

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

Office of Communications Media,)	
Office of the Chief Administrative Officer,)	
Employing Office,)	
)	
and)	
)	Case No. 96-LM-2
National Association of Broadcast Employees)	
and Technicians, Communications Workers of)	
America, AFL-CIO,)	
)	
Petitioner.)	

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

DECISION AND DIRECTION OF ELECTION

I.

The National Association of Broadcast Employees and Technicians, Communications Workers of America, AFL-CIO, (“Petitioner”) has duly filed with the Board of Directors of the Office of Compliance (the “Board”) a petition to represent employees of the Office of Communications Media (“OCM”), Office of the Chief Administrative Officer (the “Employing Office”). In response to the petition, the Board, acting pursuant to its authorities under Chapter 71 of title 5 of the United States Code, as applied by section 220(c)(1) of the Congressional Accountability Act of 1995 (the “CAA”), 2 U.S.C. § 1351(c)(1), and the Board's regulations, has investigated the petition and found that there was a question concerning representation. The Board accordingly held a pre-election investigatory hearing to develop a record upon which to make a decision as to disputed representation issues. In addition, the Employing Office has raised several collateral issues relating to the conduct of the hearing, which the Board also disposes of here.

II.

A. Appropriate Unit

The parties agree that a functional unit consisting of the skilled employees of the OCM, except those excluded by statute, is an appropriate unit, and have stipulated that the three supervisory positions, the current incumbents of which are Michael Allen, Gary Dennick, and

Alex Cusati, and the non-supervisory position of staff assistant, the current incumbent of which is Patrick Kenealy, should be excluded from this unit.

However, the parties disagree as to whether four part-time, temporary positions, all of which were vacant at the time of the hearing, are properly included in the unit. Despite the fact that the disputed positions are vacant, Petitioner asks the Board to decide the issue now. Petitioner Brief at 20-22. Petitioner argues that the temporary employees are part of an appropriate unit because they have a reasonable expectation of continued employment and otherwise share a community of interest with the other skilled employees in the OCM. *Id.* at 17-20. The Employing Office disagrees, arguing that temporary employees do not have a reasonable expectation of continued employment and also have different interests from those of the permanent employees in the agreed-upon unit. Employing Office Brief at 21-30. The Employing Office further argues that the inclusion of temporary employees in the unit would not promote effective dealings with and efficiency of the operations of the Employing Office. *Id.* at 29-31. Therefore, the Board must determine whether the agreed-upon unit of all skilled employees of the OCM is appropriate; whether the Board should now determine the status of the vacant part-time, temporary positions; and, if so, whether these positions are properly included in whatever unit the Board finds appropriate.

Under section 7112(a) of title 5, as applied by section 220(c)(1) of the CAA, the Board “shall determine in each case whether, in order to ensure employees the fullest freedom in exercising the rights guaranteed under [Chapter 71], the appropriate unit should be established on an agency, plant, installation, functional, or other basis. . . .” (emphasis added). A unit is appropriate only if it “will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with and efficiency of the operations of the agency involved.” *Id.* All three statutory criteria must be satisfied. *See Red River Army Depot Texarkana, Tex.*, 17 F.L.R.A. 216, 218 (1985) (failure to satisfy any one of the three criteria must result in a finding that the unit sought is inappropriate); *Dep’t of Health and Human Servs. Pub. Health Serv. Food and Drug Admin. Bureau of Drugs*, 11 F.L.R.A. 687, 688 (1983) (same).

While no single factor is dispositive, a functional unit based on the special interests of an occupational or craft grouping is generally an appropriate unit within the meaning of the statute where the employees have specialized training or unique qualifications, little transfer or interchange with other groups of employees, and perform similar skilled jobs. *See, e.g., Panama Canal Comm’n*, 5 F.L.R.A. 104, 115, 116-17 (1981) (separate units of firefighters, police, and marine engineers); *International Communication Agency*, 5 F.L.R.A. 97, 101-02 (1981) (unit of radio broadcast technicians). Such a unit may be appropriate for exclusive recognition, even where an agency wide unit is also appropriate, *See Panama Canal Comm’n, supra*, 5 F.L.R.A. at 115, 116, 117, or where the occupational or craft unit is small. *See U.S. Dep’t of the Air Force, Edwards Air Force Base, Cal.*, 35 F.L.R.A. 1311,1314 (1990).

Craft employees performing similar skilled functions will generally be found to have a clear and identifiable, specialized community of interest, separate and distinct from that of the larger administrative unit of which they are also a part. *Id.* A unit limited to craft employees will generally also promote effective dealings and efficiency of agency operations where the parties can “respond in a more meaningful manner to a functional group of employees who possess characteristics and concerns limited to that group.” *Department of the Navy, Naval Station, Norfolk, Va.*, 14 F.L.R.A. 702, 704 (1984).

In the instant case, the proposed craft unit of the OCM is an appropriate functional unit, within the meaning of section 7112, as applied by the CAA, for the following reasons. The work of the OCM is self-contained. Record at I:110. (All Record references are to the Official Transcript of the Pre-Election Investigatory Hearing, Volumes I-II, referring to the transcript of the hearing conducted on December 17, 1996 and January 17, 1997, respectively.) All skilled media functions are performed by employees in the proposed unit; only clerical functions and assistance to Members of Congress in operating the teleprompter are provided by outside staff. Record at I:110-11. All positions in the proposed unit require specialized training--the OCM seeks to hire candidates with at least five years of commercial experience in the field of broadcasting. Record at I:106-07. Staff also share some functions; in the past two years, after staff was cut to approximately 16 full-time, permanent employees, the OCM began cross-training all its professional employees so that they would be able to substitute for one another, as needed. Record at 107-08. Finally, there has been no transfer of employees between the proposed unit and other House offices. Record at I:112-13. Therefore, the employees in the proposed unit share a clear and identifiable community of interest, separate and distinct from the interests of the larger administrative and personnel unit of which they are a part. Because the proposed functional unit has unique characteristics and concerns, it will also promote effective dealings and efficiency of agency operations because the parties can focus on these special needs and concerns. For all the foregoing reasons, and based on the pertinent legal authorities, the Board finds that the agreed-upon unit of all skilled employees in the OCM is appropriate.

A question remains regarding the unit status of the four or five authorized, but vacant, temporary positions in the OCM. The Board finds instructive in this context the decision of the Federal Labor Relations Authority not to determine whether a vacant position should be included in or excluded from the unit if such a determination would be based on speculation, rather than fact. *See, e.g. Dep't of the Treasury, Bureau of the Mint, U.S. Mint, Denver, Colo.*, 6 F.L.R.A. 52,53 (1981). (The Federal Labor Relations Authority will not make determinations regarding vacant positions because “reliance would have to be place on such evidence as written position descriptions or testimony as to what the duties had been or would be, which evidence might not accurately reflect the actual duties performed by the incumbents when the vacancies are filled.”). The Board agrees that prudential considerations generally counsel against determining whether vacant positions should be included in or excluded from a unit.

Applying these principles to the present case, the Board finds that it would be inappropriate to make a determination regarding the inclusion or exclusion of the temporary positions in the unit because all the temporary positions at issue were vacant at the time of the

hearing. Record at 1:25-26; *see also* Record at 1:86 (last date of employment of any temporary employee was Nov. 1, 1996). The Director of the OCM testified that he had recently requested that these four or five authorized temporary positions be filled, Record at 1:89-91, but that at the time of the hearing he had no information as to whether they would, in fact, be filled in 1997. Record at 1:122. In these particular circumstances, if and when the positions are filled, either party may petition the Board to clarify the unit under section 2422.1 of the Board's regulations, 142 Cong. Rec. H10369, H1 0372 (daily ed. Sept.12, 1996), in the event that the parties are unable to reach agreement.

B. Other Issues Raised by the Parties

1. Employing Office's Request that the Board Promulgate Regulations Addressing the Issue of Conflict of Interest

In its Post-Hearing Brief, the Employing Office has requested that the Board

“promulgate a regulation and/or amend § 2420.2 so as to establish procedures to address the issue of conflict of interest in union representation matters. In the alternative, the Board should promulgate rules regulating union activities involving legislative lobbying, campaign financing, political campaigning and advertising, dues allocation, union use of public facilities and resources, and special access to Members by way of the union's special status as the exclusive bargaining representative, as well as any other issues that might raise a conflict of interest or appearance of conflict of interest.” Employing Office Brief at 20.

A request for rulemaking was also made in the previous representation case before the Board, *US Capitol Police (Case No. 96-LM-1)*. As the Board stated there, “it is inappropriate to conduct rulemaking as part of a pre-election investigatory hearing under section 220.” *Denial of Petition Filed by U.S. Capitol Police Board for Rulemaking About Application of Section 7103(b) of Title V* (February 5, 1997); *Order* (February 5, 1997) (same); *Order* (December 12, 1996) (same). Therefore, the Board denies the request. The Employing Office may, however, pursuant to section 304(f) of the CAA, “petition to the Board for the issuance, amendment, or repeal of a regulation.” The Board would then review any such petition to determine whether there is a showing of good and substantial cause to initiate a rulemaking.

2. Employing Office's Continuing Objections to the Conduct of the Hearing

In its Post-Hearing Brief, the Employing Office renewed its continuing objections to the Board's pre-election investigatory hearing process and procedures. Employing Office Brief at 1-5; 6 n.4. The Board hereby denies those objections.

DIRECTION OF ELECTION

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

All non-supervisory, permanent employees of the Office of Communications

Media, including employees in the following positions: Camera Operator, Senior Audio Specialist, Audio Specialist, Character Generator Operator, Electronic Technician, and Production Engineering Specialist, excluding the Staff Assistant and those employees excluded by statute.

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

Issued, Washington, D.C., March 17, 1997

CERTIFICATE OF SERVICE

I certify that I have served the persons listed below a copy of the attached Decision and Direction of Election by Hand Delivery:

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Dated this 17th day of March, 1997, at Washington, D.C.