

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

**WINGATE MANAGEMENT, LLC/
BUFFALO HOUSING ASSOCIATES
Employer**

and

Case 03-RC-081746

**LABORERS INTERNATIONAL UNION
OF NORTH AMERICA, LOCAL 161
Petitioner**

DECISION AND DIRECTION OF ELECTION

Wingate Management, LLC/Buffalo Housing Associates, the Employer, is a property management company. It manages approximately 188 rental units located on ten properties in Buffalo, New York. The Employer employs a maintenance staff of three building cleaners (“cleaners”), one maintenance mechanic (“mechanic”), and one maintenance superintendent (also referred to as maintenance supervisor in Employer documentation pertaining to the position)¹ who service and maintain the Employer’s properties.² The Employer has an office located in Buffalo which is staffed by a site manager, an assistant site manager, and a leasing agent. The Employer’s Buffalo operations are overseen by a regional manager based in Adams, Massachusetts.

The Petitioner seeks to represent a unit of all maintenance employees, including the cleaners and mechanics, employed by the Employer in Buffalo, New York. The sole issue in this proceeding is whether the maintenance superintendent is a supervisor within the meaning of

¹ The parties were unable to stipulate at the hearing as to whether the position title is maintenance superintendent or maintenance supervisor.

² At the time of the hearing, the Employer employed three cleaners: Jason Rich, Joseph Tada, and Mirko Lazarevic; one mechanic, Fernando Mendoza; and one maintenance superintendent, Jeffrey Yaris. A second maintenance mechanic, Christopher Grossman, resigned on May 24, 2012, leaving a vacancy.

Section 2(11) of the Act. The Petitioner contends the position is not supervisory and should be included in the bargaining unit. The Employer contends that the maintenance superintendent is a supervisor within the meaning of the Act and should be excluded from the bargaining unit.

As discussed below, based on the record and relevant Board law, I find that the maintenance superintendent is a supervisor within the meaning of Section 2(11) of the Act and thus should be excluded from the petitioned-for unit.

Background

The Employer's site manager, Ibrahim Alami, is the highest-ranking official at the Employer's Buffalo facility, earning \$18.50 per hour. Immediately below him in the Employer's managerial hierarchy is the assistant site manager, who earns \$16.33 per hour. Maintenance Superintendent Jeff Yaris has been employed by the Employer since 2006. He began his employment as a maintenance mechanic, and held that position until October 2007 when he was promoted to maintenance superintendent. The promotion was accompanied by a wage increase. Yaris currently earns \$18.15 per hour. The record reveals that one cleaner is paid \$11.70 per hour while another cleaner is paid \$12.00 per hour. The record does not disclose the wage rates of the other maintenance employees. As the maintenance superintendent, Yaris oversees the cleaners and mechanics. During business hours, residents frequently call or walk into the office to report maintenance problems ("work orders") to the office staff. The office staff obtains a description of the problem from the resident and calls it in to Yaris. Yaris then assigns the work order to a maintenance employee.

The maintenance staff works predominantly in the field, traveling between the Employer's ten properties to perform, in the case of the cleaners, janitorial services, or, in the case of the mechanics, maintenance and repair services. The maintenance staff performs a wide

variety of duties including, but not limited to, cleaning and painting rental units (“apartment turnovers”), fixing leaks, responding to complaints about alarms going off, repairing clogged toilets, checking and fixing boilers, shoveling snow, and removing graffiti from the Employer’s properties. The maintenance superintendent also spends much of his work time in the field, traveling between the Employer’s buildings reviewing the work performed by both the maintenance staff and outside contractors at the Employer’s properties.³ Yaris also assists the mechanics in performing their work when they encounter a problem they cannot resolve.⁴

There is a maintenance shop located in one of the Employer’s buildings where tools and parts are housed. The shop can be accessed by maintenance employees at any time. Yaris reported that he recently built an office for his own use in the shop area which houses filing cabinets, a desk, and a telephone. Yaris testified that he did not seek permission from the Employer to build the office but rather determined that it was necessary because he needed a place to organize files, paperwork, and order supplies.

Board Law

Section 2(11) of the Act defines a statutory supervisor as any individual with “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.” It is not required that the individual have exercised any of the powers

³ Yaris testified that the Employer recently decided to use its maintenance staff to perform much of the work for which it had previously used outside contractors. However, there are still instances where the Employer would employ outside contractors; for example, if the Employer lacked the necessary parts or tools to address an issue, or its staff did not have the necessary skills to remedy an issue. Yaris testified regarding two such instances, one involving a boiler replacement and another involving a carbon monoxide detector.

⁴ The record does not disclose what percentage of his time Yaris spends performing each type of work.

enumerated in the statute, rather, it is the *existence* of the power that determines whether the individual is a supervisor. Arlington Masonry Supply, Inc., 339 NLRB 817, 818 (2003); California Beverage Co., 283 NLRB 328 (1987). Moreover, a person needs to possess only one of the specific criteria listed or the authority to effectively recommend, as long as the performance of that function is not routine but requires the use of independent judgment. Fred Meyer Alaska, Inc., 334 NLRB 646, 647 (2001). 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. 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. Oakwood Healthcare, Inc., 348 NLRB 686, 693 (2006).

The burden to prove supervisory authority rests with the party asserting it. Oakwood Healthcare, supra at 687, citing NLRB v. Kentucky River Community Care, 532 U.S. 706, 713 (2001). Any lack of evidence in the record is construed against the party asserting that such status exists. Elmhurst Extended Care Facilities, 329 NLRB 535, 536 (1999). The Board has also long recognized that purely conclusory evidence is not sufficient to establish supervisory status. Volair Contractors, 341 NLRB 673, 675 (2004).

Application of Board Law to this Case

In reaching the conclusion that the maintenance superintendent/maintenance supervisor is a supervisor within the meaning of Section 2(11) of the Act, I rely on the following analysis and record evidence.

A. Hiring

The authority to hire or to effectively recommend hiring, utilizing independent judgment, is itself sufficient to confer supervisory status. Fred Meyer Alaska, Inc., 334 NLRB 646, 647 (2001); Union Square Theatre Management, 326 NLRB 70, 71 (1998). The authority to effectively recommend generally means that the recommended action is taken without independent investigation by superiors, and not simply that the recommendation is ultimately followed. Children's Farm Home, 324 NLRB 61, 61 (1997). The record clearly establishes that Yaris effectively recommended at least three individuals for hire: Fernando Mendoza, Mirko Lazarevic, and Jeffrey Yaris, Jr.

Yaris testified that about a year ago, there was an opening in the maintenance department. According to Yaris, the Site Manager at the time, Victor Barberio, was busy and asked Yaris to review the applications. Yaris reviewed about fifteen applications, selected about six applicants who he believed were qualified, and told Barberio that “we need to call them in.” Barberio told Yaris to call the potential employees in to determine if they were good candidates for the job. Yaris scheduled interviews with each of the six employees and he alone interviewed them. He testified that when each of them arrived, he took them to several of the Employer’s buildings, showed them around, and then took them to the shop and questioned them on their knowledge of tools and parts. He then determined, based on the meeting, whether the individual was qualified. Yaris testified that if he determined an applicant was not qualified, either before or after an interview, he would mark the application a “no go” and eventually discard it. One of the candidates Yaris interviewed was Fernando Mendoza. Yaris testified that after the interview, he forwarded Mendoza’s application to Site Manager Barberio along with a positive recommendation. Mendoza’s application was the only application he forwarded to Barberio with

a positive recommendation. Barberio subsequently interviewed Mendoza and he was hired by the Employer.⁵

With regard to Lazarevic, Site Manager Alami testified that the Employer had an opening for a cleaner in or around September 2011. During this time, there was no site manager. Regional Manager Bonnie Senecal testified that she communicated directly with Yaris regarding the need to fill the vacancy. Senecal advised Yaris that she had placed an advertisement in the paper but would not be physically present at the site, so she expected Yaris to review the incoming applications. She further advised him that “if he felt there was anybody worthy of the job, to sit down and question them, maybe show them around and get a feel for that person.” When Alami was hired, the cleaner vacancy was still open. The Employer received six applications for the position and Yaris reviewed them. Yaris testified that he “would review them...look at what they put down on them and what experience they have in cleaning and that, and where they have been, and how long their employment has been with different places.”

Yaris selected three out of six applicants to interview and communicated his availability to Alami, who scheduled the interviews. The candidates met with Yaris alone; Alami did not participate in the interviews. At the conclusion of the interviews, Alami testified that Yaris selected Mirko Lazarevic to recommend for hire. Yaris testified that Lazarevic was the only applicant he recommended to Alami. Alami never interviewed Lazarevic; he simply collected copies of his license and social security card and a release to perform a background check. After Yaris recommended Lazarevic for hire and his background check was completed, Alami contacted Lazarevic and offered him the job. Nothing in the record indicates that anyone else in the Employer’s supervisory hierarchy interviewed Lazarevic or otherwise reviewed Yaris’s hiring recommendation.

⁵ Yaris did not participate in the site manager’s interview of Mendoza.

The record further reveals that in or around October 2011, there was a temporary opening for a cleaner while one of the maintenance employees was out due to an injury. Yaris recommended his son, Jeffrey Yaris, Jr., for the position. Alami testified that Jeffrey Yaris, Jr. was hired based on his father's recommendation. There was no interview process and the position was never advertised. Yaris, Jr. was hired and worked for the Employer for approximately four months. Alami testified that Yaris, Jr. was hired on the basis of Jeff Yaris, Sr.'s recommendation.

The record establishes that Yaris possesses, and has exercised, the authority to effectively recommend a candidate for hire. In all three cases, his recommendation was adopted. In two cases, his recommendation was adopted without any further interview by any Employer representative. In contrast to the facts in cases such as The Door, 297 NLRB 601 (1990) and Bowne of Houston, 280 NLRB 1222 (1985), in which the Board found that an employee's mere screening or participation in the hiring process did not constitute effective recommendation to hire, the record in this case clearly establishes that Yaris's role in the hiring process was more significant. In The Door, the putative supervisor's role in the hiring process was limited to screening resumes, making recommendations with respect to technical qualifications, and participating, along with others, in applicant interviews. In Bowne of Houston, the Board found that an assistant foreman did not make hiring decisions or effective hiring recommendations because, although he interviewed applicants and advised management of the experience of at least one of them, management also interviewed all applicants and had final hiring authority.

Here, management did not interview all applicants but instead relied on Yaris to screen applicants, interview them and assess their suitability for the position. In two instances, Yaris was the only one to interview the candidate. In the sole instance in which a site manager had also

interviewed the candidate, the candidate was also interviewed by Yaris. In each instance, Yaris's hiring recommendation was followed. Moreover, during the period of time in which there was no site manager, the regional manager communicated directly with Yaris regarding the open position and directed him to interview and evaluate candidates. No other manager or supervisor, including the assistant site manager, was involved in the interview process.

B. Assign

Under Board law, the authority to “assign” refers 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 ... In sum, to ‘assign’ for purposes of Section 2(11) refers to the ... designation of significant overall duties to an employee, not to the ... ad hoc instruction that the employee perform a discrete task.” Croft Metals, Inc., 348 NLRB 717, 721 (2006), citing Oakwood Healthcare, supra at 690. The authority to make an assignment, by itself, does not confer supervisory status— the putative supervisor must also use independent judgment when making such assignments. Oakwood Healthcare, supra at 692-693. This means that the individual must exercise authority that is free from the control of others, and make a judgment that requires forming an opinion or evaluation by discerning and comparing data. Id.

I find that Yaris' assignment of work to the maintenance staff is supervisory. The maintenance staff works mainly in the field. Yaris meets with the employees each morning at the office where they pick up their keys and radios and Yaris distributes work orders. Cleaners are assigned to several different buildings where they spend a specific amount of time each day cleaning the Employer's facilities. Yaris testified that the assignment of cleaners to specific buildings is based on a schedule that was created before he was hired by the Employer. Yaris,

however, assigns cleaners to work at different buildings as needed, for example, when there are large and/or heavy items which cannot be moved by one person alone, or apartment turnovers that require cleaning and painting be completed in a limited time frame. Employees are assigned to an on-call schedule for calls that come in outside regular business hours.⁶ The schedule, which is created by Yaris, operates on a rotation in order of employees' seniority. There is no evidence that the judgment exercised by Yaris in assigning work orders and other tasks to employees or in scheduling employees for on-call is "dictated or controlled by detailed instructions." Rather, Yaris testified that he has the discretion to elect how and when to schedule employees and has chosen to use the existing method.

The assignments made by Yaris represent "significant overall tasks" performed by the maintenance staff. Yaris is not simply responsible for assigning discrete portions of overall job duties to the maintenance staff; he assigns them the bulk of their duties. As noted above, the work performed by the maintenance staff varies greatly in type, complexity, and urgency. Yaris exercises discretion and independent judgment in determining both the order in which jobs are performed and who will perform them; in doing so, he controls whether an employee spends their work day moving furniture, painting apartments, building screens, investigating a gas leak, repairing appliances, fixing a clogged toilet, or performing some other task. There is no indication in the record that Yaris's determinations are subject to review or control by any supervisor or manager, and in this regard, they involve independent judgment. With regard to the priority and the order of the work to be performed, Yaris indicated that there are almost always work orders remaining at the end of the day that will not be addressed until the following day. In this respect, Yaris determines which tasks are more pressing and which ones can wait. In addition, Yaris indicated that he tries to prioritize work orders so as to avoid receiving a call

⁶ Both mechanics and the maintenance mechanics staff the on-call schedule.

during non-business hours that would require the on-call employee to respond and come in to work.

Although Yaris testified vaguely that he considers the maintenance employees “all pretty equal,” his testimony regarding the employees’ relative skills and characteristics contradict that statement.⁷ For example, Yaris testified that at some point he made a determination that cleaner Mirko Lazarevic was not performing his job adequately. To address this, he assigned cleaner Joseph Tada to work with Lazarevic and show him how to do the job properly. When questioned as to his reason for choosing Tada instead of building cleaner Jason Rich, Yaris replied that he felt Tada was “more of an instructor” and that he had more “educational capacity.”

The Petitioner argues in its post-hearing brief that Yaris’s assignment of Tada to assist Lazarevic does not constitute the exercise of a supervisory function, but is more accurately characterized as “occasional switching of tasks,” which the Board in Croft Metals found did not “implicate the authority to assign as that term is described in Oakwood Healthcare.” Petitioner fails to address, however, that the very definition of ‘assign’ set forth in Oakwood Healthcare and reiterated in Croft Metals plainly states that the term refers to the act of “designating an employee to a place ... appointing an employee to a time ... or giving significant overall duties...” As described above, Yaris distributes work orders (designating employees to a place), creates the on-call schedule (appointing employees to a time), and distributes work orders which comprise the bulk of employees’ overall tasks. Thus, in finding that Yaris exercises the authority to assign, I do not rely solely on the one instance addressed by the Petitioner, but rather on the entirety of the record which establishes that Yaris possesses the authority to exercise all three functions enumerated in the Board’s definition of the term “assign.”

⁷ Additionally, I note that it is unclear as to which employees Yaris was referring to when he stated that the maintenance employees were all “pretty equal,” as he used the term “my guys,” which could refer to all maintenance staff employees, or the cleaners or mechanics, separately.

Furthermore, Yaris has discretion to determine whether and when specialized help or knowledge is necessary. For example, he testified that there was a repeat problem with a carbon monoxide alarm going off in a resident's apartment. Maintenance mechanic Grossman addressed the issue and subsequently referred it to Yaris for further attention, which Yaris attributed to Grossman's inexperience. As a result of his inspection, Yaris determined it was necessary to enlist the help of an outside contractor to measure the carbon monoxide levels in the unit. Yaris made this recommendation to Site Manager Alami, who gave the approval for Yaris to contact and obtain the services of the outside contractor. In doing so, Yaris made an effective recommendation to hire the outside contractor.

In Croft Metals, the Board found that the lead persons at issue were not supervisors because they did not prepare employees' posted work schedules, appoint employees to the production lines, departments, shifts, or any overtime periods, or give significant overall duties to employees. In contrast, Yaris creates the on-call schedule, assigns employees to specific Employer buildings and assigns them specific work orders.⁸ Moreover, in Croft Metals the Board, in finding the leads to be nonsupervisory, noted that "if an employee quits, the lead persons must simply accept a replacement selected and hired by others to fill in the crew void." Here, the record demonstrates that Yaris has made effective recommendations for hire in all three recent instances in which employees have been hired.

C. Responsibly Direct

The authority "responsibly to direct" arises "[i]f a person on the shop floor has 'men under him,' and if that person decides 'what job shall be undertaken next or who shall do it,'...provided that the direction is both 'responsible' and carried out with independent

⁸ The record does not disclose who creates the maintenance employees' regular work schedule, if one exists, or which days of the week employees generally work. The record does reveal that the maintenance staff works from 8:00 a.m. to 5:00 p.m., except that the employee who is on call for the week works 7:00 a.m. to 4:00 p.m.

judgment.” For direction to be ‘responsible,’ the person performing the oversight 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 are not performed properly.” To prove accountability, the party asserting supervisory status must show both that the putative supervisor has “the authority to take corrective action” and can potentially receive “adverse consequences” for the performance errors of other employees. Finally, the putative supervisor must also exercise independent judgment in responsibly directing the work of the employees under him. Where tasks are highly regulated, repetitive, and well known to the employees, the degree of independent judgment is reduced when directing employees in such tasks. Oakwood Healthcare, supra at 691-693; Croft Metals, supra at 721.

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. Section 2(11) contrasts “independent judgment” with actions that are “of a merely routine or clerical nature.” As such, the authority to effect a supervisory function must be independent, it must involve a judgment, and the judgment must involve a degree of discretion that rises above the “routine or clerical.” Oakwood Healthcare, supra at 693.

Yaris is held accountable for the performance of the maintenance staff. For each year since he assumed the maintenance superintendent position in 2007, Yaris’ job performance evaluations have referenced his ‘direction’ of the maintenance staff. For example, his 2008 evaluation stated that he “does a very good job coordinating the field staff and holding them accountable” and that he gave “clear guidance and feedback” to the field employees. His 2010

evaluation stated that he “works well with the staff and does a very good job at directing them day to day,” and “holds the rest of the field staff and contractors to the same standards.”⁹

Yaris has the authority to take corrective action for the performance errors of the maintenance employees. Site Manager Alami testified that Yaris has the authority to discipline employees. Yaris testified that, although he has never formally disciplined an employee, he has spoken to employees regarding the inadequacy of their performance and how long it has taken them to complete particular jobs without being directed to do so by anyone else. In addition, Yaris has taken corrective action outside the confines of formal discipline to correct employees’ performance problems. As discussed above, upon making a determination that cleaner Lazarevic was not meeting performance expectations, Yaris assigned cleaner Tada to work with Lazarevic and show him how to do the work properly. Yaris also testified that on two or three occasions in the past six months, Alami asked Yaris to accompany him to an apartment where a work order had not been completed properly and that, in these cases, Alami was “letting [him] know to let that person know to correct that problem.”

Furthermore, Alami stated that he will hold Yaris accountable for the performance of the employees in the maintenance department. Specifically, he testified that he had considered disciplining Yaris for an incident that occurred shortly before the hearing in which a work order was not timely completed by the maintenance employee to whom it was assigned. The maintenance employee claimed he had notified Yaris at the time the task was assigned that he would not have enough time to complete the job and someone else should be dispatched; however, no other employee was dispatched. Yaris testified that he asked the employee the next day whether he had completed the work order, and the employee replied that he had not gotten to

⁹ The record is unclear as to whether positive performance evaluations could result in wage increases or whether all employees received annual cost-of-living increases unassociated with their evaluations.

it and would do it first thing that day. When asked to elaborate specifically on how Yaris would be held responsible, i.e., what sort of job action might be taken, Alami testified that only one such incident had arisen during his employment and he had not yet had an opportunity to discuss it with Yaris, so he was not sure what kind of action would be taken.¹⁰

The record establishes that Yaris plays a significant role in reviewing the maintenance employees' work. Alami testified that has never personally overseen any of the work done by the maintenance staff. Specifically, he indicated that he does not possess the skills or the competence to assess the maintenance staff's work and that he relies on Yaris to do so. Yaris testified that he reviews employees' daily logs for accurate and efficient use of time and, if he notes any problems, speaks to those employees himself.¹¹ Yaris testified that Alami spends time in the field "when we need him," while the previous site manager spent approximately one to two hours in the field about three times per week.¹² As to his experience, Alami testified that he is "not a skilled maintenance mechanic and would not be able to make determinations in the field." Alami added that when he completes annual performance evaluations, he will solicit the assistance and knowledge of the maintenance superintendent with regard to the work performance of the maintenance employees.¹³

The Petitioner notes in its post-hearing brief that for direction to be responsible, a putative supervisor 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." Where there is no evidence establishing that a lead person is held accountable for

¹⁰ Alami testified that Yaris had been out on vacation since the incident occurred.

¹¹ The record reflects that Alami reviews the daily logs after Yaris has done so.

¹² Later in his testimony, when asked about the maintenance experience of the former site manager, Yaris stated that he had "never seen [the site manager] in the field doing anything."

¹³ At the time of the hearing, Alami, who was hired in August 2011, had not yet completed any employee performance evaluations.

his/her direction of other employees, the Board will not find responsible direction. Evidence of actual accountability must be present to prove responsible direction. Alstyle Apparel, 351 NLRB 1287, 1287 (2007); Golden Crest Healthcare Center, Inc., 348 NLRB 727, 730-732 (2006). Here, however, Yaris is clearly held accountable for the work performance of the maintenance staff, as evidenced by both his performance evaluations praising his oversight of the other employees, and by Alami's testimony that he contemplated disciplining Yaris as a result of an incident in which a job was not promptly completed by one of the mechanics. The mere fact that Alami had not yet decided on a course of action does not remove the possibility that, as confirmed by Alami, Yaris may yet be subject to adverse consequences as a result of the incident.

Finally, while not dispositive,¹⁴ I note that the job description for the maintenance superintendent position includes the following:

ESSENTIAL JOB FUNCTIONS AND RESPONSIBILITIES:

- Prioritize and delegate work assignments and work orders and establish work schedules for maintenance, grounds and cleaning staff.
- Coordinate emergency maintenance on-call schedule, and post and distribute emergency telephone numbers.
- Supervise, review, evaluate and counsel employees in conjunction with the directives of the Property and/or Assistant Site Manager.
- Insure that maintenance personnel understand and comply with Worker's Compensation and OSHA safety rules.
- Make certain that maintenance personnel understand and adhere to all Fair Housing Laws.

Thus, the job description is consistent with the conclusion that Yaris exercises supervisory authority in the assignment of work to the maintenance employees and that he is responsible for the direction of their work.

¹⁴ See Training School at Vineland, 332 NLRB 1412, 1416 (2000), in which the Board noted that "job descriptions or other documents suggesting the presence of supervisory authority are not given controlling weight.

D. Secondary Indicia

Finally, there is evidence of secondary indicia to further support Yaris's supervisory status. The Board has held that secondary indicia of supervisory status are not dispositive without evidence of at least one statutory indicator of such status. Juniper Industries, 311 NLRB 109, 110 (1993). Here, such primary indicia of supervisory status are present. In addition, Yaris is paid significantly more than the employees he supervises and more than the assistant site manager. Yaris has his own office, issues equipment to employees and signed an employee disciplinary warning form as "supervisor."¹⁵ Thus, the Employer treated and held Yaris out to the employees as a supervisor. Having found that Yaris possesses supervisory authority with regard to hiring, assignment, and responsible direction, I also find that this secondary evidence supports the conclusion that Yaris exercises Section 2(11) supervisory authority.

Accordingly, I conclude that the maintenance superintendent/maintenance supervisor is a supervisor within the meaning of Section 2(11) of the Act and should be excluded from the petitioned-for unit.

CONCLUSION AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I find and conclude as follows:

1. The hearing officer's rulings 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 herein.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

¹⁵ Although Yaris signed a warning of a former employee on the line marked "supervisor's signature," the former site manager also signed the warning, and Yaris testified he believed he was present at the meeting where the notice was issued as a witness, not as a supervisor.

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.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All maintenance employees, including all building cleaners and maintenance mechanics employed by the Employer at its Buffalo, New York properties; excluding the site manager, assistant site manager, leasing agent, maintenance superintendent/maintenance supervisor, guards, and all other supervisors as defined in the Act.

There are approximately 4 employees in the bargaining unit found appropriate herein.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit, as described above. The employees will vote whether or not they desire to be represented for collective bargaining purposes by: **LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 161**. 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.

A. 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.

B. 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 **July 6, 2012**. 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,¹⁶ by mail, by hand or courier delivery, or by facsimile transmission at (716) 551-4972. 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 **four** 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.

C. Notice 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 an employer from filing objections based on non-posting 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

¹⁶ 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. When the E-File page opens, go to the heading **Regional, Subregional and Resident Offices** and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the eligibility list, and click the Submit Form button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's web site, www.nlr.gov.

the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington, DC by 5 p.m. EDT **July 13, 2012**. The request may be filed electronically through the Agency’s web site, www.nlr.gov,¹⁷ but may not be filed by facsimile.

DATED at Buffalo, New York this 29th day of June, 2012.

/s/ Michael J. Israel
MICHAEL J. ISRAEL
Acting Regional Director
National Labor Relations Board, Region 3
130 South Elmwood Avenue, Suite 630
Buffalo, New York 14202-2465

¹⁷ To file the request for review electronically, go to www.nlr.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Board/Office of the Executive Secretary** and click on the “File Documents” button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the “Accept” button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the Submit Form button. Guidance for E-Filing is contained in the attachment supplied with the Regional Office’s initial correspondence on this matter and is also located under “E-Gov” on the Board’s web site, www.nlr.gov.