

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

COMPUCOM SYSTEMS, INC.

and

Case 22-CA-28969

**COMMUNICATIONS WORKERS
OF AMERICA, LOCAL 1032**

**MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

This memorandum is submitted by Counsel for the General Counsel (CGC) in support of the Motion for Summary Judgment filed herewith.

CGC respectfully submits that the pleadings herein, and the rulings made in the related representation case discussed below, demonstrate that there is no genuine issue of fact as to any allegation in the Complaint. As such, as a matter of law, Summary Judgment and an Order remedying in full the violations set forth in the Complaint should issue.

I. STATEMENT OF THE CASE

Upon a charge (Exhibit A) filed by Communication Workers of America, Local 1032 (the Union), a Complaint issued in Case 22-CA-28969 on July 24, 2009 (Exhibit B) against CompuCom Systems, Inc. (Respondent). The Complaint alleges that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by refusing to recognize and bargain with the Union as the exclusive bargaining representative of its employees in a unit appropriate for the purposes of

collective bargaining, even though the Union had been certified by the National Labor Relations Board (the Board) as the unit's bargaining agent.

Respondent's Answer (Exhibit C)¹ to the Complaint contests only the Board's certification of the Union as the bargaining representative of an appropriate unit of its employees and the legal conclusions and consequences of its admitted refusal to recognize and bargain with the Union in compliance with the Board's Certification of Representative in Case 22-RC-12925.

II. BACKGROUND

Respondent provides information technology related services to customers throughout the United States and, on August 20, 2008, purchased the business of Getronics USA, Inc. (Getronics). (Ans. ¶ 2) Respondent has continued to operate the business of Getronics in basically unchanged form at the facilities of its client, Novartis, in East Hanover, Florham Park, and Suffern, New Jersey (the Facilities).² (Ans. ¶ 3) Respondent has continued to employ a majority of Getronics' employees at the Facilities and admits that it is a successor of Getronics. (Ans. ¶ 3-4)

The Union filed a petition (Exhibit D) in Case 22-RC-12925 on May 20, 2008 and, pursuant to a Stipulated Election Agreement approved on June 6, 2008, an election was conducted on June 27, 2008 in the following bargaining unit (the Unit):

All-full-time and regular part-time Technical Support Specialists, Network Engineers, Logistics Coordinators and Help Desk Analyst employees, employed by Respondent at its Florham Park, East Hanover, New Jersey and Suffern, New

¹ Citations to the Answer herein are referred to as (Ans. ¶ ___).

² For a discussion of the location of Respondent's operations in New Jersey, see the Recommended Decision on Objections and Challenges (Exhibit F p. 2) of Administrative Law Judge Steven Fish.

York facilities, but excluding all office clerical employees, Business Analyst, Project IC Managers, guards, and supervisors, as defined in the Act.

The Tally of Ballots (Exhibit E) shows 14 votes for and 10 votes against the Union, with 5 determinative challenged ballots. The Union challenged the ballots of John Paynter, Robert Mikol, Thomas Skorka, Gustavo Gil and Charles Crosby on the ground that they are supervisors. On July 7, 2008, the Union filed timely objections to conduct affecting the results of the election.

In a Recommended Decision on Objections and Challenges that issued on December 30, 2008 (Exhibit F), Administrative Law Judge Steven Fish (Judge Fish) recommended that the challenges to the ballots of Paynter and Mikol be sustained. Judge Fish recommended that all the outstanding objections and challenges be overruled.

In a Decision and Certification of Representative that issued on April 27, 2009 (Exhibit G), the Board denied Respondent's exceptions, adopted Judge Fish's recommendation to sustain the challenges to the ballots of Mikol and Paynter, and certified the Union as the bargaining representative of the Unit.

By letters to Respondent dated May 19, 2009 (Exhibit H) and June 9, 2009 (Exhibit I), Union Staff Representative Thomas G. Jones requested bargaining and information related thereto. By letter to the Union dated June 15, 2009 (Exhibit J), Respondent Associate General Counsel Marthe C. Stanek stated that Respondent does not believe the Union represents a majority of Unit employees and that it intends to contest certification.

III. THE PLEADINGS

In its Answer to the Complaint, Respondent admits the filing and service of the charge; the jurisdictional commerce criteria; its successorship of Getronics; that the Union was certified as the collective bargaining representative of that unit; its refusal to bargain collectively with the Union; and the Union's status as a labor organization within the meaning of Section 2(5) of the Act. Respondent denies only that the Union won the election in Case 22-RC-12925 -- on the ground that all five determinative challenged ballots should have been overruled and counted toward the final election results -- and is the bargaining representative of the Unit. (Ans. Affirmative Def. ¶ 1) Accordingly, Respondent contends that the Union should not have been certified as the bargaining representative of the Unit and that it has not violated Section 8(a)(1) and (5) of the Act by refusing to bargain with the Union.

IV. ARGUMENT

There is no genuine issue as to any material fact alleged in the Complaint regarding the alleged 8(a)(1) and (5) violation

Respondent seeks to contest the certification of the Union as the lawful bargaining representative of employees in the Unit and the conclusionary allegations that, by its admitted conduct, Respondent violated Section 8(a)(1) and (5) of the Act. Pursuant to the Board's established practice in such instances, the Board is hereby requested to take official notice of the prior representation proceeding in Case 22-RC-12925, including Judge Fish's Recommended Decision on Objections and Challenges and the Board's Decision and Certification of Representative. *Frontier Hotel*, 265

NLRB 343 (1982); Rules and Regulations of the Board, Sections 102.68 and 102.69(g).

It is apparent that Respondent is merely attacking the Union's certification as the exclusive collective bargaining representative of the Unit, and that all issues raised by Respondent were or could have been litigated in the prior representation proceeding. The Board has maintained a "long-settled policy not to allow parties to relitigate representation case issues in 'test of certification' unfair labor practice proceedings, absent newly discovered or previously unavailable evidence or special circumstances." *Troy Hills Nursing Home*, 326 NLRB 1465 (1998), citing *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146 (1941). Since Respondent does not allege any special circumstances that would require the Board to re-examine the decision made in the representation proceeding, but merely disagrees with the Regional Director's conclusion and the Board's adoption of that conclusion, there exists no factual issue before the Board, and therefore, no matter requiring a hearing. See *Superior Protection Inc.*, 341 NLRB No. 35 (Feb. 25, 2004) enf'd 401 F.3d 282 (5th Cir. 2005); *Dole Fresh Vegetables, Inc.*, 333 NLRB 169 (May 11, 2001) enf'd 334 F.3d 478 (6th Cir. 2003); *Ritz Carlton Hotel Company*, 321 NLRB 659 (1996) enf'd 123 F.3d 760 (3rd Cir. 1997); Rules and Regulations of the Board, Sections 102.67(f). Accordingly, summary judgment is appropriate.

V. REMEDY

CGC respectfully requests that the Board grant this Motion for Summary Judgment, find that Respondent has engaged in and is engaging in unfair labor

practices with the meaning of Section 8(a)(1) and (5) of the Act, and issue an Order requiring Respondent to cease and desist therefrom, and upon request, bargain collectively with the Union as the exclusive representative of all employees in the Unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the Unit will be accorded the services of their selected bargaining agent for the period provided by law, it is further requested that the Board, in its Order, direct that the initial year of certification begin on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative of the Unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962) *enfd* F.2d 600 (6th Cir.); *Burnett Construction Company*, 149 NLRB 1419 (1964), *enfd* F.2d 57 (10th Cir.); *Walt Disney World Dolphin Hotel*, 314 NLRB 154,155 (1994).

Dated at Newark, New Jersey, this 12th day of August, 2009.

Respectfully submitted,



Benjamin W. Green
Counsel for the General Counsel
National Labor Relations Board
Region 22
20 Washington Place, 5th Floor
Newark, New Jersey 07102
(973) 645-6453

INDEX OF EXHIBITS

<u>Exhibit Letter</u>	<u>Description</u>
A.	Charge filed in Case 22-CA-28969
B.	Complaint in Case 22-CA-28969
C.	Respondent's Answer in Case 22-CA-28969
D.	Petition in Case 22-RC-12925
E.	Tally of Ballots in Case 22-RC-12925
F.	Judge Fish's Recommended Decision on Objections and Challenges in Case 22-RC-12925
G.	The Board's Decision and Certification of Representative in Case 22-RC-12925
H.	The Union's May 19, 2009 letter requesting bargaining and information
I.	The Union's June 9, 2009 letter requesting bargaining and information
J.	Respondent's June 15, 2009 letter refusing to bargain or provide information.

UNITED STATES OF AMERICA
 NATIONAL LABOR RELATIONS BOARD
 CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE

CASE 22-CA-28969 DATE FILED 6/19/2009

INSTRUCTIONS:

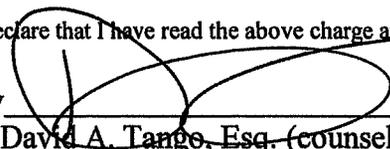
File an original and 4 copies of this charge with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT		
a. Name of Employer CompuCom	b. Number of workers employed 30	
c. Address (street, city, state, ZIP code) CompuCom c/o Navartis Pharmaceuticals Building 431, Room 2530 D 1 Health Plaza East Hanover, NJ 07936	d. Employer Representative Pat Llewellyn	e. Telephone No. 862-778-7957 888-299-4565 (fax)
f. Type of Establishment (factory, mine, wholesaler, etc) Corporation	g. Identify principal product or service Contract Computer Support Services	
h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (5) of the National Labor Relations Act, and these unfair labor practices are unfair practices affecting commerce within the meaning of the Act.		
2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices) CWA Local 1032 was certified on or about April 27, 2009 by the Board as the exclusive collective bargaining representative of all full-time and part-time employees employed in the titles Technical Support Specialist, Network Engineer, Logistics Coordinator, and Help Desk Analyst by Getronics, USA, Inc., at its Florham Park, NJ, East Hanover, NJ, and Suffern, NY facilities. (22-RC-12925). CompuCom, the successor to Getronics USA, Inc., has refused to bargain with CWA in violation of Sections 8(a)(1) and (5) of the Act. By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.		
3. Full name of party filing charge (If labor organization, give full name, including local name and number) Communications Workers of America, AFL-CIO, Local 1032		
4a. Address (street and number, city, state, and ZIP code) 67 Scotch Road Ewing, NJ 08628	4b. Telephone No. 609-434-1032 609-883-8184 (fax)	
5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization) Communications Workers of America, AFL-CIO		

6. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By


David A. Tango, Esq. (counsel to CWA Local 1032)

Address: Weissman and Mintz LLC
One Executive Drive, Suite 200
Somerset, New Jersey 08873

(Telephone No.)
732-563-4565

(Date)
6/18/09

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22**

COMPUCOM SYSTEMS, INC.

and

Case 22-CA-28969

**COMMUNICATION WORKERS OF
AMERICA, LOCAL 1032**

COMPLAINT

Communication Workers of America, Local 1032, herein called the Union, has charged that CompuCom Systems, Inc., herein called Respondent, has been engaging in unfair labor practices as set forth in the National Labor Relations Act, 29 U.S.C. § 151 et seq., herein called the Act. Based thereon the Acting General Counsel, by the undersigned, pursuant to Section 10(b) of the Act and Section 102.15 of the Rules and Regulations of the National Labor Relations Board, herein called the Board, issues this Complaint and Notice of Hearing and alleges as follows:

1. The charge in this proceeding was filed by the Union on June 19, 2009, and a copy was served by certified mail on Respondent on June 19, 2009.
2. At all times material herein, Respondent, a Massachusetts corporation with offices and places of business in East Hanover, Florham Park and Suffern, New Jersey has been engaged in the business of contract computer support services.
3. On or about August 20, 2009, Respondent purchased the business of Getronics USA, Inc., herein called Getronics, and since then has continued to operate the

business of Gentronics in basically unchanged form, and has employed as a majority of its employees individuals who were previously employees of Gentronics.

4. Based on the operations described above in paragraphs 2 and 3, Respondent has continued the employing entity and is a successor to Gentronics.

5. During the preceding twelve-month period, Respondent, in conducting its business operations described above in paragraphs 2 and 3, purchased and received at its New Jersey facilities goods valued in excess of \$50,000 directly from points outside of the State of New Jersey.

6. At all material times, Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

7. At all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

8. The following employees of Respondent, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All-full-time and regular part-time Technical Support Specialists, Network Engineers, Logistics Coordinators and Help Desk Analyst employees, employed by Respondent at its Florham Park, East Hanover, New Jersey and Suffern, New York facilities, but excluding all office clerical employees, Business Analyst, Project IC Managers, guards, and supervisors, as defined in the Act.

9. On April 27, 2009, the Union was certified as the exclusive collective-bargaining representative of the Unit.

10. At all times since April 27, 2009, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

11. Since about April 27, 2009, Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective bargaining representative of the Unit.

12. By the conduct described above in paragraph 11, Respondent has been failing and refusing to bargain collectively with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

13. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

ANSWER REQUIREMENT

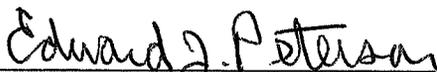
Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be **received by this office on or before Friday, August 7, 2009, or postmarked on or before Thursday, August 6, 2009.** Unless filed electronically in a pdf format, Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically by using the E-Filing system on the Agency's website. In order to file an answer electronically, access the Agency's website at <http://www.nlr.gov>, click on **E-Gov**, then click on the **E-Filing** link on the pull-down menu. Click on the "File Documents" button under "Regional, Subregional and Resident Offices" and then follow the directions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to

timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the parties if not represented. See Sections 102.21. If an answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer needs to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature be submitted to the Regional Office by traditional means within three (3) business days after the dated of electronic filing.

Service of the answer on each of the other parties must still be accomplished in conformance with the requirement of Section 102.114 of the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations of the complaint are true.

Issued at Newark, New Jersey, this 24th day of July, 2009.


Edward J. Peterson
Acting Regional Director
National Labor Relations Board
Region 22
20 Washington Place, 5th Floor
Newark, New Jersey 07102

Attachments

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 22

COMPUCOM SYSTEMS, INC.

§
§
§
§
§
§

and

Case No. 22-CA-28969

COMMUNICATION WORKERS
OF AMERICA, LOCAL 1032

COMPUCOM SYSTEMS, INC.'S ANSWER TO THE COMPLAINT

Respondent CompuCom Systems, Inc. ("CompuCom" or "Respondent") files this Answer to the Complaint and states as follows:

I.

RESPONSES TO NUMBERED PARAGRAPHS IN COMPLAINT

1. Respondent admits the allegations in Paragraph 1 of the Complaint.
2. Respondent admits that it is a Delaware corporation which maintains its corporate offices in Dallas, Texas. Respondent also admits that it provides information technology ("IT") related services to business customers throughout the United States, including the installation, maintenance and support of customers' IT infrastructure. Respondent also admits that it conducts business in East Hanover, Florham Park and Suffern, New Jersey. Respondent denies the remaining allegations in Paragraph 2 of the Complaint.
3. Respondent admits that on or about August 20, 2008, it purchased the business of Getronics USA, Inc. (hereinafter "Getronics"), and since then has continued to operate the business of Getronics in basically unchanged form, and has employed a

majority of the individuals who were previously employees at Getronics. Respondent denies the remaining allegations in Paragraph 3 of the Complaint.

4. Respondent admits that it is a successor to Getronics. Respondent denies the remaining allegations in Paragraph 4 of the Complaint.

5. Respondent admits that during the preceding 12-month period, Respondent has purchased and received at its New Jersey facilities goods valued in excess of \$50,000 directly from points outside of the State of New Jersey. Respondent denies the remaining allegations in Paragraph 5 of the Complaint.

6. Respondent admits the allegations in Paragraph 6 of the Complaint.

7. Respondent admits the allegations in Paragraph 7 of the Complaint.

8. Respondent admits the allegations in Paragraph 8 of the Complaint.

9. Respondent admits that on April 27, 2009, the National Labor Relations Board (the "Board") issued a Decision and Certification of Representation certifying the union as the exclusive collective bargaining representative of the unit, but Respondent contests the Decision and Certification and denies that the union is the bargaining representative of the unit.

10. Respondent denies the allegations in Paragraph 10 of the Complaint.

11. Respondent admits that since about April 27, 2009, it has failed and refused to bargain with the union because Respondent denies that the union is the exclusive collective bargaining representative of the unit.

12. Respondent denies the allegations in Paragraph 12 of the Complaint.

13. Respondent denies the allegations in Paragraph 13 of the Complaint.

II.

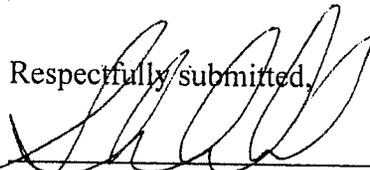
AFFIRMATIVE DEFENSES

1. Subject to and without waiving the foregoing, and in the alternative if necessary, Robert Mikol ("Mikol") and John Paynter ("Paynter") are not "supervisors" as defined by Section 2(11) of the National Labor Relations Act (the "Act"), and therefore, the five ballots which were challenged during the representation election underlying this Complaint should be opened and counted.

2. Subject to and without waiving the foregoing, and in the alternative if necessary, the Board's April 27, 2009 Decision and Certification of Representation was issued by a two-member Board which does not have the statutory authority under Section 3(b) of the Act to resolve Respondent's objections in this matter.

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully requests that the Complaint be dismissed in its entirety.

Respectfully submitted,



Steven L. Rahhal
State Bar No. 16473990
Edward Berbarie
Texas Bar No. 24045483

LITTLER MENDELSON
A PROFESSIONAL CORPORATION
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srahhall@littler.com
eberbarie@littler.com

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument was served on the following parties via Federal Express on this 4th day of August, 2009:

David A. Tango, Esq.
Weissman & Mintz
One Executive Drive, Suite 200
Somerset, NJ 08878

Communication Workers of America
Local 1032
67 Scotch Road
Ewing, NJ 08628



Steven L. Rahhal

UNITED STATES GOVERNMENT NATIONAL LABOR RELATIONS BOARD PETITION

DO NOT WRITE IN THIS SPACE Case No. 22-RC-12925 Date Filed 5/20/2008

INSTRUCTIONS: Submit an original and 4 copies of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

- 1. PURPOSE OF THIS PETITION (if box RC, RM, or RD is checked and a charge under Section 8(b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.) (Check One) [X] RC-CERTIFICATION OF REPRESENTATIVE...

2. Name of Employer Getronics Employer Representative to contact Pat Llewellyn Telephone Number 662 778-7957

3. Address(es) of Establishment(s) involved C/O Novartis Pharmaceuticals, Bldg 431 Rm 2530 D, 1 Health Plaza, East Hanover, NJ 07936

4a. Type of Establishment Computer Service Provider 4b. Identify principal product or service computer technical support

5. Unit Involved Included All full time and regular part time technical and network employees... Excluded All managerial and supervisory employees... 6a. Number of Employees in Unit Present 26 6b. Is this petition supported by 30% or more of the employees in the unit? [X] Yes

7a. [X] Request for recognition as Bargaining Representative was made on (Date) May 20, 2008 and Employer declined recognition on or about (Date) no reply

8. Name of Recognized or Certified Bargaining Agent (If none, so state.) None. Affiliation

Address, Telephone No. and Telecopier No. (Fax) Date of Recognition or Certification

9. Expiration Date of Current Contract. If any 10. If you have checked box UD in 1 above, show here the date of execution of agreement granting union shop

11a. Is there now a strike or picketing at the Employer's establishment(s) involved? Yes No [X] 11b. If so, approximately how many employees are participating?

11c. The Employer has been picketed by or on behalf of (insert Name) organization, of (insert Address) Since (Month, Day, Year)

12. Organizations or individuals other than Petitioner (and other than those named in items 8 and 11c), which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in unit described in item 5 above.

Table with 4 columns: Name, Affiliation, Address, Date of Claim. Row 1: None.

13. Full name of party filing petition (if labor organization, give full name, including local name and number) Communications Workers of America Local 1032 AFL-CIO

14a. Address (street and number, city, state, and ZIP code) 67 Scotch Road, Ewing, NJ 08628 14b. Telephone No. 609 434-1032 EXT 14c. Telecopier No. (Fax) 609 883-8184

15. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization) Communications Workers of America AFL-CIO

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name (Print) Migdalia Santiago Signature Title (if any) Organizer Telephone No. 973-589-1544 Telecopier No. 973-589-5304

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001) PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing charges for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 2006). This information to the NLRB is voluntary; however, failure to supply the information will cause

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

GETRONICS USA, INC.

Employer

and

COMMUNICATION WORKERS OF AMERICA,
LOCAL 1032

Petitioner

Date Filed

Case No. 22-RC-12925

5-20-08

Date Issued June 27, 2008

Type of Election
(Check one:)

- Stipulation
 - Board Direction
 - Consent Agreement
 - RD Direction
- Incumbent Union (Code)

(If applicable check either or both:)

- 8(b) (7)
- Mail Ballot

PINK BALLOTS

TALLY OF BALLOTS

The undersigned agent of the Regional Director certifies that the results of the tabulation of ballots cast in the election held in the above case, and concluded on the date indicated above, were as follows:

- 1. Approximate number of eligible voters 30
- 2. Number of Void ballots 0
- 3. Number of Votes cast for PETITIONER 14
- 4. ~~Number of Votes cast for~~ -
- 5. ~~Number of Votes cast for~~ -
- 6. Number of Votes cast against participating labor organization(s) 10
- 7. Number of Valid votes counted (sum of 3, 4, 5, and 6) 24
- 8. Number of Challenged ballots 5
- 9. Number of Valid votes counted plus challenged ballots (sum of 7 and 8) 29
- 10. Challenges are not sufficient in number to affect the results of the election.
- 11. A majority of the valid votes counted plus challenged ballots (Item 9) has (not) been cast for COMMUNICATION WORKERS OF AMERICA, LOCAL 1032

For the Regional Director

Region 22

Bernard S. Mintz

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For EMPLOYER

For PETITIONER

Asi J. Est.

Miguel Santos CWA 1032

For

For

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

GETRONICS USA , INC.
Employer

Case 22-RC-12925

COMMUNICATION WORKERS OF
AMERICA LOCAL 1032
Petitioner

Ariella Feingold, Esq. and Laura Schneider, Esq.
(Wilmer Cutler Pickering Hale and Dorr) New York, NY
for the Employer

David Tango, Esq. and Ann Marie Pinarsk, Esq.
(Weissman & Mintz, LLP) Somerset, New Jersey
for the Petitioner

RECOMMENDED DECISION ON OBJECTIONS AND CHALLENGES

STATEMENT OF THE CASE

Steven Fish, Administrative Law Judge. Pursuant to a Petition filed by Communications Workers of America, Local 1032, herein called Petitioner or the Union, on May 20, 2008, the parties entered into a Stipulated Election Agreement on June 3, 2008, providing for an election to be conducted on June 27, 2008, in a unit of employees in various positions employed by Getronics USA, Inc. herein called Getronics or the Employer at its Florham Park and East Hanover, New Jersey and Suffern, New York facilities.

Thereafter, the Region served a Tally of Ballots upon the parties showing the following:

Approximate number of eligible voters	30
Void ballots	0
Votes cast for Communication Workers of America, Local 1032	14
Votes cast against participating labor organization	10
Valid votes counted	24
Challenged ballots	5
Valid votes counted plus challenged ballots	29

Challenges are sufficient in number to affect the results of the election. On July 7, 2008 the Petitioner, filed timely objections to conduct affecting the results of the election.

On July 17th, 2008, the Director issued a Report on Challenged Ballots and Objections and Notice of Hearing, in which he approved the Petitioner's request to withdraw objection No. 6,

and concluded that the remaining Objections filed by the Petitioner, as well as the Challenges to the ballots of John Paynter, Robert Mikol, Thomas Skorka, Gustavo Gil and Charles Corby, raised substantial and material issues which can best be resolved on the basis of record testimony at a hearing. The Director ordered that a hearing be held to received testimony with respect to the issues raised in the Report.

Accordingly, a hearing was held before me in Newark, New Jersey on August 18, 19 and 20 and September 26, 2008. Briefs have been filed and have been carefully considered. Based upon the entire record, including my observation of the demeanor of the witnesses, I issue the following:

FINDINGS OF FACT

1. BACKGROUND

Getronics is a worldwide information technology outsourcing company, with its main office in the Netherlands. It employs approximately 10,000 employees all over the world. It is divided into various regions, including Getronics North America, which in turn includes Getronics U.S.A. which is the entity involved in this proceeding. Getronics North America employs approximately 3500 employees at numerous locations including 10-12 offices, which are leased facilities, where employees work. Its main office is in Tewksbury, Massachusetts. Getronics USA's CEO is Gary Cawthorne.

The majority of employees of the Employer work at customer sites throughout the country. The proceeding here involves the employees of the Employer who work at three sites of Novartis, in East Hanover and Florham Park, New Jersey, and Suffern, New York. Getronics USA employees between 150-200 employees who work at these three facilities, including the 30 employees eligible to vote in the election.

William Schultz is the Operations Manager of the Novartis locations, and is responsible for ensuring that the Employers' contract objectives with Novartis are met. Schultz reports to Carl Stager, the Program Manager II at the East Hanover site, who in turn reports to Pat Llewellyn the Program Director for the sites. Bruce Strow, Operations Manager I, reports to Schultz.

The majority of bargaining unit employees are classified as Technical Support Specialists, (TSS). Getronics has four TSS levels, and employees are classified as TSS I, II, III, of IV, depending on their technical skill experience and knowledge.¹

2. THE CHALLENGES

A. FACTS

The Petitioner challenged the ballots of Paynter, Mikol, Gil, Skorka and Corby on the grounds that they are supervisors. Four of the individuals challenged, are designated by the Employer as Team Leads. (Mikol, Paynter, Skorka and Gil). Corby has not been so designated.

There is conflicting testimony in the record as to how and when these individuals became Team Leads. Thus Strow and Schultz testified that Schultz instituted the designation two and

¹ TSSI is the lowest ranking and TSS IV is the highest ranking.

half years ago. Mikol and Paynter on the other hand testified that the designation occurred between 3-4 years (Mikol) and 7 (Paynter) and that the position was "assumed" according to Paynter, and was instituted by Llewelyn, according to Mikol.

5 I need not resolve this credibility dispute, since the issue of supervisory status is not determined by titles, but by whether the alleged supervisors have the authority to or exercise any of the indica of supervisory authority detailed in Section 2(11) of the Act. Here regardless of when and how the individual became "Team Leaders", the issue is what supervisory authority they possessed or exercised. Notably, some of the evidence adduced concerning such issues, particularly the involvement of the individuals in the Employer's hiring process, took place before they were designated as "Team Leads", under any of the versions described above.

15 The Team Lead designation is not a job classification, and did not or does not result in any increased compensation. The Team Leads are the most experienced employees, and their function is primarily to be a contact point for other technicians to resolve technical issues and work tickets, and to be a point of contact for Novartis employees in the event that work issues arise, particularly when nether Schultz nor Strow are available.

20 Corby although not designated a Team Lead, is the most experienced TS IV, and so all employees can come to him for technical assistance. Previous to the Team Lead designations, all employees went to Corby for technical assistance. Thus the designation of the four Team Leads, took some of that burden from Corby, and spread the work of assisting employees to these other individuals.

25 The Employer's internal organizational chart does not make any reference to Team Leads, and divides the unit employees into two groups (including the Team Leads and Corby), some reporting to Schultz and others to Strow.

30 However, the Employer did prepare and distribute another organizational chart to employees and to Novartis. This chart places Schultz on top as the Operations Manager, and then the next level includes six individuals on the same line, including Strow, listed as Manager of Desk Side Support, and Mikol and Paynter as Team Leads. The next in line includes 7 individuals, including Skorka and Gil designated as Team Leads, Corby listed Technical Support, and three individuals, who are clearly unit employees.² This chart lists the employees under each of the Team Leads, with their job function. Thus Mikol's "Team" includes six other employees,³ 8 other individuals.⁴ Skorka's "Team" includes four technicians, Robert Kwiatkowski, Joe Peters, Donald Nwobi, and Russell Callahan, and one contractor, Alfredo Hernandez. Gil's "Team" includes four individuals listed as technicians (Ulian Matveychuk, Elliot Ottenstein, Evelyn Otero and Gritzko Cerdal), a Printer Support Technician (Michael Nah), and a Suffern Support Technician (Vasilos Liakos).

As noted, none of the Team Leads received salary increases when they received the designation. However, the Team Leads as well as Corby do receive substantially higher

45 ² Nicholas Battista, Derek Lamar and Manny Rosario.

³ Rosario is listed as Field Support Technician, Andy Albertsen, Field Support Build Center, Oscar Olmedo, Inventory, Obbie Williams, Logistics Coordinator, and Mark Anderson and William Napolitano, Build Center.

50 ⁴ David Sullivan, David LaCorte, Network Support, Lamer, Network Projects, Anthony Steriacci, and Eric Simpson. Moves, Justin Chung and Tyrone Pearson Deploy/Recover, and Joe DiCarbo Engine 4 Project Contractor).

salaries, than the other unit employees. Corby's 2008 salary was \$89,450. Skorka's salary as of 2006 was \$95,975. The 2008 salaries for Paynter, Mikol and Gil, were \$81,409, \$80,132 and \$78,009. The salaries of other unit employees ranged from \$39,469.00 for Andrew Albertsen,⁵ to \$63,860.00 for Donald Nwobi.⁶ Russell Callahan and Michael Nah, are TSS II's, and had salaries of \$50,801.00 and \$50,900 respectively in 2008.

The primary evidence concerning the supervisory status of the challenged voters, particularly Mikol and Paynter, consisted of their participation in the interviewing of employees. In that regard the record establishes that the Employer's practice, which was in existence prior to the Team Lead designations, was to request that one or more of the five individuals in question participate in the interview process.

In 1999 Russell Callahan was interviewed for employment by Getronics by Strow, Corby and Gil. All three individuals present asked Callahan questions according to Callahan, about "what I knew, what I did, and stuff like that". A few days later Callahan called up and left a message on Corby's voice mail asking about the status of his application.⁷ Corby returned Callahan's call a day or two later, and informed Callahan that he was going to be offered the job, and would be receiving an offer in the mail. Shortly thereafter, Callahan received an offer in the mail and was hired by the Employer at that time. No evidence was presented as to what discussions if any, Gil or Corby had with Strow after the interview concerning Callahan, nor any evidence that either Gil or Corby made any recommendation to Strow or any other management official concerning whether or not to hire Callahan.

Both Paynter and Mikol furnished extensive testimony concerning their roles in the interview process, which also touched tangentially on the roles of Corby, Gil and Skorka on that process. Their testimony which is in part mutually corroborative and credible reflects as follows.

Both Paynter and Mikol testified, corroborated by Strow and Schultz, that the Team Leads and Corby are asked to participate in job interviews along with Strow and Schultz, primarily to evaluate the applicants "Technical" abilities, and to determine if the applicants were honest about the skills and experience listed on their resumes. As Mikol explained, they engage the applicants "Technically... if they're coming off, you know, being brash or whatever, that they have a strong resume all these different... You know, we'll challenge them in those particular areas, technically, to make sure, you... you know, just as a check and balance point what you put on your resume, we'll expect you to know".

After the interviews conclude with the applicants, either Schultz or Strow will ask the others how the applicant handled him or herself, were their responses technically consistent with their resume, and was there anything that they discovered technically. According to Mikol, he and the other Team Leads present at the interviews, will give their opinions to Strow or Schultz as to their assessment of whether the applicant "fits the bill or doesn't".

Both Mikol and Paynter testified that where the applicant is applying for a position in the area of responsibilities that they have, each of them will recommend whether or not the Employer should hire or extend an offer to the particular applicant.

⁵ Albertsen was TSS 1.

⁶ Nwobi is a TSS III.

⁷ The record does not reflect why Callahan called Corby to inquire about his status.

Paynter testified that when he interviews applicants, along with Strow and or Schultz and or other Team Leads, he asks questions about the applicants technical knowledge, to determine "if the could do the job that is going to be asked of them", and "if they would be a good fit for what the job is going to be required of them". After the interview concludes, Paynter would tell Strow or Schultz whether Paynter thinks that person would be a good fit for the job, whether that person would be a good hire or a bad hire, and whether he (Paynter) believes that person should be hired.

There is no dispute, but that either Strow or Schultz makes the final decision to hire the applicants, and that after these interviews, if Getronics intends to hire the applicant either Strow or Schultz will discuss salary, hours and other matters with the applicants before they are actually hired by the Employer.

The record contains several specific examples, where Paynter and or Mikol made recommendations to hire or not to hire, specific applicants for employment. Approximately seven years ago,⁸ Paynter and Mikol participated in the interview process, wherein Mark Andersen was hired by Getronics. Strow was the only management representative present at the interview.⁹ At that time there were three applicants for the position that Andersen was hired to fill. Paynter, Mikol, and Strow first interviewed an applicant. Paynter and Mikol asked the applicant technical questions, and after the interview, both Mikol and Paynter recommended to Strow that this applicant not be hired, because that applicant was very nervous during the interview and they felt that he couldn't take the pressure of the job,¹⁰ and because the applicant did not have the technical skills for the job.

Strow was in agreement with the recommendations of Paynter and Mikol, and they proceeded to interview the next applicant. The next applicant to be interviewed was George Le Chek. After Paynter and Mikol questioned Le Chek, they concluded and recommended to Strow that Le Chek did not have the technical skills for the position. Strow agreed with this conclusion, and they proceeded to interview Andersen.

Mikol and Paynter asked Andersen technical questions, which Andersen answered.¹¹ Although Paynter recalled that Andersen was "really nervous" during the interview, both he and Mikol felt that Andersen's responses to the technical questions were good enough, so that they both recommended to Strow that he be hired. Strow agreed, and after Strow conducted a phone interview with Andersen, Andersen was hired as an employee.

About five years ago, Mikol, Paynter and Strow interviewed Nicholas Battista for a position.¹² Paynter and Mikol asked Battista questions about his experience, his ability and about his technical competence. They also tested Battista's knowledge of certain terms involved in the computer field. After the interview concluded, both Paynter and Mikol informed Strow that in

⁸ I note that this incident occurred prior to either Mikol or Paynter being chosen as Team Leads.

⁹ Paynter testified that "I think Charlie Corby was there. Gus Gil might have been there". Mikol did not testify whether anyone else was present during the interview other than himself and Strow.

¹⁰ During the interview, the applicant was hot and sweaty, and started to take off his clothes during the meeting, and appeared very nervous.

¹¹ Strow asked Andersen non-technical questions, such as if Andersen could commute to work.

¹² By that time, according to Paynter, both he and Mikol were Team Leads.

their view, Battista was "a good fit", and that Getronics should hire him for the position. Strow said okay, and then conducted his own telephone interview with Battista, wherein he discussed issues such as salary and benefits. Within a week, Battista was hired by the Employer.

5 Also approximately five years ago, Mikol and Paynter interviewed Andy Albertsen for a position as an Inventory Coordinator.¹³ Paynter testified that the applicant didn't really need technical skill sets to do that job. He needed only the ability to understand part numbers, since the position was inventory coordinator. Paynter and Mikol asked Albertsen some simple questions, such as "What a hard drive is"? After the interview with Albertsen ended, both Mikol and Paynter recommended to Strow that Albertsen be hired for the position, since they thought that Albertsen "could do the job". Shortly thereafter, Albertsen was hired by Getronics.

15 David Sullivan was interviewed by Mikol, Paynter and Strow, approximately eight years ago.¹⁴ During the interview, Paynter and Mikol asked Sullivan questions about technical aspects of his experience and of the job. After Sullivan left the interview, Paynter and Mikol recommended to Strow that Sullivan be hired. Strow agreed, and followed up with a phone interview, and Sullivan was hired.

20 After working for Getronics at East Hanover for a few years, Sullivan transferred to another Novartis worksite in Parsippany, New Jersey, but remained as an employee of Getronics. After working at that jobsite for several years, an opening arose at East Hanover two years ago. At that time, about eight years ago, Getronics announced that a position was available. Sullivan, as well as two other Getronics employees, Evelyn Otero and Ross Rivera applied for this job. In this instance the interviews were conducted by Paynter and Strow. Otero was first. Paynter asked Otero questions about her experience at her present position, and ascertained that she had no experience with switchers or routers, which was essential for the position. After Otero left the interview, Paynter recommended to Strow that Otero not be selected for the position, and Getronics should "keep looking", since she did not have the relevant experience for the job. Strow agreed.

30 Rivera was interviewed, and he too had no experience with switchers and routers. Again Paynter recommended to Strow that Rivera not be selected because of his lack of experience, and Strow agreed.

35 Sullivan was the last of the three applicants to be interviewed. Paynter asked Sullivan what work he was doing at the Parsippany facility. Sullivan replied that he had set up switchers and servers, which was similar to the work involved in the position. After the interview ended, Paynter recommended to Strow that Sullivan be selected for the vacant position, because Paynter had worked with Sullivan in the past and that Sullivan had the "skill set" to perform the job. Strow said okay, and Sullivan was transferred to the East Hanover worksite.

45 Approximately one to two years ago, Schultz asked Paynter to interview several applicants for positions as temporary employees. Paynter asked employee David La Corte to sit in with him during these interviews, because La Corte had previously performed the job. (Deployment and Recoveries). There were two positions available, for which Getronics had five applicants. These applicants had been sent over to Getronics from an Agency for interviews. Schultz had informed the Agency that the Employer needed two individuals for this particular type of work. The Agency then sent over five individuals. These individuals are not and were not ever

50 ¹³ Strow may or may not have been present at this interview.

¹⁴ Once again, Paynter testified that Gil and Corby "could have been there, I'm not sure."

employees of Getronics. They were employees of the Agency, and Getronics pays the Agency for the services of the employees. Once on the site, however, these employees of the Agency, perform the same work as Getronics employees, and are members of the "Teams", under the Team Leads.

5 Paynter and La Corte interviewed five Agency employees to fill the two vacant positions as temporary employees for Getronics.¹⁵ La Corte and Paynter explained to the five applicants what they would be doing while employed at the Getronics worksite, and asked them questions to determine if they had the ability to perform the work required.

10 Paynter testified that these positions required minimal skill sets, but that he and La Corte had to determine if they had the aptitude to understand the position. They asked questions to see if the applicants understood IP addresses, sub-nets and super-nets, among other questions, to see if they could "troubleshoot", if a PC does not work properly. After interviewing the five
15 individuals, La Corte and Paynter conferred and decided to recommend the hire of Tyrone Pearson and Justin Chung for the two available positions as "Temps". Paynter informed Schultz of this recommendation. Schultz said okay, that's fine. Schultz then called the Agency, discussed monetary issues, and arranged for Chung and Pearson to be start work as Temps at the East Hanover facility.

20 About six months ago, Getronics offered Pearson and Chung full time positions as employees of Getronics. They both accepted and are still employed by the Employer. The decision to convert these individuals from Temps to permanent employees was made by Schultz. He did not ask Paynter or any Team Leader for their recommendation as to whether to
25 offer these individuals permanent employment. Schultz did however inquire of Paynter as to how these Temps were doing. In that conversation, Schultz did inform Paynter that the time period for retaining these individuals as "Temps" was expiring, and that Getronics needed to make a decision to make them permanent.¹⁶ Paynter replied that Chung and Pearson were both doing fine, and they were okay with their work. Paynter denied that he made a
30 recommendation to hire them as permanent employees, but conceded that "probably in a manner of speaking. I don't think those are my exact words". According to Paynter, Schultz did not inform him during this conversation, whether Getronics was going to make Pearson and Chung permanent employees. Shortly thereafter, Paynter was informed by Schultz that Getronics had made Pearson and Chung permanent employees.

35 Mikol interviewed approximately 18 applicants for employment with Getronics. He estimated that of these 18, he recommended that Getronics hire 9 of these applicants, and Getronics followed his recommendation and offered employment to the applicants that Mikol recommended, approximately 7 or 8 times. Thus he was overruled 1 or 2 times out of his 9
40 positive recommendations.

45 Similarly, with respect to the approximately nine applicants where Mikol recommended that the applicant not be extended an offer by Getronics, he estimated that he was overruled the same number of times.

50 ¹⁵ As noted above these individuals were not really temporary employees of Getronics, since they were not employees of Getronics at all. However in the record they are referred to by the witnesses as temporary employees. I shall refer to them as "Temps" in subsequent discussion.

¹⁶ Both Chung and Pearson were members of Paynter's Team.

Mikol recalled specifically recommending the hire of Mark Andersen Isabelle Niven about seven years ago, and Jennifer Mack, five years ago. These individuals were all hired by Getronics.

5 The above findings with respect to the role of Paynter and Mikol in the hiring process is based on the credible and mutually corroborative testimony of Mikol and Paynter. Neither Schultz nor Strow denied any of the specific testimony of these individuals, although they did testify conclusorily that neither of them had the authority to recommend hire or transfer. To the extent that such testimony can be construed as a denial of Mikol and Paynter's testimony, I do not credit such denials. Both Strow and Schultz conceded that Team Leads as well as Corby, sometimes are asked to sit in on interviews with applicants for employment, including Temps. They assert that the Team Leads and Corby, are asked to participate, solely in order to assess the applicants technical skills. The both concede that they would ask the Team Leads or Corby for feedback as to whether the applicants had the technical ability to perform the job, but deny that they ever asked any Team Lead for a recommendations as to whether or not to hire any applicants.

Neither Schultz nor Strow denied that Team Leads in fact made recommendations to them to hire or not to hire applicants for permanent or temporary employment. I note that initially when asked, Strow testified if a Team Lead makes a recommendation to hire, that he Strow is not enthusiastic about, their recommendation would not influence him.¹⁷

Strow was asked specifically about the testimony of Paynter and Mikol that they both had made recommendations to hire various applicants. His response was simply that he did not solicit such recommendations whether or not to hire any applicants. Finally upon further pressing Strow conceded that Paynter and Mikol "probably did" inform Strow that applicants were candidates that should be hired. Further Strow also admitted that he did take into account the feedback of Paynter and Mikol (on technical matters) into account when he makes hiring decisions.

Finally, Schultz's testimony which is uncontradicted, establishes that Getronics has not hired directly any permanent employees for the past two and a half years.¹⁸ Schultz also testified that when Getronics has hired temporary employees, he does request that Team Leads interview applicants, but asserts that he interviews them before and after the Team Lead's interview the candidates. Schultz further asserts that after the applicant leaves, he will have a discussion with the Team Lead, and receive their input as to the technical abilities of the applicants. Schultz also admitted that the Team Lead will inform him whether the applicant is good or met the technical requirements for the job, and whether the applicant is a good or a bad candidate.

However, Schultz denied that he would ask the Team Leads which of a group of applicants should be selected for particular spots. However, Schultz did not deny the detailed and believable testimony of Paynter, which I credited above, that Paynter recommended to Schultz that Getronics hire Pearson and Chung as Temps and that Getronics followed that recommendation. Schultz further admitted that he would not hire any Temps where the Team Leader says that they are not good candidates, and that Getronics would only hire those individuals where the Team Lead has informed him that the applicants are good candidates, since they are only temporary. Schultz adds that if the Temp does not work out, Getronics can

¹⁷ Strow provided no examples of that scenario ever occurring.

¹⁸ As related above Getronics has converted Temps to permanent employees, including (Chung and Pearson), within that period.

simply get rid of that individual.

Both Paynter and Mikol have also been involved in the process of employee evaluations. These evaluations are referred to as Performance Management Process Approval Forms (PMP's), and are prepared annually for each employee. The PMP's include a number of categories measuring various areas of performance, and employees receive a numerical ratings in each category. The PMP's also include narrative comments by management. The PMP's and are prepared by Schultz and he discusses the PMP's directly with employees.

Paynter was asked by Schultz to discuss with him PMP's that Schultz had prepared for employees,¹⁹ three years ago when Schultz began his tenure as Operations Manager. Schultz was not that familiar with the employees at that time so he asked for Paynter's input. Paynter has continued to be involved in this process since that time, but Paynter was not certain that he had been consulted for the last evaluations prepared by Schultz for the year ending December 31, 2007, since by then Schultz had become more familiar with the work of the employees himself.

Schultz would normally ask Paynter for his opinion and input of the PMP's that he prepared. Paynter recommended changes in the PMP for Eric Simpson. Paynter felt that the number for team leadership for Simpson should be higher and the score for communication should be lower. Schultz agreed with these suggestions, and Simpson's scores were adjusted accordingly. Thus Simpson's overall rating stayed the same, since the increase in Simpson's leadership score was balanced out by the decrease in his communication score.

Paynter discussed the PMP's of all other members of the Network Team (Lamer, Sullivan and La Corte), with Schultz, and recommended to Schultz that he add comments in the PMP's about recommendations for improvements because of the certification process, that employees should strive for. Schultz added these comments as Paynter had suggested. Paynter also reviewed and discussed with Schultz the scores for these employees, but Paynter agreed with Schultz's numbers for these employees, so no changes were recommended by Paynter or made by Schultz.

Paynter also attended many, but all of the meetings between Schultz and the employees when their PMP's were discussed. The grades and comments in the PMP's were discussed with the employees, But the employees involved did not dispute or question any of the grades. Thus no changes were requested or made during these meetings.

Mikol began becoming involved in the evaluation process about 5-6 years ago. He would meet with Strow initially, and then when Schultz came on board three years ago, Mikol met with Schultz prior to the evaluation being shown to the employees. At that time, since Schultz was unfamiliar with the employees, he relied upon Mikol in preparing the scores for employees. Subsequently, when Schultz became more familiar with the employees, he would prepare the numbers himself, and Mikol would not see PMP's until the meeting with the employees. At such meetings, there would be discussions with the employees about the PMP's. Mikol would offer his opinion, either in support of the numbers or some instances, in support of the employees position, where it differed from managements. Mikol could not recall any incident where Schultz changed an employee's score, based upon Mikol's comments. It is undisputed that Schultz

¹⁹ For the first evaluations prepared by Schultz three years ago, Paynter helped Schultz put in the numbers for the employees. In subsequent years, Schultz would prepare the PMP's himself, including putting in the numbers, and then ask Paynter for his input and opinion.

makes the ultimate decision on what scores to include in the PMP's.²⁰

The record is unclear as to whether the PMP's are used in computing raises for employees. According to Mikol, he was told²¹ the PMP's do not have a bearing on wage increases.

5 Strow testified that according to Human Resources of Getronics, the PMP's are "technically" not supposed to be used for wage increases, since they are "separate entities". Thus the PMP's are supposed to be merely tools to give employees an idea as to how they are performing. However, Strow admits that he and Schultz do review the PMP's of employees, before deciding on wage increases for employees, and that in his (Strow's) mind, the PMP's do have "some bearing" on the wage increases recommended for employees.

10 Nonetheless, the record contains no evidence that any wage increase for any employee was affected by any "changes" in the PMP scores recommended by Mikol, Paynter or any other Team Lead.

15 Testimony was adduced concerning the role of Paynter and Mikol, and to some extent other Team Leads in assigning and directing work. For the most part the record reveals that most "assignments" of work are made by unit employees such as Mark Andersen or by Strow and Hernandez an employee of a contractor, or by Deborah Esposito a Novartis employee. Further much of the work is not actually assigned at all. Thus work is simply placed in the in boxes of particular groups, and the employees themselves decide which job to perform.

20 Mikol does distribute work tickets to employees Albertsen and Rosario, who work as Field Support employees in desk side support. Once the jobs comes into the inbox from the Houston Help Desk, Mikol decides whether Rosario or Albertsen will perform the assignment. However, Mikol makes that decision solely based on the workload of these two employees, and does decide based on which employee is more capable of performing the particular job.

25 Paynter assigns work to employees Chung and Pearson, who are on the Deployment and Recovery Team. Here again, the work tickets originate in the Houston Help Desk, and Paynter will make the assignment based upon the particular building involved. Thus the employees are assigned to serve particular buildings, and Paynter makes the assignment based on that system. If there is an overload of work in particular buildings at a particular time, Paynter will change the assignments to keep the work load of Pearson and Chung relatively even.

30 Mikol has at times instructed members of his Team to prioritize one job over another. For example when a job such as an update to Cemote users is being performed, and if it goes "South",²² Mikol assigned one of his Field OPS, (Rosario or Albertsen) to help out in completing that job, which had more priority than the jobs that Rosario or Albertsen were working on. Mikol did not or would not consult Schultz or Strow when he made this decision, but would notify Schultz and Strow of his action since they had already been informed by Novartis of the problem, and that he (Mikol) was on top of the situation.

45

²⁰ The above findings based on the mutually corroborative and credible testimony of Mikol and Paynter.

²¹ Mikol did not testify, nor was he asked who told him that the PMP's were not used in assessing raises.

²² Meaning that there is a problem with completing this job.

At times Mikol will notify Napolitano or other members of his team, that a "VIP" was here, and that a particular job had to be "done now".

5 At times Paynter has instructed Lamer or other members of his Team to stop a particular job and perform a different task, such as a Network Printer or an LAN connection. Paynter will decide to prioritize assignments, based on if a VIP or the Executive Committee of the CEO is involved in a job. Paynter will instruct the employee to do this job first. According to Paynter such a prioritization is just "common sense". Further, if a work ticket is outstanding for several weeks, Paynter will also tell an employee that the job needs to be "done immediately".

10 Similarly, if a VIP comes in and a job has to be done, Paynter will pull either Lamer or Sullivan off the projects that they were working on, to help perform the project that needs to "escalated" because of the VIP.

15 Paynter is also involved in the process of "backfilling", which involves filling in for an employee who is out of work, due to vacation, sick leave or a personal day. In such a case, Paynter decides depending on the workload, if the job has to be done or it can wait until the employee returns to work. If Paynter decides that the work must be done, he will perform the job himself, or assign someone else from his Team to perform the work, or ask Schultz or Strow to use an employee from another Team to do the particular job.

20 Both Paynter and Mikol consider themselves responsible for the work getting done by the members of their Teams. In that regard, Schultz admits that all TS5 IV's, including Mikol and Paynter, have the responsibility that if he sees employees who are not doing their job, goofing off, or coming in late, to speak to this employee about these problems, and to tell him or her that he or she must do better in that particular area.

25 The record does contain some examples of this kind of activity by Mikol and Paynter. About five years ago, Paynter noticed that an employee was sleeping at his desk, on more than one occasion. Paynter criticized the employee for this behavior, and at one point, "screamed" at the employee. Eventually Paynter brought the issue to higher management, and the employee was eventually fired. There is no evidence that Paynter recommended that the employee be disciplined or discharged. On other occasion, described by Paynter as "fairly recently", he noticed that an employee was not doing his job properly and taking shortcuts by setting up a computer and failing to tuck away the wires, resulting in a power chord going across the lap of employees. Paynter photographed this incident and showed it to the employee, and told the employee that this wasn't acceptable. Paynter did not escalate this conduct to higher management. Paynter also criticized an employee for driving over the lawn. This employee was reprimanded by Schultz as well, as this conduct had been reported by Novartis personnel.

30 Finally where employees on his Team have personality clashes and one complains to Paynter about the issues, including one employee, not carrying his or her weight, Paynter will try to resolve the problem himself. If he is not successful Paynter would escalate the problem to Schultz.

35 40 45 50 Mikol received a complaint from a Novartis employee, that one of the members of his Team was coming in late and leaving early. Mikol spoke to the employee in question, and informed him that, "were all here doing the same job. You know, you're coming in later and leaving earlier, you're cheating us as a Team. You know, we need to be a Team". The employee corrected this problem and Paynter did not address it again or escalate it to higher management.

5 Approximately three or four years ago, Mikol began to observe that employee Mario Spelorosa, appeared to be distracted, and had in Mikol's view lost interest in the job, causing another employee to "pick up the slack". Mikol spoke to Spelorosa about this problem, several times, before escalating it to Pat Llewellyn. Mikol told Llewellyn that he had an employee who wasn't holding his share of the workload, was causing a strain on the other technician, and he needed it addressed by management. Llewellyn spoke to the employee about the complaints made by Mikol, but no disciplinary action was taken against him. Spelorosa eventually quit his employment with Getronics.

10 About two years ago, employee Rosario was speaking to a client on the phone. While they were speaking employee Napolitano used "inappropriate" language, and this language was overheard by both the client and Rosario. Both the client and Rosario complained to Mikol about Napolitano's conduct. Mikol then took Napolitano into a private room, and told him that a co-worker was on the phone when he used inappropriate language. Mikol explained to
15 Napolitano that employees need to be professional at work, and not to use such language. Mikol did not report this incident to either Strow or Schultz. Napolitano received no discipline for this incident. In fact neither Mikol nor Paynter ever issued any written warnings to any employees. Nor did they ever recommend to higher management that any employee be suspended, discharged, or otherwise disciplined.

20 Evidence was introduced that at times, when employees request vacation time, they will send an E-mail to either Paynter or Mikol, requesting approval, as well as an E-mail to Strow, who makes the final decision. Then either Paynter or Mikol will send an E-mail to Strow stating their approval of the requests. However their approval is based solely on the availability of other
25 employees and whether or not another employee performing similar work has requested vacation for the same period of time. When that happens, either Paynter or Mikol will tell the employee that someone else has already been approved for vacation for the time requested. If the employee cannot convince the employee, whose vacation was already approved, to change their plans, the employee will not be permitted to take vacation at that time.

30 At times either Paynter or Mikol will decide based on the work load or people out on vacation or personal days, that back filling, (i.e. obtaining employees from other Teams), was necessary. In such cases they will discuss it with Strow, and Strow will decide if anyone can be spared from other Teams. In some cases Paynter or Mikol will decide to perform the particular
35 work themselves.

40 Employees will also notify either Mikol, Paynter and or Strow that they will be out sick or need a personal day. In such cases, approval is routinely granted by Paynter or Mikol, but the ultimate decision on approval is made by Strow. In practice these requests are ordinarily granted and approved without question.

45 The record reveals that both Paynter and Mikol spend a significant amount of their time attending "meetings". These meetings include meetings of Team Leads plus Strow and Schultz. No other employees are present at these meetings. Strow and Schultz discuss with the Team Leads upcoming changes and projects that Novartis is planning to implement.

50 Mikol and Paynter, as well as other Team Leads will give Schultz their input as to whether the proposed changes will have a substantial impact on Getronics operations, so that Schultz might have to go back to Novartis to re-evaluate how much money it will take to perform the contract. No human resources or personnel issues are discussed at these meetings. After the meetings conclude, Paynter and Mikol will disseminate the information that they receive at the meetings to the members of their teams.

5 Mikol and Paynter, as well as other Team Leads and Corby, attend "problem management" meetings with Novartis representatives and Schultz and Strow. These meetings address infrastructure issues related to specific to projects, complaints by Novartis or Getronics, as well as discussions about upcoming projects. On occasion, other employees are invited to attend these meetings with Novartis personnel, because of particular expertise of such employees. Non Team Lead employees Andersen, Simpson and Olmedo have attended such meetings, but not a regular basis, as do the Team Leads.

10 Additionally, Paynter attends Engineer meetings with Novartis personnel, where moves are discussed. At these meetings, Paynter is the only Getronics employee present.

15 The Employer also conducts what Schultz and Strow consider "management" meetings. These meetings with Schultz, Strow, Stager and Llewellyn, and other officials, consist of discussions of such various issues such as salaries, subcontract prices, human resources, and updates of the contract with Novartis. Neither Paynter, Mikol nor other Team Leads are present at these meetings.

20 Further, every morning at 9:30 A.M., an operational meeting with Novartis employees and the Team Leads, during which the participants review the daily watch list and Novartis informs the Getronics" Team Leads of the "hot items" that Novartis wants to make sure that these tickets "do not" fall through the cracks. Mark Andersen, regularly attends these daily meetings, as Mikol's "front load person" for the Build Center. On occasion, Mikol will ask Rosario to attend, if there are "support" issues to be discussed.

25 The record is clear that Mikol and Paynter the large majority of their time monitoring and directing their Team members, and spend very little of their time performing the work done by their members. Paynter is the Team Lead for 3 work groups, Network Group, Moves Team, and the Deployment and Recovery Team. Paynter testified that on a day to day basis, "I'm just going around between each of these groups". Paynter is capable of performing all of the tasks performed by his Team members, but he will do so only when someone is out, or the workload is heavy, or if a problem needs to be escalated. Paynter estimated that he spends 10-20% of his time working the field, in such situations.

35 Mikol oversees four types of work: Field Support Operations, Inventory, Logistics and Builds. Mikol, like Paynter is capable of performing all of the tasks of his Team members, but only does so when someone is out on vacation, or sick, or it there is a substantial increase in volume of work. Both Paynter and Mikol will make the decision whether they should fill in for an absent employee, or the volume of work necessitates that they perform work usually performed by their Team members.

40 Employees Lamer and Napolitano testified that they considered their Team Leads (Paynter and Mikol respectively) to be their supervisors.

45 B. ANALYSIS

Section 2(11) of the Act, 29 U.S.C. § 152(11), defines the term "supervisor" as:

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

the use of independent judgment.

5 An individual need only possess *one* of these indicia of supervisory authority as long as the exercise of such authority is carried out in the interest of the employer, and requires the use of independent judgment. *Arlington Masonry Supply, Inc.*, 339 NLRB 817, 818 (2003).

10 Significantly, it is not required that the individual have exercised any of the powers enumerated in the statute; rather, it is the *existence* of the power that determines whether the individual is a supervisor. *Id.* Further, the burden of proving that an individual is a statutory supervisor rests on the party alleging such status. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 712 (2001).

15 Applying these principles to the facts of this case, I conclude that the Petitioner has met its burden of proving that Paynter and Mikol possess supervisory authority within the meaning of Section 2(11) of the Act. Specifically, I find that Paynter and Mikol exercise independent judgment in effectively recommending employee hire and transfer.

20 In that regard, the evidence demonstrates that Paynter and Mikol interview applicants for permanent employment with Getronics, as well as for transfers, and make recommendations to higher management, which are generally followed. These recommendations include recommendations that particular applicants be hired, as well as that applicants not be hired. It is well established that an effective recommendation by a purported supervisor not to hire an applicant is considered indicative of the authority to effectively recommend hire under Section 2(11) of the Act. *Sheraton Universal*, 350 NLRB 1114, 1118 (2007); *USF Reddaway*, 349 NLRB 329, 340 (2007); *Queen Mary*, 317 NLRB 1303 (1995); *HS Lordships*, 274 NLRB 1167, 1173 (1985); *Berger Transfer & Storage*, 253 NLRB 5, 10 (1980); *enfd.* 678 F.2d 679 (7th Cir. 1982), Supplemented by 281 NLRB 1157 (1986).

30 Here both Paynter and Mikol testified to numerous examples, where they participated in the interview process for hiring employees, and made recommendations which were generally followed by Getronics. Mikol interviewed approximately 18 applicants for employment, and recommended that Getronics hire approximately nine of these applicants, and not to hire the other nine. Getronics followed Mikol's recommendations, 7 or 8 times out of each group of recommendations. This constitutes an effective recommendation. *Donaldson Bros.*, 341 NLRB 958, 959 (2004) (Finds supervisory recommendations effective where it is followed 75% of the time, citing *Venture Industries*, 327 NLRB 918, 919 (1999)).

40 Further the evidence discloses several specific examples of effective recommendations to hire or not to hire made by Paynter and Mikol. Thus both Mikol and Paynter participated in the interview process, wherein Mark Andersen was hired seven years ago. There were three applicants interviewed. After questioning the first two applicants, Mikol and Paynter both recommended to Strow that they not be hired. Strow agreed without interviewing these applicants separately. After interviewing Andersen, Paynter and Mikol recommended that he be hired, Strow agreed, and Andersen was subsequently hired.

45 Similarly, both Paynter and Mikol interviewed Nicholas Battista, Andy Albertsen, and Daniel Sullivan at different times for employment. They recommended to Strow that these individuals be hired. Once again, Strow agreed, and these three applicants were hired as permanent employees of Getronics.

50 Finally, about two years, Getronics announced an opening at its East Hanover site. Three Getronics employees applied for this position, including Sullivan, who had previously transferred to another Getronics location in Parsippany, New Jersey. Paynter along with Strow, conducted

the interviews. After questioning the first applicants, (Otero and Rivera), Paynter recommended to Strow that these two individuals not be selected for the position, because they did not have the experience for the job. Strow agreed with both of Paynter's recommendations, and they proceeded to interview Sullivan. Paynter recommended to Strow that Sullivan be selected for the vacant position, because Paynter had worked with Sullivan in the past, and that Sullivan had the "skill set" to perform the job. Strow said okay, and Sullivan was transferred to the East Hanover worksite. I note that although the authority to recommend transfer is set forth as a separate category from hiring, in the statute, the Board generally treats transfer as part of the hiring process. *Fred Meyer Alaska*, 334 NLRB 646, 648 (2001); *Venture Industries*, 327 NLRB 918, 919-920 (1999); *CTI Alaska*, 326 NLRB 1121 (1998).²³

The Petitioner also relies on the evidence of Paynter's involvement in the hiring of temporary employees Chung and Pearson, about two years ago. Petitioner asserts that the "Board does not appear to draw any distinction between an individual's recommendation to hire or not hire permanent employees and his or her recommendation to hire or not hire temporary employees when deciding an individual's supervisory status". *Price Copper*, 271 NLRB 323 (1984); *RB Associates*, 324 NLRB 874, 879 (1997). While Petitioner is technically correct in this assertion, and the cases cited support its position, Petitioner overlooks a significant issue. That is that the individuals who Paynter interviewed for positions as "temporary employees", were not at the time being interviewed for positions as employees of Getronics. Rather, they were employees of an outside contractor, and not employees of the Employer. In such circumstances, it is well established that an individual must exercise supervisory authority over employees of the employer at issue, and not employees of another employer, in order to qualify as a supervisor under Section 2(11) of the Act. *Franklin Hospital Medical Center*, 337 NLRB 826, 827 (2002); *Crenulated Co.*, 308 NLRB 1216 (1992); *Fleet Transport Co.*, 196 NLRB 436, 438 Fn. 6 (1972); *Eureka Newspapers Inc.*, 154 NLRB 1181, 1185 (1965); *Textile Workers of America*, 139 NLRB 800, 802 (1962); *Great Lakes Sugar Co.*, 92 NLRB 1408, 1409, 1410 (1951).

Therefore, while Paynter recommended the hire of employees Pearson and Chung they were employees of the Agency, (an outside contractor), and not employees of Getronics. Thus, Paynter's role in the "hiring" of these individuals does not support a finding of supervisory status. *Franklin Home Health, supra*; *Fleet Transport, supra*.

Petitioner further argues that Paynter played a role in the transformation of Chung and Pearson to being "hired" by Getronics as permanent employees. In that regard, before deciding whether to offer Chung and Pearson positions as permanent employees, Schultz asked Paynter how these individuals (who were members of Paynter's team), how they were doing. Paynter informed Schultz that they were "doing fine", which Petitioner argues represents, Paynter "essentially recommending that Chung and Pearson be hired as permanent employees". I disagree. The fact that Schultz asked Paynter for his opinion of how these individuals were performing, falls short of establishing that Paynter's responses, constitute an effective recommendations affecting job status. *Northeast Nursing Home*, 313 NLRB 491, 497-8 507 (1993). Paynter's conduct is at best, a reporting function, that is not supervisory under the statute. *Chevron Shipping*, 317 NLRB 379, 381 (1995). Notably, Schultz never asked Paynter for a recommendation whether or not Chung or Pearson should be offered positions as permanent employees. Accordingly, I reject Petitioner's reliance on this conduct of Paynter, and I do not rely on it in concluding that Paynter possessed and exercised the authority to effectively

²³ In any event whether the authority to recommend transfer of employees is considered separately or as part of the hiring process, it is clearly indicative of § 2(11) supervisory authority. I so find and rely on this incident.

recommend hire of employees.

In connection with that issue, the Employer makes several arguments in support of its contention that Paynter and Mikol (as well as the other challenged voters) do not effectively
5 recommend hiring under Section 2)(11) of the Act.

Getronics initially argues that the evidence of the involvement of Paynter and Mikol in the hiring process is not current, and since no permanent employee has been hired in the past 2½ years, Paynter and Mikol cannot be said to possess the authority to effectively recommend hire.
10 I cannot agree.

With respect to supervisory status, the rule is clearly established in Board precedent that possession of authority consistent with any of the indicia of Section 2(11), not that authority, is the evidentiary touchstone. *Allstate Insurance Co.*, 332 NLRB 759, 760 (2000), citing *Pepsi Cola Co.*, 327 NLRB 1062 (1999).
15

While the absence of the exercise of that authority for a sustained and lengthy period can raise questions as to whether the alleged supervisor does in fact possess the statutory supervisory authority, it is not conclusive, and is just one fact to consider in assessing the determinative issue of "possession" of such authority. *Allstate Insurance, supra*.
20

Here the facts establish, as detailed above, that both Paynter and Mikol participated in the hiring process for permanent employees on numerous occasions in the past, and made recommendations to higher management, which were routinely followed. It is correct as
25 Getronics contends, that no permanent employees have been hired by the Employer,²⁴ for 2½ years, and therefore neither Paynter no Mikol have exercised the authority to recommend hire for this period of time. However there is no evidence that Getronics has made a permanent decision to no longer hire employees directly from the outside, (as opposed to hiring temporary employees from a general contractor and converting then to permanent status). Nor did
30 Getronics inform Paynter or Mikol that they no longer posses the authority to recommend hiring. *Enclosure Corp.*, 225 NLLRB 629, 630 (1976). (Purported supervisors had not been told that there was a change in his authority). Furthermore, within the 2½ year period, about 2 years ago, an opening developed for a job, which was filled by transfer. Paynter was involved in the transfer interview process, similar how he and Mikol participated in the hiring process in prior
35 years. Thus Paynter effectively recommended to Strow that the first two applicants not be selected, and that the third (Sullivan) be offered the position. Strow agreed and Sullivan was transferred to East Hanover to fill the vacant job. Since the transfer of employees was treated similar to the hiring, concerning the interview process, and transfer is akin to hiring, I find this evidence highly suggestive that Paynter, as well as Mikol, possess the authority to recommend
40 hire, notwithstanding the absence of any exercise of that authority for at least 2½ years. *Enclosure Corp., supra*; see also *Starwood Hotels*, 350 NLRB 1114, 1118 (2007) (Possession of authority to recommend hire, even in absence of any evidence of exercise of that authority).

I conclude therefore, that in the absence of any evidence that Getronics revoked the
45 authority of Paynter or Mikol to recommend hiring, or that Getronics had made a permanent decision not to hire any more employees directly from the outside, that Paynter and Mikol retained their authority to recommend hire, and that if and when Getronics decided to hire employees directly, Mikol and Paynter would likely be involved in the process as they had been

²⁴ Other than converting temporary employees, who were actually employees of a contractor, to permanent status.
50

in the past. I therefore reject Getronics' contention that they no longer possess the authority to recommend hiring.

5 The Employer also contends that the recommendations made by Paynter and Mikol were not effective, under the statute, because the final decision was made by higher management after they conducted an independent investigation. *Ryder Truck Rental*, 326 NLRB 1386, 1387-1288 (1998).

10 Here the evidence discloses that although if Getronics intends to hire the applicant, higher management, (usually Strow) conducts a phone interview, to discuss salary and benefits, this phone interview can hardly be construed as an independent investigation. In fact it appears that these interviews are merely following up on a decision previously made during the interviews with Strow, Paynter and Mikol, wherein Paynter and Mikol recommended hire, and Strow agreed. While Strow and Schultz insisted correctly that they make the final decision, and that it is within their right to reject an applicant previously recommended by Mikol or Paynter, neither Strow or Schultz pointed to any instances where the recommendation of Paynter or Mikol to hire or transfer employees, was rejected. See, *Donaldson Bros.*, *supra*, 341 NLRB at 959. (Respondent failed to refute purported possession of hiring and firing indicia by showing any instance in which Employer overruled recommendations of purported supervisors).

20 On the contrary, the record discloses that Getronics routinely and consistently followed the recommendations of Paynter and Mikol to hire and transfer employees. *Venture Industries*, *supra*. (followed supervisors recommendation to hire 80-90% of the time), *USF Reddaway Inc.*, 349 NLRB 329, 340 (2007) (Following recommendation of purported supervisor or hire employees, sufficient to establish supervisory status, notwithstanding that higher official had final say in selection). *Accord Mountaineer's Park, Inc.*, 343 NLRB 1473, 1475-1476 (2004) (Higher management routinely approves recommendations. "Supervisory status turns on the extent to which his decision relies on the recommendation, the record shows that such reliance is indeed weighty". *Id.* at 1476).

30 Moreover, here the record discloses that in several instances, such as the interviews where Andersen was selected to be hired, and Sullivan was selected to be transferred, the interviews were conducted by Mikol and Paynter and Strow, and Mikol and or Paynter recommended that the first two applicants interviewed for the positions be rejected. Strow accepted these
35 recommendations immediately, without any phone interview or any further investigation, and they went on to interview the next applicant. As detailed above, the authority to recommend against hiring can establish supervisory status, *Sheraton Universal*, *supra*; *Berger Transfer*, *supra*; see also, *H.S. Lordships*, 274 NLRB 1167, 1173 (1985) (Supervisory status found where bar manager's recommendations not to hire are followed). I therefore reject the Employer's
40 contention that the recommendations to hire and transfer made by Mikol and Paynter were not effective under Section 2(11) of the Act; due to the fact that higher management makes the final decision.

45 Finally, and must strenuously, Getronics argues that the recommendations made by Paynter and Mikol were not "effective" recommendations to hire, because such as their role in the hiring process was limited to an "assessment of an applicant's technical ability to perform the work". *Aardvark Post*, 331 NLRB 320, 321 (2000); *Hogan Mfg. Co.*, 305 NLRB 806, 807 (1991); *The Door*, 297 NLRB 601, 602 (1990); *Plumbers Local 195 (Jefferson Chemical Co.)*, 237 NLRB 1099, 1102 (1978).

50 Once again I do not agree with the Employer's position. I find the cases cited above to be factually distinguishable, and not dispositive. I further conclude that based on subsequent

Board and Supreme Court cases,²⁵ the continued viability of *Aardvark Post*, *supra*, and its progeny,²⁶ is open to question.

Initially, I must observe that I am somewhat puzzled by the Board's rationale in these cases. It appears to me to be saying that the purported supervisor is not exercising independent judgment in making a recommendation based on "technical abilities", since the "recommendation" is akin to simply reporting the results of a test. Thus in *Aardvark Post*, as well as in *Hogan Mfg.*, and *Jefferson Chemical*, the purported supervisor merely reported the results of a test that the purported supervisor gave to the applicants. Indeed, the Board emphasized in its opinion in *Aardvark Post*, that it was undisputed that Bartlett (the purported supervisor) never made a recommendation to Kimes (the higher level decision maker) that an applicant be hired or rejected. Rather Bartlett's role was limited to testing each applicants technical ability and reporting the results to Kimes. Further the Board emphasized that it was the job of Kimes to determine if the applicant would "fit into" the Employer's operation.

Here, the evidence discloses that Paynter and Mikol did not give the applicants any kind of test, and or merely report the results of the test to higher management unlike the purported supervisors in *Aardvark Post*; *Hogan and Jefferson Chemical*, Paynter and Mikol did make specific recommendations to Strow, whether or not to hire or transfer applicants, which recommendations were generally followed.

Further, I find that these recommendations encompassed more than merely assessing technical abilities of the applicants. (Clearly this was a significant aspect of the process, but not the only factor considered by Mikol and Paynter). Indeed Mikol testified without contradiction that he and other leads give their opinions to Strow or Schultz of whether the applicant "fits the bill or doesn't", and Paynter determines and tells Strow or Schultz if the applicant would be "a good fit for what the job is going to be required of them."

Additionally, after Mikol, Paynter and Strow interviewed Battista, both Paynter and Mikol informed Strow that Battista was a "good fit" and that Getronics should hire him. Strow said okay, and Battista was hired within a week. These statements by Paynter and Mikol are nearly identical to the function relied upon by the Board in *Aardvark Post*, attributed to the deciding official. (Whether the applicant would "fit into" the Employer's operation). Furthermore Mikol explained that he will assess if the applicant was being "brash", and both Paynter and Mikol assess whether the applicant was being honest in their resumes. These are not "technical" questions.

Also, when Mikol and Paynter (along with Strow) interviewed Andersen, the first applicant interviewed was very nervous during the interview. After that applicant left, Paynter and Mikol recommended to Strow that this applicant not be hired, in part because he was very nervous during the interview, and they felt that he could not take the pressure of the job. This is certainly not a "technical" assessment by Mikol or Paynter.

When Albertsen was hired as an Inventory Coordinator, Paynter and Mikol interviewed him, without the presence of Strow. This position did not require technical skill, since it needed only the ability to understand part numbers. They asked Albertsen simple questions such as what is a "hard drive"?, and thereafter recommended to Strow that he be hired because they thought

²⁵ *Oakwood Healthcare*, 348 NLRB 686, 692-693 (2006), applying *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 1215. Ct 1861 (2001).

²⁶ *The Door*, *supra*; *Hogan Mfg.*, *supra* and *Jefferson Chemical*, *supra*.

Albertsen "could do the job".

5 In *The Door, supra*, the purported supervisor did not give a test to the applicant, but instead interviewed the applicant and asked "about his experience in the laboratories and what he had done in terms of the technical aspects of the lab, what he was capable of doing and that was about it". The evidence disclosed that the purported supervisor did recommend that this individual be hired, and he was in fact hired. The Board viewed the purported supervisor's recommendation as "limited to whether a candidate had the technical ability to perform the work of a lab technician". As I have detailed above, Mikol and Paynter's recommendations were not so limited, since they considered other factors such as whether the applicant would be "a good fit", whether the applicant could stand the pressure of the job, or whether the applicant could answer simple questions, so that he could understand parts numbers, in a job that did not require technical skills.

15 Moreover, in *The Door, supra*, the Board also emphasized that the purported supervisor was only one of a number of several individuals who interviewed the applicant. The Board observed that "there is no evidence that Jalbuena was hired as a direct consequence of Hilfer's recommendation or that Hilfer's recommendation regarding a specific candidate carried greater weight than that of other interviewers or, indeed any weight at all".

20 That conclusion cannot be made herein. Here the evidence is clear, as outlined above, that the recommendations of both Paynter and Mikol to hire or not to hire or to transfer employees, were routinely followed by Getronics, and given not only "great weight", but frequently conclusive weight in the Employer's hiring and transfer decisions.

25 Accordingly, I find the cases cited by Getronics to be distinguishable, and conclude, once again that Mikol and Paynter effectively recommended hire and transfer of employees, using independent judgment, and based on this factor alone, are supervisors under Section 2(11) of the Act. *Queen Mary, supra; USF Reedway, supra; see also, Fred Meyer Alaska, 334 NLRB 646, 648-649 (2001) (Meat and seafood managers made effective recommendations to hire "based on their own assessments of what skills are needed and whether the individuals they are considering hiring have the appropriate skills or qualifications". Id. at 649.)*²⁷

35 Although I have concluded above, that the facts in *Aardvark Post*, and its progeny are sufficiently distinguishable, from the facts herein, I also believe that in view of the analysis and reasoning in *Oakwood Health Care, supra*, that the continued viability of these cases, is in considerable doubt. In *Oakwood Health Care, supra*, the Board was responding to the Supreme Court's rejection in *Kentucky River* of the Board's definition of independent judgment involving assignment and direction of work. The Court rejected the Board's prior decisions wherein it excluded the exercise of ordinary professional and technical judgment in directing less skilled employees to deliver services. The Board in *Oakland Health Care*, consistent with *Kentucky River*, "adopted an interpretation of independent judgment, that applies irrespective of the Section 2(11) supervisory function implicated, and without regard to whether the judgment is exercised using professional or technical expertise". *Id.* at 642. Thus, while *Oakwood Health Care, supra*, dealt with assignment and direction of work, the reasoning applies to all functions in Section 2(11) of the Act, including the effective recommendation to hire. Indeed the Board discussed the issue of recommending or hiring employees, by way of example. The Board

50 ²⁷ I note that in *Fred Meyer Alaska, supra*, two of the individuals found by the Board to be supervisors, gave a block/cut test to the applicant, and then made a recommendation, which was followed, to higher management, based in part on whether the applicant passed this test.

observed, "Thus a registered nurse, when exercising his/her authority to recommend a person for hire, may be called upon to assess the applicant's experience, ability attitude and character references, among other factors. If so, the nurse's recommendations likely involve the exercise of independent judgment". *Id.* at 693. This definition in my view, would clearly encompass a recommendation based on "technical" abilities of the applicant. The Supreme Court's decision in *Kentucky River, supra* supports this view. As the Court observed, "what supervisory judgment worth exercising, one must wonder, does not rest on professional or technical skill or experience". *Id.* 532 U.S. at 714, 121 5.Ct. at 861. Interestingly, the Supreme Court criticized the Board for using a different standard for assessing independent judgment in cases of responsibility directing employees. The Court observed that it was unable to discover any opinion of the Board, where it held that a supervisor's judgment in hiring, disciplining or promoting an employee ceased to be "independent judgment because it depended upon the supervisors professional or technical experience. When an employee exercises one of these functions with a judgment that possess a sufficient degree of independence, the Board invariably finds supervisory status". *Id.* at 532 U.S 714-18, 121 5 Ct. at 1868-69. It seems that the Supreme Court may have overlooked *Aardvark Post*, and its progeny, where the Board appears to have created another exception, where a recommendation to hire is based on technical expertise or experience. I recognize that *Aardvark Post, supra* talks about "effective recommendation", rather than independent judgment, in finding a lack of supervisory status. However, in my view these two issues are essentially the same in this context. In *The Door, supra*, the Board found that the Petitioner had not carried the burden of proving that Hilfer exercises independent judgment in effectively recommending hire of employees. 297 NLRB at 601. I find the Board's further assertion therein rather startling, and in my view, inconsistent with *Oakland Health Care* and *Kentucky River*. That is the statement that "Hilfer's recommendation was limited to whether a candidate had the technical ability to perform the work of a lab technician". In my opinion, anytime a purported supervisor makes a recommendation to hire (or not hire) an applicant, he is making an assessment of whether the applicant has the technical ability to perform the particular job. I also find the Board's further observation in *Aardvark Post* to be strained and also inconsistent with *Oakwood* and *Kentucky River, supra*. The Board, citing *Hogan Mfg, The Door* and *Jefferson Chemical*, stated that it "has consistently found that such an assessment of an applicant's technical ability to perform the required work does not constitute an effective recommendation", 331 NLRB at 321.

I therefore agree with the Petitioner, that these cases, as well as the Employer's position, are flawed, inasmuch as semantics cannot detract from or obfuscate the fact that Mikol and Paynter have the authority to effectively make hiring recommendations, using independent judgment, and are supervisors with the meaning of Section 2(11) of the Act.

The Petitioner contends that in addition to possessing the authority to effectively recommend hiring, Paynter and Mikol also possess several other indicia of supervisory authority under Section 2(11) of the Act. They include the alleged authority to responsibility direct employees, their participation in the evaluation process, their authority to recommend the approval of vacation and time off requests and their alleged adjustment of grievances. The Employer asserts that none of the evidence presented concerning these areas, supports the supervisory status of Paynter or Mikol. I agree with the position of the Employer with respect to all of these issues.

Petitioner asserts that Paynter and Mikol responsibly direct the work of their subordinates, due to the evidence that they change and "prioritize" the work assignments of the employees on their teams. *American River Transportation*, 347 NLRB 925, 927 (2006). In this regard, the record discloses that both Paynter and Mikol will at times reassign their team members to stop working on their current assignment, and concentrate on another job, due to instructions from

Novartis, the presence of a VIP, or their assessment that a particular job needs to be done immediately, or to balance workload of the team members.

5 The evidence also discloses that both Paynter and Mikol consider themselves responsible for the work getting done by their team members, and Schultz conceded that Mikol and Paynter (as well as other TS IV's), have the responsibility that if they see an employee who is not doing their job, goofing off, or coming in late, to speak to the employee about these problems, and to tell him or her that they must do better in that particular area. The record also contained several examples of Paynter and Mikol speaking to team members about various deficiencies in their performance, including lateness, sleeping at their desk, being distracted, and using
10 inappropriate language.

15 Both sides correctly cite *Oakwood Health Care, supra* for the appropriate standard for assessing whether the alleged supervisors "responsibility direct" employees under 2(11) of the Act. Thus, if a person has "men under him, and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor provided that the direction is both responsible and carried with independent judgment". *Id.* at 691. The Board defined "responsible" direction, as where the "person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some
20 adverse consequence may befall, the one providing the oversight if the tasks performed by the employee are not performed properly". *Id.* at 692. "Thus to establish accountability for the purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to take corrective action, if necessary. It must also be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these
25 steps". *Id.*

In sum in order to establish supervisory status, the Petitioner must show that the alleged supervisors direct their subordinates using independent judgment, have authority to take corrective action, if necessary, "and" that there is a prospect of adverse consequences for the putative supervisor if they do not take these steps. It is clear that the Petitioner must establish the existence of all of these elements, in order to establish supervisory status. *Lynwood Manor, 350 NLRB 489, 490 (2007).*

35 Here, I need not and do not decide whether Petitioner has established that Paynter or Mikol exercised independent judgment in directing or "prioritizing" work of their subordinates, or whether they had the authority to take corrective action, if necessary, if their directives are not followed,²⁸ since I conclude that Petitioner has failed to establish the third and equally necessary element of responsible direction, that there is a prospect of adverse consequences for Mikol or Paynter, if they did not take these steps.

40 ²⁸ I note that is questionable whether or not Petitioner has met its burden of establishing either that they exercised independent judgment in directing employees or that they had the authority to take corrective action. Thus the "prioritizing" relied on by Petitioner consisted mainly of Paynter and Mikol changing assignments, due to instructions from Novartis, presence of a
45 VIP or to equalize workload. These types of directions or assignments are generally considered routine and not the exercise of independent judgment. *Croft Metals, 348 NLRB 717, 7211-722; Oakwood Health Care, supra* at 693.

50 It is further questionable whether they have the authority to take "corrective action", if their subordinates did not comply with their directions. The fact that Paynter and Mikol criticize employees for various deficiencies in their performance, is not necessarily sufficient to establish authority to correct. *Oakwood Health Care, supra* at 695.

In this regard, the evidence relied upon by Petitioner, that Paynter and Mikol consider themselves “responsible” for the work getting done by their team members, or that Schultz admitted that they have the responsibility to speak to an employee and to improve concerning deficiencies in said employees performance, is insufficient to meet Petitioner’s burden of proving that Mikol or Paynter are held accountable for the consequences if their team members, do not perform their work properly. Such evidence is purely conclusory, and does not establish that prospect of any adverse consequences for the putative supervisors, for the failure of other team members to follow their directions, *Golden Crest Health Care Center*, 348 NLRB 727, 731 (2006). Petitioner has presented no specific evidence that Mikol, Paynter (or any Team Leads for that matter), may be disciplined, receive a poor performance rating, or suffer any adverse consequences with respect to their terms and conditions of employment due to a failure of their team members to perform their jobs. *Lynwood Manor*, *supra* at 490-491; *Oakwood Manor Health Care*, *supra* at 695; *Golden Crest*, *supra*, nor has Petitioner presented any evidence that a Team Lead has ever been informed by management that any such material consequences might result from their performance in directing their team members. *Golden Crest*, *supra* at 731.

Accordingly, based on the foregoing analysis I find that the Petitioner has not established that Paynter, Mikol (or any Team Lead) possesses the authority to responsibility direct employees.

Petitioner also relies on Paynter and Mikol’s role in the evaluation process. Petitioner cites the testimony that Mikol and Paynter do provide some input into the Evaluations (PMP’s), prepared by management, and that Strow conceded that in his mind, the “PMP’s” do have “some bearing” on the wage increases recommended for employees. Petitioner argues that this evidence establishes a direct correlation between the evaluations and wage increases granted to employees, and the supervisory status of Mikol and Paynter. *Bayou Manor Health Center*, 311 NLLRB 955 (1993).

However, in order to establish supervisory status on this basis, Petitioner must show that the PMP’s lead directly to wage increases for any employees. *Norton Health Care*, 350 NLRB 648, 663 (2007). Petitioner adduced no evidence that any specific employee’s wage increase was affected by the limited role of Paynter and Mikol²⁹ in the PMP’s in their particular evaluations. Strow’s vague admission that generally PMP’s, in his mind, have “some bearing”, on his views as to wage increases is insufficient to establish a direct connection between the role of Paynter and Mikol in the process, and wage increases of any employees. I note that Schultz and Strow collaboratively decide wage increases, with Schultz having the final say. There is no evidence that Schultz considers the PMP scores in computing wage increases, and in fact the record reveals that according to Human Resources, PMP’s are not supposed to be used for wage increases.

Accordingly, Petitioner has failed to show a direct connection between the role of either Paynter or Mikol in the wage increase for any employee, and therefore their conduct in connection with PMP’s does not support a finding of supervisory status. *Norton Health*, *supra*; *Williamette Industries*, 336 NLRB 743, 749 (2001); *Training School at Vineland*, 332 NLRB

²⁹ I note that neither Mikol nor Paynter made any final decisions on scores for the evaluations, and that they merely assisted Schultz or Strow in their preparation, and years ago made specific recommendations for scores. Recently when Schultz became more familiar with the employees, Schultz would prepare the scores himself, and not even ask for input of Mikol or Paynter.

1412, 1419 (2000); *Vencor Hospital Los Angeles*, 328 NLRB 1139, 1140 (9994), *Elmhurst Extended Care*, 329 NLRB 535, 536 (1999).³⁰

5 Another primary indicia of supervisory authority under Section 2(11) of the Act, is the authority to adjust grievances. Petitioner contends that the evidence supports the conclusion that Paynter and Mikol possessed and exercised such authority. *H.S. Lordships, supra* at 1174.

10 Petitioner relies on Paynter's general testimony that when his subordinates have a non-technical problem with a co-worker they address these concerns with him. Paynter would speak to the employee complained about, as well as the person making the complaint. Paynter would either resolve the issue, or forward the matter to Schultz or Strow. Examples of issues that Paynter resolved himself were personality clashes, or instances where employees were arguing with each other. Instances where Paynter escalated the matter to Schultz or Strow included a situation where one employee was complaining about the other not finishing their work, or missing work, resulting in the complaining employee having to finish performing the work.

15 The Union also relies on the evidence that Rosario informed Mikol that Napolitano had used inappropriate language in the work area, while Rosario was talking with a client. The client also complained to Mikol about Napolitano's language. Mikol took Napolitano into a private room and informed him that the language that he had used on the phone was inappropriate and unprofessional. In another instance, Napolitano approached Mikol and complained that he believed that a co-worker had put something on his computer. Napolitano asked Mikol to talk to the individual about the matter. The record does not reflect whether or not Mikol did so, but instead Napolitano was contacted by Human Resources about his complaint.

20 I agree with the Employer that none of these instances, singly or collectively establish that Paynter or Mikol adjust grievances within the meaning of Section 2(11) of the Act. The evidence discloses that the conduct of Mikol and Paynter described above, reveals at best, that they resolved minor disputes among employees concerning workload, personality conflicts or "squabbles" between employees, which are not considered to be the "adjustment of grievances" under Section 2(11) of the Act. *Ken-Crest Services*, 335 NLRB 777, 779 (2001); *Illinois Veterans Home*, 323 NLRB 890, 891 (1997); *St. Francis Medical Center*, 323 NLRB 1046, 1048 (1997); *Riverchase Care Center*, 304 NLRB 861, 865 (1991); *Ohio Masonic Home*, 295 NLRB 390, 394 (1989).

25 Further to the extent that in some situations, Paynter decided to escalate some issues to higher management, such escalation merely represents a reporting function not constituting the exercise of supervisory authority. *Lincoln Park Nursing*, 318 NLRB 1160, 1162 (1995); *Beverly Enterprises*, 275 NLRB 943, 946 (1985). ("Problems that LPN's are unable to resolve informally are reported to Director of Nursing to take action. The LPN's have no more than a minor reportorial role in these procedures, not amounting to making effective recommendations. This facet is insufficient to elevate them to supervisory status").

30 Petitioner also contends that several secondary examples indicia of supervisory authority have been established. They include the authority to recommended approval of requests for vacation, time off and leaving early, higher pay, attendance at management meetings, spending time not doing unit work, and being perceived by co-workers as supervisors. I note that

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50 ³⁰ *Bayou Manor, supra*, cited by Petitioner is clearly inapposite. There a direct correlation between the scores in evaluations, prepared solely by the purported supervisors, and the merit increases received by employees, was established.

Petitioner appears to contend that the authority to recommend approval of vacations and time off, is a primary indicia of supervisory status. *H.S. Lordships, supra; Conner's Super Store*, 266 NLRB 309, 311 (1983). I disagree. Section 2(11) of the Act makes no mention of these functions. The cases cited by Petitioner merely conclude that such power is "Indicative of supervisory authority", without specifying whether this authority is considered to be primary or secondary. I conclude that these functions are secondary indica. In any event whether they are considered primary or secondary, in my view, the conduct engaged in by Mikol and Paynter with respect to vacations and time off is not demonstrative or supportive of their supervisory status. While both Paynter and Mikol will "approve" vacation requests of some team members, by so stating in E-Mails, in fact this "approval" is merely a notification to Strow, that Paynter and Mikol recommend approval. However, the recommendation to approve is made solely based on availability and scheduling, and which employee requests vacation first. Thus where two employees request the same dates, Paynter or Mikol will tell the second employee that he cannot take vacation at the time requested, unless he can convince the employee who previously had their vacation approved first, to change his plans, and agrees to another date.

While Strow does routinely approve the "recommendations" of Paynter or Mikol for vacations, I find that they did not exercise independent judgment in these recommendations, since they were based solely on availability of the dates, and are routine and clerical in nature. *North Shore Weeklies*, 317 NLRB 1128, 1131 (1995); *Los Angeles Water and Power Association*, 340 NLRB 1232, 1234 (2003); *Fleming COS*, 330 NLRB 277, 280 (1999); *Dico Tire Inc.*, 330 NLRB 1252, 1253 (2000).

The record also demonstrates that employees notify Mikol or Paynter that they will be out sick or need a personal day. In such cases Paynter or Mikol will routinely grant these requests, and they will ultimately be approved by Strow. This evidence established merely that the employees are merely providing notification that they will not be in, and does not show that Paynter or Mikol have the authority to grant or deny time off. *Los Angeles Water, supra; Fleming COS, supra* at 280-281.

Petitioner also relies as noted on the evidence that Paynter and Mikol have substantially higher salaries than their team members, are considered to be supervisors by their team members, attend management meetings, and regularly perform different work from their subordinates.

These secondary indicia of supervisory status can be relied on here, since I have found above, that Paynter and Mikol possessed the authority to effectively recommend hire of employees, one of the primary indicia of supervisory status. I find it appropriate, and I do rely on these secondary indicia as described above, as supportive of my conclusions that they are supervisors under Section 2(11) of the Act. *Monotech of Mississippi v. NLRB*, 876 F.2d 514, 517 (5th Cir. 1989); *Mountaineer Park*, 343 NLRB 1473, 1476 (204) (Higher wages); *USF Reddaway, supra*, 349 NLRB 341 (Employees regarded Leads as supervisors); *Sheraton Universal, supra*, 350 NLRB at 1115 (Higher pay and attendance at management meetings); *HS Lordships, supra*, 274 NLRB at 1174 (Attended management meetings, higher salary, employees believed individual to be supervisor, and he performed different work than other employees); *Berger Transfer, supra*, 253 NLRB at 10 (Attendance at management meetings).

The Employer contends that the "management" meetings attended by Paynter and Mikol, should not be construed as "management meetings" indicative of supervisory status. It argues that these meetings involve operational issues only, and do not involve personnel issues, and the only "management meetings" held are those involving Schultz, Strow, Llewellyn, Stager and others, but do not include Paynter, Mikol or any Team Lead. I disagree.

Here Paynter and Mikol attend production meetings, meetings with clients and Team Leads meetings that for the most part are not attend by unit employees. They discuss production issues, problems that the clients have, and changes in upcoming projects. Paynter and Mikol will give management their input as to whether the proposed changes will have a substantial impact on Getronics operations, so that the Employer might have to go back to Novartis to re-evaluate how much money it will take to perform the contract. After the Team Lead meetings, Paynter and Mikol will disseminate the information that they receive at the meetings to their team members. I conclude that these meetings, attended by Paynter and Mikol are "management meetings", under Board precedent, and supportive of supervisory status. *McClatchy Newspapers*, 307 NLRB 773, 778 (1992); *Memphis Truck & Trailer*, 284 NLRB 900, 910 fn. 15 (1987); *Turnbill Cone & Baking Co.*, 271 NLRB 1320, 1353 (1984); *Formco Inc.*, 245 NLRB 127, 128 (1979); *Associated Hospitals of East Bay*, 237 NLRB 1473 (1978).³¹

I therefore find it appropriate to consider the management meetings attended by Mikol and Paynter, as indicative of their status as a supervisor under Section 2(11) of the act.

Having found that Paynter and Mikol are supervisors under Section 2(11) of the Act, I shall recommend that the challenges to their ballots be sustained.

Petitioner also challenged the ballots of Skorka, Gil and Corby on the same grounds as that of Paynter and Mikol. However the evidence presented concerning Gil, Skorka and Corby falls far short of establishing their supervisory status. I note that unlike Paynter and Mikol, Petitioner did not call Gil, Skorka or Corby as witnesses, and the evidence concerning their authority in the record is minimal and conclusionary. Although Callahan was interviewed by Corby along with Strow when Callahan was hired in 1999, and Corby days later notified Callahan that he was being offered a job, that evidence hardly suffices to establish that Corby recommended, effectively or otherwise, that Callahan be hired. Thus there is no evidence that Callahan made any recommendation whatsoever to Strow concerning Callahan's hire. The fact that Corby informed Callahan that he was going to be offered a job, proves nothing more than Corby was relaying a decision made by management.

While there is testimony from Paynter and Mikol, as well as from Strow and Schultz that Gil, Skorka and Corby attend interviews and assess the "technical" ability of the applicants, but unlike Paynter and Mikol, there is no probative evidence that Gil, Skorka or Corby ever made specific recommendations to hire or not to hire any applicants. I also note that the evidence does not establish that either Corby, Gil or Skorka were present during any of the specific interviews testified to by Paynter and Mikol, where I found above that Paynter and Mikol made effective recommendations to hire or not to hire applicants for employment with Getronics.³²

Therefore there is insufficient evidence that Corby, Gil or Skorka effectively recommend hire or transfer of employees, or that they possessed the authority to engage in any of the other indica of supervisory authority in Section 2(11) of the Act.

³¹ Notably, the subject of prices for the contractor are discussed at both the Team Lead meetings, as well as at the admitted "management meetings", attended by high management officials.

³² Applicants Mark Andersen, George Le Chek, Nicholas Battista, Andy Albertsen, Daniel Sullivan (twice, once as an applicant for hire and once for an applicant for transfer), Evelyn Otero, Ross Rivera, and Isabelle Niven.

Although there is some record evidence that Corby, Gil and Skorka possessed some secondary indicia of supervisory status such as higher pay, and attendance at management meetings, such indicia cannot establish supervisory status, unless the disputed supervisor possesses at least one of the types of authority listed in Section 2(11) of the Act. *American River Transportation, supra*, 347 NLRB at 949; *Stanford New York*, 344 NLRB 558, 563 (2005); *Valair Contractors*, 341 NLRB 673, 674 fn.8 (2004); *J.C. Brook Copy*, 314 NLRB 157, 159 (1994).

Accordingly, I conclude that Petitioner has not established that Corby, Gil or Skorka are supervisors under Section 2(11) of the Act and that the challenges to their ballots should be overruled.

3. THE OBJECTIONS

The Objections filed by the Petitioner are set forth below.

1. Board Agent Bernard Mintz arrived forty-five (45) minutes late for the election, thereby causing the election to start fifteen (15) minutes late at 1:15 and potentially disenfranchising unit members. Local 1032 Staff Representative Migdalia Santiago can provide direct testimony concerning Mr. Mintz's tardiness.

2. On June 23, 2008, the employer committed objectionable conduct by distributing a handout to all unit employees just four days before the election that announced the sale of Getronics to CompuCom. The sale has been pending for months, and is neither complete nor official as the finalization of the sale is still contingent upon regulatory review and approval. The employer's conduct has coerced and interfered with the rights guaranteed to employees under Section 7 to freely choose a labor organization as their collective bargaining representative. Russell Callahan can provide direct testimony on his receipt of the handout and its contents.

3. On June 25, 2008, the employer committed objectionable conduct by holding a joint meeting with representatives from CompuCom and all unit employees discussing the perils of voting for Local 1032 in the election scheduled just two days from a date of the meeting. The employer's conduct has threatened, coerced and interfered with the rights guaranteed to employees under Section 7 to freely choose a labor organization as their collective bargaining representative. Russell Callahan can provide direct testimony concerning the specifics of the meeting and what was discussed.

4. Prior to or during this June 25, 2008 meeting, Charles Corby, who served as the employer's observer during the election, threatened unit employees that he would disclose their support for Local 1032 to CompuCom, the company that bought Getronics, and the new potential employer of the unit employees. The employer's conduct has threatened, coerced and interfered with the rights guaranteed to employees under Section 7 to freely choose a labor organization as their collective bargaining representative. Russell Callahan can provide direct testimony on his receipt of this threat.

5. On June 27, 2008, the day of the election, the employer committed objectionable conduct by providing certain employees with a pay raise. This pay raise was unannounced, unexpected, and not received by all employees. The employer's conduct has coerced and interfered with the rights guaranteed to

employees under Section 7 to freely choose a labor organization as their collective bargaining representative. Robert Kwiatkowski can provide direct testimony on his receipt of the pay raise on June 27, 2008.

5 6. On June 27, 2008, after the conclusion of the election, Charles Corby reiterated his threat to unit employees that he would disclose their support for Local 1032 to CompuCom. The employer's conduct has threatened, coerced and interfered with the rights guaranteed to employees under Section 7 to freely
10 choose a labor organization as their collective bargaining representative. Mark Andersen and William Napolitano can provide direct testimony of their receipt of this threat by Mr. Corby.³³

15 7. By failing to post notices of the election prior to the date of the election, the employer has committed objectionable conduct.

OBJECTION NO. 1

20 The election on June 27, 2008 was scheduled to be held from 1:00 PM to 3:00 PM. The Board Agent, Bernard Mintz, arrived at the site at 1:15 PM, at which time, the election started. The polls remained open until the scheduled 3:00 PM closing time.

25 The Excelsior list contained 30 names. Twenty nine of these employees voted. The one employee who did not vote, Manny Rosario was on vacation, and in the Dominican Republic at the time.

30 In order to find late opening of the polls to be objectionable, the Board requires a finding that the late arrival of the Board agent caused or may have caused, eligible voters to be disenfranchised. *Jim Kraut Chevrolet*, 240 NLRB 960 (1979); *Grant's Home Furnishing*, 229 NLRB 1305, 1306 fn. 9 (1977).

35 Here the evidence establishes that all but one eligible voter voted in the election, and the one eligible voter who did not vote, was out of the country, on vacation. In these circumstances, Petitioner has not shown that the late opening of the polls, caused or may have caused the disenfranchisement of any eligible voters. In fact to the contrary, the evidence demonstrates that no eligible voter was disenfranchised, since the only voter who did not vote was out of the country on the date of the election, and would not have voted, even if the polls were opened on time.

40 Therefore this objection has no merit, and I shall recommend that it be dismissed. *The Smith Co.*, 192 NLRB 1098, 1102 (1971) (Election not set aside, where of the only two eligible voters who did not vote, one was on leave of absence and the other was absent because of illness); *Jobbers Meat Packing Co.*, 252 NLRB 41 (1980); *Jim Kraut Chevrolet, supra*.

OBJECTIONS NOS. 2 AND 3

45 On June 23, 2008, Getronics distributed to all its employees in North America, including its employees at the three locations involved in the election, a memorandum announcing that Getronics has agreed to sell its North American operations to CompuCom, another IT
50 outsourcing company. The memo reflects that the sale will result in a "transition phase" to

³³ As noted above the Director approved the Union's request to withdraw Objection #6.

explore the details of how the combined entities will operate, which was expected to take approximately 60 days.

5 On June 25, 2008, all Getronics' employees at the Novartis sites were invited to attend a meeting to discuss the sale. Gary Cawthorne, Getronics' President of the Americas, explained that as a result of the partnership between CompuCom and Getronics, CompuCom would run the North Americas. Cawthorne added that it was an exciting challenge, and that the combination would result in the Number 3 IT company in the world.

10 There were several representatives from CompuCom present at the meeting, including its Vice President of Sales and Vice President of Human Resources. These individuals talked about what CompuCom does, what they were getting into by partnering with Getronics, and that CompuCom was excited about the transaction.

15 Several questions were asked by employees, including what would happen with medical benefits. The CompuCom representative answered that the medical benefits would be the same, and that most areas would also be the same, but they would not know about any possible changes until after the transition was completed, which was estimated to be the end of August.

20 Elliot Oxenstein, a bargaining unit employee, asked CompuCom's HR representative if he was aware of the fact that there was going to be a union election on Friday, June 27. The HR representative replied that he was aware of it, and that was part of the reason why CompuCom was at the meeting, to introduce itself to Getronics employees and let them know what CompuCom is like, and how it treats its employees. Oxenstein asked the CompuCom
25 representative what his thoughts were about the election. The HR rep replied that "we don't have Unions at CompuCom, so I don't know anything about it". He added that CompuCom doesn't need Unions because their employees were happy.

30 Neither Cawthorne, nor any representative from Getronics made any comments about the Union or the election at this meeting.

Wayne Ogg, Getronics' Vice President of Human Resources testified concerning the details of the sale and the timing of the announcement.

35 This testimony which is uncontradicted, and corroborated by documentary evidence established the following: Negotiations between CompuCom and Getronics concerning the proposed acquisition began in August of 2007. These discussions involved only a select number of high level senior people from the two companies, and were highly confidential. No
40 manager at the Novartis site participated in these discussions, and no Getronics manager at the Novartis site was made aware of the potential acquisition. According to the securities law in the Netherlands,³⁴ following the execution of a purchase and sale Agreement, Getronics was required to announce the acquisition either after the close or before the opening of the Netherlands Stock Exchange. On June 19, 2008, Getronics and CompuCom executed the purchase and sale Agreement.

45 Beginning in April 2008, discussions began between representatives of CompuCom and Getronics concerning how and when the public, customers and employees would be informed about the acquisition. Various documents and drafts were prepared, circulated and revised, resulting in a final decision documented in a communication plan and timeline, which was
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³⁴ The Netherlands as noted above, is the home of Getronics, Inc. parent company.

implemented. This timeline was followed, and it included the memo sent to all North American employees by Cawthorne on June 23, 2008. The plan also included notifying the top 10 customers on the day the agreement was signed (June 20), so to insure that they would not cancel their contracts. The next available date, to announce the sale to the public, in accordance with Netherlands' Securities and Exchange rules was Monday, June 23, 2008, which was the date selected.

Thus before the opening of the Netherlands stock exchange on June 23, 2008. Getronics issued a global press release announcing the sale. Getronics' CEO sent a letter via E-Mail to all Getronics employees worldwide announcing the acquisition, and Cawthorne sent a similar letter to all of Getronics's North American employees.

Napolitano testified when he found out about the sale in the letter from Cawthorne, it made him "curious" about CompuCom and whom he would be working for. After the meeting, Napolitano further testified that the sale and the comments made at the meeting, made him think about what he wanted to do as far as the election was concerned.

Petitioner argues that the announcement of the sale should be construed as a "benefit", and the standards of *Star Inc.*, 337 NLRB 962 and *Mercy Hospital*, 338 NLRB 545 (2002) be applied. Thus, both the granting of or timing of benefits are governed by the same standards. "The Board will infer that an announcement or grant benefits during the critical period is a coercive, but the employer may rebut the inference by establishing an explanation other than the pending election for the timing or bestowal of the benefit". *Star, supra* at 962; *Mercy Hospital, supra* at 545.

Petitioner argues that in applying these principles to the instant case, that Getronics has not met its burden of proof in this regard. Petitioner asserts that the timing of the announcement, (just four days before the election), coupled with the "coercive" comments made by officials of CompuCom at the June 25, 2008 meeting, just two days before the election, establish that the employees "were forced to ponder what impact their vote for CWA would have on their job status for their soon-to-be new employer. The addition of this new element to the employees thought process mere days before the election was coercive". Petitioner argues that its position is supported by Napolitano's testimony that the announcement of the sale, plus the comments made at the meeting by CompuCom officials made him think about how he was going to vote in the representation election. I do not agree.

Initially, I note that Petitioner's reliance on Napolitano's subjective reaction to the sale and or the comments made at the meeting are misplaced. It is well settled that the subjective reactions of employees is irrelevant in assessing objectionable conduct. *Lamar Advertising*, 340 NLRB 979, 981 fn.13 (2003); *Taylor Wharton Division*, 336 NLRB 157, 158 fn.7 (2001); *Hopkins Nursing Care Center*, 309 NLRB 952 (1992); *Emerson Electric*, 247 NLRB 1365, 1370 (1980), *enfd.* 649 F.2d 589 (8th Cir. (1981).

The appropriate standard for evaluating conduct of a party is whether it has a "reasonable tendency to interfere with the employees freedom of choice". *Cambridge Tool*, 316 NLRB 716 (1995). Where the alleged conduct is committed by a third party, an election will be set aside, only if conduct is so aggravated that it creates a general atmosphere of fear and reprisal rendering a free election impossible. *Lamar Advertising, supra*; *Cal-West Periodicals*, 330 NLRB 599, 600 (2000).

Here the comments were made by CompuCom representatives, who are third parties in this proceeding. Therefore the comments made by the CompuCom representative that "we don't

have Unions, I don't know anything about it", and that CompuCom "does not need Unions because their employees were happy", must be evaluated under the more stringent third party standard. Clearly, these comments are not so aggravated that they "create a general atmosphere of fear and reprisal rendering a free election impossible".

5 Further, even if one were to argue that the party standard should be applied here, since CompuCom had announced that it had agreed to acquire Getronics, the statements made were not coercive. "It is well settled that an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a threat or reprisal or force or promise of benefit".
10 *Manhattan Crowne Plaza*, 341 NLRB 619 (2004), citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1964). The comments made by the CompuCom representatives detailed above cannot be construed as a threat of reprisal, and is therefore neither coercive nor objectionable.

15 As far as the timing of the announcement is concerned, I find the evidence submitted by the Employer more than adequately explained its decision, and established that the timing was based on legitimate business reasons, totally unrelated to the Union election. *Onan Corp.*, 338 NLRB 913, 914-915 (2003); *Adams Super Markets*, 274 NLRB 1334, 1335 (1985); *American Sunroof Co*, 248 NLRB 748 (1980) modified on other grounds 667 F.2d 20 (6th Cir. 1981).

20 The evidence established that CompuCom and Novartis negotiated their agreement over a long period of time, which included a timeline and how and when to notify employees, clients and the public. The parties complied with that timeline, which included complying with securities laws of the Netherlands, the home office of Getronics' parent company. This procedure resulted in the notification to the employees on June 23, 2008. The fact that this date was four days
25 before the election is coincidental. The Getronics employees at the Novartis sites found out about the acquisition in the exact same way and at the exact same time as did all other Getronics employees. I agree with the Employer, that the fact that 30 employees, out of 3500 North American employees and 10,000 worldwide employees, would be voting in a Union
30 election had absolutely no bearing on the sale of a billion dollar company to another billion dollar company or on the timing of the announcement of the sale.

Accordingly, I recommend that the Objections 2 and 3 be overruled.

35 OBJECTION NO. 4

On June 27, 2008 the election was held, and as noted above, began at 1:00 PM. In the morning of that same day. Strow sent E-Mails to Russell Callahan, Michael Nah, Donald Nwobi, Robert Kwiatowski, and Skorka, inviting them to meet with Strow. Skorka, Nah, Nwobi and
40 Kwiatowski accepted Strow's invitation to meet with him that morning. At these meetings, which all occurred before the election began, Strow notified the employees that they would be receiving a pay raises or bonus, effective June 16, 2008, but it would appear in their paychecks on June 30, 2008.³⁵ Callahan who did not accept Strow's invitation to meet with him on June
45 27, 2008, received his raise also on June 30, 2008, of \$1,850.00. Thus Callahan was not aware of his raise until after the election.

Strow furnished extensive testimony, in part corroborated by Ogg, concerning the Employer's process for granting wage increases and bonuses, and how the wage increases and

50 ³⁵ Skorka received a bonus of \$1,500. Kwiatowski, Nah and Nwobi received wage increases between \$1,550 and \$2,500.

bonuses of June of 2008 were effectuated. This testimony establishes there is no policy of automatic wage increases for employees. Rather the Employer grants merit increases to employees at various "focal points" during the year. The practice has been that these focal points are either three or four times a year. The focal points are June, September and December, and sometimes March.

The procedure is in January or February, local management decides based on the budget, and their assessment of its employees, what increases to recommend for the year's focal points. They consider various factors in their decision, including seniority, the last time the employee received a raise, as well as the work performance of the employees. A recommendation is then prepared by local management, and forwarded to the North American main office in Massachusetts for approval. Generally after several months, the main office will send its approval (or disapproval) to the local site. The approvals are generally sent piecemeal, i.e. about a month prior to the focal point that the increases are to be effective. Local management must then confirm its approval (or disapproval), and if it continues to approve, the increases are effectuated, usually in the last payroll period of the month of the focal point. (i.e. March, June, September or December).

In 2008, this policy was followed, and Strow and Schultz decided upon local management's recommendation for increases for 2008. On February 5, 2008, Cawthorne sent a memo, stating that for 2008, the focal points would be June, September and December, for increases. Schultz and Strow recommended the increases, eventually approved, for the five employees.

Although approval by the main office generally takes 2-3 months, in 2008 for reasons unexplained in the record, it took longer. In fact Strow asked Schultz if he had heard anything about the increases, and Schultz replied that he had not.

Finally, on May 28, 2008, Strow received E-Mails from Bill Walters at the main office, informing him that the wage increases for Kwiatowski, Callahan, Nwobi and Nah had been approved. The E-Mail asked Strow to send an E-Mail back, indicating his approval to move forward with the increases, which would be effective June 16, 2008. The E-Mails to Strow contain the following language. "If you have approved this transaction without deviating from the information below you may communicate the increase to the employee".

On June 3, 2008, Strow received an E-Mail from HR representative Renee Hemming, approving the recommendation for a bonus to Skorka. This document also states that Strow "may" communicate the bonus to Skorka, if Strow approved the transaction.

According to Strow, his practice during the six or seven years that he has been involved in wage increases, has always been inform employees of their increases one or two days before the employees would actually receive the raise in their pay.³⁶ Strow further testified that he followed this normal practice in 2008, sending E-Mails to all five employees requesting a meeting the morning of June 27, 2008, (a Friday) which was one working day, prior to the day, (June 30, 2008) where employees would receive their increases in their pay. As related above, Callahan did not respond to the E-Mail and did not attend the meeting. Thus he was not informed about his increase on June 27, 2008, and was unaware of it, until he received it on June 30, 2008.

³⁶ I note due to the Employer's payroll system, this date would be two weeks after the effective date of the increases.

The record also reflects that on May 8, 2006, Ogg met with Getronics' employees at the Novartis sites, to address various concerns that they had with several issues, including health insurance, and salary increases. Ogg sent a memo to Getronics employees at Novartis dated May 31, 2006, summarizing what he had said at the meeting, as well as some information, addressing the concerns expressed at the meeting. This memo reads as follows:

I wanted to touch base and update you on the actions the Company has taken to address some of the concerns you shared with me at our meeting on May 8, 2006.

In our meeting, several employees expressed discontent about experiences they had with Getronics' health insurance vendors. In particular, it is my understanding that some employees have had difficulties resulting from the change in our medical insurance vendor from United Healthcare to Blue Cross Blue Shield.

In order to address your specific issues, I dispatched Stephanie Fields of Human Resources to the Novartis site to intake your concerns in a more private forum. Ms Fields announced her visit to the Novartis office in advance and unfortunately few employees availed themselves of the opportunity to meet with her. In addition, Ms. Fields and Richard Hill of Human Resources are reaching out to employees via telephone calls, in an effort to resolve any lingering issues you may be experiencing. We are serious about resolving any remaining health care issues you have. If you have not yet spoken with Ms. Fields or Mr. Hill, I encourage you to contact them.

Getronics regrets that its employees have had problems with the transition from United Healthcare to Blue Cross Blue Shield, and the current service provided by Blue Cross Blue Shield (in particular, issues surrounding prescriptions). Please know that Getronics is committed to taking steps to try to resolve your concerns and to prevent future difficulties. To this end we have met with Blue Cross Blue Shield about the kind of issues you discussed with me on May 8th. They have undertaken to re-train the help desk analysts and they are reviewing the taped call logs to determine other areas where further training or communication may be required.

I would also like to take this opportunity to address the concerns you shared regarding salary increases. As I previously explained to you, the 2006 salary plan is in progress. I have reviewed the data and would like to share the following with you.

In building the salary plan, Getronics' goal is to compensate employees at or close to market rates taking into account other factors, including what the Company can afford, an employee's individual job performance and the number of months since the employee's last salary increase.

Although Getronics is not allowed to make any promises to you while employees are exercising their right to organize, we are permitted to continue programs and practices that are consistent with "normal business course" and that were in progress prior to our awareness of any organizing activities. As you were told during my meeting with you on May 8, 2006, a salary plan process has been underway since early March.

5 Under the Company's salary plan, employees hired prior to October 1, 2005 are eligible to receive salary increase or a bonus payment. The salary budget is dictated in large part by the revenue generated from Getronics' service contract with Novartis. And, as we have explained to you in the past, the price that our clients are willing to pay for our services continues to decline. Although we must work within the difficult economic constraints that are driven by existing market conditions, it is important to the Company to reward employees financially, when feasible, for exceptional work.

10 Whether an employee is eligible for a salary increase and the amount of any increase depends upon an individual's job performance and his/her contribution to the business objectives of Getronics' North American Operations. Each employee's job performance should be reviewed formally by the employee's manager on an annual basis on or near the employee's anniversary date. During
15 this review process, employees should have the opportunity to discuss with their manager their job performance over the prior 12-month period as well as goals and areas for improvement for the upcoming year.

20 Salary increases for eligible employees go into effect on one of three focal point dates throughout this year. The focal point dates in 2006 are in June, September and December. The focal point date on which an eligible employee would receive a salary increase is determined by the employee's manager and is based on the budget.

25 Managers will inform employees shortly if they are eligible to receive a salary increase this year based upon their job performance and the focal point date on which any such salary increase will take effect.

30 Finally, I would like to take this opportunity to remind you that all Getronics employees are free to access the Getronics Virtual University (GVU). The GVU is an extraordinary resource with training courses on a multitude of topics. It is my understanding that approximately half of this group has taken advantage of the GVU. I encourage all of you to discover this excellent resource.

35 Thank you and I look forward to continue working with you.

40 Ogg testified concerning his statement in the letter that "managers will inform employees shortly if they are eligible to receive salary in arrears this year based upon their job performance and the focal point date on which any such salary increases take effect". Ogg does not know whether Strow or local management complied with this statement of his in this letter. No documentary evidence was submitted by anyone as to precisely when increases were granted in 2006, or when employees were so informed. Ogg testified that there is no company policy in effect as to when or how local managers inform their employees about the increases. The
45 decision is left to local management. According to Ogg, some managers, as Strow testified is his practice, will not notify employees until a day or two before the increase is received and others will tell employees that the manager had recommended them for an increase at particular focal points, and their receipt of this increase is dependent on the budget.

50 Strow, as noted insisted that he has never deviated from his practice of informing employees of their increases, one or two days before they are to receive it. However, Strow could not recall who received raises in December of 2007, or precisely when he notified them of the December increases. However, Strow again was certain that he notified such employees at

the end of the pay period when the raise was going to appear.

5 The record does disclose some prior E-Mails, sent on November 27, 2007 from Walters to Schultz, concerning raises to be granted in the December 2007 focal point. These raises were to be effective on December 10, 2007 or December 6, 2007. These documents reflected raises for Andrew Albertsen, Corby, Gil, Mikol, and Paynter.

10 The proper analysis of this objection, is similar to the analysis of the prior objection, concerning the announcement of the sale. Since the wage increases were granted on June 16, 2008, and announced to employees on June 27, 2008, all within the critical period, the Board will infer that the grant and the timing of the benefit is coercive, but the employer may rebut the inference by establishing an explanation other than the pending election for timing of the announcement or bestowal of the benefits. *Mercy Hospital, supra; Star Inc., supra.*

15 I agree with the Employer that it has submitted sufficient credible evidence to rebut the inference of illegality, and has established a credible explanation other than the pending election for the timing of the announcement, as well as the bestowal of the benefits.

20 Petitioner makes no assertion that the grant of the benefits are unlawful, since it is clear that they were granted pursuant to Getronics normal policy of increases at the end of various focal points. I therefore find that the grant of the benefits was not objectionable.

25 Petitioner does contest however, the timing of the announcement, contending Getronics' decision to notify employees of their raises and bonus, on the morning of the election, was calculated to influence the results of the election, and was coercive. Petitioner argues that Strow's self serving testimony, unsupported by any documentary evidence, is insufficient to meet the Employer's burden of establishing a reason other than the pending election for the timing of the announcement. Petitioner notes that Strow was unable to recall any specifics of which employees received increases in 2007, or when he notified them of such increases, as well as Ogg's May 31, 2006 memo which states that managers will inform employees shortly if they are eligible to receive increases, and the focal date on which any such salary increase will take effect.

35 However, I found Strow's testimony in this area to be credible, and at least partially supported by the testimony of Ogg. I found Strow generally to be candid and believable in his responses, and he impressed me as someone who was attempting to truthfully recount the facts that as he recalls them, rather than tailoring his testimony to what he believed would be helpful to the Employer's position. I note his admission that the PMP's have "some bearing" in his mind on his assessment of what wage increases to recommend for employees, even though that admission was clearly and obviously contrary to the Employer's position on that issue, as well as on the supervisory status of Paynter, Mikol and the other team leaders.

40 Further, I do not find it significant that Strow was unable to recall which employees received raises in 2007, or precisely when he spoke to them about their increases. Strow did insist, credibly in my view, that he followed his normal practice of notifying employees one or two days before their increases would appear in their paychecks.

50 I also place little reliance on Ogg's May 31, 2006 memo. While that memo did state that managers will (emphasis supplied) notify employees shortly of their increases, Ogg did not and does not know whether that request by him was complied with by Strow. Further Ogg partially corroborated Strow, by asserting that to his knowledge, there are other managers, at Getronics, who as Strow testified do not notify their employees of wage increases until shortly before the

date of receipt.

5 I also emphasize that Petitioner introduced no evidence contradicting Strow's testimony of his "normal practice". Petitioner called several witnesses, and adduced no testimony or evidence, that disputed Strow's testimony in this regard. Notably, Petitioner called Paynter and Mikol as witnesses, and the evidence discloses that they both received wage increases in 2007. Yet Petitioner did not even ask these witnesses when or how they were notified on these increases. Thus Strow's testimony stands uncontradicted, and I believe it to be credible, and sufficient to meet the Employer's burden of rebutting the inference of coerciveness of the timing of the announcement.

15 Finally, I find it likely, that if the Employer was motivated by an intent to influence the election in the timing of the announcement, it would have made sure that Callahan received notice of his raise prior to the election. I note that Callahan was the Union observer, so Getronics would be most interested in being assured that he was notified of his raise prior to the election. Yet, although Strow did invite Callahan to a meeting to notify Callahan about his raise, on the morning of the election, Callahan did not comply and was not informed about his raise until June 30, 2008, when he received it, after the election was over. In my view, if the Employer was intent on influencing the election, it could have and would have made more of an effort to notify Callahan of his raise. Thus, after Callahan did not attend the meeting scheduled for him,³⁷ Strow could have made efforts to find him, or send Callahan an E-Mail notifying him of his raise. Strow's failure to take either of these steps, demonstrates to me, that the pendency of the election, had (as Strow testified) no bearing on his decision or to when and how to notify Getronics's employees of their increases.

25 Accordingly, based on the foregoing analysis, I conclude that Getronics has met its burden of establishing that the grant and timing of its wage increases in June of 2008 was consistent with past practice, and unrelated to the pendency of the election. *Onan Corp.*, 338 NLRB 913, 914-915 (2003); *American Sunroof, supra*, 248 NLRB at 74, I therefore recommend that this objection be overruled.

OBJECTION NO. 6

35 As related above, officials of CompuCom and Getronics met with employees on June 25, 2008 to discuss the sale of Getronics North America to CompuCom. During the course of this meeting, Russell Callahan testified that he was sitting across from Charles Corby, and that he overheard a comment by Corby to no one in particular. According to Callahan, Corby said something to the effect that "I wonder who they are going to hire if I tell them who's a Union or Union advocate".

40 Corby adamantly denied making such comments, or anything resembling these remarks. Corby does concede that he may have said something about the Union or the election, or the sale during the meeting, but he did not recall what he said about these issues. Corby also denied that anyone from CompuCom ever asked him his opinion concerned which employees of Getronics should remain, be terminated or laid off.

45 I need not resolve the credibility issues *vis á vis* Corby and Callahan, inasmuch as I have found above that Petitioner has not established Corby's supervisory status. Thus, Corby's comments, even if made testified to by Callahan, and even if considered coercive, are not

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³⁷ Callahan's meeting was scheduled for 11:00AM.

attributable to Getronics.

5 These alleged statements must be evaluated under the Board's standard for third party conduct. As I noted above the conduct, in order to be sufficient to set aside an election, must be "so aggravated that it creates a general atmosphere of fear and reprisal rendering a free election impossible". *Lamar Advertising, supra*, 340 NLRB at 980. The alleged comments made by Corby falls far short of meeting that stringent standard. *Lamar Advertising, supra; Cal West Periodicals*, 330 NLRB 599, 600 (2000); *NLRB v. Hood Furniture MFG.*, 941 F2d. 325, 330 (5th Cir. 1991); *Nabisco v. NLRB*, 738 F2d. 955, 957-958 (8th Cir. 1984).

10 Therefore I recommend that Objection No. 6 be overruled.

OBJECTION NO. 7

15 On June 19, 2008, counsel for Getronics telephoned Board Agent Frank Flores to inform him that Novartis would not permit Getronics to post the Notice of Election on its property.³⁸ Flores discussed with Getronics's counsel an alternative means of providing bargaining unit employees with copies of the Notice of Election, namely by scanning a copy of the Notice into the computer and sending an E-mail to each bargaining unit employee attaching a PDF copy of such Notice. After informing counsel for the Petitioner, of the situation and the need to provide 20 Notices to unit employees other than by posting on Novartis' property, Flores notified Getronics that it may E-Mail PDF copies of the Notice of Election to bargaining unit employees, and Getronics did so. Petitioner made no objection to this procedure, until after the election, when it filed its Objections.

25 Although Section 103.20 requires the Posting of Notices for 3 full working days prior to the election, I find that in the circumstances here, there has been substantial compliance with the rule.

30 Getronics was unable to post the Notices, because Novartis, the owner of the property, would not allow it. Getronics promptly notified the Region, and worked out an alternative method of notification with the Region, which consisted of E-Mailing PDF copies of the Notice to employees. Flores notified the Union of this situation, and the Union did not object. Getronics complied with this procedure.

35 Petitioner has not advanced any arguments as to what it expected Getronics to do in these circumstances. I find that Getronics complied with the requirements of 103.20 as best that it could, the Region agreed to the alternative procedure, and the Petitioner did not object.

40 Accordingly, I recommend that Objection No. 7 be overruled. *Penske Dedicated Logistics*, 320 NLRB 373 (1995); *Madison Industries Inc.*, 311 NLRB 865 (1993); *Sugar Food Inc.*, 298 NLRB 628 (1990).

CONCLUSION

45 I have recommended above that the Challenges to the ballots of Mikol and Paynter be sustained, and the Challenges to the ballots of Gil, Corby and Skorka be overruled. That results

50 ³⁸ I note that Getronics's employees worked on Novartis's property, where the election was held. While Novartis apparently agreed to holding the election on its premises, it did not agree to permit the Notices of Election to be posted. Getronics had no right to post these notices on Novartis' property absent Novartis' permission.

in the following revised tally of Ballots. Fourteen votes for Petitioner, ten against, with three Challenged ballots, that ordinarily would be opened and counted, (Gil, Skorka and Corby). However, these Challenges are no longer determinative. It is therefore unnecessary to open and count these ballots.

5 I shall therefore recommend that a Certification of Representatives be issued to the Union.

10 In the event that I am reversed as to my recommendations on the ballots of Paynter and Mikol, and after their ballots, as well as the ballots of Skorka, Gil, and Corby are counted, a majority of votes are not cast for Petitioner, then a Certification of Results should issue, inasmuch as I have recommended that all of Petitioner's Objections be overruled.

ORDER³⁹

15 A Certification of Representation should be issued to the Petitioner.

Dated: Washington, D.C. December 30, 2008

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Steven Fish
Administrative Law Judge

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45 ³⁹ Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, Exceptions to this Report may be filed with the Board in Washington, D.C., within 14 days from the date of issuance of this Report and Recommendations. Exceptions must be received by the Board in Washington by January 13, 2009. Immediately upon the filing of such exceptions, the party filing same shall serve a copy thereof upon the other parties and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board may adopt this recommended
50 decision.

NOT TO BE INCLUDED
IN BOUND VOLUMES

LS
East Hanover and
Florham Park, NJ
and Suffern, NY

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

GETRONICS USA, INC.

Employer

and

Case 22-RC-12925

COMMUNICATION WORKERS OF
AMERICA, LOCAL 1032

Petitioner

DECISION AND CERTIFICATION OF REPRESENTATIVE

The National Labor Relations Board has considered determinative challenges to an election held June 27, 2008, and the administrative law judge's decision recommending disposition of them.¹ The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 14 for and 10 against the Petitioner, with 5 determinative challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs and has decided to adopt the judge's

¹ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

findings² and recommendations³ and to sustain the challenges to the ballots of Robert Mikol and John Paynter. Because the challenges to the ballots of Thomas Skorka, Gustavo Gil, and Charles Corby are no longer determinative, we find that a certification of representative should be issued.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Communication Workers of America, Local 1032, and

² The judge was sitting as a hearing officer in this representation proceeding. The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We have carefully examined the record and find no basis for reversing the findings.

³ In the absence of exceptions, we adopt pro forma the judge's recommendations to overrule the Petitioner's objections to the election, and to overrule the challenges to the ballots of Thomas Skorka, Gustavo Gil, and Charles Corby.

In adopting the judge's recommendation to sustain the Petitioner's challenges to the ballots of Robert Mikol and John Paynter, we find in agreement with the judge that they possessed the ability to effectively recommend the hiring of employees (there are no exceptions to the judge's finding that they did not possess other primary indicia of supervisory authority). As such, their involvement in the hiring process was more extensive than, and distinguishable from, that at issue in *Aardvark Post*, 331 NLRB 320 (2000) (supervisory authority not established by conducting an assessment of applicant's technical skills and reporting results of assessment to management). Because *Aardvark Post* is distinguishable, we find it unnecessary to pass on the judge's statement questioning the continued viability of that case in light of *Oakwood Healthcare*, 348 NLRB 686 (2006).

that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time Technical Support Specialists, Network Engineers, Logistics Coordinators and Help Desk Analysts employees employed by the Employer at its Florham Park, New Jersey, East Hanover, New Jersey, and Suffern, New York facilities, but excluding all Office Clerical employees, Business Analysts, Project IC Managers, Guards, and Supervisors as defined in the Act.

Dated, Washington, D.C., April 27, 2009.

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD



CWA LOCAL 1032

COMMUNICATIONS
WORKERS OF AMERICA
A.F.L.- C.I.O.

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Fax: (973) 589-5304

91 7108 2133 3934 3929 7411

May 19, 2009

Pat Llewellyn
Novartis Pharmaceuticals CompuCom
Bldg. 431 Room 2530-D
1 Health Plaza
East Hanover, NJ 07936

Dear Mr. Llewellyn,

This letter shall serve as notification that the Communications Workers of America Local 1032 representing all Technical Support Specialists, Network Engineers, Logistics Coordinators and Help Desk Analysts at CompuCom requests to commence negotiations for a collective bargaining agreement for the affected employees.

In order for us to prepare sound contract proposals for negotiations with your company, please provide the following information for each individual current employee:

1. Date of hire
2. Hourly rate of pay
3. Job classification
4. Normal work schedule
5. Normal work location
6. Normal hours worked per week

For employees as a group:

1. A list of all supplemental benefits provided to employees including vacation allowance, sick leave, paid holidays, health, life, accident or other types of insurance, jury duty leave, birthday leave, medical check-up, welfare, retirement

Confirmation Services	Package ID: 9171082133393439297411	E-CERTIFIED
	Destination ZIP Code: 07936	STCL REGULAR LETTER 1
	Customer Reference:	
	Recipient: Address:	PBP Account #: 46352322 4232494 2 1 42P

EXHIBIT H

May 19, 2009
Pat Llewellyn
Page 2

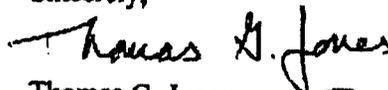
and non-occupational disability benefits. Please provide an explanation for each benefit and where possible, a copy of the plan document.

2. The average per hour cost figure for each supplemental benefit provided to employees.

I can be reached at my office in Newton, NJ at 973-579-7539 if there are any questions.

Thank you for your attention and courtesies.

Sincerely,



Thomas G. Jones
Staff Representative

(12)

Cc: Patrick Kavanagh, CWA Local 1032 President
Migdalia Santiago



CWA LOCAL 1032

COMMUNICATIONS
WORKERS OF AMERICA
A.F.L.- C.I.O.

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Fax: (973) 589-5304

91 7108 2133 3934 3925 7497

June 9, 2009

Pat Llewellyn
Novartis Pharmaceuticals Getronics/CompuCom
Bldg. 431 Room 2530-D
1 Health Plaza
East Hanover, NJ 07936

Dear Mr. Llewellyn,

In a letter dated May 19, 2009, I requested information from you regarding items that are mandatory subjects of bargaining. As of this date I have received no response.

In order for us to prepare sound contract proposals for negotiations with your company, please promptly provide the requested information.

I can be reached at my office in Newton, NJ at 973-579-7539 if there are any questions concerning this matter.

Sincerely,

Thomas G. Jones
Thomas G. Jones
Staff Representative 

Cc: Patrick Kavanagh, CWA Local 1032 President
Migdalia Santiago



Integrating IT. Delivering Value. 

June 15, 2009

VIA U.S. MAIL AND FACSIMILE (973) 579-5649

Thomas G. Jones
CWA Local 1032
61 Spring Street
Newton, NJ 07860

Re: Request for Information

Dear Mr. Jones:

At this time, we do not believe that you represent an uncoerced majority of the CompuCom employees at the Novartis site (the "employees") and we will be contesting certification. Accordingly, we refuse to recognize CWA as the employees' representative and reject your offer to commence bargaining.

Please direct all future correspondence to me at the following address.

Marthe Stanek, Associate General Counsel
CompuCom
836 North Street
Tewksbury, MA 01876
Telephone: 415-644-0340
Fax: 978-625-5221

Thank you.

Very truly yours,

Marthe C. Stanek
Associate General Counsel

cc: Pat Llewellyn
Rick McDonough, General Counsel

