

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

G4S SECURE SOLUTIONS (USA) INC., *etc.*

and

Case 12-CA-26644

THOMAS FRAZIER, an individual

Case 12-CA-26811

CECIL MACK, an individual

**RESPONDENT'S ANSWERING BRIEF TO EXCEPTIONS
AND IN SUPPORT OF ALJ'S DECISION**

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I. PRELIMINARY STATEMENT

The threshold issue in this case is whether the Administrative Law Judge (ALJ) correctly concluded that the alleged discriminatees are statutory supervisors. In arguing the ALJ reached an erroneous conclusion in this regard, Counsel for the Acting General Counsel (General Counsel) relies heavily on a prior Board decision concerning the Respondent and the lieutenant position held by the alleged discriminatees. In making this argument, however, General Counsel asks the Board to ignore that (1) there are new and different facts present in this case that were not considered in the prior Board decision; and (2) after that decision was issued, the Board modified the applicable analysis regarding supervisory authority when it issued *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006). Based on current law and the changed facts relative to the lieutenant position at issue, the ALJ was correct in determining that the alleged discriminatees are statutory supervisors, who are not protected by the Act.

Because of the ALJs conclusion on the threshold issue of supervisory status, he did not address whether the alleged discriminatees engaged in concerted, protected activities; whether such activities were a motivating factor in Respondents decision to terminate one or both of them; whether Respondent would have terminated one or both of the alleged discriminatees regardless of the alleged concerted, protected activities; or the parameters of an appropriate remedy if Respondent violated the Act. As such, assuming the Board concludes that the ALJ was incorrect and the alleged discriminatees are not supervisors under the Act, Respondent

respectfully suggests the Board should remand this case to the ALJ for review of the above-outlined issues.¹

II. FACTS

A. Background And Facts Regarding Lieutenants

G4S Regulated Security Solutions, a division of G4S Secure Solutions (USA) Inc., f/k/a The Wackenhut Corporation (õRespondentö), provides security services to its client, Florida Power & Light, at the Turkey Point nuclear facility in Florida City, Florida (õTurkey Pointö). As part of its services, Respondent oversees thousands of acres owned by the client, as well as the numerous buildings and structures that make up the actual facilities. (Transcript from April 4-6, 2011 Hearing (õTr.ö) at 73-74, 315-317.)

Respondent employs approximately 235 individuals at Turkey Point, with the security detail broken down into five shifts or teams, including four active duty shifts and one training shift. Each shift has approximately 36 security officers who are supervised by and report to seven field supervisors that hold the rank of lieutenant. Approximately five officers regularly report to each lieutenant. However, a lieutenant might supervise up to 20 officers at any given point in time and there could be as many as 47 security officers on a shift on any given day. The lieutenants report directly to the captain of their respective shifts who, in turn, reports to the Operations Coordinator (Juan Rodriguez) and the Project Manager (Mike Mareth). (Tr. at 88, 216, 315-317; Organization Chart, Employer Exhibit (õEx.ö) 13.)

¹ Notwithstanding the fact that the ALJ did not decide any of the issues relative to the termination of the alleged discriminatees, other than the threshold one of supervisory status, General Counsel has fully presented her arguments on these issues to the Board. Therefore, even though Respondent believes the Board should remand any such issues to the ALJ if it rules the alleged discriminatees are not supervisors, Respondent is compelled to present the facts and its arguments on these issues to the Board, as well.

The alleged discriminatees, Thomas Frazier and Cecil Mack, were employed as field supervisors/lieutenants at Turkey Point. Frazier was hired as a security officer in 1989 and promoted to lieutenant in 2003. Mack was hired as a security officer in 2002 and promoted to lieutenant in 2003. (Tr. at 153, 155, 271.)

As field supervisors, lieutenants' primary responsibility is to provide oversight of and direction to security officers. (Tr. at 318.) As such, lieutenants do not regularly perform security officer duties, but spend most of their time observing the bargaining unit employees in the field and correcting any deficiencies they observe in their performance. As Frazier admitted, he only performed security officer duties once or twice per month, and less frequently closer in time to his termination. (Tr. at 208.) Lieutenants also issue weapons to officers, perform inventories of equipment, do post inspections, handle Central Alarm System (CAS)/Secondary Alarm System (SAS) operations, relieve security officers who are not feeling well or are fatigued and ensure that officers are fit for duty. (Tr. at 272, 338-339.)

As set forth in the applicable procedure containing the lieutenants' job description, "this procedure provides guidance to Security Field Supervisors for performing supervisory functions of Security Officers manning Security posts and assisting the Security Shift Supervisor in carrying out daily Security operations." (Security Force Instruction 1106, § 1.1, General Counsel Ex. 33.) Among other things, lieutenants have the following responsibilities: ensure operations are conducted following instructions and procedures, ensure only qualified officers are assigned to posts and that they understand the requirements of that post, ensure officers properly perform their duties and correct any identified deficiencies in officers' behavior, attitude or inattentiveness to duty. (*Id.* at §§ 4.1.3, 4.1.1.0, 4.1.1.11, 4.1.14 and 4.1.21.) In addition,

lieutenants may only be relieved by other lieutenants/field supervisors or the security shift supervisor/captain. (*Id.* at § 3.2.)

Along with other lieutenants (and captains), the alleged discriminatees were provided various documents that highlighted their supervisory responsibilities, which they were asked to review and sign acknowledging their understanding of those responsibilities. For example, as the alleged discriminatees understood, they were required to “use coaching techniques . . . , counseling and progressive discipline to correct unprofessional conduct and poor job performances,” “lead by example” and “keep issues discussed between supervisors confidential.” (Supervisory Requirements, Employer Exs. 1 and 7, §§ 3, 10 and 13.) In a Leadership Pledge which they signed indicating their rank/position as supervisor, the alleged discriminatees agreed to “be ever observant to possible changing work place behaviors of direct reports under [their] command;” “enforce policies [and] procedures;” “listen effectively and respond appropriately to . . . the direct reports under [their] command;” “use a positive, non-threatening communication style with all [their] direct reports,” and “develop, coach, mentor and train those direct reports assigned to [their] command.” (Leadership Pledge, Employer Exs. 2 and 8.) In another document that reflected that they were part of the management team with authority over their subordinates, the alleged discriminatees answered affirmatively to the question, “As a supervisor, do you consider yourself a leader?” (RSS Management Challenge, Employer Ex. 3 at 2; Employer Ex. 9 at 2.)

Various written evaluations of the alleged discriminatees further reflected their supervisory responsibilities, including their role in encouraging an environment where all employees felt they could raise issues of concern without retaliation. (Performance Objectives and Development Plan at 2, §V(1), General Counsel Ex. 8 and Employer Ex. 11 (“Develops

employees through job coaching/mentoring and performance feedback;ö ðEncourage/reinforce a culture that invites open/honest feedback and [a]ct positively on that feedback;ö ðEffectively promote use of Corrective Action Program;ö and ðEffectively communicate expectations and provide adequate oversight to ensure projects are completed as expected.ö.)

As was true when the alleged discriminatees were field supervisors at Turkey Point, it is undisputed lieutenants are responsible for ensuring the quality of work performed by the officers that report to them. (Tr. at 157-158, 330.) If a lieutenant does not do an adequate job of ensuring the quality of that work, he or she can be coached, disciplined, demoted or terminated. (Tr. at 331, 335.) In addition, a lieutenant can be evaluated poorly for the same reason, which can affect that lieutenant's chances for future promotion. (Tr. at 335-336.)

It is also undisputed lieutenants have the authority to issue disciplinary actions. (Tr. at 219.) They may do so independently and without any involvement by anyone higher in management. (Tr. at 322, 328, 379.) As explained in Respondent's Progressive Discipline Policy, Respondent's ðsupervisors are responsible for administering this policy as it applies to employees under their supervision . . . ö (General Counsel Ex. 17, §3.2.) Supervisors, including lieutenants, have authority to issue oral counselings under step 1 of the progressive discipline system, written disciplinary counselings under step 2 and written disciplinary counselings and suspensions up to two days under step 3. (*Id.* at § 4.5 - 4.7; Tr. at 322.) (On the contrary, security officers have no authority to issue disciplinary actions to one another. (Tr. at 328.))

And, in fact, lieutenants have exercised such authority. As reflected in various disciplinary actions, lieutenants have issued oral warnings, written warnings and 1-day

suspensions to various security officers under the Progressive Discipline Policy and a separate Attendance Policy. (Employer Ex. 16; Tr. at 326; General Counsel Ex. 18.)

The discipline issued by lieutenants constitutes the initial steps in a progressive disciplinary system that may result in further consequences to employees and affect their job status, including suspension (or further suspension) and termination. (General Counsel Ex. 17 at 3-4, 10.) As such, but for Level 1 offenses (which justify termination for the first offense), security officers will suffer more severe penalties if they commit similar infractions for which lieutenants have previously disciplined them. (Tr. at 323.)

It is undisputed that, since approximately the start of 2008, lieutenants evaluate the security officers that regularly report to them. (Tr. at 84, 205, 295, 328.) The evaluation process consists of an annual performance review and a quarterly one-on-one process. (Tr. at 84, 205-206; Employer Exs. 4 and 10.) It is also undisputed that, on a regular and consistent basis, lieutenants perform these evaluations without consulting with or getting input from anyone else, and that no one in upper management otherwise completes written evaluations of the security officers. (Tr. at 84-85, 88-89, 206-207, 295-296, 330.) (On the contrary, captains perform monthly one-on-one and annual evaluations of lieutenants. (Tr. at 84.))

The evaluations completed by lieutenants are reviewed if a security officer seeks a promotion and affect a security officer's chance of obtaining a desired promotion. (Tr. at 220, 329-330; Promotion Policy, Employer Ex. 17, §§ 4.10, 4.13.) This fact is undisputed, as well. (Security officers do not evaluate other security officers. (Tr. at 337-338.))

The following facts also are undisputed: Some security officers believe certain posts are more preferable than others. (Tr. at 217.) Lieutenants have the authority to transfer security

officers from one post to another and do not need to consult with a superior before exercising such authority. (Tr. at 217-218.)

Lieutenants are treated differently than the security officers that report to them in numerous other ways. For example, approximately once per month, upper management meets only with lieutenants and captains before or after a shift briefing and security officers are not part of such extra briefings. (Tr. at 216-217, 342-343.) In addition, lieutenants and captains take part in regular training sessions without security officers during their 5-week training cycle. (Tr. at 217.) (There are also occasions when a training session is held only with security officers and the lieutenants and captains are excluded. (Tr. at 344-345.)) Further, newly promoted lieutenants are provided with an additional week of initial training and two weeks of leadership development that security officers do not receive. (Tr. at 111, 344.)

It is also undisputed that there is a significant difference in pay between lieutenants and the security officers that report to them. Specifically, the lowest paid lieutenants are paid at least \$4.00 per hour more than the highest paid security officers. (Tr. at 342.) In addition, Respondent has in place an incentive bonus program pursuant to which lieutenants (and captains) are eligible for an annual bonus of \$1,400.00, while security officers may only earn up to \$1,120.00. (Employer Ex. 44 at 1.) There is also a different formula applied to determine the bonus for lieutenants (and captains) than that applied for security officers, including a separate category based on the absenteeism of the security officers under the command of all the lieutenants. (*Id.* at 2, 8.) Lieutenants also are entitled to a higher amount of life insurance paid for by Respondent. (Tr. at 215-216.)

There are also differences regarding evaluations. Lieutenants evaluate security officers and conduct one-on-one reviews on a quarterly basis. On the contrary, captains evaluate lieutenants and conduct one-on-one reviews of the lieutenants on a monthly basis. (Tr. at 84.)

As explained by the Respondent's Project Manager (Mike Mareth), it is inconceivable that Respondent would be able to meet its contractual obligations in providing security services at Turkey Point if lieutenants are not supervisors. If the lieutenants are not supervisors, generally speaking, that would leave one captain overseeing at least 43 other individuals ó 36 security officers plus 7 lieutenants. Quite simply, in light of the number of individuals to be supervised, and the thousands of acres and numerous buildings and facilities to be overseen, Respondent could not operate with such a ratio of supervisors to employees. (Tr. at 319, 348.)

It is also undisputed that Respondent considers lieutenants to be supervisors and holds them out as part of management. The alleged discriminatees admit this fact and identified themselves as "supervisors" while employed as lieutenants. (Tr. at 225, 304; Employer Ex. 2 at 2; Employer Ex. 8 at 2.) The Local Union president also referred to the alleged discriminatees as "supervisors" and admitted that security officers' first line of reporting is to lieutenants rather than captains. (Tr. at 252, 257.)

General Counsel has suggested that lieutenants do not exercise any discretion or independent judgment because everything they do is covered by clear, written policies and procedures or dictated by their superiors. In addition to the examples set forth above, the following testimony demonstrates that such is not the case. As the captain who supervised the alleged discriminatees testified, there are occasions where lieutenants act on their own regarding safety concerns and housekeeping issues without his approval and guided by their work

knowledge and common sense. (Tr. at 92-93.) Moreover, as Project Manager Mareth stated, "you can't have a written procedure for absolutely everything that you do in the field." (Tr. at 340.) Mareth further explained as follows:

Q. Mr. Mareth, is everything that lieutenants do on a daily basis covered by some written policy or procedure?

A. No.

Q. Would you please give us some examples of something they do that's not covered by a written policy or procedure?

A. Lieutenants on a daily basis have to be able to use their judgment and discretion on some things. Fitness for duty, for example, if they're observing an officer in the field and the officer identifies or communicates to them that they're feeling tired or fatigued, they have to use judgment there in discussion as to whether or not that individual falls into our fitness for duty fatigue policy and whether or not that needs to be addressed, i.e., relieving the individual.

It could be as simple as just saying leave post for a period of time, go get a cup of coffee, kind of get your blood pumping and flowing. So those are situations that there's a fitness for duty policy, fatigue policy, but doesn't go into the micromanaging of that piece.

A good many of our policies address and deal with the compliance piece of our work and what it doesn't have is the specificity of how to deal with the softer issues, you know, the people issues. So he may have an officer using the vest issue, for an example, that could be at a location where they're overheating.

And a lieutenant can certainly tell the individual to loosen the vest. They could tell them to remove the vest, let the heat -- let their body temperature cool, but you won't find that in a procedure.

An individual could be posted at a particular location and maybe the post instructions aren't worded correctly or need more added to it because a condition has changed. A lieutenant can add or delete to a post instruction based on their understanding of changing conditions.

So I think most of those people, softer issues that aren't covered in procedures, they certainly have the latitude of using their discretion at those times.

(Tr. at 396-397.) Thus, the testimony ó and common sense ó demonstrate that not every situation encountered by lieutenants is covered by a written policy.

Finally, all of the security officers supervised by lieutenants are part of a bargaining unit represented by a union, a unit that includes all security officers and excludes all supervisors as defined by the Act. (Relevant sections of Collective Bargaining Agreement dated April 1, 2010 at 4, Article 2(1), Employer Ex. 42.) It is undisputed that neither lieutenants (nor sergeants) are part of this or any other bargaining unit represented by the union. (Tr. at 259.)

Further, there was a time when CAS/SAS operators were part of the bargaining unit, along with security officers. *The Wackenhut Corp. and International Union Security, Police and Fire Professionals of America (SPFPA)*, 345 NLRB 850, 867 (2005) (óThe Unionø certification, and the recognition clause in the collective-bargaining agreement negotiated by the parties in 2000, specifically includes within the bargaining unit the CAS and SAS operators.ö) At least as far back as 2007, however, and pursuant to agreement of the union and Respondent, individuals performing CAS/SAS work ó including lieutenants ó have not been part of the bargaining unit. (Employer Ex. at 42, Article 2(1); relevant sections of Collective Bargaining Agreement dated April 2, 2007 at 5, Article 2(1), Employer Ex. 45; Tr. at 259.)

B. An Environment Designed To Encourage Employees (and Supervisors) To Bring Issues To Management's Attention

It is undisputed that Respondent has numerous processes and procedures pursuant to which employees may, and are encouraged to, bring virtually any type of issue to the attention of management, including every issue supposedly raised by the alleged discriminatees. (Tr. at 349-351, 391.)

As an initial matter, Respondent strives for what is called a Safety Conscious Work Environment (öSCWE;ö pronounced öSkeeweeö). As set forth in Respondent's SCWE Policy, all öemployees are responsible for maintaining a questioning attitude and promptly notifying [m]anagement of all concerns and issues that relate to Nuclear Safety.ö (Employer Ex. 19 at 2.)

According to a handbook provided to all employees, öa SCWE is an environment in which employees feel free to raise issues both to their own management and the NRC [Nuclear Regulatory Commission] without fear of retaliation and in which those issues are prioritized and promptly resolved with feedback to the employee.ö (Employer Ex. 20 at 3 (page 2 of the copied handbook).) In other words, as Frazier testified, a SCWE öis a work environment where people are not afraid to bring concerns to you for fear of retaliation or discrimination.ö (Employer Ex. 3 at 3.) As the Project Manager explained, the issues covered by this concept are extremely broad and include virtually any issue of concern to an employee. (Tr. at 350-351.)

Further, under this policy, in addition to raising issues themselves, lieutenants and other supervisors are obligated to relay issues raised by security officers up the chain and, if possible, attempt to resolve issues brought to their attention. (Tr. at 89-91, 225, 319.) As set forth in the policy, lieutenants (and captains) are öresponsible to maintain open communication with the security personnel under their command and receive and address concerns and issues

enthusiastically and work to promptly resolve them.ö (Employer Ex. 19 at 2; Tr. at 352-353.) Because of their role in creating a SCWE, lieutenants are given an additional handbook and provided supplemental training. (Tr. at 356-357; Employer Ex. 21.) As explained in that additional handbook, among other things, supervisors must encourage their employees to raise issues and supervisors must act on those issues. (Employer Ex. 21 at 3-16; Tr. at 356-357.)

As part of SCWE, Respondent conducts quarterly surveys of groups of 25 employees, from security officers up to the Project Manager. (Tr. at 353-354.) As part of those surveys, employees provide anonymous answers to questions concerning whether they feel they ðcan discuss issues with [their] supervisors and management knowing that [their] input will remain confidentialö and ðsite management supports a Safety Conscious Work Environment.ö (Employer Ex. 22 at 2.) Employees also have the opportunity to anonymously identify any issues of concern. (*Id.* at 3; Tr. at 353-354.) Based on the results of the surveys, all the nuclear facilities at which Respondent provides security services, including Turkey Point, receive a score. (Tr. at 353-354.) If the score is inadequate, the facility must develop a corrective action plan. (Tr. at 356.)

At a certain point in time, Project Manager Mareth and the Leadership Development Manager (Dr. Karen Bower MacDonald) determined that they needed to do more to help employees understand the idea of SCWE. (Tr. at 108, 369.) As part of this effort, MacDonald created a PowerPoint that was presented to employees in June 2009 and Mareth (or his Operations Manager) held Question and Answer Sessions with employees to solicit issues of concern. (Employer Exs. 24, 26; Tr. at 372.)

Mareth, MacDonald and Rodriguez then put together a list of issues to address, which was called, "The First 48." (Tr. at 370.) This list is a "living document," which has been revised over time to reflect progress on various issues, but was first posted in the fourth quarter of 2009. (Tr. at 370-371; Employer Exs. 25-26, 46.) Many of the issues supposedly raised by the alleged discriminatees appear on The First 48. (Tr. at 370-371; Employer Exs. 25 and 46 at #29 ("Replace current vest with a more breathable one"), #34 ("Ensure Porta-lets are clean"), #36 ("replace the North End port-o-let with a quality facility")).

In December 2009, Respondent provided to employees at Turkey Point a document outlining certain actions it had taken over the last half of 2009 as part of these additional efforts. (Tr. at 371-372; Employer Ex. 26.)

It is undisputed that the SCWE concept is extremely important to Respondent. (Tr. at 107, 351.) The concept and necessary procedures to effectuate the concept are required by Respondent's contract with Florida Power & Light and the Nuclear Regulatory Commission. (Tr. at 350-351.) Pursuant to its contract with its client, if Respondent is not doing a sufficient job of creating an environment where employees are comfortable raising issues of concern at Turkey Point, then Respondent makes less money. (Tr. at 351.) Correspondingly, the Project Manager's compensation is based in part on creating such an environment and, if he fails to do so, he makes less money, as well. (Tr. at 352.)

In addition, there are other processes and procedures pursuant to which employees regularly raise various issues of concern. First, employees can file Condition Reports (CRs) as part of the Correction Action Program (CAP), either electronically or by submitting a paper form, raising virtually any issue, including all of the issues allegedly raised by the alleged

discriminatees. (Tr. at 175, 380-381.) As reflected in a report generated for January 1, 2009 through February 15, 2010, numerous employees and supervisors, including lieutenants, submitted condition reports on a variety of issues. (Employer Ex. 43; Tr. at 381.)

Second, Respondent conducts Safety Meetings at which representatives of the various teams raise issues of concern and possible resolutions are discussed and tracked. (Tr. at 385.) As reflected in minutes from meetings held from June 2008 through December 2009, issues supposedly raised by the alleged discriminatees also were raised and discussed at various Safety Meetings. (Tr. at 387-390; Employer Ex. 32, June 16, 2008 Meeting at ¶4 (cleaning of various areas), ¶ (vests); January 21, 2009 Meeting at ¶2 (water), ¶9 (hand washing stations); March 2009 at ¶9 (vests and gas masks); May 2009 at ¶5 (sanitary conditions), ¶6 (cleaning supplies), ¶10 (gas masks); June 2009 at ¶8 (cleaning supplies); August 2009 at ¶9 (vests); September 2009 at ¶7 (vests and gas masks), ¶10 (vests), ¶11 (restrooms); November 2009 at ¶4 (cleaning supplies); December 2009 at ¶1 (chairs), ¶11 (restrooms), ¶12 (vests).)

Third, employees can and do raise issues through Respondent's Safe to Say program and the Employee Concerns Hotline, as well as by way of informal complaints made orally or by email. (Tr. at 383.)

It is undisputed that employees and supervisors at all levels regularly and consistently bring all sorts of issues to the attention of management. (Tr. at 250, 395.) It is also undisputed that the alleged discriminatees did so for years, as well. As Frazier explained, "I've been bringing up issues to management ever since I started working out there over 20 years ago. I've never had a problem speaking to management, bringing up concerns that needed to be addressed, so it continued throughout my entire tenure at Turkey Point." (Tr. at 168.) Mack also testified

that he has been raising issues since he was an officer back in 2002, and that everyone spoke out at security briefings. (Tr. at 276.)

C. Leadership Effectiveness Program And Other Reasons For Termination

Going back a few years, Respondent, including its supervisors, had not been performing particularly well at Turkey Point. (Tr. at 391-392.) In response to its clients concerns, Respondent created and implemented a leadership development program to improve the quality of its supervisors at Turkey Point and the other facilities at which it provides security services to Florida Power & Light. (Tr. at 111-112, 392.) As part of this program, MacDonald was hired in February 2009 as the first Leadership Development Manager at Turkey Point. (Tr. at 97.)

Later in 2009, Respondents corporate headquarters developed a comprehensive program to review and analyze the leadership qualities of its lieutenants and captains at all Florida Power & Light facilities for which the Respondent provided security, including Turkey Point. (Tr. at 112-113, 392.) The marching orders for this new Leadership Effectiveness Program (the Program) were presented to the Turkey Point management in late 2009, with the initial review of supervisors scheduled for early 2010 and additional reviews to be conducted annually. (Tr. at 98, 112, 122, 142; Employer Ex. 35.)

Based on the procedures outlined in the Program and forms created by Respondents corporate headquarters, MacDonald completed a criteria worksheet for each lieutenant and captain. (Employer Exs. 35-36; Tr. at 123-126.) The scores were then entered on a master spreadsheet and converted to a summary with names in green demonstrating top performance, yellow demonstrating average performance and red corresponding to low performance.

(Employer Ex. 40; Tr. at 126.) The alleged discriminatees were two of the five supervisors that fell within the red zone ó the bottom 20%, with Frazier scoring the lowest of all supervisors.

Pursuant to the Program, Mareth, MacDonald and Rodriguez then further reviewed the lowest performers, including the alleged discriminatees. (Tr. at 41, 98.) Information for these further reviews was gathered from a variety of sources, including feedback from direct reports of each supervisor, other tools designed to measure leadership effectiveness and observations of upper management, and set forth on 1-2 page summaries put together by MacDonald. (General Counsel Exs. 2 and 13; Employer Ex. 14; Tr. at 41-42, 102-103, 127-128.) Based on these further reviews, Mareth recommended that Frazier and a number of other lieutenants be terminated. (Tr. at 101-102, 393.) Ultimately, based on Mareth's recommendations, Respondent's corporate headquarters terminated all five of the supervisors who fell within the red zone in the initial review. (Tr. at 46-47, 128, 393; Employer Ex. 41.)

In addition to his poor performance on the leadership review, Mack was terminated for engaging in inappropriate conduct towards the Florida Power & Light security manager, Respondent's key client contact on a daily basis at Turkey Point. (Tr. at 102, 394.) Specifically, Mack was loud and aggressive and used profanity during a discussion with the security manager. (Tr. at 394.) Such conduct is a Level I offense under Respondent's Progressive Discipline Policy and justifies termination for a first offense. (General Counsel Ex. 17 at 10.) Once again, based on Mareth's recommendation, Respondent's corporate headquarters made the decision to terminate Mack. (Tr. at 54-55.)

IV. LAW AND ANALYSIS

A. Lieutenants Are Supervisors Under Section 2(11) (Response to Exceptions 1-16).

The first issue is whether the ALJ correctly concluded that the alleged discriminatees are supervisors under Section 2(11) of the Act. Pursuant to Section 2(11), a supervisor is, "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 to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

Thus, Section 2(11) sets forth a three-part test for determining whether an individual is a supervisor. Pursuant to this test, employees are statutory supervisors "if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment," and (3) their authority is held "in the interest of the employer." *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 712-13 (2001), citing *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-74 (1994).

1. **Precedent does not dictate that lieutenants are statutory supervisors.**

General Counsel argues that the Board's decision in *The Wackenhut Corp. and International Union Security, Police and Fire Professionals of America (SPFPA)*, 345 NLRB 850 (2005), is binding "precedent," which dictates that the lieutenants in this case must be considered supervisors under the Act. (General Counsel's Brief in Support of Exceptions to the ALJ's Decision and Recommended Order ("Brief") at 4-7.) The concept of "precedent,"

however, is based on the idea that the same legal issue will be decided the same way in future cases concerning different parties. Although couched in terms of “precedent,” General Counsel’s contention is more accurately an argument that res judicata applies to this case. This is a concept that dictates the same legal analysis will be applied in the same way, to the same set of facts, concerning the same parties in any future proceedings, to preclude one party from re-litigating the same issue in connection with the same cause of action between the same parties.

As an initial matter, res judicata does not preclude Respondent from asserting that its lieutenants are statutory supervisors in the case at bar. In *The Wackenhut Corp.*, the relevant issue was whether Respondent violated Section 8(a)(5) when it reassigned certain bargaining unit work ó CAS/SAS operations ó to non-unit lieutenants. The Respondent made this change after its client modified its bid specifications/contract with the Respondent to require that the CAS/SAS operations be performed by “supervisors” rather than bargaining unit personnel. Respondent contended that, in order to meet its contractual obligations, it had to reassign the work to lieutenants because they were statutory supervisors under Section 2(11). Ultimately, however, the Board determined that Respondent had not demonstrated that the lieutenants were statutory supervisors and, therefore, could not rely on the client’s contractual change as a justification for the change made by Respondent. *Id.* at 853-855.

Generally speaking, res judicata bars relitigation of a matter if it concerns the identical parties or those in privity with them, identical causes of action and a prior decision on the merits. Therefore, res judicata does not apply unless the identical parties are involved in both proceedings. The charging party in *The Wackenhut Corp.* was the International Union Security, Policy and Fire Professionals of America (SPFPA). In this case, the alleged discriminatees are the Charging Parties and the SPFPA is not a party. As such, this case does not concern identical

parties or those in privity with them. *See, e.g., General Motors Corp.*, 158 NLRB 1723, 1728 (1966) (even though the general counsel, employer and union were the same, since there was a different charging party in the second proceeding, there were not identical parties or those in privity with them and, *res judicata* did not bar relitigation of the same issue).

In addition, this case arises in a very different posture and based on a different cause of action than *The Wackenhut Corp.* This case is based on the termination of two individuals, allegedly in violation of Section 8(a)(1). By way of affirmative defense, the Respondent seeks to assert that these two individuals are statutory supervisors, who are not covered by the Act. In *The Wackenhut Corp.*, the supervisory issue arose in a tangential manner related to allegations of improper transfer of bargaining unit work, a very different posture and claim than the case at hand. Therefore, *res judicata* does not bar relitigation of whether the lieutenants are supervisors under Section 2(11).

Finally, circumstances have changed since the prior decision. Specifically, the law governing the analysis of supervisory authority changed when the Board issued *Oakwood Healthcare*, 348 NLRB 686 (2006), a decision cited in virtually every Board decision concerning Section 2(11) thereafter. Since the *Oakwood Healthcare* decision modified the applicable law and was issued after the Board's decision in *The Wackenhut Corp.*, *res judicata* does not preclude relitigation of the issue of whether lieutenants are statutory supervisors. *See, e.g., United Technologies Corp.*, 260 NLRB 68, 69 (1982) (*res judicata* did not bar relitigation of same issue where the legal analysis applicable to the issue had changed); *Tri-County Electric Coop., Inc.*, 237 NLRB 968 (1978) (*res judicata* did not apply where underlying circumstances had changed).

Moreover, the factual circumstances have changed. In addition to other facts that do not appear to have been present in *The Wackenhut Corp.*, lieutenants were not given the

responsibility of independently evaluating security officers until approximately 2008, after that decision was issued. (Tr. at 205.) This is a critical fact that has changed since the Board's decision in *The Wackenhut Corp.*, and which is relevant to the analysis of supervisory authority. Therefore, *res judicata* does not apply.

For the same reasons, *The Wackenhut Corp.* is not binding precedent that dictates that the alleged discriminatees in this case are statutory supervisors. The facts upon which this determination must be made are different than the ones considered in the prior case. Further, the applicable law governing the analysis of supervisory authority has changed since the prior case. Therefore, while admittedly relevant to some degree, the Board's decision in *The Wackenhut Corp.* is not binding precedent which dictates a specific outcome in this case.

2. Lieutenants have authority to engage in numerous supervisory functions.

The next question is whether the lieutenants at issue in this case have any authority to engage in one or more of the twelve supervisory functions listed in Section 2(11). As explained in detail above, it is undisputed that lieutenants have the authority to exercise a number of supervisory functions.

a. Evaluations and Promotions

Specifically, it is undisputed that lieutenants in the case at bar have authority to evaluate the security officers that report to them. Such authority supports a finding of supervisory status under Section 2(11). For example, in *Virginia Mfg. Co., Inc.*, 311 NLRB 992, 993 (1993) (footnote omitted), the Board concluded that, "We agree with the hearing officer that leadmen Joshua Carroll and William Morrison are supervisors within the meaning of the Act [and i]n so finding, we rely particularly on evidence that Carroll and Morrison have exercised independent

judgment in evaluating the performances of employees, including discussing the evaluations with the employees before they were approved by higher management.ö Similarly, the lieutenants in this case complete evaluations of the security officers that report to them and, generally speaking, discuss those evaluations with the officers before any approval or involvement by higher management. *See also Burns International Security Services, Inc.*, 278 NLRB 565, 570 (1986) (sergeants at a nuclear facility were supervisors based on significant role in evaluating employees); *Loretto Heights College*, 205 NLRB 1134, 1136 (1973) (individuals were supervisors under Section 2(11) based, in part, on the fact that they effectively evaluate employeesø performances); *Safeway Stores, Inc.*, 174 NLRB 1274, 1276 (1969) (individuals were supervisors based on the fact that they evaluated employees).

It is also undisputed the evaluations completed by lieutenants are considered in determining whether an officer will be promoted. It is well-established that an individualø ability to affect the promotional opportunities of employees establishes supervisory authority.ö *Entergy Systems & Service, Inc.*, 328 NLRB 902, 902-903 (1999) (supervisory authority found based solely on the ability to block an employeeø promotion). *See also Loretto Heights College*, 205 NLRB at 1136 (individuals were supervisors under Section 2(11) based, in part, on the fact that they effectively made recommendations with respect to promotions); *Safeway Stores*, 174 NLRB at 1276 (individuals were supervisors based on the fact that they evaluated employees and could effectively recommend their promotion).

General Counsel argues that the performance evaluations do not support a finding of supervisory authority under Section 2(11), claiming that, ö[p]erformance evaluations signed by the issuing lieutenant were not discussed in the prior Board decision but had been considered in the representation case that was part of that record.ö (Brief at 8-13.) The representation case

upon which General Counsel relies, however, issued January 10, 2003, concerned the supervisory status of sergeants, not lieutenants. (General Counsel Ex. 3 at 3 (öBeneath the lieutenants are eight sergeants whose supervisory status is at issue.ö).)

Moreover, although there was some discussion in that representation case regarding the role of sergeants and lieutenants in the evaluation process, it is undisputed the evaluation process changed some time after that representation decision was rendered. According to that representation case, at that point in time, sergeants met with lieutenants to discuss the evaluation of an officer and then forwarded their recommendations to their captains, who then issued the final evaluations. (General Counsel Ex. 3 at 6-7.)

Since the start of 2008, however, lieutenants have actually created and issued the only evaluations issued to the security officers that report to them, including annual performance reviews and quarterly reviews. (Tr. at 84, 205-206, 295, 328; Employer Exs. 4 and 10.) This fact is undisputed, as is the fact that lieutenants regularly and consistently issue these evaluations without consulting with anyone in upper management, and the evaluations conducted by lieutenants are generally the only evaluations of security officers completed by anyone in management. (Tr. at 84-85, 88-89, 206-2078, 295-296, 330.) As such, there is no question that the lieutenants' role in the evaluation of security officers is different than the sergeants' role considered and discussed in the earlier representation case on which General Counsel relies.

Further, unlike the instant case, there was no evidence that the evaluations at issue in the representation case concerning sergeants constituted an effective recommendation regarding anything in terms of promotion, reward, employment status or tenure. As stated in that representation case, öthe record is silent concerning whether the annual evaluations affect

security officers' employment status or tenure or whether they are utilized for any purpose at all. (General Counsel Ex. 3 at 9.) As such, any findings regarding supervisory status based on performance evaluations completed by sergeants prior to January 10, 2003 are irrelevant.

With respect to *The Wackenhut Corp.*, General Counsel concedes that "performance evaluations signed by the issuing lieutenant were not discussed in that prior Board decision" of the decision cited by General Counsel as binding precedent on the issue of the supervisory status of the lieutenants in this case. General Counsel's concession in this regard simply confirms that the prior Board decision has limited relevance to this case.

General Counsel next argues that, "as was the case in the prior representation case for sergeants, there is no proof to establish that the lieutenant evaluations of security officers are directly linked to promotions, . . ." (Brief at 9.) General Counsel is correct in the sense that no such proof was presented in that representation case. (General Counsel Ex. 3 at 9.) On the contrary, however, there is undisputed evidence in this case that establishes that evaluations conducted by lieutenants are directly linked to promotions. As explained in detail above, if an officer seeks a promotion, the evaluations completed by lieutenants are reviewed by a promotions board as part of the review process. (Tr. at 220, 329-330; Promotion Policy, Employer Ex. 17, §§ 4.10, 4.13.)

General Counsel seeks to minimize the relevance of these evaluations by pointing out that the evaluations are only a part of the review process. While other factors are considered, as well, however, it is undisputed that the promotions board "shall" review evaluations/performance appraisals. (Promotion Policy, Employer Ex. 17, §§4.10, 4.13.) Thus, whatever discretion the

promotions board might have otherwise, it has no discretion regarding evaluations; it must review them as part of the process.

Moreover, it is irrelevant that the evaluations completed by lieutenants are not the only factor considered by the promotions board in deciding whether to promote an officer, because that is not the applicable legal standard. In addition to the fact that the lieutenant's role in the evaluation process is sufficient to establish supervisory authority in and of itself, the relevant inquiry regarding promotions is whether these evaluations can directly affect an officer's chance of promotion. *See, e.g., Entergy Systems & Service*, 328 NLRB at 902. And the undisputed facts demonstrate that a positive or negative evaluation can directly affect an officer's promotion.

The Promotion Policy demonstrates the role of evaluations in the promotion process. In addition, the Project Manager testified regarding four specific officers, whom he identified by name, for whom such evaluations played a role in their promotion. (Tr. at 330.) The Project Manager also testified that the same thing had occurred with respect to eight other officers in the preceding one and a half years. (*Id.*) The Project Manager's testimony in this regard was not contradicted by any witness or documentary evidence. Thus, General Counsel's protestations to the contrary, the undisputed, record evidence demonstrates a direct link between the evaluations and promotions.²

General Counsel also argues that Cecil Mack's testimony contradicted the Project Manager's testimony and should be credited, particularly since the ALJ did not discuss Mack's

² General Counsel contends that the Project Manager's undisputed testimony should not be credited because, presumably, the Employer is in possession of, and could have presented, documentary evidence in support of this testimony. (Brief at 11.) Assuming such documentation exists, the Employer is not required to present the "best evidence" on a given fact, particularly where the testimony in question is undisputed. Forcing parties to present such cumulative evidence would only serve to prolong hearings unnecessarily.

testimony. (Brief at 11-12.) As an initial matter, the ALJ concluded that “Mack’s testimony, regarding his duties and authority as a lieutenant, though in less detail, was for the most part, the same as Frazier’s testimony.” (ALJ Decision and Recommended Order at 11.) Although the ALJ did not explicitly explain why he did not rely on Mack’s testimony, in light of the fact that the ALJ determined that Mack’s testimony was essentially the same as Frazier’s testimony, although in less detail, and the ALJ’s express determination to credit the Project Manager’s testimony over Frazier’s testimony, it is clear the ALJ implicitly credited the Project Manager’s testimony over Mack’s testimony, as well.³

Moreover, it is unclear in what manner Mack’s testimony differed from the Project Manager’s testimony on any relevant point. Unlike some other subjects, Mack was not questioned at length about facts relative to the issue of supervisory authority. General Counsel claims that Mack testified that he “was told by management that the *exclusive* purpose of evaluations was to set goals for the security officers.” (Brief at 11 (citations omitted) (emphasis added).) But Mack did not testify that he was told such was the *exclusive* purpose of the evaluations. Rather, he testified he was told the purpose of the evaluations “was *mainly* to set goals for the officer.” (Tr. at 295 (emphasis added).) As such, Mack’s testimony that the evaluations were mainly to set goals is not inconsistent with the Project Manager’s testimony (and the language in the Promotion Policy) that the evaluations are considered as part of the promotion process.

General Counsel also cites Mack’s testimony regarding the fact that he discussed evaluations with his captain. (Brief at 11-12.) Mack testified, however, that he completed the

³ To the extent the Board does not believe the ALJ made this implicit finding, then it is respectfully requested that the Board remand the case to the ALJ for a determination of the credibility of Mack’s testimony since the ALJ was in a position to observe the Project Manger and Mack while they testified.

evaluations, went over them with his security officers and then turned them over to his captain, and generally only discussed the evaluations with the captain if there were attendance issues that put an officer's performance "on the line." (Tr. at 295-296.) Thus, there is nothing inconsistent about this testimony. In fact, Mack's testimony in this regard proves the lieutenant's complete evaluations of security officers and review those evaluations with officers without any input from anyone in upper management.

Finally, General Counsel relies on Mack's testimony that he was not aware of any action "taken against" a security officer as a result of his evaluations. (Brief at 12.) The fact that Mack was not aware of any such events does not mean no such actions ever occurred. In addition, the question posed does not cover the situation where an officer was promoted on account of positive evaluations, because the question only asks for actions "taken against" an officer. (Tr. at 296.) Thus, Mack's testimony, even if credited, does not change the undisputed evidence regarding the lieutenant's role in evaluating officers and the fact that such evaluations affect the promotional opportunities of those officers.⁴

⁴ General Counsel also argues that the fact that security officers "evaluated" lieutenants as part of the 360 Degree Leadership Feedback Tool renders the evaluations completed by lieutenants of security officers irrelevant. (Brief at 12.) But the fact that employees may have an opportunity to provide feedback regarding or evaluate or putative supervisors does not mean that the putative supervisors' role in evaluating the employees is irrelevant as a matter of law. Further, as is clear from the Tool forms themselves, the purpose is to gather feedback from everyone who has regular contact with a particular lieutenant, including the shift captain and other supervisors, as well as security officers. (General Counsel Exs. 6 and 12.)

b. Discipline and Suspend

In addition to the authority to evaluate and their role in the promotion process, lieutenants also have the authority to discipline and suspend security officers. And, while General Counsel may dispute the level of discretion exercised in doing so, there is no dispute that lieutenants, in fact, actually have issued disciplinary actions and suspensions. (Tr. at 219, 322, 326, 328, 379; Employer Ex. 16; General Counsel Ex. 18.)

c. Assign

Lieutenants also have the authority to assign security officers. As the Board explained in *Oakwood Healthcare*, we construe 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. That is, the place, time, and work of an employee are part of his/her terms and conditions of employment. . . . The assignment of an employee to a certain department (e.g., housewares) or to a certain shift (e.g., night) or to certain significant overall tasks (e.g., restocking shelves) would generally qualify as "assign" within our construction. . . . For example, there can be "plum assignments" and "bum assignments" -- assignments that are more difficult and demanding than others. The power to assign an employee to one or the other is of some importance to the employee and to management as well. 348 NLRB at 689.

As Frazier admitted, lieutenants have the authority to transfer security officers from one post to another without consulting with a supervisor before doing so, posts that at least some officers find more preferable than others. As such, since they can assign security officers to

particular posts and choose to assign *õplumö* posts over *õbumö* posts, lieutenants have the authority to assign employees under Section 2(11). *Oakwood Healthcare*, 348 NLRB at 689.

d. Responsibly Direct

In addition, lieutenants have the authority to *õresponsibly directö* employees. *õ[For direction to be -responsible,ø* 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 adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly. . . . Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.ö *Oakwood Healthcare*, 348 NLRB at 691-692.

It is undisputed that lieutenants in the case at bar are responsible for ensuring the quality of work performed by security officers and that lieutenants who do not do a sufficient job of fulfilling that responsibility may be disciplined or evaluated poorly, which can affect their opportunity for promotions in the future. Therefore, since *õsome adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly,ö* lieutenants responsibly direct security officers under Section 2(11). 348 NLRB at 691-692.

General Counsel challenges the ALJ's finding that such authority exists based on the Board's decision in *The Wackenhut Corp.*, and the contention that the evidence presented by Respondent on this point is *õspeculative.ö* (Brief at 21.) Once again, however, the Board's

decision in *The Wackenhut Corp.* does not dictate a particular conclusion in this case, particularly since there is no reason to believe that the fact that lieutenants are subject to detrimental action if they do not do a sufficient job of overseeing their security officers was presented to or otherwise considered by the Board in that prior case.

Moreover, the evidence in this regard is not “speculative.” The undisputed testimony establishes that lieutenants are responsible for the quality of the security officers under their command and if they do not fulfill that responsibility, they can be issued a coaching or disciplinary action and, eventually, demoted or terminated. (Tr. at 331-332.) For example, lieutenants are required to conduct certain drills for their security officers. As the Project Manager testified, it is important for lieutenants to conduct such drills so that officers will have a greater understanding and knowledge of the requisite defensive strategy, and be able to perform their jobs competently. (Tr. at 332.) As such, one lieutenant (Espinoza) was counseled on his failure to conduct certain drills with his security officers. (Employer Ex. 18 at 1.) Another lieutenant (Jean-Baptiste) was counseled on similar issues. (*Id.* at 2.) A third lieutenant received a written warning for similar failures. (*Id.* at 3.) A fourth lieutenant received the lowest score possible (1 out of 4) in a category on his evaluation for similar failures, a score that can affect his future promotion opportunities. (*Id.* at 7.)⁵

Based on the foregoing, the lieutenants have the authority to engage in one or more supervisory functions.

⁵ It should be noted that Respondent’s counsel sought to elicit additional testimony about Employer Ex. 18 and how it demonstrated that lieutenants were subject to action for failing to ensure the quality of the officers under their command, but General Counsel objected to this line of questioning and the Respondent’s counsel was thereby limited in this inquiry. (Tr. at 331-337.)

3. Lieutenants exercise independent judgment in exercising supervisory functions.

The next question is whether lieutenants exercise independent judgment in exercising one or more of the supervisory functions in which they engage. As the Board concluded in *Oakwood Healthcare*, “as a starting point, to exercise independent judgment an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” 348 NLRB at 691-692.

As explained in detail above, lieutenants evaluate the security officers that report to them on a quarterly and annual basis, evaluations that are reviewed and considered if one of those officers seeks a promotion. It is undisputed that, generally speaking, lieutenants do not consult with anyone higher in management over these evaluations. (In addition, no one else from management otherwise evaluates the security officers.) As such, since they perform evaluations “free of the control of others and form an opinion or evaluation by discerning and comparing data,” lieutenants exercise independent judgment in evaluating the security officers that report to them. *Oakwood Healthcare*, 348 NLRB at 691-692.

In addition, the type of discretion exercised by lieutenants in issuing discipline in the case at bar is precisely the type of discretion that constitutes supervisory authority under Section 2(11).

We find, contrary to the Regional Director, that the LPNs exercise independent judgment in disciplining, and effectively recommending discipline. . . .

While the Regional Director found that the LPNs do have the authority to fill out employee counseling forms, he concluded that the LPNs’ role in doing so was merely a reportorial role that did not evince any supervisory authority. His finding in this respect was based, in large part, on his determination that the counseling forms neither constitute discipline, nor automatically lead to discipline. Contrary to the Regional Director, however, it is clear that the

counseling forms are a form of discipline because they lay a foundation, under the progressive disciplinary system, for future discipline against an employee. . . .

Accordingly, the examples above convince us that the counseling forms do constitute a form of discipline because they not only affect an employee's job status, i.e., suspension or discharge, . . . but they also lay the foundation for future discipline. . . .

Moreover, the LPNs here have the discretion to document employee infractions on the counseling forms. In this respect, the LPNs alone decide whether the conduct warrants a verbal warning or written documentation. Because the LPNs here have the discretion to write-up infractions on employee counseling forms, we believe that they are vested with the authority to exercise independent judgment in deciding whether to initiate the progressive disciplinary process against an employee. . . .

Oak Park Nursing Care Center, 351 NLRB 27, 28-29 (2007) (footnote and citations omitted).

As explained above, lieutenants have the authority to issue discipline and suspend security officers. Although they occasionally do so, they are not required to consult with a superior before taking such actions. (Tr. at 322.) Even the lowest level discipline issued by lieutenants — oral and verbal warnings — lays a foundation under the progressive discipline system for future discipline against security officers. Further, lieutenants have discretion whether or not to issue discipline in the first place, as well as the discretion to determine which level of offense applies to misconduct under the Progressive Discipline Policy, which then defines the parameters for the suggested disciplinary action. (Tr. at 201, 324-326, 379.) As such, similar to the LPNs at issue in *Oak Park Nursing Care Center*, lieutenants in this case exercise independent judgment in issuing discipline.

General Counsel contends that the ALJ reached the wrong conclusion because he failed to follow the Board's conclusion in *The Wackenhut Corp.* regarding lieutenants' role in the disciplinary process. As explained above, however, the analysis regarding supervisory authority

was modified in *Oakwood Healthcare* and subsequent decisions such as *Oak Park Nursing Care Center*, both of which were decided after *The Wackenhut Corp.* For this reason, as well as the others cited above as to why the Board's decision in *The Wackenhut Corp.* does not preclude Respondent from litigating the issue of the lieutenant's supervisory status in this case, the Board's decision in *The Wackenhut Corp.* is of limited relevance.

General Counsel also argues that the discipline issued by lieutenants is insufficient to establish supervisory authority under Section 2(11) because such discipline is only at a lower level and based only on company policies. In addition to the authority to issue oral and verbal warnings, however, lieutenants have authority to issue suspensions. As such, their authority is not limited to low level actions, but includes higher level suspensions.

Further, Section 2(11) does not contain any such limitations on the type of disciplinary actions that are sufficient to support a finding of supervisory status. As the Board stated in *Oakwood Healthcare*, "the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices." 348 NLRB at 693 (footnote omitted). For example, where a putative supervisor has the discretion regarding whether to document infractions, "they are vested with the authority to exercise independent judgment in deciding whether to initiate the progressive disciplinary process against an employee." *Oak Park Nursing Care Center*, 351 NLRB at 29 (citation omitted). As explained above, lieutenants have the authority to decide whether or not to issue discipline; therefore, they exercise independent judgment relative to discipline.

Moreover, the evidence shows that lieutenants do not blindly follow policies, thereby exercising no judgment. For example, in the disciplinary action issued by Lieutenant Lee Evans

on October 28, 2009, the notice reflects that discipline was issued pursuant to Respondent's Policy 107 for a "third late in a twelve month period." (Employer Ex. 16.) The express terms of that policy, however, call for termination for a third infraction during such a period. (General Counsel Ex. 18, § 4.4.3.) Therefore, it is clear the lieutenant did not blindly follow the written policy, but exercised judgment and discretion in selecting a punishment since he did not select the punishment called for by the applicable policy.

Lieutenants also use independent judgment in assigning work. As Frazier admitted, lieutenants have the authority to transfer security officers from one post to another without consulting with a supervisor before doing so, posts that at least some officers find more preferable than others. Such authority constitutes supervisory authority. *See, e.g. Oakwood Healthcare*, 348 NLRB at 689.

While General Counsel relies on a litany of facts which are not in dispute and on which the ALJ did not rely in finding supervisory authority, General Counsel fails to address the key facts cited above that support a finding that lieutenants have the authority to assign work and use independent judgment in doing so. In addition to the fact that the law has been modified on the analysis of supervisory authority, there is no evidence that these critical facts were present, or presented to or reviewed by the Board, in connection with *The Wackenhut Corp.*

Lieutenants also exercise independent judgment in "responsibly directing" security officers since they make their own decisions how to counsel officers and suggest ways for improvement. (Tr. at 201, 207.) For example, in *Dunkirk Motor Inn, Inc.*, 211 NLRB 461, 462 (1974), the Board found an assistant housekeeper to be a statutory supervisor where she was responsible for "overseeing" the work of maids assigned to one of two floors of a motel. The

assistant housekeeper's responsibilities included, among other things, inspecting the rooms the maids cleaned and ordering them to correct deficiencies. In finding that the assistant housekeeper responsibly directed the maids, the Board stated, "The test of responsible direction does not depend on the complexity and difficulty of the maids' work or of the corrective measures invoked. . . . The proper test . . . is that [the putative supervisor] exercises independent judgment without consultation with the housekeeper in ascertaining the deficiencies in the maids' work, however prosaic and uncomplicated, and utilizing the authority to order that the work be done correctly." *Id.* at 462; *see also Colorflow Decorator Products, Inc.*, 228 NLRB 408, 411 (1977) (leadwomen responsible for making certain that production was performed properly, and for directing employees to correct improperly done work, were statutory supervisors under the Act).

Similarly, lieutenants determine the deficiencies in the security officers' work and have the authority to order that the work be performed correctly. Therefore, like the assistant housekeeper in *Dunkirk Motor Inn*, lieutenants exercise independent judgment in responsibly directing the security officers that report to them.

The third issue is whether lieutenants hold their authority in the interest of Respondent. As demonstrated by the undisputed evidence, Respondent views the lieutenants as its front-line supervisors, trains them as such and authorizes them among things to oversee security officers' performance and take necessary actions to correct deficiencies in performance. In doing so, Respondent expects the lieutenants to act on its behalf as field supervisors in accordance with the client's expectations.

4. Secondary indicia support a finding of supervisory status.

Although possession of authority to engage in any one of the enumerated supervisory functions of Section 2(11) is sufficient to confer status as a supervisor, the Board also considers secondary factors to determine whether an individual is a supervisor under the Act. It is undisputed that lieutenants in the case at bar attend management only meetings, including extra site briefings, initial training sessions, leadership development training, etc. Attendance at such meetings is secondary evidence of supervisory status. *See, e.g., McClatchy Newspapers, Inc.*, 307 NLRB 773, 773 (1992) (attendance at management only meetings and training sessions secondary criteria demonstrating supervisory status).

In addition, the lowest paid lieutenants make approximately \$4.00 per hour more than the highest paid security officers. Lieutenants also are eligible for a higher annual bonus (based on a different formula and one additional criterion) than security officers and are entitled to a higher amount of life insurance. The fact that lieutenants are paid significantly more than security officers and receive better benefits is secondary indicia of supervisory status. *See, e.g., Progressive Transportation Services Inc.*, 340 NLRB 1044, 1047 (2003) (differential of \$2 per hour was evidence of supervisory status); *Mountaineer Park, Inc.*, 343 NLRB 1473, 1476 (2004) (differential of \$.50 to \$1.00 per hour secondary indicia of supervisory status).

Further, if lieutenants are not supervisors, then one captain would be overseeing approximately 43 employees on each shift (36 security officers plus 7 lieutenants). As Project Manager Mareth testified, such a ratio is inconceivable in light of the amount and type of territory that must be supervised and the critical importance of adequate oversight over security services at a nuclear site guarding against radiological sabotage. (Tr. at 348.) Such a ratio

weighs in favor of a finding that lieutenants are statutory supervisors. *See, e.g., Burns International Security Services*, 278 NLRB at 571 (although the approximately 2-to-1 ratio of guards to supervisors seems . . . disproportionate, the ratio is explained in part by the strict security requirements at a nuclear power plant); *Colorflow Decorator Products, Inc.*, 228 NLRB at 410 (two supervisors overseeing almost 50 employees for a substantial portion of time is disproportionate and weighs in favor of finding that a third individual in question also was a supervisor).

It is also undisputed that lieutenants are held out to the security officers as supervisors, another fact that weighs in favor of supervisory status. *See, e.g., Progressive Transportation Services, Inc.*, 340 NLRB at 1047 (fact that individual was listed on employer's organizational chart as a supervisor, identified herself as a supervisor and referred to other employees as other staff secondary indicia of supervisor status); *SAIE Motor Freight, Inc.*, 334 NLRB 979, 985 (2001) (portion of ALJ decision not ruled upon by the Board) (fact that employees were specifically told he was their supervisor weighed in favor of supervisory finding).

Lieutenants also perform different work than the security officers that report to them, and rarely perform security officer work. This is another fact that weighs in favor of supervisory status. *See, e.g., SAIE Motor Freight, Inc.*, 334 NLRB at 985 (portion of ALJ decision not passed on by the Board) (finding that individual was a supervisor in part because he did not during the regular work week perform other than a limited amount of work himself).

Finally, as explained in detail above, at least dating back to 2007, lieutenants have not been part of the bargaining unit covered by the collective bargaining agreement that covers the security officers, a unit that includes all security officers and excludes all supervisors as defined

by the Act. Nor has one of the assigned job duties of lieutenants ó CAS/SAS operations ó been part of the bargaining unit during that period of time. Under the collective bargaining agreements in effect since 2007, it is clear that the union that represents security officers at Turkey Point has recognized that lieutenants are statutory supervisors, yet another fact that weighs in favor of a finding that lieutenants are supervisors under Section 2(11).

Based on the foregoing, it is clear that lieutenants have authority to engage in one or more supervisory functions, that they exercise independent judgment in doing so and that secondary indicia support a finding of supervisory status. Therefore, lieutenants, including the alleged discriminatees, are supervisors under Section 2(11). *See Burns International Security Services*, 278 NLRB at 570-571 (sergeants overseeing security officers at a nuclear facility with essentially the same job functions as lieutenants in the case at bar held to be statutory supervisors, in part, because they played a õsignificant role in evaluatingö security guards, had authority to issue oral and written reprimands which could lead to discharge, were paid more than security guards, attended monthly management meetings and prepared written evaluations of guards).

5. Supervisors are not protected by the Act.

As explained in detail above, the lieutenants are supervisors under Section 2(11). It is well-established that statutory supervisors are not protected under the Act. *See, e.g., Concrete Form Walls, Inc.*, 346 NLRB 831, 836 (2006) (õIt is axiomatic that supervisors are excluded from the protection of the Act.ö); *King Broadcasting Co.*, 329 NLRB 378, 381 (1999) (õsupervisors are excluded from the protections of Section 7 of the Actö). Since the alleged discriminates are not protected by the Act, the Complaint should be dismissed.

B. Respondent Lawfully Terminated The Alleged Discriminatees (Response to Exceptions 17-18).

1. No prima facie showing.

Assuming the alleged discriminatees are not statutory supervisors, the second issue is whether Respondent terminated them in retaliation for concerted protected activities. As is well-established, the Government must "make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision." *Wright Line*, 251 NLRB 1083, 1089 (1980). "Under the test set forth in *Wright Line*, . . . the General Counsel must initially establish union or protected activity, knowledge, animus, and adverse action." *Central Plumbing Specialties, Inc.*, 337 NLRB 973, 974 (2002). If the Government makes the requisite prima facie showing, then "the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, 251 NLRB at 1089.

Thus, the burden is on General Counsel to prove that the alleged discriminatees engaged in concerted, protected activity. Although there was testimony that each of the alleged discriminatees raised certain issues with management, it is unclear in what manner each (or any) of the issues was raised in a concerted manner or related to a protected subject. In other words, although there was general testimony that other officers brought certain issues to the attention of one or both of the alleged discriminatees, it is unclear how or when those officers asked each of the alleged discriminatees to raise issues on their behalf or in what manner the activity otherwise was concerted and protected. Once again, if General Counsel cannot prove that this element

exists, then General Counsel has failed to establish a prima facie case and the Complaint should be dismissed.

In order to satisfy its prima facie burden, General Counsel also must demonstrate that animus played some part in Respondent's decision to terminate the alleged discriminatees, allegedly for bringing various issues to the attention of management. There is no evidence of animus in this case, however.

On the contrary, it is undisputed that Respondent has numerous programs and procedures in place -- Safety Conscious Work Environment (SCWE), Corrective Action Program (CAP), Condition Reports (CRs), Safe to Say, Employee Complaint Hotline, Safety Meetings -- designed to encourage employees and supervisors to bring to management's attention virtually any issues of concern, including all of the issues supposedly raised by the alleged discriminatees. It is also undisputed that lieutenants, including the alleged discriminatees, have a role in this process and are supposed to relay to upper management issues raised by security officers and respond to such issues, when appropriate and within the lieutenants' power to do so. Thus, Respondent has an entire system set up, with multiple overlapping procedures, for making sure that everyone raises issues and does so free from fear of retaliation. Respondent has every interest in making sure its programs in this regard are sufficient, because that is required by Respondent's client and the Nuclear Regulatory Commission.

Moreover, it is undisputed that employees and supervisors bring issues to the attention of management on virtually a daily basis and have been doing so for years. In fact, Frazier admits that he did so from 1989 through his termination and Mack admits that he raised similar issues from 2002 until his termination. General Counsel, however, did not introduce any evidence to

suggest why after all these years Respondent supposedly terminated the alleged discriminatees for doing something they had been doing for years, which they had been expressly instructed to do, and which other employees and supervisors had been doing for years without retaliation. This lack of evidence belies any finding of animus and strongly rebuts any suggestion of retaliatory intent on the part of Respondent.

General Counsel relies on language in the reviews completed for the alleged discriminatees regarding the fact that they “openly criticize[d]” management decisions at team briefings.” (General Counsel Ex. 2, §1; General Counsel Ex. 13, §1.) As a full assessment of the comments in those reviews reveals, however, both of the alleged discriminatees were complimented for “appropriately challeng[ing] decisions.” (General Counsel Ex. 2, §1; General Counsel Ex. 13, §1.) The problem was that, as part of management, lieutenants have an obligation to do more than just question management decisions; they are obligated to attempt to assist in resolving problems and support management decisions. The alleged discriminatees incorrectly did not view themselves as part of management and, therefore, did not act as members of management were required to act. As a result, they were not performing at a high enough level and, along with several other supervisors, were terminated.

2. Respondent would have terminated the alleged discriminatees regardless of their protected activity.

Assuming, arguendo, General Counsel can meet her prima facie burden, Respondent has demonstrated it would have terminated the alleged discriminatees regardless of their protected activity. As explained above, it is undisputed that in early 2009, Respondent implemented a program to improve the quality of supervisors at all of the nuclear sites where it provides security services to Florida Power & Light, including Turkey Point. As part of this program, Dr.

MacDonald was hired and assigned as the first Leadership Development Manager at Turkey Point in February 2009, with one of her primary responsibilities to develop the leadership skills of lieutenants and captains at that facility.

It is also undisputed that Respondent's corporate headquarters developed a comprehensive process to analyze the leadership qualities of all of its lieutenants and captains, including the ones at Turkey Point. Headquarters put together instructions for Turkey Point's upper management to follow and forms to use in completing the first annual review under this Leadership Effectiveness Program ("Program") in January and February 2010.

It is undisputed that, based on the first round of reviews under the Program, the alleged discriminatees were in the bottom 20% of lieutenants and captains at Turkey Point, which meant they were in the "red zone" and subject to further review by upper management for possible termination. Mareth, MacDonald and Rodriguez conducted the further review dictated by the Program established by corporate headquarters and, ultimately, the alleged discriminatees and a number of other supervisors were terminated based on their poor reviews. In addition, as explained in detail above, Respondent also terminated Mack because of inappropriate conduct towards the client's security manager.

It is well established that an employer may rebut a prima facie showing of discrimination by demonstrating that other employees who were not engaged in protected activity were terminated for the same reason as the alleged discriminatees and/or that other employees who were engaged in similar protected activity as the alleged discriminatees were not terminated. As the Board has stated:

Perez was discharged as part of a staff reduction of probationary employees prompted by business reasons. There is no evidence or

contention that the general staff reduction was unlawfully motivated. Further, it is undisputed that Perez engaged in multiple incidents of misconduct and poor performance, several of which generated complaints from his coworkers. Additionally, other buffet cooks who had not engaged in union activity and whose performance, although flawed, was not as deficient as that of Perez were also discharged as part of the staff reduction. Accordingly, we find that the Respondent has met its burden of showing that it would have discharged Perez even in the absence of union activity.

...

[T]he judge failed to consider that Perez's discharge occurred in the context of a general reduction in staff in which the Respondent sought to select for discharge its poorest performing employees.

Palms Hotel and Casino, 344 NLRB 1363, 1365-1366 (2005); *see also Krystal Enterprises, Inc.*, 345 NLRB 227, 230 (2005) (decision to lay off alleged discriminatee not unlawful because it was part of a plantwide layoff of about 80 employees and there was no claim that this layoff was unlawfully motivated or anything other than a necessary response to declining sales and revenue); *Smithfield Foods, Inc.*, 347 NLRB 1225, 1231-1232 (2006) (evidence that respondent has terminated employees who had not engaged in protected activity for similar misconduct rebutted prima facie showing of discrimination).

In this case, in addition to the alleged discriminatees, Respondent terminated three other individuals for failing the leadership effectiveness review. Except for some isolated testimony regarding one of them, General Counsel did not offer any evidence that the other individuals terminated as a result of the review ordered by Respondent's corporate headquarters engaged in concerted, protected activities. As such, individuals who were not engaged in the same, alleged protected concerted activities as the alleged discriminatees were terminated for the same reason, a fact that rebuts any prima facie finding of discrimination.

Moreover, it is undisputed that other employees and lieutenants regularly raised similar issues as those allegedly raised by the alleged discriminatees. There is no allegation that Respondent terminated or otherwise took any detrimental employment action relative to any of those other individuals for engaging in such conduct. This is another fact that rebuts any prima facie showing of discrimination in this case.

In conclusion, the undisputed evidence shows that Respondent goes to great lengths to encourage all employees to raise virtually any and all issues of concern. It is also undisputed that the alleged discriminatees did so for many years without any retaliation by Respondent. It is inconceivable that, out of the blue, Respondent suddenly terminated them for engaging in the same type of conduct, conduct in which Respondent encouraged them to engage. As such, the Complaint should be dismissed.

C. The Government Seeks A Remedy To Which It Is Not Entitled (Response to Exceptions 19-21).

In addition to the standard remedies in such cases, General Counsel in this case also seeks an order requiring Respondent to reimburse the alleged discriminatees "amounts equal to the difference between taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no discrimination." (Amendment to Consolidated Complaint at 1-2.) Respondent objects to the requested remedy on the basis that there is no provision for such a remedy in the Act. Further, as General Counsel conceded at the Hearing, there is no precedent for such a remedy in past Board decisions. (Tr. at 28-29.) As such, assuming, arguendo, the Board concludes that Respondent unlawfully terminated the alleged discriminatees, it is respectively requested the Board refuse to award the requested remedy.

IV. CONCLUSION

For the foregoing reasons, the Exceptions should be overruled, the ALJ's Decision and Recommended Order should be adopted in its entirety and the Complaint should be dismissed.

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Certificate of Service

On September 7, 2011, the foregoing was filed electronically and a copy served by way of electronic mail on Shelley B. Plass, Counsel for the Acting General Counsel, at Shelley.Plass@nlrb.com; Thomas Frazier at tomfrazier@gmail.com; and Cecil Mack at cecilmack3@gmail.com.

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