.<sup>39</sup> His responsibilities in overseeing projects do not render him a management official.<sup>40</sup> Although he has established processes and policies for his work unit at Keyport and written guidelines for the software development process, this work is technical in nature and does not constitute active participation in the ultimate determination as to policy within the meaning of the Statute.<sup>41</sup> Similar to Lowney, the Activity's arguments to the contrary are unpersuasive and I find Garcia should not be excluded as a management official under § 7103(a)(11) of the Statute.

### Supervisor

As noted above, Garcia need only consistently exercise independent judgment with respect to one of the supervisory indicia in order to be considered a supervisor under the Statute.<sup>42</sup> The evidence revealed that as a lead engineer for ASM, Garcia oversees a team of fifteen government employees. Garcia schedules their work and uses independent judgment to make work assignments based on the level of the work and the expertise of the employees. He meets with employees every two weeks to distribute the workload and he monitors and reassigns work as necessary. Thus Garcia consistently exercises independent judgment with respect to the assignment and direction of work. As noted previously, the Union's arguments in the brief that employees such as Garcia do not exercise independent judgment in other supervisory areas may be true. However, the evidence revealed that Garcia meets the test with respect to at least one supervisory indicia, and that is sufficient. Under the circumstances, Garcia is a supervisor within the meaning of § 7103(a)(10) of the Statute and should be excluded from the unit on that basis.<sup>43</sup>

<sup>39</sup> See e.g., *NCUA*.

<sup>40</sup> *Fort Monmouth*.

<sup>41</sup> *Id.*

<sup>42</sup> *Nat'l Mediation Board*, 56 FLRA at 8.

<sup>43</sup> See e.g., *AASC St. Louis*.

## E. ASM Test Lead - Scott Johnson

### 1. Facts

Scott Johnson also works in Code 40, Branch 414. He is a computer scientist and the software quality assurance lead for ASM.<sup>44</sup> Johnson is the test lead on David Garcia's team and receives his tasking from Garcia. Johnson's duties involve verifying and validating software functionality, either on new projects or existing functionality.

As the test lead, Johnson oversees the test team and helps to lead the bi-weekly sprint meetings with Garcia. There are currently three other testers. However in the past Johnson has been responsible for as many as twelve employees. Two of the current employees were given to Johnson. With the third employee, the supervisor came to Johnson and told him about the employee and Johnson said he sounded good. In the past Johnson made recommendations about potential employees for the team and the recommendations were followed more often than not. Johnson has also recommended that employees not be on the team if he felt they didn't fit or their technical capabilities were not needed. Based on these recommendations, the branch head has reassigned employees when another spot was available.

Johnson gets tasking from Garcia and his supervisor. He then uses his judgment to assign the work to the testers and prioritize the work. He bases his work assignments on his personal knowledge of their experience and strengths. For example, he will give a detail-oriented job to someone he knows is detail-oriented, versus a complicated job for someone who can handle the complexity. Also, where issues are initially written up by an employee, he will assign the same employee to fix and verify the issue only if he feels their original assessment was adequate. After work is assigned, Johnson works closely with the employees and monitors and assesses their work. On occasion he will notice a test scenario is not up to standard and will give the employee feedback and verify it gets done correctly. He has also reassigned work when he has determined that the assigned employee is not the best suited employee for the job.

Johnson has provided input on employee performance, but is not involved in performance evaluations. He has recommended a couple employees for awards but the branch head made the final decision.

Johnson also provides guidance. Whether its new functionality or fixing existing functionality,

Johnson helps define the tests that need to be performed. He sets the standard that has to be evaluated against to determine if functionality works as advertised. Johnson was the author of the Test and Evaluation Master Plan, which defines the overall strategy and policy for ASM testing. The TEMP applies to his group and sets out the process for verification and validation of software. If Johnson initiates a policy or process that applies to the whole program, it is typically recorded in a Keyport document that goes through the branch head. It may also go directly to the program office, or through the technical program manager, but there's usually a routing chain.

### 2. Analysis

The Activity asserted at hearing and in the post-hearing stipulation that Scott Johnson is a supervisor within the meaning of § 7103(a)(10) of the Statute and/or a management official within the meaning of § 7103(a)(11) of the Statute.

#### Management Official

Johnson's duties and responsibilities as a test lead mainly involve verifying and validating software functionality. Similar to Lowney and Garcia, he is a technical expert and not a management official within the meaning of the Statute.<sup>45</sup> His responsibilities in overseeing the test group do not render him a management official.<sup>46</sup> Although he sets certain standards for evaluating software and was the author of TEMP, this work is technical in nature and does not constitute active participation in the ultimate determination as to policy within the meaning of the Statute.<sup>47</sup> For the same reasons as the others, the Activity's arguments to the contrary are unpersuasive and I find Johnson should not be excluded as a management official under § 7103(a)(11) of the Statute.

#### Supervisor

The evidence revealed that as a test lead for ASM, Johnson oversees the test team. The team currently consists of four employees, but Johnson has been responsible for as many as twelve. As the test lead, Johnson uses his judgment to prioritize the work and assign work to the other testers. He assess whether work is done in an adequate manner and has used those assessments in assigning future work. He also reassigns work as necessary. Thus Johnson consistently exercises independent judgment with respect to the assignment and

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<sup>45</sup> See e.g., NCUA.

<sup>46</sup> Fort Monmouth.

<sup>47</sup> See e.g., DOI.

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<sup>44</sup> His position of record is ND-1550-04 scientist.

direction of work. The Union's assertion in its brief that Johnson does not exercise independent judgment in other supervisory areas may be true. However, the Union's claim that Johnson does not assign work is inconsistent with the evidence. Under the circumstances, Johnson is a supervisor within the meaning of § 7103(a)(10) of the Statute and should be excluded from the unit on that basis.<sup>48</sup>

#### **F. Code 40 Lead Scientists - Carla Peterson and Sean Youtsey<sup>49</sup>**

##### **1. Facts**

Carla Peterson works in Code 40, Branch 421, which provides in-service engineering for lightweight torpedoes. She is a testing lead and requirements lead for the Cold Gas Fleet Exercise System that goes on the Mark 54 lightweight torpedo.<sup>50</sup> She recently transitioned into systems engineering work and does project planning. She works with NAVAIR, NAVSEA, and Naval Surface Warfare Center Carderock to do certifications for a specific torpedo.

As the lead, Peterson oversees the work of some of the junior engineers working on the Mark 54 project. There are typically two or three junior mechanical and electrical engineers working with her, depending on the workload. Although she is newer and did not select her team, she has the ability to ask for help when needed. For example, at one point when someone was gone, she requested a particular individual from a different code to help out and she was able to get that person.

As far as assignment of work, Peterson gets the tasks and then decides who will do what work. She assigns work based on expertise and skills. Although some of the work is divided based on whether it is electrical or mechanical engineering work, a third of the work can be done by anyone on the team. Peterson provides day-to-day tasking, reviews the work and gives feedback to employees. She provides guidance and direction, and makes sure that they are following the proper requirements and standards. Although priorities are sometimes set at a higher level, she is allowed to prioritize work based on the team's schedule, their workload, and what they have to get done. In fact, she has

had employees set things aside in order to focus on other work.

Peterson does not provide formal feedback on performance, but she has informed the supervisor when someone did not perform up to standard. She has not recommended employees for awards and has not been involved in any grievances or disciplinary actions.

Peterson has provided input on Keyport processes and plans within her area of expertise. For example, she developed a project engineering plan that provides: an overview of the system she is working on, who is the technical working group, what the risks are, what has been done so far, where they are going, a schedule, and all the certifications and tests that need to be done. Once this type of plan is developed, it goes through multiple layers of review and is signed by the technical warrant holder.

Peterson attends division-level management meetings where she provides status updates on her projects. If there are issues, they discuss and she provides recommendations. Those recommendations are followed about 70% of the time.

##### **2. Analysis**

The Activity asserted at hearing and in the post-hearing stipulation that Carla Peterson is a supervisor within the meaning of § 7103(a)(10) of the Statute and/or a management official within the meaning of § 7103(a)(11) of the Statute.

#### Management Official

Similar to the other leads described above, Peterson is a technical expert and not a management official within the meaning of the Statute.<sup>51</sup> Her duties as a testing lead and requirements lead involve project planning and certifications for the Mark 54 lightweight torpedo. Peterson's input into Keyport processes and plans, and her development of a project engineering plan, are technical in nature and do not constitute active participation in the ultimate determination as to policy within the meaning of the Statute.<sup>52</sup> In addition, this work goes through multiple layers of review and she is not the signatory on the plans. For the same reasons as the others, the Activity's arguments to the contrary are unpersuasive and I find Peterson should not be excluded as a management official under § 7103(a)(11) of the Statute.

<sup>48</sup> See e.g., *AASC St. Louis*.

<sup>49</sup> The parties stipulated at hearing that the testimony of Carla Peterson was applicable to ND1550-04 Scientists in Code 40 and that the decision by the FLRA about the bargaining unit eligibility of Carla Peterson would be applicable to Sean Youtsey.

<sup>50</sup> Her position of record is ND-1550-04 scientist.

<sup>51</sup> See e.g., *NCUA*, 59 FLRA 858.

<sup>52</sup> See e.g., *DOI*.

### Supervisor

The evidence revealed that as a lead Peterson oversees the work of two or three junior engineers. Peterson assigns work based on her assessment of their expertise and skills. She provides day-to-day tasking and reviews the work of the employees. Although some priorities are set at a higher level, she does prioritize work based on the team's schedule and workload. Thus Peterson consistently exercises independent judgment with respect to the assignment and direction of work. As previously mentioned, the Union's arguments in its brief about lack of authority over other supervisory indicia is not persuasive since Peterson need only consistently exercise independent judgment with respect to assignment and/or direction of work. Under the circumstances, Peterson is a supervisor within the meaning of § 7103(a)(10) of the Statute and should be excluded from the unit on that basis.<sup>53</sup> Based on the parties' stipulation that Peterson's testimony was applicable to Sean Youtsey, he is excluded for the same reason.

#### **G. Code 40 Systems Engineers – Ellis Greene, David Cobb, Kevin Hamza, and Keith Hawryluk<sup>54</sup>**

##### 1. David Cobb

Cobb is a systems engineer in Code 40, Division 42, the Weapons System Engineering Division, and is a member of the Division Manager's staff.<sup>55</sup> Division 42 supports the product - e.g. torpedo - after it has been accepted from the contractor and put into the fleet. They manage how the fleet uses the product, run the necessary tests, and make reliability improvements when necessary. They also support the product acceptance group by helping them with data analysis.

There are several systems engineers in Division 42 that divide the work. Cobb and Ellis Greene primarily deal with lightweight torpedoes. Greene - who is the lead/senior systems engineer - focuses on mechanical and launch accessory interfaces, while Cobb focuses on the electrical production support. In addition to his Keyport duties, Cobb also works for NUWC Newport in pay production support doing tasks such as helping develop specifications for the next generation contract.

Division 42 systems engineers are responsible for keeping track of everything that is going on in the division. They do not have specific tasks, but rather work across the division making sure the division is operating and accomplishing its goals. The division head depends on the system engineers to act fairly autonomously and provide support as needed, and they are sent to program reviews as his representative if he is unable to go. In the program reviews, the systems engineers can accept actions for the division. The systems engineer then briefs the division head on the action and he usually just tells the engineer to go get the work done. Only once in a while will the division head say that some action is not the responsibility of the division.

As a systems engineer, Cobb also identifies issues on his own and then decides what work needs to be done. Once a task has been established, Cobb will go to the branch heads with the work assignment. Cobb can request certain employees based on his knowledge of their experience and background, and the branch head will let him know whether the employees are available. Cobb is normally not involved in directing the work on a day-to-day basis. His job is more to monitor the progress, review results, make sure things are headed in the right direction, and ultimately ensure that the right work gets done.

Cobb has about two to six tasks going on at a time. Two or three times a year he works on bigger projects with a TPM or project lead, but usually his work is more broad brush. If there's a lead and a team working on it, it's a project and they have a project plan. However a lot of times the tasks are small and there will just be individuals working on a particular task. In those cases, once an employee is assigned to the task by the branch manager Cobb will tell the employee what he needs done.

An example of a smaller short-term issue was dealing with an in-water run failure. Cobb put together a failure analysis plan and then he and the division manager signed off on the plan. Cobb assembled a team to investigate the failure. Every other day there was meeting to discuss the progress and what the next steps would be. The plan was updated as necessary to get a resolution. Once the analysis was done, Cobb reported out to NAVSEA – PM 404.

On some issues Cobb has a temporary team that he leads. This usually occurs where there is a series of failures. When there is a higher than usual failure rate, the Navy will get concerned that there is a reliability problem. Cobb leads the group of people that investigate all the failures. His responsibility is not only to close out the individual failures, but to find out if there's any

<sup>53</sup> See e.g., *AASC St. Louis*.

<sup>54</sup> The parties stipulated at hearing that the testimony of David Cobb was applicable to certain ND4 systems engineers in Code 40 and that the decision by the FLRA about the bargaining unit eligibility of David Cobb would be applicable to Kevin Hamza and Keith Hawryluk.

<sup>55</sup> His position of record is ND-0801-04 engineer.

overarching issue that is causing a lower reliability, or if a bunch of failures all just happened at the same time.

Cobb attends weekly Division 42 staff meetings. The attendees are the division head, the branch heads, and the systems engineers. They discuss what happened at the Code 40 staff meeting and then everything that is going on that week for Division 42. They go around the room and everybody discusses what people are working on and any issues. They also talk about priorities and staffing.

Cobb also attends weekly Failure Review Board meetings and In-Service Review Board meetings. At the FRB meetings, they track new failures and progress on existing failures. The system engineers make sure that everything is progressing along as it should. At the ISRB meetings, they review all the change documents that are in process and the approval status of those documents.

With respect to policies, Cobb does not work on Keyport-wide policies and he could not think of any particular policy he worked on. However, as part of monitoring what is going on in the division, the systems engineers can modify and establish new procedures as necessary. Their responsibilities involve how Code 42 conducts its business, e.g. how they support logistics, how they do failure analysis and failure analysis planning. For example, the policies and procedures that Cobb works on relate to how a task will be performed and he will make recommendations to the division head. Also, if there is a procedure or policy that Cobb thinks needs to be changed, he usually works with the other systems engineers and the owner of the policy to make modifications. Almost all of these are signed by the division head.

## 2. Ellis Greene

Ellis Greene is the Senior Weapons Systems Engineer in Code 40, Division 42, and works with Cobb within his subject matter area.<sup>56</sup> Greene works internally on the processes related to the torpedoes, including managing technical documents. If there is a technical issue about how things work, he is a part of figuring it out. He also mentors and provides advice to other engineers.

Similar to Cobb, Greene often figures out on his own what work needs to be done and then lets the division head know. He assembles teams all the time to work on the tasks he identifies. He usually ascertains who he wants on a particular task or team and then goes to the resource manager (usually branch head) to get approval. He bases his requests on the capabilities and expertise of

the employees. 95% of the time he gets the employees he requests. Greene also has a role in setting the number of employees on a team. Once a team is established, Greene does assign tasks, but he is usually not involved in day-to-day assignments. His job is more coordinating and managing the work, and he prioritizes and assigns the work in a general sense. However he does monitor the work and has had to reassign employees from his teams. When he feels someone is not performing well, he will talk with their supervisor. He also gives other feedback to supervisors, but is not involved in performance reviews.

Although Greene is not on every team and does not assemble every team, he is a part of deciding who is on a particular team. He also participates in reviews and briefings where there are discussions about whether a team is going in the right direction. For example, Greene will advise that a particular employee look into an issue, or that an employee stay on a task and not get pulled to another program.

Greene also works with external organizations such as NAVAIR and NAVSEA as the NUWC Keyport representative. Keyport builds and ships torpedoes, and he is the lead person working with the outside world on those torpedoes. As part of these duties, Greene is on teams outside of NUWC. For example, the Hawk program is a large upcoming program where they are developing a high altitude launch accessory wing kit to fly the weapon in. Greene chairs the logistics group, which includes NAVAIR China Lake, NUWC Newport and Keyport, and private industry. He stood up the group, wrote the charter, and identified who needed to be on it. Now he decides what needs to be briefed and resolved. Greene also represents Keyport on the Weapon System Explosives Safety Review Board.

Also, same as Cobb, Greene is one of the systems engineers on the FRB. According to Greene, the systems engineers are responsible for assigning a lead engineer to each failure within their area of expertise. The lead engineer then brainstorms about the failure with the fifteen or so other engineers in the room.

As far as policies, Greene has worked on technical manuals and policies. For example, he has written locals plans such as the Lifecycle Sustainment Plan – which set out how the Hawk would be employed by the fleet. He also wrote the Writer's Guide for Lightweight Torpedo. These documents were reviewed by multiple people.

## 3. Analysis

The Activity asserted at hearing and in the post-hearing stipulation that Ellis Greene and David Cobb are supervisors within the meaning of § 7103(a)(10) of the

<sup>56</sup> His position of record is ND-0830-05 engineer.



Statute and/or management officials within the meaning of § 7103(a)(11) of the Statute.

#### Management Official

As noted above, a management official is someone who (1) creates, establishes or prescribes general principles, plans or courses of action for an agency; (2) decides upon or settles upon general principles, plans or courses of action for an agency; or (3) brings about or obtains a result as to the adoption of general principles, plans or courses of action for an agency.<sup>57</sup> In determining that an employee is a management official, the Authority has considered whether recommendations and findings are accepted and implemented, whether they have authority to make independent decisions, and the extent to which their actions are reviewed.<sup>58</sup> In finding that the assistant to the research director was a management official, the Authority in *Twin Cities* noted that the employee made independent decisions within broad agency guidelines and his actions were reviewed solely to check for consistency with established programs.<sup>59</sup> Further the employee planned research projects with the director and management staff and monitored the projects by evaluating reports and meeting with the research supervisors in charge.<sup>60</sup> The Authority also found a staff engineer was a management official where he used independent judgment and discretion to plan, budget, schedule and implement research and development programs, and directed the work of others to ensure that the programs were completed in conformance with the program objectives.<sup>61</sup>

Unlike the other engineers discussed thus far, Greene and Cobb work at the division level – directly for the division head. Their duties as Division 42 systems engineers are broader in scope and involve determining what work needs to be done across the division. They make recommendations to the division head that are almost always followed. Thus, they play a significant role in deciding what projects and tasks will be done. They represent the division head at program reviews and accept actions to be performed by the division. Only rarely does the division head refuse to accept the actions. Thus, similar to the employees in *Twin Cities*, Cobb and Greene

plan and monitor projects and their actions are usually only given a cursory review. Under the circumstance, both Cobb and Greene actively participate in influencing and determining courses of action the division will take.

In addition, the Division 42 systems engineers play an important role in determining who will perform the work. They assemble and lead teams, manage the work, and review the work. Thus, like the staff engineer in *Twin Cities*, Cobb and Greene direct the work of others to ensure that the tasks and projects are completed in conformance with the goals and objectives set by them and/or the division or department. As such, they are more than just professionals or experts rendering resource information or guidance and I find that they should be excluded from the unit as management officials within the meaning of the Statute. In addition, based on the parties' stipulation that Cobb's testimony was applicable to other ND4 systems engineers in Code 40, Kevin Hamza and Keith Hawryluk are also excluded as management officials.

The Union correctly asserts in its post-hearing brief that the documents that systems engineers work on are technical in nature and not policies within the meaning of the Statute. In addition, they do not appear to have final signatory. However, my finding is not based on their work on these documents and therefore does alter my decision.

#### Supervisor

The evidence related to Ellis Greene revealed that he consistently exercises independent judgment with respect to assigning employees to tasks and/or teams. Although he is not necessarily involved in day-to-day assignments, he identifies who he wants to be on teams and perform certain tasks, and 95% of the time those employees are assigned to do the work. He also is involved in prioritizing and monitoring the work and has had to reassign employees from teams. Since Greene only need exercise independent judgment with respect to one supervisory criteria to be considered a supervisor, I find that he should be excluded from the unit not only as a management official, but also as a supervisor within the meaning of the Statute.<sup>62</sup>

However, there was insufficient evidence presented at hearing that Cobb is also a supervisor. There was testimony that Cobb has input into who gets assigned to perform certain tasks and that he assembles teams to investigate failures. But it was not enough to establish that he consistently exercises independent judgment in either assigning or directing work. Regardless, since I

<sup>57</sup> *Navy, ADP*, 7 FLRA at 177.

<sup>58</sup> See e.g., *DOI, Bureau of Mines, Twin Cities Research Ctr., Twin Cities, Minn.*, 9 FLRA 109 (1982)(*Twin Cities*); and *DOE*, 40 FLRA at 271-272.

<sup>59</sup> *Twin Cities* at 112.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 113.

<sup>62</sup> See e.g., *AASC St. Louis*.

find that he is a management official within the meaning of the Statute, he - and the other systems engineers - are excluded from the unit.

## H. Code 30 Blackbelts/Strategic Planners

### 1. Larry Beggs

Larry Beggs is an engineer in Code 30.<sup>63</sup> Organizationally, Beggs is part of Code 30A and works directly under the deputy department head. His assigned duties involve two basic roles. Fifty percent of the time he is acting as a Code 30 lean blackbelt and the other fifty percent is workforce shaping.

A blackbelt is a person who has training in facilitating discussions, analyzing processes, and leading a team to bring about a change in facilities, processes or requirements. As the Code 30 blackbelt, Beggs facilitates what are referred to as lean events or continue process improvements. Basically, the different divisions and branches are looking for opportunities for improvement and he works with the line codes to identify areas to improve and then builds teams to address the issue, find solutions, and implement those solutions. Sometimes he goes to the codes and looks for inefficiencies himself and sometimes the issues are brought to him. After working with the line codes to identify issues, he brings them to management and works with management to prioritize which issues to address. Division management then decides which events he will participate in.

Lean events generally last from two to five days and include six to twenty team members. The team includes a team lead – who is usually a supervisor or branch head - and others with expertise in the affected area. Bargaining unit employees are on the teams and the Union is invited to attend. As the facilitator, Beggs puts together the agenda and action plans, takes minutes, helps with the brainstorming and discussions, and ultimately provides the team recommendations to management.

Beggs' other duties involve strategic planning focused on manpower and people – referred to as workforce shaping. Beggs works with Code 30 and Code 70 to understand what workload is coming in and what work years are required to accomplish the work. They then define what skills are needed to accomplish the work and look at the mix of government to contract workers to make sure all the requirements are being met and there are enough people to do the work. Because of the recent restrictions on hiring, the need to appropriately use contractors is increasing. Thus Beggs has spent a lot of time looking at where contractors could be brought in to increase the capacity and reduce the amount of carryover

in the workload. Beggs also looks at whether employees can be moved around to deal with surges and declines in workload. For example, he looked at whether certain engineers could be moved from one code to another on a temporary or permanent basis in between projects. He was involved in the development of how it might be done and made recommendations to management.

As part of his workforce shaping duties, Beggs is working on a database that can capture workforce needs: e.g. what workload is coming in, what manpower is required, where the gaps are in the workforce, what skills are required, how much of the work can be done by contractors, how much has to be government, and what is proper mix of government versus contractor. For example, the database will indicate who has a particular skill and whether that skill is high, medium or low, so that management will be able to assess where the skill gaps are. In doing this work, Beggs has access to confidential personnel information such as names, birth dates, retirements dates, etc.

Beggs also attends Code 30 weekly staff meetings. Attendees include the department head, the deputy department head, the division heads, and those providing input directly to the department head. The meetings include discussions on strategic planning; new work strategies; what work is coming in; how work is going to be scheduled; hiring plans; attrition; expectations on attrition; moving people around because either the code is getting new work or a certain type of work is getting ready to go away; and trying to find either existing contracts for bringing in contract workers or developing a new contract that will meet the needs for the next few years. During these meetings either Beggs or the deputy department head briefs management on Beggs' most recent staffing analysis.

Although grievances may be discussed at these staff meetings, it is more for informational purposes – e.g. a grievance was filed, what it dealt with, and what divisions will be contacted to provide information. Details and strategies on how to deal with a particular grievance are not discussed. Similarly, if there are changes in working conditions the information provided at the meeting is informational in nature. Management lets everyone know about the change and informs them what they are telling the Union. People may be asked to provide information, but they are not told how it will be used, and negotiation proposals or strategies are not discussed.

Recently, Beggs was a member of a Keyport-wide workforce shaping team that met every week for almost a year. The team included workforce analysts, department heads, division heads, branch heads, human resources representatives, and a contracting specialist.

<sup>63</sup> His position of record is ND-0801-04 engineer.

The team worked on ways to improve workforce utilization. Beggs acted as a subject matter expert due to his work in Code 30. For example, he recommended moving engineers to different codes in between projects instead of having to contract out or hire new employees. His recommended process was then implemented at the department level. At the end of the team's work, they presented their recommendations to the board of directors and those recommendations were approved. As a result, new Keyport directives were created and others were revised.

## 2. Nicholas Rau

Like Larry Beggs, Rau is a Code 30 engineer with dual roles working under the deputy department head.<sup>64</sup> He spends 50% of his time acting as a blackbelt. The other 50% is spent on strategic planning related to infrastructure – mostly equipment and facilities.

As a Blackbelt, Rau performs the same functions as Beggs. He works with management to identify issues or areas that could be improved. He facilitates lean events and works with groups to come up with recommendations for management.

In his strategic planning role, Rau has several functions. One duty is to go to the Code 30 division managers, find out what they want to invest in, and have them prioritize their needs. He gathers all of the information and prioritizes everything across the divisions for the whole department. He then meets with the department head and makes recommendations about what to fund. The department head brings his high level strategic knowledge and Rau brings his knowledge of the divisions, and they meld it together to come up with a prioritized list. Both of them take the list to the Command level and their recommendations are normally followed.

Rau also works with the division heads and their deputies when they see a certain need coming or a certain infrastructure problem. He recommends how best to address their problems given different funding options and directions - e.g. can or should it be funded by customers, NAVSEA, or internally. He essentially helps them to approach their issues in the best way to get funding. He also has one-on-one discussions with division heads about strategic planning and where they are going.

Rau attends the same Code 30 staff meetings as Beggs. He is involved in strategic discussions that help mold where the department is going and how that matches with where they are investing. For example, what buildings do they need; what type of space do they

need; are they purchasing the right equipment; do they have the right number of contractors versus government employees.

Similar to the database Beggs is creating for workforce planning, Rau is developing a model for facilities planning. This includes information on the equipment, how much it cost initially; how much is spent on maintenance; and what it would cost to buy it again or re-capitalize on it. This will allow Code 30 to figure the cost of equipment, what the gaps are, and budget accordingly. This type of information is already utilized by Rau to help him prioritize needs across the divisions.

Another one of Rau's duties that falls under strategic planning for facilities involves physically moving employees. He is mostly involved in small moves where employees are reorganized to a different code and/or moved to a different location. Rau helps figure out where they are going to sit, making sure their IT needs are met, and other issues that come up with moves. Rau is brought in early in the process - before the employee(s) and most people know about it - to try to help figure out what needs to be addressed and making sure it happens. He also reminds managers to notify the Union.

Rau has also worked with Code 30 to develop negotiation positions and strategies for negotiating with the Union over moves. In one case Rau was one of the main coordinators for the move of a whole division involving 70 employees. He helped develop the layouts, which involved discussions with leadership about the size of the cubes; where employees would sit; partitions; and furniture. Given his background and his responsibility for equipment contracts, he helped ensure that everything was purchased and taken care of. He also made recommendations on how to make it go smoothly given his experience with what employee issues were likely to come up. He discussed with department, division, and branch heads what information would be provided to the Union and when. He put together the brief packet for the Union, which included the layouts and some slides with timelines and impacts to employees. He also was one of the management representatives who met with the Union to discuss the changes.

## 3. Analysis

The Activity asserted at hearing and in the post-hearing stipulation that Larry Beggs and Nicholas Rau should be excluded from the unit because they are management officials within the meaning of § 7103(a)(11) of the Statute; engaged in personnel work in other than a clerical capacity pursuant to § 7112(b)(3); and/or a confidential employees within the meaning of § 7103(a)(13).

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<sup>64</sup> His position of record is ND-0801-04 engineer.

### Management Official

None of Beggs' or Rau's blackbelt or strategic planning duties render them management officials within the meaning of the Statute. As for the blackbelt duties, their role is that of a facilitator and does not require or authorize them to formulate, determine or influence policy within the meaning of § 7103(a)(11) of the Statute.<sup>65</sup> Although they sometimes identify issues on their own, management determines whether a lean event will be put together to address the issue and whether they will participate. When they do participate, their role is only to facilitate and then to provide the team's recommendations to management. With respect to Beggs' workforce shaping duties, he acts as a professional expert in developing a workforce database, providing input at Code 30 weekly staff meetings, and analyzing staffing needs.<sup>66</sup> Similarly, when Rau is performing his strategic planning duties - providing information, analyses, advice and recommendations - he is acting as a professional expert.<sup>67</sup>

### Confidential Employee

Normally an employee is "confidential" if: (1) there is evidence of a confidential working relationship between an employee and the employee's supervisor; and (2) the supervisor is significantly involved in labor-management relations.<sup>68</sup> In *Arlington Field Office*, the Authority also extended the exclusion to employees if - in the normal performance of their duties - they obtain advance information regarding management's position with regard to contract negotiations, the disposition of grievances, or other labor management relations matters; or if they have access to and prepare materials related to labor relations.<sup>69</sup> The Authority found including attorneys in the unit who had access to this type of internal labor relations information would present a conflict of interest.<sup>70</sup> The Authority also found that the frequency and amount of confidential work may be relevant but is not controlling.<sup>71</sup>

<sup>65</sup> See e.g., *NCUA*.

<sup>66</sup> See e.g., *DOE*.

<sup>67</sup> *Id.*

<sup>68</sup> *DOI, Bureau of Reclamation, Yuma Projects Office, Yuma, Ariz.*, 37 FLRA 239, 244 (1990).

<sup>69</sup> *Office of the Solicitor, Arlington Field Office*, 37 FLRA 1371, 1383 (1990)(*Arlington Field Office*).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 1382.

Here, there was insufficient evidence presented that Beggs acts in a confidential capacity to a particular manager or supervisor who formulates or effectuates management policies in the field of labor-management relations. In addition, there was insufficient evidence presented that he has advance information regarding labor-management relations issues such as contract proposals, unfair labor practices, or grievances.<sup>72</sup> Although he attends staff meetings where grievances or changes in working conditions may be mentioned, his testimony revealed that there are no discussions of details, including actual proposals, decisions or management strategies. Further, although staffing and workforce shaping are discussed at these meetings, this is insufficient since there was no evidence that specific *labor-management* decisions or strategies are discussed. However, to the extent that Beggs makes recommendations about staffing at these meetings, that does create a conflict of interest and is discussed more fully below. Finally, the fact that he has access to confidential personnel information such as retirement dates etc., is not a basis to exclude him from the bargaining unit since it is not confidential *labor-management* information.<sup>73</sup>

On the other hand, the evidence related to Rau indicates he does act as a confidential employee. His strategic planning duties involve the physical movement of employees. In the early stages, before the Union and employees are informed, Rau is brought into the process to help assess and address any needs and requirements related a move. Rau has worked with Code 30 management to develop negotiation positions and strategies related to moves and in one case - where a whole division of employees was moved - he served as one of management's representatives in discussions with the Union. In fact, he was one of the main coordinators for the move, developed the layouts, and prepared the brief packet that was presented to the Union. Thus, as part of his normal duties, Rau has obtained advance information related to labor management relations, and has had access to and prepared materials related to labor relations.

The Union asserts in its brief that Rau's involvement with the unions is minimal. However, direct involvement with the unions is not the only factor -

<sup>72</sup> Labor-management relations" is limited to matters understood to be within that phrase, such as contract negotiations and the disposition of grievances. *Broad. Bd. of Governors*, 64 FLRA 235, 237 (2009) (*Board of Governors*) (incumbent who had advance knowledge of possible personnel cuts was privy to sensitive and confidential information, but not information concerning labor-management relations).

<sup>73</sup> *Id.*

involvement in the pre-decisional process and access to advance information are also considerations.<sup>74</sup> In addition, frequency and amount of confidential work is not controlling.<sup>75</sup> Thus, there is sufficient evidence to find that Rau is a confidential employees within the meaning of § 7103(a)(13) of the Statute and should be excluded from the unit.

### Personnel Work

An employee is engaged in personnel work in other than a clerical capacity pursuant to § 7112(b)(3), where: the character and extent of involvement of the employee in personnel work is more than clerical in nature; the duties are not performed in a routine manner; and the employee exercises independent judgment and discretion.<sup>76</sup> The Authority has found that this exception extends beyond “internal personnel operations” to exclude employees whose work “directly impact[s] staffing and the overall work environment.”<sup>77</sup> In *FAA*, the Authority excluded analysts from the unit who worked on cases involving the analysis and evaluation of implementing new technologies where the analyses looked at the impact on staffing levels and duties of employees.<sup>78</sup> Similarly, other employees were excluded who evaluated organizational processes and made recommendations that could affect staffing.<sup>79</sup> The Authority repeatedly cited to an earlier case - *Ft. Campbell*<sup>80</sup> - where eight of ten management analysts were excluded from the unit. The Authority noted that the analysts used independent judgment in looking at the appropriateness of the agency’s organizational structure, staffing, method of operations and capital investments.<sup>81</sup> In addition, because the analysts’ job duties could directly impact the elimination or creation of jobs and the overall work environment of bargaining unit employees, the nature of their job created a conflict of interest between union affiliation and their job duties.<sup>82</sup>

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<sup>74</sup> See e.g., *Arlington Field Office*.

<sup>75</sup> *Id.*

<sup>76</sup> *VA, N. Cal. Health Care Sys. Martinez, Cal.*, 66 FLRA 522, 524 (2012).

<sup>77</sup> *DOT, FAA*, 63 FLRA 356, 360 (2009)(*FAA*).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 361.

<sup>80</sup> *United States Dep’t of the Army, Headquarters, 101<sup>st</sup> Airborne Div., Fort Campbell, Ky.*, 36 FLRA 598 (1990)(*Ft. Campbell*).

<sup>81</sup> *Id.* at 603-604.

<sup>82</sup> *Id.*

In this case, the Union correctly asserts in its brief that Beggs’ blackbelt duties do not constitute personnel work within the meaning of the Statute. Any staffing recommendations that come out of the lean process are not Beggs’ personal recommendations. His role is facilitator, not analyzer. In addition, his role in creating the personnel database is insufficient to exclude him. However, his other workforce shaping duties include performing personnel work in other than a clerical capacity. Beggs’ workforce analyses involve defining what skills are needed to accomplish the work, whether there are enough employees to do the work, whether certain work can or should be contracted out, and whether employees can be moved around to deal with surges and declines in workloads. One example of a result of his analysis was a recommendation to move engineers among codes in between projects, and he was involved in the development of how it might be done. Thus, similar to the analysts in *Ft. Campbell* and *FAA*, Beggs’ analyses and recommendations are directly related to staffing and can impact whether and what work is done by government employees.

Further, because Beggs uses his knowledge, expertise and independent judgment in his analyses and recommendations, his work is not routine or clerical in nature.<sup>83</sup> In its post-hearing brief, the Union cites several Authority cases for the premise that employees do not exercise independent judgment and discretion where they rely on higher management to make decisions and policy.<sup>84</sup> However, although it may be a consideration, the test is not whether recommendations are reviewed by upper management. Rather, the Authority looks at whether the duties are performed in a routine manner and in accordance with routine regulations and established guidelines.<sup>85</sup> Unlike the clerks and assistants in *IRS Cincinnati* and *BOP Marion* who were included in the unit, Beggs’ duties are not performed in a routine manner and based on specific agency policy. He analyzes information and makes recommendations about staffing based on his independent judgment. As such, Beggs is engaged in personnel work within the meaning of §7112(b)(3) and should be excluded from the unit on that basis.<sup>86</sup>

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<sup>83</sup> See e.g., *FAA*.

<sup>84</sup> Citing *IRS, Wash. D.C. and IRS, Cincinnati Dist., Cincinnati, Ohio*, 36 FLRA 138 (1990)(*IRS Cincinnati*) and *DOJ, BOP, U.S. Penitentiary, Marion, Ill.*, 55 FLRA 1243 (2000)(*BOP Marion*).

<sup>85</sup> *Id.* at 1244 and *IRS Cincinnati* at 144-146.

<sup>86</sup> See e.g., *FAA* and *Ft. Campbell*.

On the other hand, Rau's strategic planning work is different from Beggs' and does not provide a basis for exclusion from the unit. Rau's focus is on infrastructure, not workforce shaping. He is not specifically analyzing staffing needs or making recommendations about staffing. Where staffing recommendations come out of Rau's blackbelt duties facilitating lean events, these recommendations come from the group and are not Rau's personal recommendations. As such, he is not performing personnel work in other than a clerical capacity. Regardless, as discussed above, I find that he should be excluded from the unit as a confidential employee.

#### IV. Order

First, I would note that most of the engineering/scientist positions at issue are hard to describe since the exact titles held by the employees are described differently by the organization charts, employee list, LDAs, and hearing testimony. Thus, the positions excluded from the unit should be narrowly applied to employees who testified at hearing, were the subject of representative testimony, or who fill the exact position in the future.

I find that the Code 40 Contracting Officer Representative position - held by Keith Groce - should be included in the bargaining unit represented by IAM/AW, District 160, Local Lodge 282. I also find that the following positions should be excluded:

- 1) Code 20, 30, and 40 Lead Engineers as supervisors under § 7103(a)(10) and § 7112(b)(1) of the Statute (Martin Renken, Joe Galles, Quentin Vaira and Eric Landis);
- 2) Code 40, Branch 414, Advanced Skills Management System Lead Engineers as supervisors under § 7103(a)(10) and § 7112(b)(1) of the Statute (Daniel Lowney and David Garcia);
- 3) Code 40, Branch 414, Advanced Skills Management System Test Lead as a supervisor under § 7103(a)(10) and § 7112(b)(1) of the Statute (Scott Johnson);
- 4) Code 40, Branch 421 and 441 Lead Systems Engineers as supervisors under § 7103(a)(10) and § 7112(b)(1) of the Statute (Carla Peterson and Sean Youtsey);
- 5) Code 40, Division 42 Systems Engineers as management officials under § 7103(a)(11) and § 7112(b)(1) of the Statute (David Cobb, Kevin Hamza, and Keith Hawryluk);
- 6) Code 40, Division 42 Senior Weapons System Engineer as a management official under § 7103(a)(11) and § 7112(b)(1) of the Statute and a supervisor under § 7103(a)(10) and § 7112(b)(1) of the Statute (Ellis Greene);
- 7) Code 30 Blackbelt/Strategic Planning/Workforce Shaping position should be excluded under § 7112(b)(3) of the Statute (Larry Beggs);
- 8) Code 30 Blackbelt/Strategic Planning/Infrastructure position should be excluded under § 7103(a)(13) and § 7112(b)(2) of the Statute (Nicholas Rau).

#### V. Right to Seek Review

Under section 7105(f) of the Statute and section 2422.31(a) of the Authority's Regulations, a party may file an application for review with the Authority within sixty days of this Decision. The application for review must be filed with the Authority by February 9, 2015, and addressed to the Chief, Office of Case Intake and Publication, Federal Labor Relations Authority, Docket Room, Suite 201, 1400 K Street, NW, Washington, DC 20424-0001. The parties are encouraged to file an application for review electronically through the Authority's website, [www.flra.gov](http://www.flra.gov).<sup>87</sup>

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Jean Perata  
Regional Director, San Francisco Region  
Federal Labor Relations Authority

Dated: December 10, 2014

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<sup>87</sup> To file an application for review electronically, go to the Authority's website at [www.flra.gov](http://www.flra.gov), select **eFile** under the **Filing a Case** tab and follow the instructions.