

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

In the Matter of

STEWARD CARNEY HOSPITAL, INC.
d/b/a CARNEY HOSPITAL, A CARITAS
FAMILY HOSPITAL

Employer¹

and

UNITED FEDERATION OF SPECIAL
POLICE & SECURITY OFFICERS, INC.

Petitioner

Case 1-RC-22525

DECISION AND DIRECTION OF ELECTION²

The United Federation of Special Police & Security Officers, Inc. (Union) seeks to represent a unit composed of security officers, officers-in-charge (OICs), and security sergeants. The Employer (Hospital) contends that the security sergeants should be excluded from the unit as statutory supervisors. The Employer further contends that

¹ The name of the Employer appears as amended at the hearing.

² Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

Upon the entire record in this proceeding, I find that: 1) the hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed; 2) the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this matter; 3) the labor organization involved claims to represent certain employees of the Employer; and 4) a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

OICs should be excluded from the unit as statutory supervisors, on the ground that they function as sergeants for a regular and substantial portion of their work time. The Union contends that the sergeants and OICs should be included in the unit as non-supervisory employees. I find that the Employer has failed to demonstrate the supervisory status of either the sergeants or the OICs and shall include them in the unit.

Background and staffing

The Employer operates Carney Hospital, an acute care hospital in Dorchester, Massachusetts. Carney Hospital provides inpatient care to patients in various medical, surgical, and psychiatric units. Its emergency room department provides emergency medical care to patients. The Hospital also provides outpatient care in a medical office building.

The Security Department is responsible for maintaining the safety and security of patients, employees, and visitors at the Hospital. Scott Martin is the Director of Security. Director of Security Martin generally works from 8 a.m. to 4:30 p.m., Monday through Friday.

Three full-time security sergeants, Robert McMaster, Anthony Gentile, and Robert Huxley, report to Martin. About 23 full-time, part-time, and per diem security officers report to the sergeant on duty on their shift and to the Director of Security.³ Three of the security officers, Michael Thompson, Robert Hennessey, and Michael Burns, serve as the OIC during those shifts when no sergeant is present. They work as regular security officers when they work a shift that is already staffed by a sergeant.

The Security Department provides coverage at the Hospital 24 hours a day, seven days a week in three shifts: day, evening, and night. Each shift is staffed by either a sergeant or an OIC. Each sergeant works five days per week, and an OIC heads up the shift during the remaining two days of the week when the sergeant on his shift is off.⁴ Each shift is also staffed by two to four security officers, depending on the shift and day of the week. There are three to four security officers assigned to each day shift, three to

³ The parties have stipulated, and I find, that, pursuant to the standard *Davison-Paxon* formula, those per diem employees who have worked an average of four hours per week during the calendar quarter preceding the eligibility date will be included in the unit.

⁴ Sergeant McMaster or OIC Thompson covers the day shift, Sergeant Gentile or OIC Hennessey covers the evening shift, and Sergeant Huxley or OIC Burns covers the night shift.

Each of the three OICs regularly works in that capacity for two eight-hour shifts per week. Burns and Thompson, who are full-time employees, each work three additional shifts as security officers, so that they work 40 percent of their time as OICs. Martin testified that Hennessey is a 32-hour employee, and he is listed as such on Employer Exhibit 1, but a staff schedule in evidence as Employer Exhibit 5 indicates that Hennessey works two shifts as the evening shift officer-in-charge and no other shifts.

four security officers assigned to each evening shift, and two security officers assigned to each night shift.

The security officers' hours are from 8 a.m. to 4 p.m. on the day shift, 4 p.m. to midnight on the evening shift, and midnight to 8 a.m. on the night shift. The sergeants and OICs assigned to each shift arrive an hour earlier than the security officers, so that their hours are 7 a.m. to 3 p.m. for the day shift, 3 p.m. to 11 p.m. for the evening shift, and 11 p.m. to 7 a.m. for the night shift.

Duties of the security officers and sergeants

The function of the security officers is to provide for the security and safety of all staff, visitors, and patients.⁵ According to their job description, security officers patrol the Hospital buildings and grounds on foot and by vehicle to deter crime and prohibited activities. They respond to emergent and non-emergent situations; assist patient care staff in restraining disorderly or combative patients; ensure that only authorized personnel are admitted onto hospital premises; escort visitors, patients, and staff to and from parking areas upon request; respond to fires; investigate unusual incidents; and give courteous responses to inquiries by patients, visitors, or staff.

The security officers work at certain posts during their shifts. The officers generally remain at their posts, although they may walk around the area. One post is the lobby post at the Hospital's main entrance. According to a job description for the "information desk security officer," the officer at this post greets and directs patients and visitors, calls for wheelchairs and taxis, secures access of authorized personnel, and the like.⁶ A second post is in the emergency room. A third post is in a room outside of the emergency department waiting room, which Martin referred to as the "security base," that has security monitors and alarm systems.⁷ A fourth post is located in a medical office building.⁸

⁵ Security officers are required to have a background in private security, law enforcement, the military, and/or a degree in criminal justice.

⁶ Although the Employer submitted a separate job description for the "Information Desk Security Officer," this document appears to refer to the duties of the security officer assigned to the lobby post rather than to a separate job classification. One particular officer, Robert Angland, is designated on the schedule as the "lobby" officer on the day shift, Monday through Thursday. Other security officers on the day and evening shift rotate through the lobby post until the lobby closes at 8 p.m.

⁷ Sergeant Gentile testified that the posts on his shift, which is the second shift, are the emergency room, "triage," and the front desk. It appears, although it is not entirely clear, that the term "triage" may be a reference to the room with the security monitors.

⁸ The medical office building closes a little before 8 p.m., after which no security officer is assigned to that post.

In addition to assignment to a post, security officers may also be assigned other duties. On the second shift only, a security officer is assigned to patrol the Hospital parking lot in a security vehicle at the end of the shift, for the comfort of the staff coming and going from the parking lot at night. Another type of assignment is to do “key call,” i.e., to respond to requests from staff to unlock their offices. Security officers may be assigned to do a “one on one” with a patient, i.e., to remain with a patient to make sure nothing happens. Officers may be assigned to pick up valuables from a patient, a duty ordinarily performed by a sergeant, if the sergeant is busy and unable to do so. As further described below, officers may be assigned to participate in restraining a patient.

The sergeants and OICs run the security operations on their respective shifts.⁹ As noted above, they arrive an hour before the security officers. They meet with the sergeant from the previous shift to find out if there have been any incidents during the prior shift. The outgoing sergeant hands over a pager to the incoming sergeant, on which the sergeants receive emergency calls. The sergeants are responsible for picking up valuables from patients and are in charge of a safe in the basement that holds these valuables. The outgoing and incoming sergeants count the valuables to make sure they are accounted for. During their shifts, the sergeants are the only officers who are not at a fixed location. The sergeants patrol the Hospital throughout their shift, making sure that the various units are safe. At the end of their shifts, the sergeants complete a daily shift report for Martin in which they report what happened during the shift, including whether any officers called in sick. They are responsible for completing fire reports if there is a fire alarm, a restraint report if a patient restraint has occurred during their shift, and an incident report, if needed.¹⁰

Sergeants’ role in assignment and responsible direction

Security Director Martin assigns the security officers, sergeants, and OICs to their shifts on the schedule. Sergeants have no authority to assign security officers to their shifts.

The sergeants are responsible for assigning the officers to their posts at the start of each shift. Martin testified that the sergeants rotate the officers between posts so they are not stuck at one location for the entire shift. He testified that each sergeant does this differently; the officers may do one-hour or two-hour rotations between posts. Martin testified that the day-shift sergeant rotates officers every two hours and that the midnight shift has “their way” of managing their shift. Martin testified that it is up to the sergeants to run their shifts, and Martin believes they can fairly distribute the work evenly.

Second shift sergeant Gentile testified that he rotates his officers through the front desk, emergency room, and triage posts hourly. Gentile also rotates the nightly

⁹ Unless otherwise indicated, all references to the duties of the sergeants also describe the duties of the OICs.

¹⁰ Security officers also fill out incident reports if they witness an incident.

assignment of driving the security vehicle during the shift change so that the same officer does not perform this task every night. Gentile testified that the assignments are not based on any particular characteristics possessed by the officers. It is a question of fairness and making sure that the assignments do not get stale. He also rotates the officers through the “key call” assignment. He testified that he has officers who prefer to stay in one spot. When that happens, he mentions it to the other officers and asks if it would be okay if they cover the remaining posts. He tries to be as agreeable as he can.

The sergeants are responsible for assigning security officers to respond to requests for patient restraints. In this regard, a doctor may order that a patient be restrained or prevented from leaving the building if the doctor determines that the patient is in danger of harming himself or others. A restraint may involve either verbal de-escalation or mechanical restraint, depending on the direction of the medical staff. Restraints are often ordered in the Hospital’s emergency room or on one of the Hospital’s three psychiatric units.

Martin testified that the sergeants decide which officers to call when there is a request for a restraint and that he does not get involved in these decisions. The sergeant would be the first person to arrive when a restraint is needed on one of the psychiatric units. When the sergeant arrives, he decides whether he can deal with the patient himself or with a nurse, or whether he needs other officers and, if so, how many additional officers are needed to subdue the patient. If the sergeant needs more officers, he calls a “Code 33” on the radio and asks for a particular officer to come to the location. The officer in the emergency room is called away from his post only as a last resort, as the sergeants try to keep an officer at that post at all times because of the violence there. The lobby officer is also called to respond to a restraint only if needed, as the sergeants try to keep that post covered. As for restraint calls from the emergency room, Martin testified that the security officer posted in the emergency room or a charge nurse may call a “code” on the radio. If a code has not been called already, the sergeant calls a “Code Amber” on the radio, calling for all officers to go to the emergency room to assist.

Sergeant Gentile is the sergeant on duty on the second shift, during which the vast majority of restraints occur.¹¹ Gentile testified that the order for a restraint must come from a doctor. Gentile does not call Martin when a restraint is requested; there is no time to do so in light of the violent situation. Gentile usually calls all officers to the area, because having as many hands as possible diminishes the risk of injury. If the incident occurs on a psychiatric unit, the security officer posted in the emergency room asks the charge nurse in the emergency room if he can leave. Nine times out of ten, the charge nurse tells the officer to go ahead, but the charge nurse may say the officer may not leave if there is a volatile situation in the emergency room. If a restraint is ordered in the emergency room, Gentile is often notified by the security officer who is already posted there. Then Gentile radios all of the other officers to meet him at the emergency room. The first officer on the scene runs the restraint. Often the restraint is in progress when

¹¹ Gentile testified that 20 out of the 25 restraints per month occur during this shift.

Gentile arrives. Once the medical staff gives Gentile the “all clear,” he tells the officers to return to their posts.

The sergeants cover for the security officers when they take their breaks. Gentile testified that the officers do not need his permission to go on break; they tell him, out of courtesy, that they are going to get something to eat. He tells them to go ahead and covers their posts.

Sergeants are responsible for finding a replacement officer when an officer calls in sick. They must fill the post, even if filling it results in overtime. The sergeants have been directed to call the per diem security officers first to fill an open shift and then the part-time officers. As a last resort, they may offer an open shift to a full-time officer. The record does not reveal the basis on which the sergeants call one officer versus another within the per diem, part-time and full-time categories. Martin testified only that the sergeants “run down the list.” Sergeants are not required to call Martin before they fill a vacancy on a shift, although those on the day shift usually call him to tell him an officer has called in sick.¹²

The sergeants are responsible for contacting Martin regarding any inaccuracies in the payroll sheets.

Sergeants and OICs receive annual evaluations by Martin. Martin testified that the sergeants are evaluated on how they manage their teams, including whether there have been complaints from security officers about their managerial skills. Former OIC Harry Sanon was removed from his OIC position because of complaints by officers that he was unfair to them and did not address them in a professional manner.

Sergeants’ role in evaluating security officers

Martin testified that the Security Department has a formal evaluation program for security officers, with an evaluation sheet. No evaluations of security officers were submitted into evidence. Martin testified that the evaluations are a team effort by him and the sergeants.¹³ The sergeants tell Martin if they have a concern about an officer who is not up to par or who is “not listening to their authority.” Martin does not know the officers on the night shift or sit at the posts himself, so he has to rely on his sergeants for their evaluations. Martin testified generally that the sergeants make recommendations that he absolutely follows, but he did not give any examples of such recommendations,

¹² Recently, however, Gentile called Martin on a Sunday about another matter and mentioned that he had replaced an officer who had called in sick with Officer Harry Sanon. Martin asked Gentile to call someone else, because there had been some disagreements about overtime, with some officers feeling that some were getting more than others, and Martin said he wanted to make it fair. So Gentile called another officer to see if he was interested, which he was not.

¹³ There was no testimony concerning whether or not the OICs participate in the evaluation process.

nor does the record otherwise reveal what sort of recommendations sergeants have actually made as part of the evaluation process. There is no record evidence as to whether or not the evaluations are used for merit increases or if they are used for any other purpose. Gentile testified that he has no authority to promote employees or to reward them for doing a good job.

Sergeants' authority to discipline

Martin testified that neither he nor the sergeants have authority to terminate officers themselves and that the Hospital's human resources department makes the final decision with respect to terminations. As for the sergeants' role in termination decisions, Martin described the termination of security officer Mario Joseph, which happened within the last six months. Joseph worked on Sergeant Gentile's shift. Martin testified that the termination was a joint effort between him and Gentile and that he never would have known about the incident that led to Joseph's termination if Gentile had not told him. Joseph's termination was based on multiple incidents. Martin testified that Gentile was having a rough time with Joseph and came to Martin's office many times to ask how to deal with someone who is not listening. Gentile told Martin about the final incident, in which Joseph had refused to escort a female employee to her car upon her request. Gentile told Martin that "this person needs to be dealt with." Martin testified that he relayed what Gentile told him to the human resources department.¹⁴ The record does not reveal whether Gentile recommended either to Martin or to the human resources department that Joseph be terminated or made any recommendation at all regarding the particular penalty to be imposed.¹⁵ Nor does the record reveal whether Martin, himself, recommended Joseph's termination. The record includes no documentary evidence of Joseph's termination or of Sergeant Gentile's role in his termination.

Martin testified, on the one hand, that sergeants cannot suspend officers and that even he, Martin, would not say an officer is "gone" for three days. Sergeant Gentile testified similarly that he has no authority to suspend officers. Martin testified, on the other hand, that a sergeant could send an officer home if he had to and that if a sergeant told Martin about an unsafe condition, the sergeant has authority to "walk that person off." There is no evidence that a sergeant has ever suspended an officer or sent an officer off the property.

With respect to the sergeants' role in lower levels of discipline, Martin testified that sergeants may "write up" officers. He testified that if an officer is not at his post, it is the sergeant's responsibility to discipline the officer. If a sergeant sees an officer doing something like playing games on a cell phone, the officer would be "talked to," and the discipline would depend on how the sergeant deals with his officers.

¹⁴ Gentile testified that Joseph also had other job performance issues with which Gentile was not directly involved.

¹⁵ Martin testified generally that, if a sergeant makes a recommendation that "this isn't working out," Martin needs to weigh that and relay it to the human resources department.

The Employer introduced into evidence one document evidencing an OIC's participation in discipline. On March 24, 2010, Martin and Harry Sanon, who was then an OIC, issued a "Record of Conversation," to former employee Mario Joseph for reading a newspaper while on duty and for responding to an emergency without the proper uniform. The option "First Written Notice" was checked off on the document. Martin testified that he and Sanon sat in on the "disciplinary hearing" together.

Gentile testified that he "could have" written up Mario Joseph for being late to a restraint, although the record does not reveal whether he actually did. Gentile testified that he has not written up anyone else. Gentile testified, however, that the use of the term "write-up" refers to the fact that, if there are any disciplinary issues involving the officers on his shift, Gentile reports those issues in his evening shift report to Martin and also sends an e-mail to Martin reporting any disciplinary incidents. If a problem is severe enough, he calls Martin to tell him what occurred. Gentile testified that he does not issue "disciplinary slips" to employees himself.

Secondary indicia

The sergeants' base rate of pay ranges between \$16.81 and \$17.28 per hour. The pay for the security officers generally ranges from \$12.62 to \$16.10 per hour, although two security officers, Robert Hennessey and Robert Angland, earn over \$20 per hour.¹⁶ The three security officers who serve as OIC for some shifts receive about \$2 per hour extra when they act as OIC. All security officers, sergeants, and officers-in-charge receive the same shift differential and weekend differential, if applicable.

Sergeants are the highest ranking individuals on duty in the Security Department at the Hospital during the evening and night shifts. Martin testified that he is responsible for any changes in policies or procedures, but the sergeants run day-to-day operations. The sergeants must be able to deal with problems in his absence, because he is present at the facility less than 25 percent of the time. Martin tells the sergeants to page him if there is an emergency, such as a patient assault; otherwise, they are on their own. Martin receives a call from the sergeants perhaps two times a week when he, himself, is off duty.¹⁷

¹⁶ Martin testified that the two officers have worked at the Hospital for 30 to 40 years and were formerly sergeants, and that their higher pay is due to the Hospital's practice of not reducing pay.

¹⁷ As an example of a security matter that a sergeant handled on his own, Gentile testified that recently, the security officer at the front desk reported to him that three men were videotaping in a patient waiting room for a magazine. Without contacting Martin, Gentile told the men to stop filming patients due to privacy laws, which they did. He advised the men to contact the Hospital's public relations department or the Director of Security. Gentile then sent an e-mail to Martin to about the incident to give him a "heads up."

Sergeants serve as the representative of the Security Department on their shifts, in that they work with the managers of other Hospital departments, such as the emergency room department or psychiatric units, to resolve issues. They meet with the Boston Fire Department representative

Unlike the security officers, the sergeants and OICs have an office with a desk and a computer, located in a sub-basement of the Hospital, where Martin also has an office. Only the sergeants and OICs carry a pager and the “sergeant’s ring,” i.e., the keys to the sergeants’ office and to the safe where patient valuables are kept. When asked if he has attended any “managerial” meetings, Gentile testified that there has been one sergeants’ meeting since he became a sergeant, which he was unable to attend. The record does not reveal the purpose of the meeting.

Security officers, sergeants, and OICs all wear the same uniform, but security officers wear a silver badge while sergeants wear a gold badge. The record does not reveal what kind of badge officers-in-charge wear when they serve in that capacity.

Sergeants perform bargaining unit work. In this regard, Gentile testified that he runs his shift but also performs the same duties that a security officer performs. For example, he does restraints and key calls. Gentile testified that he has been injured on the job, spit at, and punched.

CONCLUSION

Supervisory status of the sergeants

The Employer contends that the sergeants are Section 2(11) supervisors because of their role in assignment and responsible direction of security officers, discipline, and the evaluation process.¹⁸ The Employer also relies on various other secondary indicia of supervisory status, including the fact that the sergeants are the highest ranking individuals on duty in the security department for substantial periods of time. The Employer contends that OICs are statutory supervisors because they spend a regular and substantial portion of their work time functioning as sergeants.

Pursuant to Section 2(11) of the Act, the term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, where the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. To qualify as a supervisor, it is not necessary that an individual possess all of the powers specified in Section 2(11) of the Act. Rather,

after every fire alarm and with the Boston Police Department representative when necessary, e.g., to pick up rape kits or to coordinate if the police bring an inmate to the Hospital.

¹⁸ The record reflects that the sergeants have no authority to hire, promote, transfer, lay off, or recall employees or to adjust their grievances, and the Employer does not assert supervisory status on the basis of any of those indicia.

possession of any one of them is sufficient to confer supervisory status. *Chicago Metallic Corp.*¹⁹

The burden of proving supervisory status rests on the party alleging that such status exists. *NLRB v. Kentucky River Community Care*.²⁰ The status of a supervisor under the Act is determined by an individual's duties, not by his title or job classification. *New Fern Restorium Co.*²¹ The Board will refrain from construing supervisory status too broadly, because the inevitable consequence of such a construction is to remove individuals from the protection of the Act. *Quadrex Environmental Co.*²²

The sergeants' role in assignment and responsible direction

In *Oakwood Healthcare, Inc.*,²³ the Board refined its analysis of the terms "assign," "responsibly direct," and "independent judgment" in assessing supervisory status.²⁴ The Board announced that it construes the term "assign" to refer to "the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee."²⁵

With respect to "responsible direction," the Board explained in *Oakwood* that, 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 out with independent judgment. For direction to be "responsible," the person directing the oversight of the employee must be accountable for the performance of the task by the other. To establish accountability, it must be shown that the employer delegated to the putative supervisors authority to direct the work and

¹⁹ 273 NLRB 1677, 1689 (1985).

²⁰ 532 U.S. 706, 121 S.Ct. 1861, 167 LRRM 2164 (2001).

²¹ 175 NLRB 871 (1969).

²² 308 NLRB 101, 102 (1992).

²³ 348 NLRB 686 (2006).

²⁴ The Employer contends that this case is controlled by *Burns Security Services, Inc.*, 278 NLRB 565 (1986), in which the Board found that security sergeants were statutory supervisors. In *Burns*, however, the sergeants possessed distinct statutory authorities, including the power to discipline guards. Further, to the degree that the Board relied on the security sergeants' authority to assign in finding the *Burns* sergeants to be supervisors, I decline to rely on a pre-*Oakwood* case involving this factor.

²⁵ *Id.* at 689.

take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisors if they do not take these steps.²⁶

Finally, the Board held in *Oakwood* that to establish that an individual possesses supervisory authority with respect to any of the statutory functions, the individual must also exercise independent judgment in exercising that authority, which depends on the degree of discretion with which the function is exercised. “[T]o exercise independent judgment, an individual must at a minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.”²⁷ “[A] judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.”²⁸ The Board also stated that the degree of discretion exercised must rise above the “routine or clerical.”²⁹

The Employer has failed to establish that sergeants have statutory authority to assign the security officers. As for assigning officers to a time, the Director of Security assigns the security officers to their shifts. The sergeants’ role in finding replacements when officers call in sick does not require the independent judgment necessary for a finding of supervisory status. Sergeants exercise no judgment in determining whether or not to fill an empty slot, as they are required to fill all vacancies. The sergeants’ discretion in selecting particular replacements for open shifts has been circumscribed in that they have been directed to call the per diem security officers first, then the part-time officers, and then the full-time officers as a last resort. There is no record evidence about the nature of the judgments the sergeants make, if any, in offering shifts to different officers within the per diem, part-time, and full-time categories. Martin testified only that the sergeants “run down the list.” Finally, it is well established that the party seeking to establish supervisory authority must show that the putative supervisor has the ability to *require* that a certain action be taken; supervisory authority is not established where the putative supervisor has the authority merely to *request* that a certain action be taken. *Golden Crest Healthcare Center*.³⁰ Thus, mere authority to request volunteers to fill a vacancy on a shift does not confer supervisory status. *Heritage Hall, E.P.I. Corp.*³¹ In the absence of evidence that sergeants have the power to require officers to fill a vacancy on a shift, I decline to find supervisory status on that basis.

²⁶ Id. at 689-692.

²⁷ Id. at 693.

²⁸ Id.

²⁹ Id.

³⁰ 348 NLRB 727, 729 (2006).

³¹ 333 NLRB 458,459 (2001).

There is no evidence that the sergeants schedule the officers' break times, nor do officers need a sergeants' permission to take their breaks. Rather, the officers on Gentile's shift notify him when they are going on break so he can cover for them. Even assuming that the sergeants did assign break periods, such assignments are considered routine and do not require the use of independent judgment. *Springfield Terrace, LTD*;³² *Regal Health & Rehab Center*;³³ *Los Angeles Water & Power Employees Assn.*³⁴ As for the sergeants' authority to notify Martin about inaccuracies in the payroll sheets, the Board has consistently held that authority to verify employees' time sheets is routine and clerical and does not indicate supervisory authority. *Golden Crest Healthcare Center*.³⁵

The sergeants' authority to assign security officers to their posts during the course of their shifts could arguably be deemed as authority to assign them to a place or to an overall duty. In either event, I find that it requires no independent judgment to make these assignments, which are simply rotated among all security officers on the shift every one or two hours, without any evaluation of the relative skills or characteristics of the officers.

I find the Employer has also failed to establish that the sergeants responsibly direct the security officers. In this regard, sergeants do direct security officers to perform certain discrete tasks, such as "key call," patrolling the parking lot in a security vehicle, responding to patient restraint calls, conducting a "one-on-one" with a patient, and picking up patient valuables. The Employer has failed to establish, however, that any of these directions require independent judgment. Gentile testified that he assigns key call and parking lot patrol on a rotational basis, which requires no independent judgment. There is no record evidence concerning the types of judgments made by the sergeants in assigning officers to do a "one-on-one" with a patient or to pick up patient valuables. *Croft Metals, Inc.*³⁶ (Board will not conclude that the degree of discretion involved rises above the routine or clerical where the employer adduced almost no evidence regarding the factors weighed or balanced by the lead person in making production decisions and directing employees). As for calling security officers to respond in patient restraint situations, I note that only doctors may initiate restraints, and medical personnel must also give the "all clear" at the end.³⁷ As for the selection of which officers respond, Gentile testified that he usually calls all officers to the area, while Martin testified that the

³² 355 NLRB No. 168, slip op. at 6 (2010).

³³ 354 NLRB No. 71, slip op. at 9 (2009).

³⁴ 340 NLRB 1232, 1234 (2003).

³⁵ 348 NLRB 727, 730 (2006).

³⁶ 348 NLRB 717, 721 (2006).

³⁷ I note that the charge nurse in the emergency room may countermand a sergeant's order that the officer posted in the emergency room respond to a restraint call elsewhere.

sergeants arrive on the scene first for those restraints that occur in the psychiatric unit and then decide whether they need additional officers to subdue a patient and, if so, how many additional officers are needed. I find that Gentile, who is personally involved in the vast majority of the restraints at the Hospital, is in the best position to know what actually occurs, and that it does not require independent judgment to routinely call all officers to respond to every restraint request. Even if Martin is correct, however, that in some cases sergeants make an assessment as to how many officers are needed to subdue a patient, there is no evidence that the sergeants consider the relative skills or competence of one officer versus another in deciding which officers to call to the scene.

Finally, in order to establish supervisory status on the basis of responsible direction, *Oakwood Healthcare* requires the Employer to demonstrate that the sergeants are held accountable for the performance of the security officers on their shifts. The only record evidence concerning this factor was Martin's testimony that the sergeants are evaluated annually on how they manage their teams, including whether the security officers have registered any complaints about the sergeants' managerial skills. This testimony establishes only that the sergeants are held accountable for their own performance and does not demonstrate, as required, that the sergeants face the prospect of adverse consequences based on the performance of their subordinates. Further, where accountability is predicated on employee evaluations, there must be evidence that a putative supervisor's ratings for directions of subordinates may have an actual or prospective effect on that person's terms and conditions of employment. *Golden Crest Healthcare*.³⁸ Here, there is no evidence that there is any consequence to the sergeants as a result of their evaluations. In the absence of such evidence, the Employer has failed to establish the requisite accountability.

Sergeants' authority in disciplinary matters

The Employer has failed to demonstrate that sergeants possess statutory authority to discipline officers. It is clear from the record that sergeants have no authority to terminate or suspend officers themselves. The Employer asserts that Sergeant Gentile's role in the termination of Security Officer Mario Joseph proves that sergeants effectively recommend termination. In this regard, the Employer contends that Joseph was terminated because Gentile raised concerns about Joseph to Martin and to the human resources department and because Gentile told Martin that "this person needs to be dealt with."

Bringing substandard performance by employees to the attention of management, without a recommendation for future discipline, is nothing more than a reporting function, which is not supervisory authority. *Williamette Industries*.³⁹ Furthermore, the Board has consistently applied the principle that authority effectively to recommend generally means that the recommended action is taken without independent investigation

³⁸ 348 NLRB 727, 731 (2006).

³⁹ 336 NLRB 743, 744 (2001).

by superiors, not simply that the recommendation is ultimately followed. *Children's Farm Home*.⁴⁰ Here, there is no record evidence that Gentile made any recommendation for discipline at all. A recommendation that "this person needs to be dealt with" falls far short of a recommendation of termination or of any other particular consequence Cf. *Sheraton Universal Hotel*⁴¹ (putative supervisor who recommended that employee receive the most severe discipline possible for his conduct made an effective recommendation of discipline). Further, the Employer presented no evidence concerning the process that the human resources department followed in reaching its decision to terminate Joseph or what the department relied on in doing so. Thus, the Employer has failed to establish that the human resources department determined to terminate Joseph without conducting an independent investigation of the matter.

The record similarly fails to demonstrate that sergeants possess statutory authority to issue or effectively recommend discipline other than termination. The Employer submitted into evidence only one disciplinary notice in which a sergeant or OIC played a role. This "First Written Notice" was co-signed by an OIC and the Director of Security, who testified that he also sat in on the "disciplinary hearing." The fact that an OIC signed the written notice does not, by itself, demonstrate that the OIC recommended its issuance or that the OIC did anything more than act as a witness. Nor does the record reveal whether the Director of Security independently investigated the incidents that gave rise to the written notice or relied solely on input from the OIC. Gentile testified that he does not issue disciplinary "slips" to employees himself; rather, his role appears to be limited to reporting disciplinary incidents to Martin in his evening report or by e-mail. There is no record evidence that Gentile or any other sergeants have ever recommended disciplinary action in these "write-ups" or that any such recommendations have ever been followed. I find the sergeants' authority in this area to be merely reportorial and not Section 2(11) authority.

Sergeants' role in evaluating security officers

I find that the sergeants' role in evaluating the security officers does not confer supervisory status. No actual evaluations of security officers were submitted into evidence, nor was there any testimony about the nature of the evaluation forms. The record does not reveal, for example, whether the evaluations require some sort of numerical rating. There is no evidence of the process used in completing them, beyond the fact that the evaluations are a "team effort" by the sergeants and the Security Director. Martin's testimony that he absolutely follows the sergeants' recommendations does not demonstrate their supervisory authority, where there is no evidence about the nature of the recommendations that the sergeants make during the evaluation process.

Finally, the Board has held that when an evaluation does not, by itself, affect the wages and/or job status of the employee being evaluated, the individual performing such

⁴⁰ 324 NLRB 61 (1997).

⁴¹ 350 NLRB 1114, 115-1116 (2007).

an evaluation will not be found to be a statutory supervisor. *Pacific Coast MS Industries Co., LTD.*;⁴² *Williamette Industries.*⁴³ Here, there is no record evidence that the security officers' evaluations are used to determine promotions, merit raises, or other rewards, nor is there any evidence that a poor evaluation may result in discipline or any other adverse action. Thus, the Employer has failed to demonstrate that the security officers' evaluations have any effect on their job tenure or status.

Secondary indicia

The Employer asserts that the fact that the sergeants are the highest ranking members of the Security Department on duty for the majority of the Department's operations demonstrates that they have statutory authority to assign and responsibly direct officers. The status of being the highest ranking employee on site falls within the category of secondary indicia of supervisory authority. *Golden Crest Healthcare Center*;⁴⁴ *St. Francis Medical Center-West.*⁴⁵ Secondary indicia are insufficient by themselves to establish supervisory status when there is no evidence presented that an individual possesses any one of the several primary Section 2(11) indicia. *Golden Crest Healthcare Center*;⁴⁶ *Ken-Crest Services.*⁴⁷

The Employer also argues that the sergeants are statutory supervisors because they enjoy a higher rate of pay, have a designated office with a computer, carry keys and pagers, wear different badges, and attend management meetings, and because the employees in other departments understand that they are in charge of the officers. These, too, are only secondary indicia that cannot by themselves form the basis of a Section 2(11) finding where the Employer has failed to demonstrate that the sergeants possess any of the primary indicia of statutory authority.

Supervisory status of the OICs

In light of my finding that the sergeants are not statutory supervisors, the fact that the three OICs function as sergeants for certain shifts does not establish their supervisory status.

⁴² 355 NLRB No. 226 (2010).

⁴³ 336 NLRB 743, 743 (2001).

⁴⁴ 348 NLRB 727, 730 fn. 10 (2006).

⁴⁵ 323 NLRB 1046, 1047 (1997).

⁴⁶ *Supra.*

⁴⁷ 335 NLRB 777, 779 (2001).

Accordingly, based upon the foregoing and the stipulations of the parties at the hearing, I find that the following employees of the Employer constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time security officers, security sergeants, and officers-in-charge, including per diems, employed by the Employer at its 2100 Dorchester Avenue, Dorchester, Massachusetts facility, but excluding supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by **United Federation of Special Police & Security Officers, Inc.** The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing

the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **April 7, 2011**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website, www.nlr.gov,⁴⁸ by mail, or by facsimile transmission at 617-565-6725. To file the eligibility list electronically, go to the Agency's website at www.nlr.gov, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by **April 14, 2011**.

⁴⁸ To file the eligibility list electronically, go to www.nlr.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu, and follow the detailed instructions.

The request may be filed electronically through the Agency's website, www.nlr.gov,¹ but may not be filed by facsimile.

DATED: March 31, 2011

/s/ Rosemary Pye

Rosemary Pye, Regional Director
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