

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

**THE S.W. PITTS HOSE COMPANY
OF LATHAM, N.Y., INC.**

Employer

and

Case 03-RC-095640

**LOCAL 4924, COLONIE
PROFESSIONAL FIREFIGHTERS
ASSOCIATION, INTERNATIONAL
ASSOCIATION OF FIREFIGHTERS¹**

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board. Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, I find that:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated that The S.W. Pitts Hose Company of Latham, N.Y., Inc., hereinafter referred to as the Employer, is a not-for-profit New York corporation with a facility in Latham, New York, where it provides firefighting and emergency services. During the past twelve months, a representative period, the Employer performed services valued in excess of \$50,000 for various entities which entities in turn engaged directly in interstate commerce.

¹ The parties' names appear as stipulated at the hearing.

Based on the parties' stipulation and the record as a whole, I find that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated, and I find, that Local 4924, Colonie Professional Firefighters Association, International Association of Firefighters, hereinafter referred to as the Petitioner, is a labor organization within the meaning of Section 2(5) of the Act.

4. The parties stipulated that there is no collective-bargaining agreement that would bar a representation election with respect to the petitioned-for unit.

5. The parties stipulated that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time firefighters employed by the Employer at its 226 Old Loudon Road, Latham, New York location; excluding office clerical employees, volunteers, guards, professional employees, and supervisors as defined in the Act.

6. 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.

The sole issue in this proceeding is whether the firefighter-supervisor is a supervisor within the meaning of Section 2(11) of the Act. The Employer seeks to exclude the firefighter-supervisor from the Unit because he exercises the following supervisory authority over the paid firefighters: assigns work, responsibly directs employees, and effectively recommends discipline and rewards. The Petitioner argues that the firefighter-supervisor does not possess supervisory authority and should be included in the Unit.

No party asserts that the firefighter-supervisor has the authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward or discipline employees, or to adjust their grievances;

or to effectively to recommend such actions, with the above-noted exceptions concerning the Employer's contention that the firefighter-supervisor assigns work, responsibly directs employees, and effectively recommends discipline and rewards in connection with employee evaluations.

Based on the evidence adduced at the hearing and the relevant case law, I find that the Employer has not met its burden of establishing that the firefighter-supervisor is a statutory supervisor within the meaning of Section 2(11) of the Act. Accordingly, I shall include the firefighter-supervisor in the Unit.

FACTS

The S.W. Pitts Hose Company of Latham, N.Y., Inc. ("Employer"), also known as the Latham Fire Department, provides emergency firefighting and medical services in the Colonie, New York area. The Employer utilizes both paid firefighters ("firefighters") and volunteer firefighters ("volunteers") to ensure adequate emergency response coverage at all times. During the week (Monday through Friday) from 6:00 a.m. to 6:00 p.m., paid firefighters staff the fire station and are responsible for responding to emergency calls. On nights and weekends, when paid firefighters are not scheduled to work, the Employer relies on volunteer firefighters to respond to emergency calls. At the time of the hearing, the Employer employed three paid full-time firefighters, one part-time firefighter, and firefighter-supervisor Timothy Gaffney.

At the scene of a fire, both paid and volunteer firefighters take direction from the ranking "firematic" officer(s) on site.² The Employer also maintains a roster of civilian officers, including the president, vice-president, recording secretary, financial secretary, treasurer, and a

² Fire Chief is the highest-ranking firematic officer position, followed by several assistant chiefs, captains, lieutenants, and various other officers.

board of directors, who oversee the Employer's general operations. The Fire Chief oversees all the paid firefighters, including the firefighter-supervisor.³

Paid firefighters, including the firefighter-supervisor, generally work one of two shifts, either from 6:00 a.m. to 2:00 p.m., or from 10:00 a.m. to 6:00 p.m. When the Employer is fully staffed, there are two firefighters scheduled to work on each shift.⁴ Full-time firefighters generally work 40 hours per week, with occasional overtime to cover an absence or respond to an emergency call. The part-time firefighter is scheduled as needed, and is routinely used to fill in and cover for both scheduled and unscheduled absences. The firefighter-supervisor works alongside the paid firefighters and constitutes one of the two paid firefighters on a given shift. Given the shift schedule, there is generally a four-hour period each day when the firefighter-supervisor is not present at the station.

The firefighter-supervisor reports directly to the Fire Chief. The record is unclear as to whether the non-supervisory firefighters report directly to the firefighter-supervisor or to the Fire Chief.⁵ Ultimately, the Fire Chief is responsible for all the paid firefighters.

The Employer maintains an employee handbook which contains a variety of employment-related policies applicable to the paid firefighters. A Paid Personnel Committee, consisting of the Fire Chief, President, and Chairman of the Board of directors, is responsible for administering the policies contained in the employee handbook. Among them is a policy entitled "General Responsibilities and Job Duties of Paid Firefighter/EMS Personnel" which lists various daily, weekly, and monthly duties as well as projects to be completed by the paid firefighters.

³ Neil Blanchard succeeded Christopher Morigerato as Fire Chief on January 1, 2013 .

⁴ The testimony established that the Employer usually employs four full-time firefighters and one part-time firefighter. Prior to October 2012, firefighters Chris Dedrick, Greg Fulfree, Matt Pagano, and Timothy Gaffney were full-time; and Jason Gibbons was part-time. In October 2012, Pagano left the Employer, leaving a vacancy for one full-time firefighter that had not been filled at the time of the hearing.

⁵ There is no record evidence that the firefighter-supervisor is accountable for the job performance of the non-supervisory firefighters.

There is no policy setting forth the job duties of the firefighter-supervisor. The record reveals, and the Employer acknowledges, that the firefighter-supervisor, in addition to his duties as firefighter supervisor, performs the same job duties as the other paid firefighters.

Timothy Gaffney began working for the Employer as a paid firefighter in 2009. He testified that, in November 2010, after the former firefighter-supervisor resigned, Fire Chief Morigerato approached him and proposed that he become the firefighter-supervisor because he was the most senior paid firefighter. Gaffney agreed and, after a 30-day probationary period, became the firefighter-supervisor. Gaffney earns \$17.00 per hour, while compensation for the other firefighters ranges from \$13.00 to \$16.00 per hour. The wage rates for the paid firefighters and the firefighter-supervisor are set forth in the employee handbook. Gaffney receives the same medical and fringe benefits as the other firefighters. He wears the same uniform as the other firefighters.

As the firefighter-supervisor, Gaffney prepares the schedule for the paid firefighters each month and submits it to the Fire Chief for his review and approval. The testimony established that the firefighter-supervisor is responsible for creating the schedule in conjunction with, and subject to the approval of, the Fire Chief, and that the Fire Chief can adjust the schedule as he sees fit. Until October 2012, that schedule generally consisted of two full-time firefighters assigned to each of two shifts per day.⁶ Gaffney includes himself in the schedule as one of the paid firefighters on a given shift. He testified that, in preparing the schedule, the same two firefighters are generally scheduled to work together, and each week the pair rotates from the early shift (6:00 a.m. to 2:00 p.m.) to the late shift (10:00 a.m. to 6:00 p.m.). Gaffney testified that when a new firefighter is hired, he or she is simply scheduled in the shift left open by the outgoing firefighter.

⁶ As noted above, after October 2012, there was a vacancy for one full-time firefighter.

Gaffney testified that, generally, the Employer's staffing needs do not change, and he uses the same routine formula to make the schedule each month. The record reveals that the Fire Chief can, and does, direct Gaffney to adjust the staffing needs on occasion, for example by bringing in someone to work overtime. Generally, however, the staffing remains consistent with the same employees scheduled to work each week day. The record contained some testimony about "swaps," instances in which employees trade shifts with one another for personal convenience. Gaffney testified that he does not have a role in authorizing swaps; from his perspective, as long as the shift is covered, it does not matter who is working it. In terms of the criteria used for scheduling employees, Gaffney testified that it is "automatic," as he just follows the pattern that was in existence when he started and rotates the shifts each week. The record contains no evidence that the scheduling assignments are based on Gaffney's assessment of the firefighters' relative skills or any other criteria except availability.

Given the nature of the firefighters' work shifts, there is generally a four-hour window each day when Gaffney is not present at the station. Former Fire Chief Morigerato testified that if he needed to speak with someone at the station when Gaffney is not working, he asks to speak to the most senior firefighter on the shift.

As firefighter-supervisor, Gaffney also signs off on firefighters' requests for time off, both for personal service time (general leave) and for sick time, and for overtime requests. The procedure for submitting such a request differs according to the type: employees are required to submit requests for personal service time one week in advance, while sick time is generally unscheduled. The employee completes a time-off request form and has Gaffney sign off on it. The form is then submitted to the Fire Chief for his review and approval. The record does not contain a single instance where Gaffney authorized a time-off request that was not also

authorized by the Fire Chief. Gaffney also abides by the same procedure himself; completing the request form, signing it himself, and then submitting it to the Fire Chief for approval. The Fire Chief has authority to deny the request.⁷

With regard to overtime requests, the same request and authorization process applies. If the overtime is scheduled in advance for a specific purpose, Gaffney submits a request for authorization to the Fire Chief and will only schedule the overtime if it is approved. The testimony establishes that Gaffney does not independently authorize scheduled overtime without approval from the Chief. Former Fire Chief Morigerato testified that he often initiated scheduled overtime requests, which were sent to Gaffney for incorporation into the schedule. The record contains evidence of one instance in which Morigerato directed Gaffney, via email, to schedule an employee for overtime to complete a specific task. Gaffney responded to the email, indicating which employee was available and informing the Chief that he would schedule him as directed. Morigerato also testified that, as Fire Chief, he authorized employees to work overtime to complete particular tasks.

Unscheduled overtime generally occurs when there is an emergency call that extends beyond the firefighters' regular working hours. At that point, the officer in charge of the crew – whether Gaffney or a non-supervisory paid firefighter – can authorize overtime so that the crew can finish responding to the call. The alternative, to leave the scene of a fire and/or an emergency, was characterized by Chairman of the Board Richard Barlette, in his testimony, as an unwise decision. The record reveals that the only time unscheduled overtime is authorized without advance approval from the Fire Chief is when it is necessary to continue fighting a fire or responding to a call. Gaffney follows the same procedure for requesting leave and overtime as

⁷ The record is silent as to whether the firefighter-supervisor has the authority to deny the request. The record contained no example of an instance in which Gaffney denied such a request.

the non-supervisory firefighters, and his leave and non-emergency overtime requests, like the firefighters' requests, require the Chief's authorization.

The Employer contends that the firefighter-supervisor responsibly directs employees in part through his involvement with, and creation of, a monthly report and monthly accomplishments list. The monthly report tracks how many emergency and non-emergency calls are received each month; how many days each employee works; how many apparatus checks and routine housekeeping checks are performed; and how many training programs and projects are completed. The accomplishments list essentially details the specific daily, weekly, and monthly tasks completed by the paid firefighters. The record reveals that this tracking report was created as a tool to provide the membership (volunteers) with a method of quantifying the amount of work being done by the paid firefighters when they were not actually responding to calls. Gaffney testified that he compiles the accomplishments list from a daily log book that is accessible to all paid firefighters in their shared work space. He testified that firefighters log which tasks they complete each day, and at the end of the month, Gaffney transfers the information into a monthly report which is provided to the Fire Chief.

In its post-hearing brief, the Employer contends that there is no oversight of the firefighter-supervisor in his dealings with the paid firefighters because the Fire Chief, who supervises the firefighter-supervisor, is a volunteer and is generally not present at the firehouse during any of the working hours of the paid firefighters. The daily, weekly, and monthly tasks to be accomplished by the paid firefighters, including the firefighter-supervisor, are set forth in the employee handbook. These tasks, as the testimony indicates, are routine and familiar to the firefighters; they are completed without significant oversight, with only occasional direction from Gaffney via notes on a dry-erase board in the shared office space.

The firefighter-supervisor is in frequent contact with the Fire Chief, both by email, cell phone and text message. The record also reveals that the Chief frequently identifies a designee when he is going to be unavailable, and communicates this information to the firefighter-supervisor. Gaffney testified that he is often directed to contact one of the assistant chiefs with questions, or for approval or authorization, when the Chief is unavailable.

The Employer asserts that the firefighter-supervisor is a statutory supervisor based on his role in completing the firefighters' performance evaluations. The Employer points to the language in the Employee Handbook which provides:

- If an employee's performance is rated as "Needs Improvement," it shall be noted on the Performance Review Form (PRF). The employee shall be advised what must be done in the time remaining in order to achieve the acceptable rating of "Meeting or Exceeds Expectations."
- If the employee's performance continues at a rating of "Poor" or "Below Expectations," notification by the supervisor shall occur and disciplinary action shall be initiated up to and including termination of the employee.

The record reveals that, at regular intervals, depending on the firefighter's length of service, Gaffney completes an employee evaluation form. The form is a two-page document consisting mainly of a checklist broken into three categories: Job Performance, Behavior/Initiative, and Work Habits. Each category contains a series of sub-categories. Gaffney checks one of various boxes characterizing the employee's performance on a spectrum from "below expectations" to "far exceeds expectations." There is also a space on the form for general comments as well as signature lines for the employee, the supervisor, and a reviewer.

The evaluation process is initiated by the Fire Chief, who directs Gaffney to perform a firefighter's evaluation at the appropriate time. Gaffney then completes the evaluation form, meets with the firefighter being evaluated, reviews the evaluation with him, and both Gaffney

and the firefighter sign off on the evaluation. The evaluation is then provided to the Chief who also reviews it and signs off on the evaluation.⁸

The Employer acknowledges that no employee has ever been rated in the “below expectations” category, and as such, no remedial action has ever been taken by the Employer in accordance with this hypothetical scenario. Additionally, the language in this provision of the employee handbook is unclear as to what type(s) of remedial action may occur and who would be responsible for implementing that action. The handbook states that the Paid Personnel Committee, consisting of the Fire Chief, president, and chairman of the board of directors, “shall administer and oversee all provisions as identified in the Employee Handbook, including employee grievance, disciplinary measures, and termination matters.”

The Employer also notes that the employee handbook provides the following:

“Should an employee’s services prove unsatisfactory, the supervisor shall indicate on the employee evaluation form any and all corrective action necessary for a satisfactory rating. Note: If an evaluation report remains unsatisfactory at the conclusion of the probationary period, termination will occur.”

Despite this language, the testimony establishes that the firefighter-supervisor’s completion of the employee evaluation form is routine and subject to review and adjustment by the Fire Chief. Gaffney testified that, in at least one instance, he took direction from the Chief regarding how to evaluate an employee. The record reveals that no employee has ever been disciplined, terminated, promoted, rewarded, or otherwise materially impacted by the contents of the performance evaluation. The testimony establishes that the Fire Chief, and ultimately the Paid Personnel Committee, exercise the final say over the employee evaluations. Gaffney testified that his reviews of employees are routine, and that he takes direction from the Fire Chief regarding how employees should be evaluated. Gaffney has never been notified by the Employer

⁸ The record is unclear as to whether the Chief also meets with the employee being evaluated.

that he has the authority to take any corrective or disciplinary action in connection with the evaluations.

The record contains no evidence that the firefighter-supervisor is held accountable for the performance of the other firefighters' tasks, or that he has ever been disciplined or rewarded in connection with their job performance.

Gaffney, as firefighter-supervisor, receives \$1.00 per hour more than the top pay rate of the non-supervisory firefighters. Gaffney receives the same medical and fringe benefits as the other paid firefighters. He wears the same uniform as the firefighters. He works in an office space that is shared by all the firefighters. All the firefighters have desks, but Gaffney's desk is the only one with a computer terminal. The record is unclear as to whether other firefighters can access his computer. Gaffney attends monthly officer meetings; however, the record reveals that his attendance at those meetings is optional. Gaffney has an Employer-issued cell phone, while the non-supervisory firefighters do not. Gaffney also has an Employer email account while other firefighters do not.⁹

There is some record evidence that Gaffney initiated a proposal for improving the office space at the fire station by making various minor improvements. The testimony revealed that this proposal was subject to approval by the Fire Chief and the President, and that any employee could initiate such a proposal for consideration and approval by the appropriate officials. There is no evidence that Gaffney had any independent authority to implement the proposal.

ANALYSIS

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,

⁹ The record reveals that Gaffney typically does not use this email address for work-related correspondence, but instead uses his personal AOL email address for work correspondence.

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.

To establish that individuals are supervisors, the party with the burden of proof must show: (1) that they have authority to engage in any one of the twelve enumerated supervisory functions; (2) that their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment”; and (3) that their authority is exercised “in the interest of the employer.” NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706, 710-713 (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). Job descriptions, job titles, and similar “paper authority,” without more, do not demonstrate actual supervisory authority. Avante at Wilson, Inc., 348 NLRB 1056, 1057 (2006); Training School at Vineland, 332 NLRB 1412, 1416 (2000). 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).

Assignment and Responsible Direction

I find that the Employer has failed to meet its burden in demonstrating that the firefighter-supervisor exercises independent judgment in assigning work to the paid firefighters.

In Oakwood Healthcare, Inc., 348 NLRB 686 (2006), the Board clarified the criteria for finding that a putative supervisor “assigns” or “responsibly directs” the work of others, and uses “independent judgment” in doing so. The Board held that 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 as opposed to discrete tasks ... 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 689-90. 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. *Id.* 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.*

In Oakwood Healthcare, Inc., the Board found that a charge nurse exercised independent judgment when she made assignments based on her “analysis of an available nurse’s skill set and level of proficiency at performing certain tasks, and her application of that analysis in matching that nurse to the condition and needs of a particular patient.” The supporting evidence must be sufficient to establish that nurses “make assignments that are both tailored to patient conditions and needs and particular [employees’] skill sets.” *Id.* at 695. In Lynwood Manor, 350 NLRB 489

(2007), the Board made clear that merely conclusory testimony regarding the basis for staffing is insufficient to establish independent judgment.

Similarly, 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 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 of the tasks performed are not performed properly.” Oakwood Healthcare, supra, at 691-693.

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.

The record in the instant case, does not establish that the firefighter-supervisor exercises independent judgment in assigning work. His creation of the monthly schedule is routine, as it does not involve any assessment of comparative skill or ability among the employees, but rather adheres to an established pattern of grouping two firefighters together on the same shift week after week. Moreover, Gaffney submits the schedule to his supervisor, the Fire Chief, for review, and the Chief can make changes as he deems appropriate. When Gaffney does make changes to the schedule, it is a rare occurrence that is typically driven by the firefighters' availability – either the Employer is understaffed or a regularly scheduled employee is absent. In that event, he again reaches out to the Fire Chief for approval if overtime is necessary. As Gaffney testified, he is interested only in ensuring coverage for the required shifts.

In its post-hearing brief, the Employer cites ADT Company, 177 NLRB 704 (1969), in support of its contention that Gaffney's scheduling duties and assignment of work make him a statutory supervisor. In ADT, the individuals found to be statutory supervisors possessed responsibility for, and were in immediate charge of, several different groups of employees, with the duty of assigning and responsibly directing them on work projects for which the putative supervisors were held immediately accountable. During the week, the supervisors travelled from job to job, overseeing the progress of the projects under their control. Here, unlike ADT, there is no evidence that Gaffney is held accountable for the work of the paid firefighters or that he spends any of his time overseeing the progress of projects under his control.

The Employer also contends that Gaffney assigns and/or responsibly directs employees by authorizing personal service time, sick time, and overtime requests. However, the record establishes that these requests are also reviewed and authorized by the Fire Chief, who has the authority to deny the authorization. The evidence shows that Gaffney's approval of these

requests is routine and is subject to review and alteration or denial by the Fire Chief. Gaffney must complete and submit his own requests for personal service time, sick time, and overtime to the Fire Chief just as the other firefighters must do.

Concerning scheduled overtime, the authorization request is often initiated by the Fire Chief and passed on to Gaffney. While the Employer contends that Gaffney selects and approves employees for overtime on a regular basis without significant oversight by the Fire Chief, the record reveals that scheduled overtime is systematically submitted to, and approved by, the Fire Chief before it is worked, and that in some instances, the Chief has denied requests for scheduled overtime. Unscheduled overtime, by contrast, is driven by the emergency calls that come into the station and is authorized as needed on the spot. The testimony established that there is little independent judgment involved in authorizing unscheduled overtime, because it often occurs in the midst of responding to an emergency call and it is assumed that the responding crew will finish the call, rather than leaving the scene during the emergency. Furthermore, according to the testimony, paid non-supervisory firefighters could authorize this type of unscheduled overtime if they were at the scene of a fire and Gaffney was not present. Gaffney does not possess the authority to independently authorize non-emergency overtime or time off; he merely approves the initial request and passes it on to the Chief for final approval. The grant or approval of time off is ultimately within the Chief's discretion.

The Employer, in its post-hearing brief, cites Warren Rural Electrical Corp., 209 NLRB 325 (1974) and F. Strauss & Son, Inc., 200 NLRB 812 (1972), in support of its assertion that the maintenance of time records is a recognized indicia of supervisory authority. In Warren, the individuals at issue not only maintained time and attendance records of employees assigned to work with them, they also decided whether or not to grant requests for time off, set vacation

times, made changes in work assignments, interchanged crew members when appropriate, and independently authorized overtime. They also evaluated employees and made recommendations with regard to merit wage increases and terminations which were relied upon by the employer. In short, the individuals found to be supervisors in Warren possessed significant additional supervisory indicia beyond simply maintaining time records and their mere maintenance of the time records was not the basis for the Board's finding of supervisory status. Similarly, in F. Strauss & Son, Inc., there was evidence that, in addition to possessing authority to grant time off and to change the schedule, the putative supervisor reprimanded employees and made recommendations to grant wage increases upon which the employer relied.

The Employer claims that the firefighter-supervisor exercises independent judgment in assigning daily, weekly, and monthly tasks to the firefighters. Again, I note the absence of evidence in the record that Gaffney assigns tasks to those employees. In this regard, Gaffney testified that the firefighters are aware of the tasks that need to be completed because they are set forth in the employee handbook. He further testified that these employees essentially complete the required tasks on their own, with occasional direction from Gaffney via notes on the dry-erase board in the shared office space.

As noted above, the Board has found that the exercise of judgment in the assignment of work "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." As such, the judgment must involve a degree of discretion that rises above the "routine or clerical." Oakwood Healthcare, *supra*, at 693. Here, there is no evidence that Gaffney's exercise of judgment in scheduling, approving time off and overtime, and assigning work, rose above the routine or clerical. The Board has found that any lack of

evidence in the record is to be construed against the party asserting supervisory status. See Elmhurst Extended Care Facilities, 329 NLRB 535, 536 fn. 8 (1999). Based on the foregoing, I find that the Employer has failed to meet its burden of establishing that the firefighter-supervisor uses independent judgment in scheduling, approving time off and overtime, and assigning work to firefighters.

Evaluations

The Employer asserts that the firefighter-supervisor is a statutory supervisor based on his role in completing the firefighters' performance evaluations. I find that the firefighter-supervisor's completion of evaluations of the firefighters does not establish that he is a Section 2(11) supervisor. While the firefighter-supervisor completes performance evaluation forms for the firefighters, there is no record evidence that the evaluations affect the firefighters' wages or job status.

The Board will not find an individual to be a statutory supervisor unless the evaluation affects the wages or job status of the employee being evaluated. See Elmhurst Extended Care Facilities, Inc., 329 NLRB at 536. In Nymed, Inc., 320 NLRB 806, 813 (1996), the Board found that, while the putative supervisors played an important role in preparing employee evaluations, their role was reviewed by a higher authority, their reviews were subject to adjustment, and their input was not directly linked to a wage increase. As such, their involvement did not constitute supervisory authority. The Board has found supervisory status in cases that show a direct correlation between the evaluation completed by the purported supervisor and the pay increase given. For example, in Trevilla of Golden Valley, 330 NLRB 1377 (2000), the Board found that LPNs were statutory supervisors because they were the only individuals to complete the

employee evaluation form and, based on the ranking they provided, the nursing director applied a formula to determine the employees' merit increase.

Here, the Employer has failed to provide any evidence that wage increases are linked to the content of employees' performance evaluations. The Fire Chief reviews and approves the evaluations after they are submitted by the firefighter-supervisor. The Chairman of the Paid Personnel Committee testified that the performance evaluations have no impact on wages, as the wages are set forth in the employee handbook. Concerning job status, the employee handbook states that the Paid Personnel Committee, which does not include the firefighter-supervisor, shall administer and oversee employee grievances, disciplinary measures, and termination matters. There is no language addressing what role, if any, the firefighter-supervisor plays in such matters, but the employee handbook suggests that these issues are handled by the Paid Personnel Committee. There is no record evidence establishing that the firefighter-supervisor's evaluations of the firefighters have ever resulted in any disciplinary action.

Secondary Indicia

While the firefighter-supervisor receives a higher rate of pay than the firefighters, and, unlike the firefighters, has an Employer-issued cell phone and computer on his desk, the Board has held that where there is no evidence of primary indicia, such secondary indicia are insufficient to establish supervisory status. See Ken-Crest Services, 335 NLRB 777, 779 (2001); Billows Electric Supply, 311 NLRB 878 fn. 2 (1993). Since the Employer has failed to establish that the firefighter-supervisor possesses any of the primary indicia of supervisory status, I find that the evidence of secondary indicia is immaterial.

Conclusion

Based on the foregoing, the entire record, and Board case law, I find that the Employer has failed to meet its burden of establishing that the firefighter-supervisor is a supervisor within the definition of Section 2(11) of the Act.

Accordingly, I find that the following employees represent a unit that is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, and I shall direct an election therein:

All full-time and regular part-time firefighters and EMTs, including the firefighter-supervisor, employed at the Employer's 226 Old Loudon Road, Latham, New York location; excluding all volunteers, office clerical employees, guards, professional employees, and 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 found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by **Local 4924, Colonie Professional Firefighters Association, International Association of Firefighters**. 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 **February 15, 2013**. 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,¹⁰ 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 only one copy 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 three 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

¹⁰ 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.

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 stops employers 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 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 **February 22, 2013**. The request may be filed electronically through the Agency's web site, www.nlr.gov,¹¹ but may not be filed by facsimile.

DATED at Buffalo, New York this 8th day of February, 2013.

/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

¹¹ 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.