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G4S Regulated Security Solutions, a Division of G4S Secure Solutions (USA) Inc. f/k/a the Wackenhut Corporation and Thomas Frazier and Cecil Mack. Cases 12–CA–026644 and 12–CA–026811

September 28, 2012

DECISION AND ORDER REMANDING

BY CHAIRMAN PEARCE AND MEMBERS HAYES
AND BLOCK

On June 27, 2011, Administrative Law Judge William N. Cates issued the attached decision. The Acting General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the Acting General Counsel filed a reply.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings, and conclusions only to the extent consistent with this Decision and Order Remanding.

The Respondent discharged Charging Parties Thomas Frazier and Cecil Mack, both lieutenants in its security force at Florida Power & Light’s Turkey Point, Florida nuclear power plant. The Respondent contends in this case that Lieutenants Frazier and Mack are statutory supervisors who possess the authority to discipline, to promote (through evaluations), to assign, and responsibly to direct. Agreeing with each of these contentions, the judge concluded that the Respondent did not violate the Act by discharging them. For the reasons stated below,¹ we find that Frazier and Mack are statutory employees protected by the Act. Accordingly, we reverse the judge and remand the case to him to determine whether their dis-

¹ In 2003, the Board certified the International Union, Security, Police and Fire Professionals of America as the representative of a unit of Turkey Point sergeants. Shortly thereafter, the Respondent unilaterally eliminated the newly represented sergeant classification and transferred some of the work performed by that bargaining unit to nonunit lieutenants. The Board found that these actions violated Sec. 8(a)(5) and (1) in *Wackenhut Corp.*, 345 NLRB 850 (2005). The Board held that the newly created lieutenants to whom the Respondent had transferred the unit work were not statutory supervisors, specifically rejecting the Respondent’s claim that they disciplined, or directed the work of, the guards with the requisite independent judgment. To the extent that the Acting General Counsel argues that the Board is bound by this earlier decision, we need not pass on that argument because we find that the Respondent has failed to carry its burden of proving supervisory status based on the record in the present case.

charges violated Section 8(a)(1) of the Act as alleged in the complaint.

I. ANALYSIS

A. Applicable Principles

Section 2(11) of the Act defines a “supervisor” as

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.

To establish that Frazier and Mack are supervisors, the Respondent must prove by a preponderance of the evidence: (1) that they held authority to engage in any one of the 12 enumerated supervisory functions listed above; (2) that their “exercise of such authority [was] not of a merely routine or clerical nature, but require[d] the use of independent judgment”; and (3) that their authority was held “in the interest of the employer.” See, e.g., *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 710–713 (2001); *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). The Respondent can prove that they had the requisite supervisory authority either by demonstrating that they actually performed a supervisory action or by showing that they effectively recommended that it be done. *Oakwood*, above. Further, “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.” *Id.* at 692–693. 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.” *Id.* at 693.

Because the Respondent bears the burden of proving supervisory status, the Board must hold against the Respondent any lack of evidence on an element necessary to establish supervisory status. See, e.g., *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1048 (2003). The Respondent has not proven supervisory status where the record evidence is inconclusive or otherwise in conflict. See, e.g., *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Likewise, “mere inferences or conclusory statements, without detailed, specific evidence, are insufficient to establish supervisory authority.” *Alternate Concepts, Inc.*, 358 NLRB No. 38, slip op. at 3 (2012); see also *Avante at Wilson, Inc.*, 348 NLRB 1056,

1057 (2006); *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). Also, job descriptions, job titles and similar “paper authority,” without more, do not demonstrate actual supervisory authority. *Golden Crest*, supra.

Applying these principles here, we find that the evidence in this case falls well short of meeting the Respondent’s burden of proving that the lieutenants possess any indicia of supervisory authority.

B. Authority to Discipline

Based on Project Manager Michael Mareth’s testimony, the judge found that lieutenants can issue any type of discipline, except termination, without consulting a supervisor.² The judge further found, based on Mareth’s testimony, that lieutenants had certain discretion when issuing discipline. For instance, they can decide not to issue formal discipline or can choose, for certain infractions, which level of discipline to issue. The judge also observed that the Respondent introduced eight disciplinary notices issued by lieutenants. The judge acknowledged that none of the eight disciplinary citations was issued by Frazier or Mack, and that there is no evidence that either Frazier or Mack ever disciplined a security officer in their approximately 7 years as lieutenants. In addition, none of the lieutenants who signed the disciplinary forms testified. Nevertheless, the judge concluded that the lieutenants exercised the authority to discipline with independent judgment. For the following reasons, we disagree.

We find that Mareth’s testimony is insufficient to carry the Respondent’s burden. Mareth, as the most senior manager in charge of security at the facility, is several levels removed from the lieutenants in the Respondent’s hierarchy. And there is no record evidence that he ever served as a lieutenant. Perhaps not surprisingly, Mareth’s testimony consists chiefly of conclusory responses to leading questions by counsel.³ Mareth did not describe what procedures, protocols, criteria, or other factors govern lieutenants’ decisions in this area. See, e.g.,

Lynwood Manor, 350 NLRB 489, 490 (2007). In fact, Mareth did not testify to a single specific instance in which a lieutenant had used discretion or independent judgment regarding discipline. See, e.g., *Avante at Wilson, Inc.*, supra, 348 NLRB at 1057 (rejecting claim of supervisory status absent testimony on specific examples). Such generalized testimony is insufficient to establish supervisory status. See *Alternate Concepts*, supra, 358 NLRB No. 38, slip op. at 3. Accord: *Oil, Chemical & Atomic Workers v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971) (“[W]hat the statute requires is evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority.”), cert. denied 404 U.S. 1039 (1972).

Contrary to the judge, we find that the eight disciplinary notices admitted into evidence do not shed any additional light on the lieutenants’ disciplinary authority. The notices refer to, and were issued pursuant to, the Respondent’s attendance and progressive discipline policies, which spell out in detail the level of discipline to be imposed for various offenses.⁴ Moreover, there is simply no detailed, specific evidence in the record as to what role the lieutenants who signed those notices played in making the decision to discipline the security officers. Such evidence could have been provided by the lieutenants themselves, but the Respondent failed to call any of them to testify. Thus, the record does not establish, for example, whether lieutenants themselves decided to discipline an employee at a certain level and then prepared and signed the disciplinary notices based on that decision, or whether they simply signed and delivered already-prepared notices at the behest of higher-ranking supervisors. In fact, there is some evidence in the record that suggests the latter possibility. One of Frazier’s performance evaluations explicitly instructed him to consult the detailed corporate progressive discipline policy and to get a captain’s review before issuing discipline.⁵

² The judge generally credited Mareth and discredited Frazier where the latter’s testimony was contradicted by others or called into question by documentation. Mack’s testimony was less extensive than Frazier’s but, in all important respects, was consistent with it. Consequently, in rejecting Frazier’s testimony as he did, the judge implicitly discredited Mack’s like testimony as well. See, e.g., *Miceli & Oldfield, Inc.*, 357 NLRB No. 49, slip op. at 1 fn. 2 (2011) (decision as a whole shows judge discredited charging party). No party has excepted to the judge’s credibility findings. Accordingly, we do not rely on those portions of Frazier’s or Mack’s testimony that the judge discredited.

³ For example: “Q. Do lieutenants have any role in disciplining security officers? A. Yes, they do.” “Q. Do lieutenants have any—exercise any discretion in issuing discipline under this policy? A. Yeah, they have the ability to do that, yes.”

⁴ The attendance policy contains 15 detailed pages of directives regarding absences and the appropriate discipline for various numbers of absences. The progressive discipline policy consists of 11 pages of equally detailed guidelines covering a wide array of other offenses.

⁵ As our dissenting colleague observes, some infractions could be punished at different levels, the unsatisfactory performance provision of the discipline policy allows for some discretion “in the opinion of management,” and the policies are characterized as “guidelines.” He also points to the “Supervisory Requirements” document signed by Frazier and Mack indicating they had the authority to use progressive discipline. But such “paper authority,” without more, is insufficient. See, e.g., *Golden Crest*, supra. And, as discussed, there is no “more” here, as the record is devoid of evidence that the lieutenants, in actual practice, exercise independent judgment in disciplining guards.

Further, our dissenting colleague’s reliance on *Oak Park Nursing Care Center*, 351 NLRB 27, 28–29 (2007), is misplaced. In that case, the putative supervisors testified, and the Board majority found, that

C. Authority to Promote (Through Evaluations)

The judge found that only lieutenants regularly prepare written evaluations of security officers and that the Respondent utilized these evaluations in its promotion policy. Specifically, the Respondent's promotion policy prescribed a five-stage process leading to promotion: (1) a written examination; (2) oral questions and an interview by a multimember promotion board; (3) review of performance appraisals, attendance records, achievements, and discipline history; (4) review of educational background; and (5) promotion board review of candidates and selection of a finalist, whose promotion required the concurrence of the project manager. The judge further found based on Mareth's testimony that, under this policy, at least four unnamed security officers had their promotions "impacted" by their lieutenant's evaluations. He observed that Frazier acknowledged that a bad evaluation could impact a security officer's promotion possibilities. Based on this evidence, the judge concluded that the lieutenants independently performed evaluations of their direct subordinates that led to promotions and, by so doing, exercised the power to promote. For the reasons stated below, we disagree.

Evaluating employees is not one of the 12 supervisory functions listed in Section 2(11). Authority to "promote" is. To tie the lieutenants' evaluations of the guards to Section 2(11) authority, the Respondent was required to establish that lieutenants' evaluations affected guards' promotion prospects. In other words, under Board law, an evaluation is evidence of supervisory status only if the evaluation, by itself, affects an employment term or condition. See *Pacific Coast M.S. Industries*, 355 NLRB 1422, 1423 fn. 13 (2010); *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 (1999); *Northcrest Nursing Home*, 313 NLRB 491, 498 (1993). The judge failed to acknowledge or apply this standard.

Applying that standard, we find that the evidence in this record does not establish that a lieutenant's evaluation, by itself, affects a guard's promotion. It is undisputed that consideration of evaluations was only one step in a multi-layered formal promotion procedure. That procedure did not attach any particular weight or significance to evaluations. Instead, they were just one piece of

they alone decided whether the misconduct at issue warranted a verbal warning or written documentation. The record here does not establish that the lieutenants exercise similar discretion.

Our dissenting colleague also argues that our decision today is out of step with other decisions finding that individuals with similar job titles at other nuclear facilities are supervisors. He likewise charges that, based on our decision, none of the Respondent's managers could exercise the authority to discipline. We are deciding only this case, however, and doing so based on the record the parties themselves created.

data that had to be assessed in the third step of the promotion board's review of candidates. Mareth did testify that, in accordance with the promotion procedures, evaluations had been "considered" and, in a few cases, had an "impact" on guard promotions. But the Respondent failed to clarify this generalized testimony. Similarly, Frazier's testimony, under cross-examination by the Respondent's counsel, that a guard who repeatedly received poor evaluations "might not" be promoted amounts to little more than speculation on his part. Accordingly, we find that the Respondent has failed to carry its burden to prove that a lieutenant's evaluation, by itself, affects a security guard's promotion.⁶

D. Authority to Assign

The judge also found that the lieutenants were supervisors based on their alleged authority to make assignments. Again, we disagree. It is undisputed that captains, not lieutenants, assigned guards to posts at the start of shifts. Mareth testified, without elaboration, that lieutenants could allow guards to switch such assigned posts for reasons of personal preference or for "operational reasons." Frazier testified that lieutenants could approve post switches without a captain's approval. The judge simply stated, with no supporting analysis, that this was sufficient to establish the use of independent judgment in assigning the guards.

Contrary to the judge, Mareth's and Frazier's sparse testimony does not establish that lieutenants exercised independent judgment in the assignment of unit guards. The Section 2(11) 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 an employee significant overall duties, i.e., tasks. See, e.g., *Oakwood Healthcare*, supra, 348 NLRB at 689. Even assuming that it has shown something akin to Section 2(11) assignment authority, the Respondent presented no evidence at all that lieutenants used the requisite "independent judgment" in connection with those assignments. The lieutenants' ability to allow post switches for personal reasons is clearly insufficient. See *Children's Farm Home*, 324 NLRB 61, 64 (1997) (schedule changes based on employees' expressed preferences do not demonstrate "independent judgment" to assign). Moreover, Mareth's testimony about post switches for "operational

⁶ Given our finding, we need not determine whether lieutenants exercise independent judgment in evaluating security officers.

The Respondent's reliance on *Bayou Manor Health Center*, 311 NLRB 955 (1993), and *Entergy Systems & Service*, 328 NLRB 902 (1999), is misplaced because the evaluations prepared by alleged supervisors in those cases did directly affect employees' promotions or wage increases.

reasons” was, like much of his testimony, purely conclusory. He gave no explanation, details, or specifics about what a switch for “operational reasons” might entail. Similarly, although the lieutenants could assign guards to work locations to respond to emergencies, and one could imagine that making such assignments would require independent judgment,⁷ Mareth’s testimony in this area was wholly conclusory, lacking any specific examples or details of how lieutenants actually handled emergencies. See, e.g., *Alternate Concepts*, supra, 358 NLRB No. 38, slip op. at 3 (detailed, specific evidence needed to show supervisory authority).

E. Authority Responsibly to Direct

Last, we cannot accept the judge’s finding that the Respondent established that lieutenants responsibly directed guards. In support of this argument, Mareth testified that substandard guard performance could lead to discipline of a lieutenant and that poor quality work by the guards whom a lieutenant supervised could adversely affect the lieutenant’s promotion chances. In addition, the Respondent introduced documentary exhibits recording a few instances in which lieutenants were counseled for not properly training their subordinates. Despite the lack of any specific instances in which a lieutenant had in fact been disciplined for a subordinate’s failings, the judge found that this evidence demonstrated supervisory authority.

Under *Oakwood Healthcare*, showing that a putative supervisor possesses authority “responsibly to direct” employees requires evidence that the asserted supervisor is “accountable” for subordinates’ performance. 348 NLRB at 691–692. Among other elements of proof, it must be shown that “there is a prospect of adverse consequences for the putative supervisor” if he or she does not properly direct work and take necessary corrective action. *Id.* at 692.

Mareth’s rote and conclusory testimony on lieutenant accountability fell well short of that standard. He stated that, hypothetically, lieutenants could suffer negative consequences from poor subordinate performance. He did not relate, however, any specific instances in which lieutenants had been disciplined or had their promotion chances reduced as a result of poor guard performance. See, e.g., *Lynwood Manor*, supra, 350 NLRB at 490–491 (no supervisory status absent evidence of specific instances of accountability). The Respondent’s exhibits on accountability all were warnings in which lieutenants were counseled for their own mistakes in training guards, not for the failings of the subordinates themselves. Such evidence, as a matter of law, does not show the requisite

accountability. See, e.g., *Entergy Mississippi, Inc.*, 357 NLRB No. 178, slip op. at 6 (2011) (rejecting “responsibly to direct” argument where putative supervisor was disciplined based on his own failings).⁸

II. CONCLUSION

We conclude that the Respondent has failed to carry its burden to prove that the lieutenants at issue were supervisors within the meaning of Section 2(11) of the Act. We therefore reverse the judge’s dismissal of the complaint. We shall remand the case for appropriate credibility resolutions, findings of fact, and conclusions of law on the merits of the complaint allegations that the Respondent violated Section 8(a)(1) by discharging Frazier and Mack because they engaged in protected, concerted activities.

ORDER

IT IS ORDERED that this proceeding is remanded to Administrative Law Judge William N. Cates for further appropriate action as set forth above.

IT IS FURTHER ORDERED that based on the existing record, the judge shall prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended order regarding solely the Section 8(a)(1) discharge allegations. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board’s Rules and Regulations shall be applicable.

Dated, Washington, D.C. September 28, 2012

Mark Gaston Pearce, Chairman

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting.

The Board has previously recognized that lieutenants overseeing nuclear power plant security are statutory

⁸ The Respondent contends that various secondary indicia support a finding of supervisory authority position the dissent also advances. But Board law is clear that, without sufficient proof of Sec. 2(11) primary indicia, secondary indicia do not establish supervisory authority. See, e.g., *Pacific Coast M.S. Industries*, supra, 355 NLRB at 1423 fn. 13. And, as demonstrated above, the Respondent’s conclusory, unspecific proof of primary indicia was wholly inadequate.

⁷ Frazier assumed as much in his testimony.

supervisors.¹ As first-line supervisors in a military-type security force charged with protecting these plants, they must have the authority to issue orders and to discipline subordinates who fail to carry them out. *Maine Yankee Atomic Power Co. v. NLRB*, 624 F.2d 347, 357 (1st Cir. 1980) (stating that it is “desirable and perhaps often essential that someone be in charge to call the shots.”). In this case, the Respondent plainly expected Charging Parties Thomas Frazier and Cecil Mack, as lieutenants in its security force at the Turkey Point, Florida nuclear power plant, to exercise that authority. Frazier and Mack just as plainly did not do so and even denied possessing that authority – denials the judge refused to credit. Contrary to my colleagues, I would affirm the judge’s determination that Frazier and Mack possess Section 2(11) supervisory authority to discipline employees and his resulting recommendation that the complaint, alleging that their discharges were unlawful, be dismissed.²

Frazier and Mack were Section 2(11) supervisors if (1) they held authority to engage in one of the 12 supervisory functions listed in that provision; (2) their “exercise of such authority [was] not of a merely routine or clerical nature, but require[d] the use of independent judgment;” and (3) their authority was held “in the interest of the employer.” See, e.g., *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 710–713 (2001); *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). Because discipline is one of the powers enumerated in Section 2(11), holding (in the interest of the Respondent) the authority to discipline with independent judgment was, by itself, enough to make Frazier and Mack statutory supervisors.

Along with 13 other guards, Frazier and Mack were promoted from the bargaining unit to lieutenant in 2003. The Respondent’s project manager, Michael Mareth, testified that lieutenants could impose all forms of progressive discipline, except termination, without advance

approval of a captain or other higher-ranking officer. He also explained that lieutenants, on their own, could decide whether or not to issue discipline, to let an offense go unpunished, or to use the incident as a “coaching” opportunity. Additionally, Mareth testified that, where offenses were listed at two levels of progressive discipline, lieutenants had discretion to impose discipline at either level. This credited testimony established all elements of Frazier’s and Mack’s Section 2(11) disciplinary authority, including independent judgment. See *Oak Park Nursing Care Center*, 351 NLRB 27, 28–29 (2007) (authority to issue employee counseling forms evinces Section 2(11) supervisory status, where disputed individuals had discretion to decide whether to document infraction).³

The majority, however, rejects Mareth’s testimony as too conclusory and unspecific. I do not. As shown above, Mareth’s testimony was clear and specific regarding the extent of lieutenants’ authority to discipline and the circumstances under which they could exercise statutory “independent judgment.” Further, Mareth’s testimony has ample support from other quarters. Frazier admitted that, as a lieutenant, he “had the authority to issue oral and written warnings” and that he “had the authority to issue discipline at least at certain levels.” Both he and Mack acknowledged that they had signed a “Supervisory Requirements” document confirming that their job duties included imposing “progressive discipline.” Frazier also conceded that he could have exercised disciplinary “independent judgment,” but he never saw the need to issue discipline. This was more than enough to establish the authority to discipline with independent judgment. See, e.g., *Oak Park Nursing Center*, supra, 351 NLRB at 29.⁴

In addition, the Respondent presented eight Employee Disciplinary/Corrective Action Notices recording various

¹ *Burns Security Services*, 278 NLRB 565 (1986) (lieutenants and sergeants at the Connecticut Yankee nuclear power plant were statutory supervisors). While not binding on the Board, several Regional Director decisions reach the same conclusion. See *Pinkerton Government Services*, Case 10–RC–015511 (May 2, 2005) (sergeants at the Watts Bar, Tennessee nuclear power plant were statutory supervisors); *Fluor Hanford, Inc.*, Case 19–RC–015019 (November 6, 2007) (lieutenants working for a private contractor at a Department of Energy nuclear site were statutory supervisors); *G4S Regulated Security Solutions*, Case 01–RC–064709 (October 25, 2011) (sergeants at the Seabrook, New Hampshire nuclear site were Sec. 2(11) supervisors based on their authority to issue oral counselings and written warnings under a progressive disciplinary system).

² I find it unnecessary, therefore, to pass on the majority’s reversal of the judge on the other three supervisory indicia at issue here—the authority to promote (through performance evaluations), to assign, and responsibly to direct.

³ Although the judge credited Mareth’s testimony, the majority nevertheless disregards it on the theory that, as the senior Turkey Point security manager, he was too far removed from the lieutenants to provide sufficient testimony as to their disciplinary authority. The record shows otherwise. Only two managerial levels (an operations manager and five captains) separated the lieutenants and Mareth, who had been “in charge” of Turkey Point security for three years and had worked for the Respondent for 28 years. Mareth testified at length regarding the position and duties of the lieutenants and his testimony on disciplinary authority was corroborated by Frazier and Mack themselves and by discipline notices drafted by other lieutenants. The judge relied on Mareth’s testimony in these circumstances, and so would I.

⁴ As noted above, the judge found that Frazier made an effort to minimize his authority as a lieutenant, and discredited his testimony “where [it was] contradicted by the testimony of others or called into question by documentation.” Consistent with this ruling, I have relied on Frazier’s admissions to possessing supervisory authority that are consistent with Mareth’s testimony.

forms of discipline by various lieutenants. These disciplinary notices covered a wide range of offenses—tardiness, absenteeism, training failure, and the inherently discretionary “unsatisfactory performance in the opinion of management.” Seven different lieutenants imposed discipline on five bargaining-unit guards, and the level II and III sanctions included oral warnings, written reprimands, and 1-day suspensions. Thus, the Charging Parties themselves and unchallenged documents supplied first-hand corroboration of Mareth’s testimony.

My colleagues dismiss this evidence on the basis that the Respondent’s progressive discipline policy was so inflexible that lieutenants could not exercise disciplinary independent judgment. This misconstrues the record. The progressive discipline policy expressly states that its three levels of offenses “are only guidelines.” It also recognizes that there may be instances in which a guard could commit an unlisted offense or in which following the guidelines would not be practical. There is an offense listed at two levels—“[f]ailure to meet satisfactory job performance or behavior standards *in the opinion of management*”—that explicitly requires supervisory judgment (emphasis added). And, as the Board cautioned 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. The progressive discipline policy here expressly does so.⁵

Concededly, the Board found that the Respondent did not establish that certain Turkey Point lieutenants possessed Section 2(11) supervisory authority to discipline in *Wackenhut Corp.*, 345 NLRB 850, 855 (2005). But much has changed since the *Wackenhut* record was compiled in 2004. Lieutenants personally signed the “Supervisory Requirements” document described above in 2006, confirming their authority to impose progressive discipline. Additionally, the Board in *Wackenhut* found that the lieutenants at issue there did not use independent judgment in issuing discipline in large part because lieutenant-signed discipline documents all cited “specific, enumerated regulations” that were not in the record in that case. 345 NLRB at 854. The lieutenant-issued employee discipline/corrective action notices here, however, refer to either the progressive discipline policy or absenteeism policy. Those policies *are* in this record and, as

⁵ The progressive discipline and attendance policies also apply to disciplinary decisions by all levels of the Respondent’s management, from lieutenants on up. If those policies preclude independent judgment, the Respondent (and many other employers with like policies) would have *no* statutory supervisors possessed of Sec. 2(11) disciplinary authority.

discussed above, they are not so detailed as to eliminate lieutenant discretion. As such, independent judgment was established on the record in this case.

Finally, lieutenants are paid more than security guards, receive additional training not given to guards, are included in management meetings that guards did not attend, and perform little actual guard work. The Board has regarded such evidence as persuasive “secondary indicia” of supervisory status. See, e.g., *American River Transportation Co.*, 347 NLRB 925, 927 (2006) (higher pay and better benefits); *Burns Security*, supra, 278 NLRB at 570 (sergeants and lieutenants attended monthly management meetings). Additionally, all Turkey Point security constituencies viewed Frazier and Mack as supervisors.⁶ And if the lieutenants were not supervisors, each captain would be responsible for supervising over 30 security guards—an implausibly large number given the size, complexity and security sensitivity of the Turkey Point site. See, e.g., *Burns Security*, supra, 278 NLRB at 571 (finding lieutenants and sergeants to be statutory supervisors with 2 to 1 guard-to-supervisor ratio at nuclear power plant).

Under the preponderance of the evidence standard, the Respondent established all elements of the lieutenants’ Section 2(11) disciplinary authority. In finding otherwise, the majority effectively imposes a higher standard of proof on employers than is appropriate. My colleagues also deprive the Respondent of its established right to the undivided loyalty of those who command its security force in securing the Turkey Point nuclear power plant and responding to emergencies of any kind. Because this step is not justified by precedent or the facts of this case, I respectfully dissent.

Dated, Washington, D.C. September 28, 2012

Brian E. Hayes,

Member

NATIONAL LABOR RELATIONS BOARD

Shelley Plass, Esq., for the Acting General Counsel.¹
Fred Seleman, Esq., for the Respondent.²

⁶ The Respondent itself, as Frazier conceded, treated them as supervisors. Frazier and Mack likewise viewed themselves as supervisors. And Timothy Lambert, who had been the union president since May 2009 and a Turkey Point guard for over 10 years, stated that Frazier and Mack “were supervisors.” Lambert further testified that a lieutenant would be his “first line of reporting” and “first line of supervision.”

¹ I shall refer to counsel for the Acting General Counsel as counsel for the Government and to the Acting General Counsel as the Government.

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. These are two discharge cases I heard in Miami, Florida, commencing on April 4, 2011. The cases originate from a charge filed by Thomas Frazier, an individual (Frazier), on February 22, 2010, in Case 12-CA-26644 and filed by Cecil Mack, an individual (Mack) on July 29, 2010, in Case 12-CA-26811, against G4S Regulated Security Solutions, a Division of G4S Secure Solutions (USA) Inc. f/k/a The Wackenhut Corporation (Company). The prosecution of these cases was formalized on December 29, 2010, when the Regional Director for Region 12 of the National Labor Relations Board (the Board), acting in the name of the Board's Acting General Counsel, issued a complaint and notice of hearing (complaint) against the Company.

It is specifically alleged the Company, on or about February 2, 2010, indefinitely suspended its employee Mack and thereafter on February 15, 2010, discharged him; and, on or about February 12, 2010, indefinitely suspended its employee Frazier and thereafter on or about February 15, 2010, discharged him because the two engaged in protected concerted activities and to discourage employees from engaging in these or other concerted activities. It is alleged the Company's actions violate Section 8(a)(1) of the National Labor Relations Act (the Act).

The Company, in a timely filed answer to the complaint, denied having violated the Act in any manner alleged in the complaint. The Company, as one affirmative defense, asserts Mack and Frazier were supervisors of the Company within the meaning of Section 2(11) of the Act and thus not protected by the Act.

The parties were given full opportunity to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. I carefully observed the demeanor of the witnesses as they testified and I rely on those observations in making credibility determinations herein. I have studied the whole record, the posttrial briefs, and the authorities cited therein. Based on the detailed findings and analysis below, I conclude and find, that at all times material herein, Frazier and Mack served as supervisors of the Company within the meaning of the Act and outside the Act's protection. I find the Company did not violate the Act when it suspended and thereafter discharged Frazier and Mack.

Findings of Fact

I. JURISDICTION, LABOR ORGANIZATION STATUS, AND SUPERVISORY/AGENCY STATUS

The Company is a Delaware corporation engaged in the business of providing guard and security services to clients throughout the United States, including the Florida Power & Light Company's power plant located at Turkey Point in Miami-Dade County, Florida (Turkey Point), and other facilities located in the State of Florida. During the 12-month period ending December 29, 2010, a representative period, the Company purchased and received at Turkey Point, and at its other

facilities located in the State of Florida, goods and services valued in excess of \$50,000 directly from points outside the State of Florida. The evidence establishes, the parties admit, and I find the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The parties admit, and I find, International Union, Security, Police and Fire Professionals of America (SPFPA) (Union) is, and has been, a labor organization within the meaning of Section 2(5) of the Act.

It is admitted Security Shift Supervisor Quentin Ferrer, Leadership Development Coordinator Karen Bower Macdonald, Project Manager Michael Mareth, Security Shift Supervisor Gonzalo Pedroso, and Operations Manager Juan Rodriguez are supervisors and agents of the Company within the meaning of Section 2(11) and (13) of the Act.

The first, fundamental and controlling issue is whether security lieutenants Frazier and Mack, at material times herein, were supervisors for the Company within the meaning of Section 2(11) of the Act. If they were supervisors they would not be protected by the Act and the Company's suspending and discharging them would not violate the Act. In as much as I find the two to be supervisors the remaining issues need not be addressed, namely, whether Frazier and Mack engaged in concerted activities protected by the Act and whether they were discharged for doing so. Nor is it necessary to address the Company's affirmative defense that Frazier and Mack were discharged for valid considerations not based on unlawful motives or considerations.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

1. Background

The Company provides guard and security services for Florida Power & Light at its Turkey Point (Miami/Dade County, Florida) nuclear generating stations. The Company provides its services pursuant to a written agreement with Florida Light & Power and provides its services supportive of, and in compliance with, site security programs which in turn are in compliance with Nuclear Regulatory Commission requirements, specifically Title 10, Code of Federal Regulations 73.55. Florida Power & Light owns several thousand acres at its Turkey Point Nuclear Power Plant facility for which various levels of security are furnished by the Company. Included in Florida Power & Light's Turkey Point property is an area referred to as the "owner controlled area" which contains security fences and intrusion detection devices. Within the protected area is a vital area which contains the power block where the generating stations are that actually produce electrical power. The security provided in all areas includes, as applicable, patrols, duty stations, and other personnel in various capacities. The Company has provided its services at Turkey Point for approximately 27 years and the Company's current contract with Florida Power & Light expires December 31, 2011.

The Company's current name came into effect in 2009, however, prior to that date it, for an extended time, operated as The Wackenhut Corporation. According to Project Manager Mareth, the Company's contract with Florida Power & Light sets

² I shall refer to counsel for the Respondent as counsel for the Company and I shall refer to the Respondent as the Company.

forth a description of the type of security services the Company is to perform. The agreement also sets forth the general staffing requirements and establishes procedures to amend the agreement if it is necessary to change the staffing requirements. Project Manager Mareth stated that generally the security officers performing security services at Turkey Point do not change if the contract is awarded to a different security company. It appears the staffing provisions in the agreement between Florida Power & Light and the Company have remained the same.

The Board in *Wackenhut Corp.*, 345 NLRB 850 (2005), sets forth a somewhat detailed history of labor relations between the Union and Company herein. A “brief” review of that history, taken from that Board case, without further referencing that case, is perhaps helpful. Prior to September 1, 2003, the Company employed four categories of employees at its Turkey Point facility, namely; captains, lieutenants, sergeants, and security officers. Specifically in July 1999, the Board certified the Union as representative of the Company’s security officers at Turkey Point. The Board noted the category “security officer” included central and secondary alarm station operators, unarmed security officers/watchmen, and part-time security officers. Prior to the election that resulted in the above unit being certified the Company stipulated it did not oppose the inclusion of the central and secondary alarm station operators in the bargaining unit. In 2002, the Union filed a petition seeking to represent the sergeants at Turkey Point. The Company opposed the petition, asserting the sergeants were statutory supervisors. The Regional Director of Region 12 of the Board issued a decision and direction of election, in which she found the sergeants were not supervisors under the Act. The Board denied the Company’s request for a review of the Director’s decision. On March 4, 2003, the Union was certified as the representative of the Company’s sergeants.

On May 28, 2003, Florida Power & Light issued a request for proposals with bid specifications for a new security contract setting forth staffing provisions which provided that supervisors would be defined as nonbargaining personnel and that all personnel assigned to operate the central and secondary alarm stations would be supervisors. Further, the new contract specifications called for four security shifts per day with each shift supervisor trained and certified to perform duties within the central and secondary alarm stations, as well as to perform other duties in the owner controlled and protected areas. In June 2003, the Company notified Florida Power & Light that if it was awarded the new contract operations at Turkey Point it would change its operations in three ways: (1) The part-time program would be eliminated; (2) The central and secondary alarm station operators would be supervisors; and (3) The position of sergeant would be eliminated. The Company was thereafter awarded the new security contract with Florida Power & Light.

After obtaining the new contract with Florida Power & Light, the Company announced a posting for new supervisory positions with a requirement that applicants be able to operate the central and secondary alarm stations. The Company then filled 15 lieutenant positions by promoting unit employees into the new positions. Starting on September 1, 2003, all central and secondary alarm station duties were performed by lieuten-

ants. As a result of the changes implemented on September 1, 2003, the Company no longer employed anyone in sergeant positions. The Board found the Company violated the Act by eliminating the sergeant positions and by eliminating the central and secondary security operators from the bargaining unit and reclassifying the operators as nonunit lieutenants. The Board also concluded the Company had failed to establish the new lieutenants “assigned to perform CAS/SAS [central alarm station/secondary alarm station] possessed or exercised supervisory authority.”

With that brief review, I now turn to the facts surrounding the issues herein. The Company’s highest ranking individual at Turkey Point is Project Manager Mareth. He is assisted by Operations Coordinator Rodriguez, Training Coordinator Roy McCloud, Leadership Development Manager Macdonald, and various other administrative personnel. There are five security officer shifts. Each shift has 1-team shift captain, 7 lieutenants, and approximately 37 security officers assigned. The security teams are referred to as Alpha, Bravo, Charley, Delta, and Echo. The Echo team is a training team that actually fills in for each of the other four teams as each team must rotate into a week of security training every 5 weeks. There are four teams performing security services and one team in training at all times. At applicable times herein (February 2010), there were approximately 170 security officers employed at Turkey Point.

The current applicable unit description for security officers follows:

The Company recognizes the International Union, Security, Police, Fire Professionals of America (SPFPA) and its Amalgamated Local No. 610 as the exclusive collective bargaining representative for all employees designated by the National Labor Relations Board’s Certification of Representative issued on July 8, 1999 in case No. 12-RC-8349, including all security officers, and watchpersons [Unarmed Officers], performing guard duties as defined in Section 9(b)(3) of the National Labor Relations Act, as amended, who are employed by the Employer at the Turkey Point Nuclear Power Plant, located in Florida City, Florida; but excluding all office clerical employees, professional employees and supervisors as defined in the National Labor Relations Act, as amended.

Frazier was hired as a security officer in 1989 and Mack in 2002. Both were promoted to lieutenant in 2003. Both Frazier and Mack were suspended from work a few days before they were terminated on February 15, 2010. Frazier’s termination notice reflects “Failure to meet satisfactory leadership expectations.” Mack’s termination notice reflects “Cecil was involved in an incident with the client that involved undesired behavior. As a part of the process management completed a review of Cecil’s personnel file. As a result of the review it is management’s perspective that Cecil’s performance does not meet satisfactory job performance or behavior standards.”

2. Company’s evidence

As noted earlier the Company, asserts as an affirmative defense, that Frazier and Mack were supervisors within the meaning of Section 2(11) of the Act. With that assertion the Company assumes the burden of proving their supervisory status. I

consider the Company's evidence first as it is the party asserting the supervisor status and afterward, I shall consider evidence presented by the Government bearing on the issue.

I note the position of lieutenant existed prior to Frazier and Mack applying for and being promoted to lieutenants in the fall of 2003. Frazier and Mack received pay raises at the time of their promotions. Project Manager Mareth testified the pay differential between security guards, which Frazier and Mack were, and lieutenants, to which they were promoted, was approximately \$4 per hour. Lieutenants Frazier and Mack received more life insurance coverage than the security officers. Project Manager Mareth testified when an employee is promoted to lieutenant he/she is given additional training not provided to the security officers. The additional training is designed to, in part, give the lieutenant "a better understanding of . . . performing oversight and observation of day-to-day activities" a lieutenant will encounter. Mareth further explained the training for lieutenants is at a "higher level" than training for the security officers. Leadership Development Coordinator Macdonald testified she conducts 80 hours of initial leadership training with lieutenants that includes interpersonal and presentation skills, training which is not provided to the security officers. Lieutenants also receive, on an ongoing basis, training not provided to the security officers. Lieutenants meet with upper management at least once per month without security officers being present.

Newly selected lieutenants, including Frazier and Mack, signed various documents after becoming lieutenants they had not been required to sign as security officers. One such form was a "Supervisory Requirements" form. On the "Supervisory Requirements" form lieutenants are instructed they should use coaching techniques as well as counseling and progressive discipline to correct unprofessional conduct and poor job performances and are to do so fairly and consistently. On the form lieutenants are instructed to seek management assistance and input when needed. Frazier and Mack acknowledged, on the signed forms, they were to "[m]ake those accountable to [them] aware of what [they] expect[ed] from them." The two acknowledge on the signed forms they were to "lead by example" and "keep issues discussed between supervisors confidential." Frazier and Mack specifically understood the Company viewed them as supervisors. Frazier and Mack each signed a Company "Leadership Pledge" agreement in which they agreed they would not tolerate inattentiveness within the ranks of their direct reports; they would be receptive to concerns and questions raised by their direct reports; they would not tolerate retaliation or peer harassment within the ranks of their direct reports; they would be observant to the work place behaviors of their direct reports; they would listen effectively and respond appropriately to their direct reports; they would use a nonthreatening communication style with their direct reports; and, they would develop, coach, mentor and train their direct reports. In signing the "Leadership Pledge" both wrote the description of their position as that of "Supervisor."

Frazier and Mack also executed "Management Challenge" forms in which they acknowledged that as part of the "management team" they had an "obligation to operate above the standard expectations" of their colleagues and being in supervi-

sion carried an accountability on their part for their teams performance. Both acknowledged the Company is committed to supporting them with relevant training to be successful supervisors and they were aware of what it meant to supervise armed personnel and that management standards for its supervisors in this type environment had to be exceptionally high.

Local Union 610 President and security officer Timothy Lambert testified regarding the duties of Frazier and Mack, in part, as follows:

As long as I've known them and they were supervisors, . . . I went to them because they cared about what was going on there. I mean they were two excellent supervisors that really cared about the operations.

Local Union President Lambert acknowledged that as a security officer his first line supervisor was the lieutenant.

Project Manager Mareth testified, at length, regarding the position and duties of lieutenants at the Company. There are approximately 170 security officers that report directly to lieutenants according to Mareth. Lieutenants in turn report to shift captains. Mareth explained the Company's supervisory structure is necessary so one individual, such as the captain, would not be the only one responsible for supervising "30-some officers assigned to [a] particular shift" with the responsibility of covering the several thousands of acres to be secured. Project Manager Mareth testified lieutenants provide direct oversight to the security officers in the field including addressing issues that arise on the job. Project Manager Mareth explained that while the Company is in a "regulated industry" with "a lot of procedures for what we do, you can't have a written procedure for absolutely everything that you do in the field." Mareth added lieutenants "have to utilize judgment and discretion" in performing their functions and may not have "a written line item that tells [them] what to do." Mareth said lieutenants "can either address [the issues] at their level, or if its something that they cannot address, then they can push it to a higher level and it just continues all the way up . . . to my [Project Manager] level." Mareth said lieutenants oversee security officers in all geographic areas at the Turkey Point facility and their oversight includes evaluation of the security officers.

Florida Power & Light's Turkey Point Nuclear Plant Security Department, Security Force Instruction 1106, Revision 9 titled "Field Supervisors" is applicable to the Company herein and, "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." The title "field supervisor" and "lieutenant" refers to the same position at the Company. Field supervisors are directed to ensure; that only qualified security officers are assigned to posts; that security officers understand the specific requirements of their post; that security officers remain alert, attentive, and properly perform their duties; that security officers perform their duties in a safe environment; that security officers properly maintain post reports; and, that field supervisors initiate prompt and appropriate actions to correct any identified deficiencies including improper behavior, attitude, or inattentiveness to duty.

Project Manager Mareth described, in general terms, a lieu-

tenant's workday. The day starts with the morning shift briefing conducted by the shift captain with, as appropriate, input from the lieutenants. Lieutenants ensure the "off-going" security officers are properly relieved and then issues weapons to the "on-coming" security officers. Lieutenants perform equipment inventories which includes verifying that the security officers have all required equipment at their posts and are properly logged in and fit for duty. Lieutenants are responsible for monitoring the central and secondary alarm systems. Lieutenants field questions from and address issues raised by the security officers and make required security observation reports. Project Manager Mareth stated lieutenants correct, coach and counsel, as needed. Lieutenants generally do not perform security officer duties.

Project Manager Mareth further explained that lieutenants are the first line supervisors to whom the security officers' report, and can issue any type discipline, excluding termination, without consulting a supervisor. The Company has a three level progressive disciplinary policy that consists of four steps. Step one is oral counseling; step two is written disciplinary counseling; step three is written disciplinary counseling and suspension; and step four is termination of employment. Stated somewhat differently level I, the highest level, results in termination. Level II is a documented discipline such as written warnings, an accumulation of which results in termination. Level III, the lowest level of discipline, typically starts with a verbal warning or a verbal warning that is documented. The progressive discipline policy and procedure reflects, "There are three levels of offenses (levels I, II, III). These are only guidelines for use by management and supervisor personnel." Mareth explained that if a lieutenant issued a written warning to a security officer and the security officer committed a similar infraction such would result in a suspension for the security officer. Project Manager Mareth testified lieutenants may, and do, exercise discretion when issuing discipline pursuant to the Company's disciplinary policies. For example, a lieutenant may decide not to issue formal discipline for an infraction or he/she can decide which level of discipline is appropriate as there is some overlap between offenses listed at the disciplinary levels. Mareth said a lieutenant may consult with the shift captain to determine if a past practice has been established for a particular offense but is not required to do so. According to Mareth lieutenants may, for example, issue a coaching, which is not part of the formal disciplinary procedure unless documented, for a first offense and if there are other like offenses determine at that time which level of discipline is warranted. According to Project Manager Mareth, lieutenants do not have to consult with their supervisor (captains) before issuing discipline. Eight employee disciplinary/corrective action notices, issued by 6 lieutenants, were received in evidence. Two of the disciplinary actions resulted in written warnings with 1-day suspensions; two involved written warnings only; and, four involved written disciplinary actions documenting oral warnings. Five of the disciplinary actions involved attendance infractions, two involved failure to timely report for training, and one involved a vehicle accident. None of the disciplinary/corrective action notices in evidence was issued by either Frazier or Mack. In fact, neither Frazier nor Mack issued any

discipline of record.

Project Manager Mareth testified lieutenants perform evaluations for their direct reports. Mareth explained the evaluations are used in the promotional process for the security officers. Mareth named four security officers whose recent promotions were impacted by their lieutenant's evaluations and added there were perhaps eight other like situations, over the previous year and half. No one higher in management than a lieutenant regularly evaluates, in writing, the security officers. The evaluations prepared by the lieutenants are used in the promotional process in accordance with the Company's policy manual at "Promotion Policy and Procedure." The manual states in part, "the promotion process consists of several stages. The required stages are as follows . . . review of performance appraisals." The portion of the manual covering promotions further states, in part, that the promotion board shall review the personnel file for each applicant for promotion with specific attention given to performance appraisals.

According to Mareth, lieutenants can be disciplined, up to and including discharge, if they fail to ensure the quality of performance of the security officers under their command. Mareth explained that a failure to ensure quality performance by the security officers could also impact promotional opportunities for lieutenants.

With respect to evaluations for the security officers, Charging Party Mack acknowledged that for 2 years prior to his discharge he evaluated the six security officers that reported directly to him and he did so on a quarterly, as well as, annual basis. Mack said he was told to perform the evaluations by his immediate shift supervisor. Mack explained the evaluations were mainly to set goals for the security officers. Mack went over each evaluation with each security officer involved before he turned the evaluations over to his superior, the shift captain.

Frazier also testified he evaluated the security officers that reported to him on a quarterly and annual basis and was instructed by his immediate supervisor, Captain Ferrer, to do the evaluations starting some 2 years prior to his discharge. Frazier said he individually reviewed the evaluations with each security officer and had them sign their evaluation before he turned the evaluations over to Captain Ferrer. Frazier said he sometimes made Captain Ferrer aware of what he had placed in a security officer's evaluation in case the officer questioned the evaluation. Frazier identified some 83 pages of evaluations, which were received in evidence, he made of certain security officers that reported to him.

3. Government's evidence relating to the supervisory issue

Frazier testified he commenced working for the Company at Turkey Point in May 1989 when it was known as the Wackenhut Corporation. Frazier worked as a security officer when first hired. Frazier described his security officer duties as protecting the plant from radiological sabotage by conducting patrols; standing guard at specific posts; conducting fire watch; fire watch patrols, checking doors, and equipment; responding to contingencies; doing vehicle patrols of owner-controlled areas; working at various entry gates; searching vehicles and materials; and, preventing unauthorized personnel and/or materials from entering the plant. Frazier said he conducted himself, and

carried out his assigned duties in accordance with Security Force Instructions established by Florida Light & Power and the Company which provided him guidance on his job functions and instructed him how to react in any given situation. Frazier said that late in his tenure as a security officer he became central and secondary security alarm certified and monitored computer screens for alarms at vital areas or fenced zones. As a certified central and secondary alarm security officer Frazier said he would run reports, answer telephones, provide information to the captains and dispatch officers to alarms in accordance with the Security Force Instructions. Frazier said his overall security officer duties did not change when he became a certified central and secondary security alarm officer that he just assumed the extra duties.

Frazier testified his position "changed slightly" when he became a lieutenant in September 2003 and was assigned to the B Team where he worked seven 12-hour shifts every 14 calendar days and reported to Shift Captain Quentin Ferrer. Frazier described his lieutenant duties as, "ensuring that qualified security officers are manning the various posts, qualified in the SFI [Security Force Instructions]," "to verify the paperwork, to ensure that the general purpose logs and post or patrol logs are correctly filled out," and to, "ensure that the officers were alert, attentive, are aware of their assigned duties as set forth by the general purpose log and the SFIS." Frazier further explained his duties included ensuring the security officers "equipment was in proper working order and not damaged or been tampered with" and to ensure the security officers worked in a safe clean environment and conducted their patrols according to the Security Force Instructions. Frazier said his central and secondary alarm system duties remained the same as when he was a security officer. Frazier said he knew what all of his duties as a lieutenant were because his duties were written out in the Security Force Instructions, training manuals, administrative directives and by his lengthy experience at Turkey Point. Frazier added there had been sergeant positions at the Company at the time he was a security officer but by the time he became a lieutenant in September 2003, the sergeant positions had been eliminated. Frazier explained sergeants "essentially" performed the same tasks he performed as a lieutenant but after further questioning by Government Counsel Frazier stated sergeants and lieutenants performed the same job.

Frazier testified he had daily contact with security officers, other lieutenants and at least 1 captain. He said he commenced his work day at the shift briefing attended by those mentioned above, as well as, on occasion Florida Power & Light security oversight specialists and other Company management such as Project Manager Mareth and Operations Coordinator Juan Rodriguez. According to Frazier the shift captain addressed the shift collectively and disseminated pertinent information for the day, such as the status of the units, making note of any fence or door zones that might be out of order or any new posts that had been established. According to Frazier the shift captain determined post assignments and reflected those assignments on a post assignment sheet, copies of which were given to the security officers and lieutenants. Frazier explained that with the assignment sheet he knew where each of his security officers would be posted and he visited each post during the shift. Fra-

zier said that while he was at each post he verified that the proper security officer was at his/her assigned post and reviewed the general purpose and inventory logs with the security officer as well as checked the security officers' weapons. According to Frazier the shift captain never discussed shift rotations with him before issuing them. Frazier said he did not direct the work of the security officers that reported to him "because the work is defined in the general purpose log," "[t]he officer reads that. Those are his post instructions." Frazier explained his responsibility was just to ensure the security officers understood his/her post instructions. Frazier stated some security officers preferred some posts over other posts and added he had the authority to transfer security officers from one post to another during a shift, under some circumstances but, only after requesting approval from the shift captain. On cross-examination, Frazier acknowledged he had stated in a pretrial affidavit he had the authority to transfer a security officer from one post to another on his shift for operational needs and he "did not generally consult with the captain before doing so."

Frazier testified he had given security officers "coachings" which he considered to be "peer checking." A "coaching," according to Frazier, may involve instructing a security officer to sit up straight instead of slouching, or to be a little more vigilant in the area where he/she was assigned. Frazier said coaching is not a form of discipline. Frazier said he had never issued discipline to security officers reporting to him because they all knew their jobs. Frazier on direct examination, said he could issue oral or written discipline to his security officers for not doing their job duties or being inattentive or not following guidelines in the general purpose log only after first bringing it to the attention of his shift captain to ascertain the appropriate disciplinary action. Frazier acknowledged on cross-examination that specific supervisory requirements applicable to him directed him to not only use coaching techniques but to utilize counseling and progressive discipline to correct unprofessional conduct or poor job performance by the security officers.

Frazier testified that about 2 years before his discharge he began to evaluate, on a quarterly and annual basis, those security officers reporting to him. Prior to that time evaluations were performed by the captain. The quarterly evaluations designated as "one-on-one" reviews were, according to Frazier, for the purpose of bringing about improvement in the security officers attendance, communication skills and knowledge of the Security Force Instructions. After preparing the quarterly and annual reviews for his security officers Frazier gave them to his shift captain or Operations Coordinator Rodriguez. Frazier explained he reviewed each evaluation with the applicable security officer before giving them to the captain and, on occasion, would speak with his shift captain about a specific evaluation in case "the officer came back and was questioning it." Frazier testified, on direct-examination, that as far as he knew the evaluations were used only to "improve the deficiencies that the officers may have." When asked on cross-examination if a bad evaluation could affect a security officers future promotional opportunities, Frazier testified "as far as I know, the one-on-ones and the evaluations were not used for promotion. They were used . . . to get the officer to improve his performance. I do not know if it was used . . . to promote." However, after

being given an opportunity to review his pretrial affidavit, Frazier acknowledged that if a security officer continually received bad evaluations or reviews the officer “may not be considered for a promotion.” Frazier did not know of any security officer being promoted based on his evaluation of the security officer. Frazier acknowledged he had recommended security officers receive meal tickets or “a letter incentive award” but added even other security officers could recommend a fellow security officer for a meal or small incentive award.

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. Mack testified that everything he did every minute of every day as a lieutenant was explicitly covered in detail by written policies. Mack likewise believed everything security officers did was covered and/or governed by written policies and the security officers simply had to follow the policies. Mack testified the captain would issue discipline and the lieutenant who was in the area of the security officer disciplined would simply deliver the discipline to that security officer.

III. CREDIBILITY COMMENTS, ANALYSIS, AND CONCLUSIONS

I am persuaded Frazier while testifying made an effort to minimize the authority he had and/or exercised as a lieutenant. For example, he testified some officers preferred some posts over other posts and that he had the authority to transfer security officers from one post to another during a shift, but only after requesting approval from his shift captain. However, after being confronted with his pretrial affidavit, he acknowledged he had the authority to transfer a security officer from one post to another on his shift for operational needs and did not generally consult with his captain before doing so. Frazier first testified he could issue oral or written discipline to his assigned security officers for not properly performing their jobs duties, being inattentive, or not following guidelines but, only after first bringing such to the attention of his shift captain. However, Frazier acknowledged, during cross-examination, that specific supervisory requirements applicable to him, called for him to use coaching techniques, as well as, counseling and progressive discipline to correct unprofessional conduct, or poor job performance by his security officers. Frazier testified on direct examination that evaluations he prepared for the security officers reporting to him were utilized to improve deficiencies the security officers may have, however, on cross-examination, and after reviewing his pretrial affidavit, he acknowledged that if a security officer continually received bad reviews or evaluations he/she may not be considered for promotion.

It is in light of this and other testimony by Frazier and particularly my observation of him as he testified; I am unable to fully credit his testimony regarding his duties and authority where contradicted by the testimony of others or, called into question by documentation. Thus, I have relied, to a great extent, on the testimony of Project Manager Mareth, which I credit, with respect to the duties and authority of lieutenants at the Turkey Point facility.

Under Board and Supreme Court precedent, in order to be a statutory supervisor, an individual must have the authority to

effectuate or effectively recommend at least one of the supervisory indicia enumerated in Section 2(11) of the Act, using independent judgment in the interest of the employer. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006) (citing *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001)). It is well established that the party asserting supervisory status bears the burden of proof on the issue, *Oakwood Healthcare, Inc.* at 686. The burden must be carried as to each particular individual who is alleged to be a supervisor. Section 2(11) of the Act provides that a supervisor is one who possesses, “authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly 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.”

Such statutory indicia must, as noted earlier, be exercised with independent judgment on behalf of management, in the interest of management and not simply in a routine manner. The Board noted in *Oakwood Healthcare Inc.*, supra citing *Chevron Shipping Co.*, 317 NLRB 399, 381 (1995), that as a general principle, it has exercised caution not to construe supervisory status too broadly because the employee deemed a supervisor is denied rights the Act is intended to protect. The Board in *Oakwood Healthcare, Inc.*, supra, adopted definitions for the terms “assign,” “responsibly to direct”, and “independent judgment” as those terms are used in Section 2(11) of the Act. It is helpful to briefly highlight those definitions.

The Board noted the terms “assign” and “responsibly to direct” were not intended to be synonymous and would ascribe distinct meanings to both terms. The Board construed “assign” to refer to the act of designating an employee to a place, a time or giving significant overall duties or tasks to an employee. The Board noted the place, time and work of employees are part of their terms and conditions of employment and decisions, or effective recommendations, to affect one of those can be supervisory functions. The Board construed “responsibly to direct” as where the putative supervisor is answerable for the performance and work product of the employees he/she directs. That is, there must be some adverse consequence for the one providing oversight if the tasks performed by the employees are not performed properly. The Board specifically stated; “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 must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.”

The Board in ascertaining the contours of “independent judgment” looked at the ordinary meaning of the two words. “Independent” means “not subject to control of others” and “judgment” the action of judging or the mental or intellectual process of forming an opinion or evaluation by discerning and comparing. The Board used, as a starting point, that for one to exercise “independent judgment” “an individual must at a minimum act, or effectively recommend action, free of control of others and form an opinion or evaluation by discerning and

comparing data.” The Board noted it was interpreting “independent judgment” in light of the contrasting statutory language, “not of an merely routine or clerical nature.” The Board stated; “It may happen that an individual’s assignment or responsible direction of another will be based on independent judgment within the dictionary definition of those terms, but still not rise above the merely routine or clerical.” The Board stated that its view, as well as the Supreme Court’s view was that actions fall into a spectrum between the extremes of completely free actions and completely controlled ones, “and the degree of independence necessary to constitute a judgment as ‘independent’ under the Act lies somewhere in between these two extremes.” The Board said it would find “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.” (Footnote omitted.) However, the Board went on to state; “On the other hand, the mere existence of company policies does not eliminate independent judgment from decision making if the policies allow for discretionary choices. [footnote omitted]” The Board summarized as follows:

Section 2(11) contrasts “independent judgment” with actions that are “of a merely routine or clerical nature.” Thus, the statute itself provides a base line for the degree of discretion required to render the exercise of any of the enumerated functions of 2(11) supervisory. The authority to effect an assignment, for example, must be independent, it must involve a judgment, and the judgment must involve a degree of discretion that rises above the “routine or clerical.” [footnote omitted]

In deciding whether the two lieutenants herein are supervisors within the meaning of the Act I am mindful the security of nuclear facilities is highly regulated. I take guidance from *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), a case where the Board refined the analysis to be applied in assessing supervisory status and set forth clear broadly applicable guidance for situations like those herein.

First, I find the lieutenants are supervisors under Section 2(11) of the Act based on the fact they prepare evaluations of the security officers that, in part, are considered in determining whether the security officers are promoted. Lieutenants Frazier and Mack both, for some 2 years prior to their discharge, prepared quarterly and annual reviews or evaluations for the security officers reporting to them. In fact, no one higher than a lieutenant at the Company regularly prepares written evaluations of security officers. Both Frazier and Mack reviewed the evaluations they prepared with the security officers involved before the evaluations were turned over to higher management. I note Frazier first explained the evaluations he made of the security officers that reported to him were simply to have the security officers improve their performance, but, he acknowledged bad evaluations could impact a security officer’s consideration for promotion. The record evidence establishes evaluations created by lieutenants are specifically utilized in the promotional process. The Company’s policy manual at “Promotion Policy and Procedure” requires, among the several stages

in the promotion process, that a review of applicable performance appraisals be conducted by the promotion panel. More specifically, the promotion policy and procedures manual requires the Company’s promotion board to review the personnel file of each applicant for promotion and to specifically review performance appraisals. Project Manager Mareth specifically stated evaluations made by lieutenants at the Company are utilized in the promotional process for security officers. Mareth even recalled four security officers whose recent promotions were impacted by their lieutenant’s evaluations and he indicated there were perhaps eight other like situations where security officers’ promotions were impacted by their lieutenant’s evaluations in the previous year to year and half. I note Frazier and Mack did not need to consult with their superiors before evaluating their direct reports, nor did they need to discuss with their supervisors the content of evaluations before preparing and going over the evaluations with those evaluated. Frazier and Mack performed evaluations free from the control of others in management and made their evaluations and formed their opinions, it appears, by their own discernment and comparisons. It is clear evaluations impact promotions of the work force and are performed in the interest of the Company. In summary, Lieutenants Frazier and Mack independently performed evaluations for their direct reports which lead to personnel actions (namely promotions) affecting the security guards involved and by doing so engaged in one (promote) of the enumerated supervisory functions within the meaning of Section 2(11) of the Act.

Lieutenants, as first line supervisors, have the authority to and do issue discipline. The Company’s progressive discipline policy and procedure “provides guidance on the administration of discipline” for its supervisors who “are responsible for administering this policy as it applies to employees under their supervision.” As Project Manager Mareth explained, lieutenants can issue any type discipline, except termination, without consulting with a supervisor. Lieutenants are generally the individuals issuing the initial step(s) in the Company’s progressive disciplinary process. The evidence establishes lieutenants have certain discretion when issuing discipline pursuant to the Company’s policies. As Project Manager Mareth explained, a lieutenant may decide not to issue formal discipline at all, or to chose which level of discipline an infraction will be placed because of some overlap between levels. It is clear lieutenants exercise independent judgment by deciding whether to initiate the progressive disciplinary process in the first place and lay a foundation for future discipline against their direct reports. The Company presented, in evidence, examples of lieutenants issuing discipline to security officers. Two of the disciplines resulted in written warnings with a 1-day suspension in each. While none of the eight examples were initiated by Frazier or Mack it appears they clearly had the authority to do so. Frazier, for example, explained he never issued any discipline for the security officers that reported to him because each knew and performed their job duties. In summary, lieutenants have the authority to issue security officers discipline and have in fact issued discipline up to and including suspension without the necessity of consulting with or obtaining approval of their superiors. I find such to establish that lieutenants of the Company

are supervisors within the meaning of Section 2(11) of the Act.

It is clear shift captains prepare shift post assignments which are then disseminated to the lieutenants and security officers which reflect the initial post assignments for security officers on any given day. However, as Frazier testified, he had the authority to transfer security officers from one post to another for operational needs during a shift. Frazier, first stated he had to request approval from the shift captain, but then acknowledged he generally did not consult with the captain before making such changes in post assignments. Frazier explained some security officer's preferred one post assignment over other assignments during a shift. Thus, in designating a place, a time, and tasks to be performed when he transferred a security officer from one post to another, Frazier engaged in a supervisory function within the meaning of the Act. The discretion Frazier, or other lieutenants, utilized in transferring security officers from one post assignment to another, in my opinion, involves a degree of discretion rising above the level of routine or clerical and is done in the interest of the Company.

Lieutenants provide direct oversight to security officers in the field and address issues that arise on the job. Lieutenants are directed to ensure that security officers assigned to them understand the specific requirements of their post, that they remain alert, attentive and perform their duties in a proper and safe manner, and that they properly maintain post reports. The lieutenants are to initiate prompt and appropriate action to identify and correct any deficiencies in the security officers including improper behavior, attitude, or inattentiveness to duty. Project Manager Mareth explained lieutenants can be disciplined, up to and including discharge, if they fail to ensure the quality of the performance of the security officers assigned to them. Likewise, Mareth further explained, a failure on a lieutenant's part to ensure quality performance by the security officers could impact promotional opportunities for the lieutenant. Here lieutenants direct the work of security officers and have authority to take corrective action as appropriate and are subject to adverse consequences if they fail to properly direct the security officers that report to them. I find lieutenants responsibly direct the work of security officers within the meaning of Section 2(11) of the Act.

All the above establishes lieutenants are supervisors within the meaning of the Act. In addition to the above findings there are secondary indicia that further support my conclusion the lieutenants are supervisors. Lieutenants are paid more; provided additional insurance not provided to security officers, given additional training not given to security officers, attend management meetings that security officers do not attend, and, the Company views them as supervisors. The secondary indicia most compelling is if the lieutenants are not supervisors then each captain is responsible for 30 plus security officers with assigned duties at various locations on the thousands of acres at a nuclear facility.

In summary, I find the Company established that Thomas Frazier and Cecil Mack were supervisors within the meaning of Section 2(11) of the Act at all times material herein, and not protected by the Act. I find the Company did not violate the Act when it suspended and, thereafter, discharged Frazier and Mack on February 15, 2010.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of the Section 2 (2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Thomas Frazier and Cecil Mack were, at applicable times, supervisors within the meaning of Section 2(11) of the Act.
4. The Company has not violated the Act in any manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The complaint is dismissed.

Dated Washington, D.C. June 27, 2011

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.