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MEMORANDUM IN SUPPORT

I. **THE BOARD CANNOT RULE UPON THE EMPLOYER'S REQUEST FOR REVIEW UNTIL IT OBTAINS A LAWFUL QUORUM**

The Board has no legal authority to function when it lacks a quorum of three members. *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010). On January 25, 2013 the Court of Appeals for the D.C. Circuit nullified President Obama's January 2012 NLRB appointments concluding that the Board lacked authority because three of its five members were improperly appointed. See, *Noel Canning v. NLRB*, 2013 U.S. App. LEXIS 1659 (D.C. Cir. 2013). The Court determined that the appointments were unconstitutional in that they violated the Recess Appointment Clause in Article II, § 2, Cl. 3 of the United States Constitution because the senate was not in recess when the President made the appointments. As such, the Board lacked the required quorum to conduct its business.

In light of the above, the appointments of Block and Griffin to the Board are invalid. Accordingly, the Board currently lacks a quorum under *New Process Steel* and *Noel Canning* and cannot rule upon the Company's Request for Review and/or adjudicate this case until such time as it attains a proper quorum.

II. **BACKGROUND**

Pursuant to the Regional Director's July 13, 2012 *Decision and Direction of Election* a secret ballot election was conducted on August 10, 2012. During the election the observer for The Ardit Company ("Employer," "Ardit," or "Company") challenged the ballots of Thomas R. McAllister ("McAllister") and Keith Barnes ("Barnes") due to the fact that they are Supervisors. Subsequently, an investigation of the issues raised by the challenged ballots was conducted under the Regional Director's direction and supervision. As a direct result thereof, the Regional Director issued, on November 5, 2012, a *Supplemental Report, Order Directing Hearing and*

Notice of Hearing ordering that a Hearing be conducted before a Hearing Officer to resolve the issues raised by the challenges to the ballots of Barnes and McAllister.

A hearing was conducted before Hearing Officer Daniel A. Goode (“Hearing Officer”) on November 13, 2012 with respect to the § 2(11) supervisory status of McAllister and Barnes. On December 17, 2012 the Hearing Officer issued his report finding that there was no evidence that McAllister and Barnes possess any of the statutory criteria for supervisory status set forth in § 2(11) of the Act. See, Hearing Officer’s Report and Recommendation (“Report”), p. 2. Accordingly, the Hearing Officer determined that McAllister and Barnes are eligible voters and, as such, recommended that that the Employer’s challenges to their ballots be overruled and that their ballots be opened and counted. Id.

The Company excepted to the Hearing Officer’s Report on Challenged Ballots and Recommendations to the Regional Director January 4, 2013. In its exceptions, the Company asserted the Hearing Officer erred in finding there was no evidence that McAllister and Barnes possessed any of the statutory criteria for supervisory status set forth in § 2(11) of the Act. The Company also excepted to certain credibility findings ruled upon by the Hearing Officer. Notably, the Hearing Officer failed to cite to the transcript to support any of his factual findings, his credibility decisions or his legal analysis. The Regional Director adopted the Hearing Officer’s Report and Recommendations noting that “the Employer has fallen well short of meeting its burden of proof to establish that McAllister and Barnes are supervisors within the meaning of Section 2(11) of the Act.” See, Regional Director’s *Second Supplemental Decision and Order* (“RD Decision”), p. 6. Contrary to the Regional Director’s *Second Supplemental Decision and Order*, the Employer did prove by a preponderance of the evidence that McAllister

and Barnes are § 2(11) supervisors. The record evidence, most importantly their own testimony, proves by a preponderance of the evidence that Barnes and McAllister are § 2(11) supervisors.

III. FACTS

A. Authority to Direct the Workforce and Assign Work

The Employer's supervisors (McAllister and Barnes) are in charge of its jobsites as Alex Johnson ("Johnson") the Company's project manager is not able to spend his days at the various jobsites. (Tr. pp. 15-16.) In fact, it is not uncommon for Johnson to remain absent from a jobsite for a full week. (Tr. pp. 234-235.) During that time McAllister and Barnes direct the workforce. Id. McAllister and Barnes direct the day to day activities of the men below them to ensure job sequencing, flow and efficiency; they manage raw materials, manpower needs and ensure the proper equipment and supplies on the job; they troubleshoot problems with materials and equipment; they direct mechanics on where to work; and when new employees are assigned to work on a project they are instructed to see McAllister and/or Barnes to get direction as to where to go and what to do. (Tr. pp. 27-28, 42-43 & 60-61.) Essentially, the Employer relies upon McAllister and Barnes to ensure the projects are completed to the correct specifications and satisfaction of the project owner. (Tr. p. 43.) Consequently, McAllister and Barnes are paid at a higher hourly rate than the employees they are supervising.

When the Employer and Petitioner were party to an 8(f) agreement McAllister was paid \$1.75 per hour above the base rate due to his experience, seniority and his responsibilities as a supervisor. (Tr. p. 17.) Barnes was paid \$1.25 per hour above the base rate due his responsibilities as a supervisor. (Tr. p. 39.) Barnes is paid at a lower rate than McAllister as Barnes was promoted to his supervisory position on July 5, 2012 while McAllister has been supervisor since approximately 1986. (Tr. pp. 16 & 41.) Under the terms of the expired

agreement, foreman were to be paid \$1.25 above the base rate if there were three or more mechanics, tile setters and/or terrazzo setters on the project. (Tr. p. 16 and Employer's Ex. 1, page 3, Article 7 and Employer's Ex. 2, p. 7, Article VII, Section 8 and p. 9, Article 10, Section 3.) The Employer paid McAllister and Barnes above the base rate regardless of the number of employees working on their crew. (Tr. pp. 21 and 39.) Even upon the expiration of the 8(f) agreement, McAllister and Barnes remain the highest paid hourly employees; McAllister at \$32.00 per hour and Barnes at \$31.00. (Tr. p. 27 and 41.)

B. Authority to Terminate and/or Recommend Termination

In addition to assigning work and directing the workforce, both McAllister and Barnes have the authority terminate and/or recommend termination as it is part of their position. (Tr. p. 137 & 172) In July 2000 McAllister terminated Bill Denney. (Tr. pp. 34-36, 107, 163-165, 177 & Employer's Ex. 5.) McAllister was given the authority to terminate by Mr. George Martina in 1986 when Mr. Martina become owner and President of the Company. (Tr. pp. 138 & 176-178.) Barnes recommended that Travis Sutherly be terminated because he could not locate Sutherly on the jobsite even though Sutherly noted on his timecard that he had worked 8 hours. (Tr. pp. 114-116 & 156.) Michele Johnson subsequently terminated Sutherly based upon Barnes' recommendation and recounting of events. (Tr. p. 156.)

IV. LAW AND ARGUMENT

Section 102.67(c) of the Board's Rules and Regulations provides that the grounds for granting a request for review are as follows:

- (1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.
- (2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

The Employer asserts that items 1 through 3 noted above are proven in this matter and, as such, a full review by the Board is appropriate in this matter.

A. Departure From Established Board Precedent

The Hearing officer and Regional Director erred when each concluded that McAllister and Barnes do not possess *any* of the statutory criteria set forth in § 2(11) of the Act. In so doing, the Regional Director’s Decision is clear departure from established Board precedent establishing that Barnes and McAllister are § 2(11) supervisors. The Act defines the term “supervisor” in § 2(11), which states:

The term supervisor means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

See, 29 U.S.C. § 152(11). The United States Supreme Court noted that § 2(11) necessarily sets forth a three part test for determining supervisory status. See, *NLRB v. Kentucky River Community Care* (2001), 532 U.S. 706, 712. An employee is a supervisor if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment, and (3) their authority is held in the interest of the employer. *Id.* at 712-713. Furthermore, “[a]n individual *need possess only one* of the of the enumerated indicia of authority in order to be encompassed by [§] 2(11), as long as the exercise of such authority is carried out in

the interest of the employer, and requires the exercise of independent judgment.” See, *Extendicare Homes, Inc.* 348 NLRB 1062, 1063 at fn. 7 (2006), citing *Arlington Masonry Supply, Inc.*, 339 NLRB 817, 818 (2003) (emphasis added). The burden of proving supervisory status lies with the party asserting that such status exists. See, *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006). Lastly, the party seeking to prove supervisory status must establish said status by a preponderance of the evidence. Id.

In general, the Board has exercised caution in not construing supervisory status too broadly because the employee who is deemed a supervisor loses the protection of the Act. See, *Oakwood Healthcare Center, Inc.* 348 NLRB 686, 688 (2006). Nevertheless, the Board has occasionally reached too far in applying that principle. Id. Indeed, the United States Supreme Court rebuked the Board’s narrow construction of § 2(11) as “inconsistent with the Act.” Id., citing *Kentucky River Community Care*, 532 U.S. at 721-722 (2001). More importantly, the Board made a determination to eliminate the results driven approach it so often implemented in determining the supervisory status of employees. Id. In so doing, the Board set forth definitions for “assign,” “responsibly direct,” and “independent judgment” as those terms are used in § 2(11) of the Act. The Board noted as follows:

The authority to assign refers to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee. . . . It follows that the decision or effective recommendation to affect one of these--place, time, or overall tasks--can be a supervisory function. The assignment of an employee to a certain department (e.g., housewares) or to a certain shift (e.g., night) or to certain significant overall tasks (e.g., restocking shelves) would generally qualify as assign within our construction. 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.

[T]he authority responsibly to direct is not limited to department heads as the dissent suggests. The department head may be a person between the personnel manager and the rank and file employee, but he or she is not necessarily the only person between the manager and the employee. If 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, that person is a supervisor, provided that the direction is both responsible (as explained below) and carried out with independent judgment. In addition, as the statute provides and Senator Flanders himself recognized, the person who effectively recommends action is also a supervisor. . . . We agree with the circuit courts that have considered the issue and find that for direction to be responsible, the person performing the oversight must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed are not performed properly. . . . Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.

Consistent with the Court's *Kentucky River* decision, we adopt an interpretation of the term 'independent judgment' that applies irrespective of the Section 2(11) supervisory function implicated, and without regard to whether the judgment is exercised using professional or technical expertise. In short, professional or technical judgments involving the use of independent judgment are supervisory if they involve one of the 12 supervisory functions of Section 2(11). . . .

[T]o 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.

As the Court indicated in *Kentucky River* there are, at one end of the spectrum, situations where there are detailed instructions for the actor to follow. At the other end, there are other situations where the actor is wholly free from constraints. In determining the meaning of the term independent judgment under Section 2(11), the Board must assess the *degree* of discretion exercised by the putative supervisor.

Id. at 689-693. (Internal quotations and citations omitted) (Italics in original).

Based upon the record evidence it is clear that McAllister and Barnes are supervisors under § 2(11) of the Act. The Board has regularly held that working foreman are supervisors under § 2(11) of the Act when they assign work and/or responsibly direct the workforce and/or terminate/recommend termination of employees just as McAllister and Barnes do here. See, *Wer-Coy Fabrication Co.*, 268 NLRB 907 (1984) (working foreman determined to be § 2(11) supervisor where he earned more than other employees, had the authority to terminate, assigned tasks to other employees and assured that the jobs were complete by the end of the day); *Maidsville Coal Co.*, 257 NLRB 1106 (1981) (working foreman determined to be § 2(11) supervisor where he regularly directed the workforce on the afternoon shift); *Contractors Cargo Co., Inc.*, 218 NLRB 549 (1975) (working foreman determined to be § 2(11) supervisor where he assigned work in the repair shop and transferred employees from one job to another); *Bee Line Engineering, Inc.*, 217 NLRB 367 (1975) (working foreman determined to be § 2(11) supervisor where he attended weekly supervisor meetings, was paid more than rank and file employees and issued discipline); *Dee Knitting Mills, Inc.*, 214 NLRB 1041 (1974) (working foreman determined to be § 2(11) supervisor where he assigned the employees to their work stations and moved them when necessary, distributed their work, oversaw their work, was responsible for seeing that the workers were used most effectively for the completion of work each day as well as the quality of work and determined the capability of workers to perform a particular task and assigned them accordingly); *Draggo Electric Co., Inc.*, 214 NLRB 847 (1974) (working foreman determined to be § 2(11) supervisor where he assigned work and was in charge of business when the owner was absent); *Imperial Cabinet Shop*, 204 NLRB 1102 (1973) (working foreman determined to be § 2(11) supervisor where he had the authority to terminate); *Captive Plastics, Inc.*, 209 NLRB 749 (1974) (working foreman determined to be § 2(11) supervisor where he

took employees off other jobs and assigned them work and used his discretion to determine which employees did what specific tasks); and *Jeffrey Manufacturing Co.*, 208 NLRB 75 (1974) (working foreman determined to be § 2(11) supervisor where he gave orders to and directed the work of other employees).

Notwithstanding, the Hearing Officer and the Regional Director disregard the record evidence and, instead, rely upon boilerplate, conclusory language in order to reach their desired finding. For instance, the Regional Director argues that the Employer's workforce is experienced and the nature of work is routine and that the laying of terrazzo and tile is accomplished in the same steps for each job. See, RD Decision, p. 4. Further, he states that the "division of labor at the jobsite is based largely upon an experienced work force taking on the tasks they are most experienced at and within their skillset." *Id.* p. 5. Such conclusory statements establish this decision is results driven. For instance, baggers and cashiers show up for work each day at Kroger knowing each day their tasks will be the same as they were the previous day. Cashier's ring up the groceries and baggers bag; it does not get any more routine than that. Nonetheless, these individuals still have supervisors on the floor. Using the reasoning of the Regional Director, they would not have supervisors on the floor because they already know what to do. Such reasoning is inherently flawed.

B. The Regional Director's Decision Is Based Upon Factual Errors

1. Authority to Terminate

The Regional Director concluded that the hearing officer correctly found that neither Barnes nor McAllister has the authority to terminate employees. See, RD Decision, p. 3. This finding is not supported by the record.

a. **Barnes**

Barnes recommended that Sutherly be terminated because he could not locate Sutherly on the jobsite even though Sutherly noted on his timecard that he had worked 8 hours. Michele Johnson subsequently terminated Sutherly based upon Barnes' recommendation and recounting of events. Michele Johnson testified that she called Travis Sutherly based upon what Barnes told her and she called him in order to terminate him. (Tr. p. 156.) Nevertheless, the Hearing Officer and Regional Director found Michele Johnson's phone call to be the equivalent of an "independent investigation" because she asked him his whereabouts immediately before she terminated him. See, Report, p. 14 and RD Decision, p. 3. Both the Hearing Officer and Regional Director erred in equating a short-lived telephone conversation with that of an independent investigation. More importantly, Barnes testified that it is possible that he recommended that Sutherly be fired. (Tr. pp. 281-282.) Barnes' testimony is in line with Michel Johnson's testimony that Barnes did recommend Sutherly's termination.

The Regional Director concedes that Michele Johnson terminated Sutherly "because of Barnes' report that he had not appeared for work." See, RD Decision, p. 3. Notwithstanding, the Regional Director concluded that "the ability to report misconduct to superiors is certainly not tantamount to disciplinary authority." *Id.*, citing *Los Angeles Water and Power Employees' Assoc.*, 340 NLRB 1232, 1234 (2003). In *Los Angeles Water* the evidence established that the putative supervisor could talk to employees about their performance or attitude. 340 NLRB 1232 at 1234. However, the putative supervisor was required to report serious employee misconduct to the office manager or the board of directors. *Id.* The board would then perform its own investigation and decide what, if any, discipline would ensue. *Id.* More importantly, there was no evidence that the board had ever considered any such discussions between the

putative supervisor and other employees when determining whether to issue any discipline. *Id.*

It is clear that Barnes at least initiated Sutherly's termination by using his independent discretion to report Sutherly's absence to Michele Johnson. The Board has found that employees possess the authority to effectively recommend discipline under § 2(11) simply because said person has the authority to initiate the disciplinary process. *See, Sheraton Universal Hotel*, 350 NLRB 1114, 1116 (2007), citing *Progressive Transportation Services*, 340 NLRB 1044 (2003). Moreover, effective recommendations of discipline need not encompass the authority to make disciplinary decisions unilaterally. *Id.* at 1116, fn. 4. For instance, the Board in *Sheraton Hotel* noted that the § 2(11) supervisor in *Progressive Transportation* brought the disciplinary issues to her director who decided the level of discipline based on the supervisor's account and advised her on the preparation of the disciplinary notice. *Id.* at 1116. The § 2(11) supervisor effectively recommended discipline because she initiated the process. *Id.*

Also, the Board in *Progressive Transportation* noted that independent judgment is used in deciding whether or not to even initiate the disciplinary process, or to just handle the matter themselves through an informal verbal warning. 340 NLRB 1044 at 1046. The Board recognized the fact that the recommendation to discipline is itself a discretionary choice. *Id.* fn. 6. The "significance" is the independent judgment used to decide whether to implement the disciplinary process by bringing the issue to the director, as opposed to resolving the incident through an informal verbal warning. *Id.*

Similarly, an individual initiates the disciplinary process by simply filling out the disciplinary report. *See, Galtier Health Center v. NLRB*, 2006 US App. LEXIS 11888, * 14 (6th Cir. 2006). Just by making the report the "nurse plays an effective role in the disciplinary

process” notwithstanding the fact that the administrator or the director of nursing makes the final decision as to whether or how the subject will be disciplined. Id.

b. McAllister

In July 2000 McAllister terminated Bill Denney. (Tr. pp. 34-36, 107, 163-165, 177 & Employer’s Ex. 5.) McAllister was given the authority to terminate by George Martina in 1986 when Mr. Martina become owner and President of the Company. McAllister’s termination of Denny is supported by Employer’s Ex. 5. Employer’s Exhibit 5 is Denney’s time card. On the back of the time card is the following notation which is dated June 26, 2000: “Tom fired him. Hiding on the job. Late to work. Doesn’t call in. Missed a lot of time. Do not pay unemployment. See Norma.” (Tr. p. 36 & Employer’s Ex. 5.)

Norma Martina testified that McAllister fired Denney, she has no doubt in her mind that what she wrote down was accurate and that her husband gave McAllister the authority to terminate employees. (Tr. pp. 163-165, & 176-178.) There is no documented evidence in the record to suggest that Norma Martina’s written notation created shortly after McAllister terminated Denney is not accurate. Nevertheless, the Hearing Officer credited McAllister’s recollection events some 12½ years after the termination in question over evidence which was documented only days after the termination. See, Report, pp. 14 & 15. The Regional Director subsequently adopted this finding. See, RD Decision, p. 3. These rulings are erroneous and yet another illustration that the Hearing Officer’s Report and Regional Director’s Decision is results driven.

The Hearing Officer credits McAllister’s version of events even though they are not plausible. McAllister alleges that Denney yelled at George Martina, the owner of the Company. According to McAllister’s credited version of events, Martina proceeded to tell McAllister that

Denney had yelled at him and, as such, he would have Johnson come to the jobsite the next day in order to fire Denney rather than terminating Denney himself. (Report, p. 14.) It is simply not probable that an owner of the Company would let an employee yell at him without terminating him immediately, or at least admonishing him. Secondly, there is no evidence of this version of events on the back of Denney's timecard. Next, the Hearing Officer supports his finding based upon the fact that McAllister had no recollection of calling Norma Martina and informing her that he had fired Denney. With respect to the telephone call, McAllister testified that it is possible that he made the phone call but he is not certain considering the fact that it has been "11 years ago." (Tr. p 229.) McAllister waffled back and forth on cross examination as to whether he did or did not make the call and, if he did make the call, who he made the call to. (Tr. pp. 228-229.) Nonetheless the Hearing Officer noted that McAllister had "specific recollection of the incident." (Report, p. 15.) It is clear that a company record kept in the ordinary course of business and created mere days after the alleged incident should be credited over McAllister's recollection of events nearly 12½ years later. Nevertheless, the Regional Director adopted the Hearing Officer's Findings. See, RD Decision, p. 3.

2. Authority to Direct the Workforce and Assign Work

The Hearing Officer acknowledged that although Johnson staffs each crew for a certain project McAllister and Barnes determine who from the crew will perform each job function and that McAllister attempts to keep crew members in the in the function they are best at. (Report, p. 7.) For instance, McAllister gave an example of assigning a finisher grout work on ceramic tile because he was the best man on the job to complete the task. (Id.) That is the very essence of independent discretion. Notwithstanding, the Hearing Officer and Regional Director found the record absent of any evidence that McAllister's and Barnes' decisions are anything more than

routine decisions based upon experience. (Id. p. 15 & RD Decision pp. 4 and 5.) Such a statement is exactly the kind of narrow construction and results driven analysis the Board vowed to do away with in *Oakwood Healthcare*. In adhering to this narrow construction, the Hearing Officer and Regional Director erroneously disregarded relevant testimony elicited from both McAllister and Barnes.

The Employer cited numerous examples illustrating the Hearing Officer erred and that Barnes and McAllister do have the authority to assign and/or responsibly direct the work. The Regional Director dismissed the examples cited by the Employer while accusing the counsel for the Employer of altering the testimony and engaging in a misleading portrayal of the evidence. The Regional Director noted as follows:

In arguing that the hearing officer erred, the Employer purports to quote numerous examples from the transcript contradicting the hearing officer's findings, even going so far as to recite the facts as if McAllister or Barnes were speaking in the first person. A review of the transcript, however, reveals that the so-called quotes are entirely inaccurate, and frequently omit key qualifiers that change their meaning. As one of many examples, on page 7 of the Employer's brief, the Employer represents that McAllister testified that "as job foreman I am responsible if someone does not do their job on a project." The actual transcript reads as follows:

Q. Do you believe that you would be held accountable and subject to discipline if a job was not - if somebody didn't do their job on a project, would you be responsible, or would somebody else?

A. My feeling is that, for the most part, we have qualified men that are responsible for their own work. But as a job foreman, I would probably be somewhat.

Q. Okay. Have you ever been held responsible for something going wrong on a job?

A. Probably, but I can't remember any. We've had floors and - not get - somebody would forget the hardener.

Q. And have you been disciplined for that?

A. No

This misleading portrayal of the evidence by the Employer's counsel has not gone unnoticed. That being said, I will respond to the Employer's arguments, although many of them are based on similarly altered accounts of the record testimony.

See, RD Decision p. 4. First, counsel for Employer did not put quotes around the information cited in the bullet points in its Exceptions to the Hearing Officer's Report as if were the actual testimony of Barnes or McAllister. Accordingly, the Employer was not purporting to quote the testimony. Secondly, the testimony cited below speaks for itself. The Employer need not alter the transcript or portray the evidence in a misleading fashion. Unlike the Hearing Officer and the Regional Director, the Employer actually cited the transcript to support its arguments. Furthermore, the Regional Director used the above testimony to state the following: "At most, McAllister testified that he 'would probably be somewhat' responsible for the work, but he unequivocally testified that he has never been disciplined for another employee's failings." Id. p. 5. However, as noted in *Oakwood, supra*, only a prospect of adverse consequences is required, meaning discipline is a possibility. McAllister's testimony fails to support the Regional Director's inference that McAllister is not responsible for his crew's work.

McAllister and Barnes own testimony expressly illustrates that their decisions are based upon independent discretion and are not simply routine and clerical as is asserted by the Hearing Officer and the Regional Director:

a. Barnes

- Barnes: Instructs employees this need finished over here or this needs started over there. (Tr. pp. 267-268.)

Q. Okay. But when you say "not directly," I'm gathering that you do do some directing when you say, "Well, not directly." Is that -- is that a fair statement?

A. That's a fair statement, except for the fact that, I mean, he -- Alex pretty much dictates how the --

Q. Okay.

A. -- the job is going to go.

Q. And I'm -- I'm not talking about Alex right now, I'm talking about you. What do you do?

A. Okay. I may tell -- yes, I may tell somebody that this specific thing needs finished over here, or this specific thing needs done or started over here.

➤ Barnes: I oversee the job and I am paid the foreman rate. (Tr. pp. 269 & 271.)

Q. Okay. And at the very beginning of your testimony you indicated that you oversee the job.

A. Well, just in -- I mean, I had been paid foreman's wages previously back in the past. But just since this June or July has that been reinstated for me to be foreman.

Q. Okay. So back to the oversee. What -- what is your -- when you say you oversee the job, what do you -- what do you mean by that?

A. Well, that would be to, if we need more material, if we need more setting material things, if we need equipment, or something, then I would call Kevin or Alex, let them know if we needed something.

➤ Barnes: I have instructed people to redo their work because it is not acceptable. (Tr. pp. 274-276.)

Q. Has there ever been a time when, you know, you're setting tile and it's not done properly and you instruct the employees that, hey, we need to do this again because it's not done right?

A. I have said some things to people, yes.

Q. Okay. And how often does that occur?

A. It's kind of rare.

Q. Okay. And could you give an example of -- of what you would say, or what you would instruct them to do?

A. Do you really?

Q. Well, a cleaned up version.

A. No. Are you going to leave that like that?

Q. Okay. So, but you instruct to say, look, that's not -- that's not going to fly.

A. Acceptable. It's not acceptable.

Q. Correct. And you're the only one on the job site that can tell someone that's not acceptable he needs to do it again.

A. No. Each of us, in our own rights as mechanics, you know, would critique each other's work, you know.

Q. Uh-huh. Has another mechanic ever told you to, since your time at Ardit since July, has another mechanic told you that's not acceptable, you need to redo your work?

A. No.

Q. Okay. And have you, since -- since July 5th -- since July of 2012, have you had the occasion to tell someone that that's not acceptable, you need to fix that?

A. Not since July I haven't, no.

Q. Okay. Well, when would be the -- the most -- the most recent time?

A. The most recent that I can remember is that Cardinal Health project when there was a different guy, John Henneky.

Q. And you indicated on the Cardinal Health job you were being paid foreman's rate; correct?

A. Yes.

b. McAllister

➤ McAllister: Duties include overseeing the job. (Tr. pp. 182.)

Q. All right. And when George took over the Company along with his partner and he hired you, what were you hired in as?

A. Tile setter, terrazzo mechanic.

Q. And what kind of duties did you have back then?

A. The same, to go put in either tile floors or terrazzo floors, oversee maybe the job.

- McAllister: The people that work with me follow my direction (the color of floor we will put in, how to mix and where we are going to work). (Tr. p. 192.)

Q. All right. And then in all fairness on certain jobs, do you tell workers where to go next?

A. Basically, not.

Q. Okay.

A. I -- George Martina once told me that I don't need to tell the grinders what to do, that they know. So, basically, I don't, because they do. They're good men.

The people that work with me usually follow my directions, like what color of floor we'll put in, how to mix, and where we're going to work.

- McAllister: The mixer does not mix until I tell them to mix. This could be because I am not yet ready or the mix may need adjusted for whatever reason. If it is cold the epoxy is hard to work with so we may cut back on chips. (Tr. pp. 193-194.)

Q. You can direct people, you said something with respect to mixing.

A. Yes.

Q. What do you -- what do you mean by that?

A. Well, basically, I tell the guy that's running the mixer that day -- they won't mix until I tell them to mix, because if I'm not ready. Or, if the mix has to be adjusted for any reason. Like epoxy, if it's cold, it's hard to work with, so we may cut back a few chips, or something.

Q. All right. So they won't mix, why? What would be a situation --

A. Because I don't want a wheelbarrow of terrazzo, epoxy terrazzo sitting there if I'm not ready to use it, because it could set off.

- McAllister: Contractors may ask that I direct the grinders to grind a certain spot and in that instance I will do so. (Tr. p. 194.)

Q. Okay. All right. So other than installing terrazzo and directing mixers to mix and pour some color in, what else do you do on a typical project?

A. That's about it. Like I said, the grinders know what they're doing, so basically -- unless -- unless the contractor will come and ask me to have them grind a certain area for a day or so, or if they want to get something done, I may direct that.

➤ McAllister: As job foreman I am responsible if someone does not do their job on a project. (Tr. pp. 202-203.)

Q. Do you believe that you would be held accountable and subject to discipline if a job was not - if somebody didn't do their job on a project, would you be responsible, or would somebody else?

A. My feeling is that, for the most part, we have qualified men that are responsible for their own work. But as a job foreman, I would probably be somewhat.

Q. Okay. Have you ever been held responsible for something going wrong on a job?

A. Probably, but I can't remember any. We've had floors and - not get - somebody would forget the hardener.

Q. And have you been disciplined for that?

A. No

➤ McAllister: You take your best helpers and whatever they are best at you try to keep them there. I would not have Tim Clemons mixing and I would not have Guy Tolliver grinding. (Tr. pp. 208-209.)

Q. All right. And then is it determined, at that point, who's going to do the -- the grinding, who's going to do the setting tile?

A. Yes. Yeah. Yes.

Q. And who determines that?

A. Usually the -- the mechanic on the job, I suppose.

Q. Decides for himself what he's going to do?

A. Yeah. You'd -- you'd take your helpers, and whatever they're best at, you try to keep them there.

Q. Okay.

A. I mean, I wouldn't have Tim Clemmons mixing for me. If Guy's there, I wouldn't have Guy grind them, because they -- they both do the other, so --

➤ McAllister: The Company pays me as a foreman so I am responsible for the job. I make sure it's completed on schedule. (Tr. p. 230.)

Q. Okay. You testified right at the beginning of you [sic] testimony that you oversee the job. What'd you mean by that?

A. Well, they pay me to be a foreman, so I -- I'm pretty much responsible for the job, I assume.

Q. Okay. And when you say you're responsible for the job, what's your --

A. That's --

Q. -- understanding of that?

A. To complete it on -- on a proper schedule, and so the Company makes a profit.

➤ McAllister: If Johnson or the contractors see a problem on the jobsite they come to me. (Tr. p. 231.)

Q. Okay. So when you say you oversee the job -- you know, at one point you said you don't direct any work because everyone knows what they do.

A. That's correct.

Q. And at the beginning of your testimony you say you oversee the job, so I'm just trying to understand. It can't be -- it can't be everyone knows what to do on one hand, and then you oversee the job on the second hand. So I'm just trying to figure out where the difference is.

A. If a problem comes up on our job site, they -- generally, it'll come to me.

Q. Okay. And --

A. But I don't -- on a day-to-day basis, I don't tell the grinders what to do, I don't tell --

Q. Okay. Now, when there's a problem on the job and they come to see you, who are you referencing?

A. The contractor.

Q. Okay. The contractor --

A. Or Alex, if he sees something needed fixed.

➤ McAllister: I correct the problem if I can. (Tr. p. 232.)

Q. And if the contractor comes to you --

A. Uh-huh.

Q. -- and states that there's a problem --

A. Yes.

Q. -- what do you do?

A. Correct it, if I can.

➤ McAllister: I direct the men to fix the problem. (Tr. p. 232.)

Q. Okay. Now, when you say correct it, are you directing your men to fix the problem that they've identified for you?

A. Yeah.

Q. Okay.

A. If it's -- yeah. Or I'll do it myself.

➤ McAllister: Johnson is sometimes absent from the jobsite for up to a week. During that time I am directing the men as to what needs to be done and who should do it. (Tr. p. 234-235.)

Q. And on direct you testified that Alex doesn't call, he gives instruction when he's on the job site in person.

A. Yeah. Very rarely will he call.

Q. Okay. Now, you also testified that it could be up to a week --

A. Uh-huh.

Q. -- when he's not on the job site. So during that period of time that Alex has been gone for a week, you're directing the men as -- as to what needs to be done and who needs to do it; correct?

A. (No audible response.)

Q. You're shaking your head yes. Is that a yes?

A. Like I said, our grinders are polishing that job. I don't -- they're up on the fifth floor, I'm in the basement, so --

Q. Okay.

A. -- I don't really contact with them.

Q. Okay. Who do you have contact with?

A. Tim Clemmons right now, and Guy Tolliver.

Q. Okay. And what does Mr. Clemmons do?

A. He's -- basically, he's a grinder.

Q. So Tim --

A. But we're short one man, so he came down to help us.

Q. Okay. And did you instruct Mr. Clemmons to come down and help you?

A. Yes.

Q. Okay. And the other gentleman you mentioned was Guy Tolliver?

A. Yes.

Q. Okay. And what does Mr. Tolliver do?

A. Basically runs a mixer, and whatever needs to be done.

➤ McAllister: The mixers are waiting for me to be told what to do. For example, I instructed the mixer to put alcohol in the epoxy to thin it. That was my decision. (Tr. pp. 236-237.)

Q. On -- on direct examination you testified that you -- you direct the mixer, you don't -- they don't mix until you're ready, and sometimes the epoxy could be cold.

A. Yeah.

Q. Correct? Okay. And you're making that decision based upon your experience; correct?

A. Which decision?

Q. To not – tell them not to mix, or tell them not to mix now because the epoxy could – could get too cold.

A. No, that ain't the reason they won't mix.

Q. Okay.

A. If I'm not ready for the first mix in the morning --

Q. Okay.

A. -- they know not to mix until I say mix.

Q. Okay. So they're waiting for your direction.

A. They're waiting to be told what to do.

Q. Okay. What are some of the circumstances -- you mentioned the epoxy being cold. What – is that just weather -- is that simply weather-related?

A. Yeah.

Q. And if it's too cold, do you have to make a decision to -- well, you walk me through the process. If it's too cold, how do you make your decision on whether to direct the mixers to mix?

A. No, they'll mix it if it's cold.

Q. Okay.

A. But like the red we're using down at the job site --

Q. Uh-huh.

A. -- it's real thick. And I don't know if that's just some -- some epoxy comes in thicker. We ended up to being able to trowel it down. We ended up having to put alcohol --

Q. Uh-huh.

A. -- in the mix itself to thin it a little.

Q. Okay. And was that your decision?

A. Yes.

➤ McAllister: If a contractor requests that something be done I assign a crew member to do that job. (Tr. pp. 237-239)

Q. Okay. Now, you testified that sometimes contractors will come up to you on a particular job site, and again, I'm not -- I don't want to put words in your mouth, but, hey, something came up, this needs to be done. Is that a fair statement?

A. Yes.

Q. Okay. And how do Ardit's men become aware of that? How did --

A. If they -- if they come -- they come to me, and if it's -- if it's -- like they wanted to -- in grouting a floor, you -- you get -- when they rub grind a floor you get pinholes.

Q. Uh-huh.

A. So what that does, I take epoxy, mix it with hardener, and they trowel that down, and then they put binder on it. So, then it gets hard, and that's what they call grout. So we had a couple areas where that excess binder didn't get swept off. So they would say something about it was getting tracked onto the carpet and they asked us to sweep it up --

Q. Okay.

A. -- so we swept it up.

Q. Okay. Did they ask you to sweep it up and you --

A. They asked me to get it swept up.

Q. Okay. Okay. And then you directed someone to sweep it up?

A. Yeah.

Q. Okay.

A. But I directed the guy that did it to do it, and he should have known to do it.

Q. Okay. The fact of the matter is he hadn't done it; correct?

A. That's the fact of the matter.

- McAllister: I try to use to use the men for what they are trained to do and I make my decisions based upon their skills and qualifications. (Tr. pp. 239-240.)

Q. Now, you indicated earlier, and I believe it was Tim Clemmons, you said - you indicated I wouldn't -- I wouldn't have Tim do a job like that.

A. No, because he's a -- he's -- he's trained to be a floor grinder, and --

Q. Okay. And what job were you -- what job were you referring to when you said --

A. To run a mixer.

Q. To run the mixer.

A. Unless my mix man doesn't show up --

Q. Okay.

A. -- then somebody has to run the mixer.

Q. Okay.

A. But I try to use the men for what they're trained to do.

Q. Teach how [sic] to make your decisions based upon the skills and qualifications --

A. Yes.

Q. -- of the men. Okay.

- McAllister: I move employees in an around the jobsite. If there is no grinding to be done I will have Tim Clemens help me pour. I instructed Greg Salibritas, a finisher, to grout one day because he was the best person for the job. My assignment was based upon the fact that he was the best man to do that particular job. (Tr. pp. 242-243.)

Q. The way -- correct. Okay. You testified -- Mr. Hymore asked you whether or not you transfer employees from -- from job site location to job site location, and you said no. Do you ever move employees around within the job, within the - within the site of the job?

A. Yes.

Q. Okay. Could you provide some examples?

A. There's a -- a finisher named Greg Salbritus. I had him grout one day ceramic tile, because he's probably the best man to do that.

Q. Okay. And you based your -- is it fair to say you based your assignment to him based upon the fact that he is the best person to do that?

A. Yes.

Q. Okay.

➤ McAllister: In referencing his decision not to follow Johnson's instruction to pour the floor at the Franklin County courthouse he noted his fear that he may lose his job if enough of my floors are torn out. (Tr. p. 245.) One floor was already in the process of being torn up at the courthouse. (Tr. p. 244.)

Q. Okay. And why did you make the determination to not follow Alex's instruction?

A. I did. Well, I just called his mother-in-law to say that if -- that's what I was told to do, and if she was comfortable with me doing it.

Q. But why didn't you want to do it?

A. Because I didn't want to tear out another floor.

Q. Okay. And did you -- what were you worried about if another floor was going to be tore up?

A. Well, if I tear out enough of my floors, I'll probably lose my job.

➤ McAllister: I check other crew members' work once or twice a week. (Tr. p. 249.)

BY HEARING OFFICER GOODE:

Q. Okay. Do you -- are you required to check the other crew members' work--

A. Daily?

Q. -- on a daily basis?

A. No.

Q. Are you ever required to check their work?

A. Not -- no. I mean, I go back like, what was it, last week, I think, Alex asked me if I -- or it was two weeks ago, asked me if I had looked at the floor that they had polished.

Q. Okay.

A. And I said, yeah, I was up there. It must have been two weeks ago, because it was the third floor.

Q. Okay.

A. And I said it looked pretty good.

Q. Okay. So how often will you check the other crew members' work, then, if you can estimate it?

A. Maybe once or twice a week.

➤ McAllister: Other employees come to him with problems and he resolves the problem if he is able to do so. (Tr. p. 257.)

Q. Okay. And then Mr. Hymore mentioned problems if -- if Alex -- if Alex comes to you with a problem or a general contractor has a problem. Has there ever been a time where one of your employees come to you with a problem?

A. Yeah, if it's our problem.

Q. Okay. And if you're able to do so, do you resolve that problem?

A. Uh-huh.

Q. Okay. And do you have any examples?

A. Yeah. Yes.

Q. Or would an example be the -- the example you just mentioned about the -

A. The terrazzo patch, yes.

Q -- the terrazzo. Okay.

Barnes and McAllister are no different than the foreman/supervisors in *Captive Plastics, Inc.*, *supra* and *Dee Knitting Mills, Inc.*, *supra*. In *Captive Plastics* the Board noted that if the

foreman of the toolroom were not a supervisor, the toolroom employees would have been “without supervision most of not all the time, warranting the conclusion that conferring upon, and exercise by, him of even a small amount of supervisory power made him a representative of the employer.” See, *Dee Knitting Mills, supra*, at 753-754. Likewise, in *Captive Plastics*, the Board noted that the owners consulted the working foreman/supervisor to see how the work was progressing; the working foreman/supervisor moved workers around when necessary; the working foreman/supervisor distributed the work; the working foreman/supervisor was responsible for making sure the workers were used most effectively; the working foreman/supervisor was responsible for the completion of work each day and for the quality of said work; and the working foreman/supervisor generally oversaw the work of a particular group of employees. See, *Captive Plastics, Inc., supra*, at 1047.

C. Rulings Made In Connection With The Proceeding Resulted in Prejudicial Error

The credibility decisions addressed have been shown by a clear preponderance of the evidence to be incorrect and should be overturned.

V. CONCLUSION

For all of the reasons stated above, McAllister and Barnes are supervisors under § 2(11) of the Act and, as such, were not eligible to vote in the August 13, 2012 election. Accordingly, the Employer respectfully requests Board grant the Employer’s Request for Review.

Dated at Dublin, Ohio on this 1st day of March, 2013.

Respectfully submitted,

/s/ Aaron Tulencik

Ronald L. Mason (#0030110)

Aaron T. Tulencik (#0073049)

Mason Law Firm Co., L.P.A.

425 Metro Place North, Suite 620

Dublin, Ohio 43017

t: 614.734.9450

f: 614.734.9451

e-mail: rmason@maslawfirm.com

atulencik@maslawfirm.com

Counsel For The Employer,

The Ardit Company

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 1, 2013, an electronic original of The Ardit Company's Request for Review of the Regional Director's Supplemental Decision and Order was transmitted to the National Labor Relations Board, office of the Executive Secretary, via the Department Of Labor, National Labor Relations Board electronic filing system and, further, that copies of the foregoing were transmitted to the following individuals by electronic mail:

Ryan K. Hymore, Esq.
Mangano Law Offices Co., LPA
10901 Reed Hartman Highway, Suite 207
Cincinnati, Ohio 45242
rkhymore@bmanganolaw.com

Counsel for Petitioner

/s/ Aaron Tulencik
Aaron T. Tulencik