

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

COMMUNITY EDUCATION CENTERS, INC. (CEC)

Employer

and

Case 04-RC-117515

INTERNATIONAL UNION, SECURITY, POLICE  
& FIRE PROFESSIONALS OF AMERICA (SPFPA)

Petitioner

**REGIONAL DIRECTOR'S DECISION  
AND DIRECTION OF ELECTION**

A party seeking to demonstrate that petitioned-for employees are supervisors within the meaning of Section 2(11) of the Act bears the burden of demonstrating that these employees possess at least one of the indicia of supervisory status set forth in that section. The Petitioner in this case seeks a unit of the Employer's Sergeants who work at the George W. Hill Delaware County correctional facility in Thornton, Pennsylvania. The Employer contends that the Sergeants are supervisors because they have the authority to assign, responsibly direct, and discipline the Correctional Officers at this facility, but the Employer has not met its burden as to any of these indicia. Therefore, I find that the petitioned-for employees are not supervisors.<sup>1</sup>

In this Decision, I will first present an overview of the Employer's operations at the correctional facility. Then, I will review the factors that must be evaluated in determining whether the petitioned-for Sergeants are supervisors within the meaning of the Act. Finally, I will present in detail the facts and reasoning that support my conclusion.

**I. OVERVIEW OF OPERATIONS**

The George W. Hill Correctional Facility is a prison in Delaware County, Pennsylvania. The Employer, Community Education Centers, is a private company that has had a contract to manage this facility since 2009. The facility holds 1,883 inmates, who are housed in prison cells.

Warden Cam Lindsey is the highest-ranking official at the facility, and Deputy Warden David Byrne heads the security force. Maribel Fernandez is the Human Resources Manager.

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<sup>1</sup> A Hearing Officer of the Board held a hearing in this case, and the parties filed briefs.

There are presently 353 Correctional Officers, 38 Sergeants, four Lieutenants, and a Captain working at the facility. Correctional Officers are known as cadets during their first 90 days of employment.

The Petitioner, SPFPA, currently represents the Correctional Officers. The Petitioner and the Employer are parties to a collective-bargaining agreement covering these employees, effective January 1, 2013. The Employer also maintains a handbook in which it sets forth its personnel policies.

The Employer's employees work around the clock, seven days a week, on three shifts. A Lieutenant serves as the Shift Commander for each shift, and during the second and third shifts Lieutenants are the highest-ranking security officials on-site. If two Lieutenants are working at the same time, the Assistant Shift Commander for each shift is a Lieutenant. If not, the Assistant Shift Commander is a Sergeant. Each Correctional Officer is assigned to a shift five days a week.

There are 12 inmate units in the facility, some of which are housing units. Each housing unit has four pods -- two 55-bed pods and two 48-bed pods. The Employer also operates an Intake/Outtake unit, which processes inmates through the system, and a K-9 unit, which guards the perimeter of the facility.

There are 100 to 110 Correctional Officers on the first and second shifts, and 85 to 90 officers on the third shift. For the Correctional Officers, first shift is from 7:50 a.m. to 4:15 p.m., second shift is from 3:50 p.m. to 12:15 a.m., and third shift is from 11:50 p.m. to 8:15 a.m.

There are seven to ten Sergeants on the first and second shifts and three to four on the third shift. The Sergeants have slightly different shift times than the Correctional Officers. First shift for Sergeants is from 7:15 a.m. to 3:15 p.m., second shift is 3:15 p.m. to 11:15 p.m., and third shift is 11:15 p.m. to 7:15 a.m.

## **II. FACTORS RELEVANT TO DETERMINING SUPERVISORY STATUS**

Supervisors are specifically excluded from coverage under the National Labor Relations Act. The burden of establishing supervisory status is on the party asserting that such status exists. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711 (2001); *Shaw Inc.*, 350 NLRB 354, 355 (2007). The party seeking to prove supervisory status must establish it by a preponderance of the evidence. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 695 (2006). Section 2(11) of the Act sets forth a three-part test for determining whether an individual is a supervisor. Pursuant to this test, employees are statutory supervisors if: (1) they hold the authority to engage in any one of the 12 supervisory functions listed in Section 2(11); (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. See *NLRB v. Kentucky River*, supra at 712-713; *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-574 (1994).

The statutory criteria for supervisory status set forth in Section 2(11) are read in the disjunctive, and possession of any one of the indicia listed is sufficient to make an individual a supervisor. *Kentucky River*, supra at 713; *Juniper Industries, Inc.*, 311 NLRB 109, 110 (1993). The Board analyzes each case in order to differentiate between the exercise of independent judgment and the giving of routine instructions, between effective recommendation and forceful suggestions, and between the appearance of supervision and supervision in fact. The exercise of some supervisory authority in a merely routine, clerical, or perfunctory manner does not confer supervisory status on an employee. See *J.C. Brock Corp.*, 314 NLRB 157, 158 (1994); *Juniper Industries*, supra at 110. The authority effectively to recommend an action means that the recommended action is taken without independent investigation by supervisors, not simply that the recommendation is ultimately followed. See *DirectTV U.S. DirectTV Holdings LLC*, 357 NLRB No. 149, slip op. at 3-4 (2011); *Children's Farm Home*, 324 NLRB 61, 61 (1997). The Board has an obligation not to construe the statutory language too broadly because the individual found to be a supervisor is denied the employee rights that are protected under the Act. *Oakwood Healthcare, Inc.*, supra at 688; *Avante at Wilson, Inc.*, 348 NLRB 1056, 1058 (2006). Where the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established, at least on the basis of those indicia. *Dole Fresh Vegetables, Inc.*, 339 NLRB 785, 792 (2003); *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). The sporadic exercise of supervisory authority is not sufficient to transform an employee into a supervisor. See *Kanahwa Stone Co.*, 334 NLRB 235, 237 (2001); *Gaines Electric Co.*, 309 NLRB 1077, 1078 (1992).

In its decisions in *Oakwood Healthcare, Inc.*, supra, *Croft Metals, Inc.*, 348 NLRB 717 (2006), and *Golden Crest Healthcare Center*, 348 NLRB 727 (2006), the Board clarified the circumstances in which it will find that individuals exercise sufficient discretion in performing two of the functions listed in Section 2(11) – assignment and responsible direction of work – to justify their classification as statutory supervisors. As defined in *Oakwood Healthcare*, the term “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.” *Oakwood Healthcare* at 689-690.

In *Oakwood Healthcare, Inc.*, the Board explained “responsible direction,” as follows: “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 . . . and carried out with independent judgment.’” “Responsible direction,” in contrast to “assignment,” can involve the delegation of discrete tasks as opposed to overall duties. *Oakwood Healthcare* at 690-692. But, an individual will be found to have the authority to responsibly direct other employees only if the individual is *accountable* for the performance of the tasks by the other employee. Accountability means that the employer has delegated to the putative supervisor the authority to direct the work and the authority to take corrective action if necessary, and the putative supervisor faces the prospect of adverse consequences if the employees under his or her command fail to perform their tasks correctly. *Ibid.*

Assignment or responsible direction will, as noted above, produce a finding of supervisory status only if the exercise of independent judgment is involved. Independent

judgment will be found where the alleged supervisor acts free from the control of others, is required to form an opinion by discerning and comparing data, and makes a decision not dictated by circumstances or company policy. *Oakwood Healthcare, Inc.*, supra at 693; *PPG Aerospace Industries, Inc.*, 353 NLRB 223, 223 (2008). Independent judgment requires that the decision “rise above the merely routine or clerical.” *Oakwood Healthcare, Inc.*, supra at 693.

### **III. FACTS**

#### *Sergeants' Overall Duties and Responsibilities*

A Sergeant may serve as a Unit Manager, an Assistant Shift Commander, or a floater who handles other assigned tasks. About 22 of the 38 Sergeants are Unit Managers on a given day. On the day shift, about seven or eight Sergeants serve as Unit Managers for the inmate housing units, one Sergeant is assigned to manage cell keys and facility supplies, another is assigned to the K-9 unit, and another works in the Intake/Outtake unit.

There are typically four Correctional Officers assigned to each unit for each shift -- one to the control tower, two to the housing pods, and another to the hallway linking the pods. When Sergeants work as Unit Managers, they are responsible for two units, which amounts to overseeing about eight Correctional Officers.

The Sergeant job description lists the following duties and responsibilities, among others: “Provide direct supervision over Correctional Officers assigned to a specific shift to ensure effectiveness and efficiency of operations;” “Provide daily supervision to Officers assigned to a designated Housing Unit;” “Promotes a team effort among Correctional Officers providing support, motivation, training and assistance to them as required;” “Supervises and participates in on-the-job training for staff on an as needed basis;” “Report and investigate all unusual incidents, including disciplinary problems that occur during assigned shift;” and “Handles disciplinary situations/reports and prepares reports of disturbances and shift activities.”

The control room in each housing unit has desks, computers, and telephones. The Correctional Officers assigned to these rooms control the opening and closing of cell doors and answer calls from participants in the criminal justice system. A Sergeant Unit Manager has a desk and a computer with a company email address.

The K-9 unit is responsible for patrolling the perimeter of the facility with the help of trained narcotic-sniffing dogs. There are seven officers in this unit, which is headed by Lieutenant John North. Sergeant Jamar Brison, who assists North, trains the officers in this unit for about 16 hours per month.

Each job classification is issued a post order that was created by the Deputy Warden. The post orders specify the duties and responsibilities of the job. This order must be signed daily, although it does not vary from day to day. The post orders for Correctional Officers and Sergeants state, essentially, that they patrol their units, regularly inspect cells and inmates, and count inmates at designated times throughout their shifts. Sergeants have the additional duty of

briefing Correctional Officers during roll call at the start of each shift, and they check the Correctional Officers for violations of the Employer's appearance and grooming policies at that time. In the event of an unusual disturbance among inmates, the officers may conduct an extraordinary search or inspection either on their own or at the Sergeant's direction. Sergeants may direct Correctional Officers how to deal with an emergency, such as an assault on an officer, and both Sergeants and Correctional Officers complete Critical Incident Reports for disturbances. A Sergeant acting as Unit Manager can decide to move an inmate to another cell or unit, sometimes at the recommendation of the Correctional Officer.

#### *Assistant Shift Commanders*

As noted above, the Assistant Shift Commander may be either a Lieutenant or a Sergeant. In recent months, because several Lieutenants have been out of work on extended leave, the position has been held by Sergeants for all but four of the day shifts.

About 10 Sergeants have been trained to perform the job of Assistant Shift Commander. Lieutenant Albert Pleasant, the first-shift Shift Commander, testified that he selects his Assistant Shift Commander from those 10 eligible Sergeants if there is no other Lieutenant present. The record identifies four of the ten Sergeants who have served in this capacity. Sergeant Robert Smith currently serves as Assistant Shift Commander about four times per week. Sergeant Saleem Jones worked in this capacity about three times per week during the years 2009 to 2012. According to their testimony, Sergeant Thomas Royals serves "occasionally," and Sergeant Daniel Kelly does so "rarely."

During the second and third shifts, the Shift Commander is the highest-ranking official present at the facility, and the Assistant Shift Commander is the second-highest-ranking official. On rare occasions, if the Shift Commander has to leave work early, the Assistant Shift Commander will assume his responsibilities.

The Assistant Shift Commander job description lists duties and responsibilities which include: "Assist the Shift Commander (Captain) in providing overall supervision of the daily security functions of this facility on a designated shift;" "Investigates disciplinary problems and intervenes in situations beyond the authority of subordinates;" and "Prepares the daily staff roster, assists in the development of the supervisory annual leave schedule."

The Employer stipulated that Sergeants do not have independent authority to hire, transfer, lay off, recall, reward, or adjust grievances. The Employer relies on three of the Section 2(11) supervisory indicia – assignment, responsible direction, and discipline -- to argue supervisory status. The specific facts as to each of these indicia are addressed separately below.

#### *Assignment and Direction*

Sergeants serving as Unit Managers primarily oversee the Correctional Officers as they patrol and inspect the inmates in their units. They have the authority to direct Correctional

Officers to perform tasks such as retrieving a video camera for documenting evidence for court, conducting a search of an inmate or cell, or transferring a disruptive inmate. A Sergeant may also move a Correctional Officer to another assignment after the roster is set, although it is uncertain how often this occurs and why.

The Assistant Shift Commander assigns the Correctional Officers to the various units. He or she takes the master list of officers assigned to a shift, which is prepared by the Deputy Warden, and places their names in the available slots. Sergeant Smith, who regularly serves as Assistant Shift Commander, testified that he considers the following factors when making assignments: seniority; whether the officer has successfully bid to be on the intake unit; and whether the officer is licensed to carry a gun. About 40 officers are licensed to carry a gun. Smith stated that he may also consider how well a person handles difficult situations. For example, he would not assign someone likely to panic in a crisis to the control room, which may be a highly stressful assignment. He did not indicate how frequently he relies on such considerations or provide any examples.

The Assistant Shift Commander creates the roster prior to each Correctional Officer shift. Along with the other Sergeants, he or she then conducts a roll call, where a Sergeant announces the assignments for that day and inspects the officers' appearance. About one or two times a week, the roll call Sergeant will instruct a Correctional Officer to improve his or her appearance, for example by tucking in a shirt. Every officer signs a post-order log at the end of roll call. The log is then initialed by the Sergeant.

When a Sergeant serves as the Assistant Shift Commander, he or she assigns mandatory overtime for the following shift based on staffing needs in order to maintain the appropriate ratio of staff to inmates. At the beginning of each shift, the Assistant Shift Commander reviews a list of officers working on the succeeding shift in order to identify who is available.

The collective-bargaining agreement requires that overtime be assigned based on a list of volunteers. If there are no volunteers, overtime assignments are based on seniority and an attempt to equalize this work. The Assistant Shift Commander may deviate from this system based on special needs such as the need for an officer with a particular gender or certification.

The Assistant Shift Commander also approves vacation requests based on staffing needs after checking a schedule book without clearing the decision with the Shift Commander. Like overtime, vacation policy is detailed in the collective-bargaining agreement, which sets forth procedures for requesting and approving vacations. The collective-bargaining agreement also provides a call-out procedure, requiring officers to contact the Shift Commander when they will be out. The Assistant Shift Commanders also set the lunch and relief schedules, but there is no indication that this task calls for the use of discretion.

Once the Assistant Shift Commanders complete the day's roster, they submit it to the Shift Commander for review. The Shift Commander may make changes, for example, if he knows that the list of officers certified to carry firearms has been updated. However, such changes are rare. Smith testified that the Shift Commander changed the roster only once or twice in the entire time he has served as Assistant Shift Commander.

Warden Lindsey testified that Sergeants may be disciplined for failing to enforce the Employer's rules; however, there is no evidence that any Sergeant has been disciplined for this reason. Captain McCarthy testified that on one occasion a Sergeant should have been disciplined for not responding quickly enough to an incident of an officer found sleeping.

#### *Authority to Discipline*

The Employer maintains detailed disciplinary rules in both its handbook and in the collective-bargaining agreement. There are three progressive disciplinary tracks – time and attendance, just cause, and mandatory overtime. A disciplinary action in one track cannot be used to establish progressive discipline for another track.

Sergeants are trained in administering discipline and have been informed that they themselves may be disciplined for failing to enforce the Employer's policies. There is no evidence, however, that any Sergeant has actually received discipline for any such failures.

The time and attendance policy has the following disciplinary steps: first offense – verbal warning; second offense – written warning; third offense – another written warning; and fourth offense – discharge.

The steps for just cause discipline are verbal warning, written warning, suspension/final warning, and discharge. Steps may be skipped for severe violations, and the collective-bargaining agreement lists 22 infractions that may result in immediate discharge. A separate policy in the Employer's handbook lists 65 specific violations that may result in some form of discipline. The Employer maintains other detailed policies, including a grooming policy which provides, among other things, that male officers are not permitted to wear beards.

Correctional Officers are required to work mandatory overtime when assigned. For the mandatory overtime disciplinary track, the first transgression results in a suspension/final warning, and the second incident results in discharge.

Time and attendance and just cause disciplinary actions are subject to review by the Employer's Investigations Office. Mandatory overtime discipline is not subject to review. All discipline may be grieved under the grievance-arbitration procedure of the collective-bargaining agreement, and the record contains several examples of discipline being modified or overturned through the grievance procedure. Disciplinary actions remain in the employee's personnel file for one year.

All Sergeants, whether acting as Assistant Shift Commanders or Unit Managers, have the authority to complete Disciplinary Action Forms. These forms list: the name of the officer being disciplined, the "manager" who initiated the discipline, and the incident date, location, and time. There may also be a witness listed. In the body of the form, the Sergeant provides a description of the incident. Additionally, each Disciplinary Action Form lists a specific handbook rule or collective-bargaining agreement provision that has been violated.

However, the Disciplinary Action Form itself does not constitute discipline, but is forwarded up the chain of command for processing. After a Sergeant completes a Disciplinary Action Form, the form is given first to the Lieutenant Shift Commander, who reviews it for completeness and ensures that the proper rule is cited. The form is then submitted to the Employer's Investigations Office, which decides whether the matter warrants an investigation. Sergeants do not decide the level of discipline and often do not know whether discipline is issued or the level of discipline, after they have forwarded the Disciplinary Action Form. The collective-bargaining agreement provides for a maximum 20-day investigation, a process which is not conducted by the Sergeant. If there is no investigation, the matter is forwarded to Human Resources Manager Fernandez.

Upon review of the employee's file, Fernandez determines whether discipline is warranted and the appropriate step of the progressive disciplinary process. Fernandez testified that it is her practice to speak to the officer who is being disciplined. If the officer admits to the conduct, she will issue the discipline. If the officer disputes the matter, she may speak to the Sergeant who completed the form. Fernandez testified that there have been occasions in which the officer's explanation caused her to believe that discipline was not appropriate, but she was unable to recall any such occasions. At times, a question may arise, and Fernandez will call the issuing Sergeant to ask about the circumstances. Fernandez does not always strictly follow each disciplinary step. For example, on one occasion, she decided not to discharge an employee for having a beard although the employee had been suspended a few days earlier for the same infraction. A union representative may be present when Fernandez issues the discipline. Warden Cam Lindsey makes the final decision for serious violations and discharges.

The Employer introduced 37 Disciplinary Action Forms for Correctional Officers into the record. Fernandez testified that these forms were not the only ones issued, but were a random sampling that she culled from employee files from about the past six months. Thirty-four of the forms were completed by Sergeants, who signed them as "manager;" the other three were issued by Lieutenants. The Sergeants completed about half of these forms when serving as Assistant Shift Commanders.

All of the disciplinary forms that are in the record were completed by 10 Sergeants. Sergeant Robert Smith completed 12 of the 34; and Sergeant Janet Cooper completed six. No other Sergeant completed more than three of them.

Smith testified at the hearing, as did Sergeants Saleem Jones, Thomas Royals, Daniel Kelly, and Jamar Brison. One Disciplinary Action Form was signed by Jones. There are no Disciplinary Action Forms signed by Royals, Kelly, or Brison in the record, although Brison and Kelly testified that they have issued them.

The 34 Disciplinary Action Forms signed by Sergeants recorded the following infractions: refusing mandatory overtime (11); calling out despite having no accrued leave (4); leaving a post without relief (4); grooming violations (4); tardiness (3); refusing an order (3); no-call/no-show (1); failure to carry proper identification (1); threatening another officer (1); sleeping on the job (1); and carrying contraband into the facility (1).

In the incident involving failure to carry proper identification, a Unit Manager Sergeant observed that an officer was not wearing proper identification and asked the Assistant Shift Commander Sergeant what to do. The Assistant Shift Commander directed the other Sergeant to complete a Disciplinary Action Form. Discipline was later issued, but it was ultimately overturned through the grievance process.

Following the submission of the Disciplinary Action Form for the contraband incident, the Investigations Office conducted an investigation before the discipline was issued.

The Disciplinary Action Form for one of the failures to follow orders indicates that it was issued by the Assistant Shift Commander to an officer who had refused direction to transfer an inmate. The Sergeant completed the form and simultaneously transferred the officer to a different unit. There is no testimony in the record about this incident. In another situation, the Disciplinary Action Form shows that a Correctional Officer refused an order to re-count the inmates in a unit. The Sergeant prepared the Disciplinary Action Form, but there was no testimony regarding the particulars.

Sergeant Smith, while serving as Assistant Shift Commander, prepared a Disciplinary Action Form for a cadet who sported a beard. Smith testified that on a prior occasion, he had told the cadet he should be clean-shaven, but notified his trainer rather than completing a Disciplinary Action Form. Human Resources Manager Fernandez testified that when she was weighing whether to issue the discipline, she called Smith, who told her that he had previously spoken to the cadet about the problem. With that prior discussion in mind, Fernandez issued a written warning to the cadet. Despite this incident, Sergeant Smith testified that he does not “verbally counsel” employees; if he observes a rules infraction, he completes a Disciplinary Action Form.

Jamar Brison, the K-9 Sergeant, testified that he issued one written disciplinary warning to an officer for parking in an unauthorized space. This discipline was not part of the record. Sergeant Saleem Jones testified that he has decided on his own to verbally counsel officers rather than initiate discipline, but did not offer specifics on how often this occurs or over what issues. Sergeant Kelly also testified that he prefers to verbally coach officers rather than to issue written discipline. He prepared Disciplinary Action Forms for officers only twice, on both occasions for time and attendance violations. He did not provide details on how frequently and over what matters he counseled employees rather than initiating formal discipline. Captain John McCarthy testified that a Sergeant can decide whether facial hair is merely a “five-o-clock shadow” that does not warrant discipline, or a beard, which warrants discipline under the grooming policy.

#### *Additional Facts*

Sergeants and Correctional Officers are paid on an hourly basis, but Sergeants’ pay is higher. Correctional Officer pay ranges from \$12 to \$24.23 with an average of \$16.31. In contrast, the pay range for Sergeants is \$17.86 to \$29.90 with an average of \$20.85.

Sergeants receive performance evaluations in which they are rated on General Job Execution (60%), Supervisory Skills (20%), and Objectives (20%).

Two Sergeants were sent to a Pennsylvania State University first-line supervisory training course in September 2013. Sergeants sometimes conduct training of cadets at a training academy.

Correctional Officers and Sergeants wear grey uniform shirts, but the Sergeants' shirts have stripes on the sleeves. Lieutenants wear white shirts.

Sergeant Jones has prepared a self-evaluation in which he assessed his supervisory skills. He referred to Correctional Officers as his "staff" and to himself as a supervisor. In his evaluation, Jones stated that he communicates well with his staff, and that he has been a "supervisor" for the entire time that he has been a Sergeant.

#### **IV. ANALYSIS**

Based on the facts set forth above, I find that the Employer has failed to meet its burden to show that the Sergeants, even when acting as Assistant Shift Commanders, possess any of the statutory indicia for supervisory authority.

##### *Assignment/Responsible Direction*

##### Unit Managers

The Sergeants' role in directing Correctional Officers in performing their daily tasks does not require independent judgment. Much of the Correctional Officers' work is repetitive. They make rounds during which they inspect, count, and control the inmates on their unit, and the Unit Manager Sergeant oversees these tasks. The Board has found that monitoring the performance of similarly repetitive work is in itself a routine task which does not require a sufficient exercise of independent judgment to establish supervisory authority. *Beverly Manor of Monroeville*, 335 NLRB 635, 669 (2001), *enfd.* in pertinent part, 317 F.3d 316 (D.C. Cir. 2003); *Heritage Hall, E.P.I. Corp.*, 333 NLRB 458, 459-460 (2001). The work performed by the Correctional Officers, by its nature, is at times difficult and dangerous, but it is governed largely by established policies and procedures and requires little direction. See *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995).<sup>2</sup> While the Employer contends that more discretion is required in emergency situations, the record does not indicate how often such emergencies arise or include specific examples of how they were handled. Without such evidence, supervisory authority has not been established on this basis.

Moreover, direction is "responsible" only where the purported supervisor is "accountable for the performance of the tasks by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly." *G4S Regulated Security Solutions*, 358 NLRB No. 160, slip op. at 4 (2012); *Oakwood*

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<sup>2</sup> In that case, the Board stated that "although the contested licensed officers are imbued with a great deal of responsibility, their use of independent judgment and discretion is circumscribed by the master's standing orders, and the Operating Regulations."

*Healthcare, Inc.*, supra, 348 NLRB at 691-692; *Croft Metals, Inc.*, supra, 348 NLRB at 722. Although there was testimony indicating that the Sergeants are supposed to be held accountable, there is no evidence that any Sergeant has been disciplined or otherwise held responsible for the poor performance of a Correctional Officer. I therefore find that the Employer has not met its burden to demonstrate that Sergeants responsibly direct Correctional Officers.

#### Assistant Shift Commanders

When Sergeants serve as Assistant Shift Commanders, their task of assigning work does not require meaningful discretion. For daily assignments, the Assistant Shift Commander matches names from the master list with job assignments. The factors used in assigning work locations to the Correctional Officers – primarily seniority, firearm certification, and bidding – are obvious and require little judgment. See *Alternate Concepts*, 358 NLRB No. 38, slip op. at 4 (2012). Sergeant Smith testified that he is unlikely to assign an officer who is susceptible to panicking to the control room. However, this general statement was not supported by any specific examples and thus cannot in itself form the basis for a supervisory finding. See *G4S Regulated Security Solutions*, supra.

The collective-bargaining agreement details the factors to be used in making overtime assignments, and these factors do not leave room for independent judgment by the Assistant Shift Commanders. See *Dico Tire, Inc.*, 330 NLRB 1252, 1253 (2000). Vacations are also covered thoroughly in the collective-bargaining agreement, and adherence to the contract's procedures is not indicative of independent judgment. *Connecticut Humane Society*, 358 NLRB No. 31, slip op. at 40 (2012); see also, *Alternate Concepts*, supra.<sup>3</sup>

Moreover, even if Assistant Shift Commanders possessed any of the indicia of supervisory authority, Sergeants would only be deemed supervisors on this basis if the record demonstrated that they spend a regular and substantial portion of their work time performing supervisory functions. See *Oakwood Healthcare, Inc.*, supra at 694 (2006). Only 10 of the 38 Sergeants have qualified to serve as Assistant Shift Commanders, and testimony was presented as to four of them. Only Sergeant Smith, who works as an Assistant Shift Commander about four times a week, has been shown to spend a regular and substantial portion of his time performing this work. Thus, Sergeant Kelly only serves in this capacity rarely, and Sergeant Royals only does so occasionally. Sergeant Jones served about three times a week from 2009 to 2012, but there is no testimony that he currently serves as an Assistant Shift Commander at all.

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<sup>3</sup> In its brief, the Employer cites a two-member Board case, *Akal Security, Inc.*, 354 NLRB 122 (2009), in support of its contention that Sergeants serving as Assistant Shift Commanders use independent judgment in making assignments. In both this case and the later Board case affirming it, *Akal Security, Inc.*, 355 NLRB 584 (2010), the Board explicitly noted, at footnote 1 in the former and footnote 3 in the latter, that it was not considering the employer's exceptions to the administrative law judge's finding of supervisory status, because the employer presented no argument in support of its exceptions. Accordingly, that portion of the Board's decision is not binding precedent.

## *Discipline*

When Sergeants witness rules infractions, they are expected to complete Disciplinary Action Forms. For the most part, however, their role is limited to documenting obvious violations and forwarding the form to others – the Lieutenant Shift Commander, the Investigations Office, and Human Resources Manager Fernandez – who make the final decision as to whether discipline issues and, if so, at what level. Indeed, the parties' collective-bargaining agreement specifically references investigations of disciplinary matters. While Fernandez generally imposes discipline based on the Disciplinary Action Form, if the Correctional Officer does not admit to having committed the infraction, she will look further into the incident. The record shows several situations in which independent investigations were conducted after the Sergeants submitted the forms. Thus, the Investigations Office conducted an investigation of the contraband incident before deciding to discipline the Correctional Officer. Additionally, Fernandez did not issue discipline to a cadet for having a beard upon receipt of Smith's Disciplinary Action Form, but spoke to Smith to learn additional facts before deciding to issue a warning. The fact that Sergeants are not the final arbiters of discipline is significant under Board law; when disciplinary actions are independently investigated by other officials, the Board will not conclude that their issuance establishes supervisory status. *Sanctuary at McAuley*, 359 NLRB No. 162 (2013); *DirectTV U.S. DirectTV Holdings LLC*, supra, slip op. at 3-4 (2011); cf. *Mountaineer Park*, 343 NLRB 1473 (2004) (supervisory status found where higher-level management routinely "signed off" on disciplinary recommendations and followed all recommendations without any investigation).

Moreover, the violations for which Sergeants issue Disciplinary Action Forms derive from detailed, well-established guidelines that are contained in the collective-bargaining agreement and the Employer's policies. The vast majority of the forms in the record relate to rules violations that are easily recognizable and require no discernible judgment, e.g., call-out without leave, failure to perform assigned overtime, no-call/no-show, failure to carry identification, grooming, tardiness, and sleeping on the job. The Employer's detailed rules in the handbook and collective-bargaining agreement leave little discretion to the issuer of discipline. See e.g., *G4S Regulated Security Solutions*, supra; *The Wackenhut Corp.*, 345 NLRB 850, 854 (2005).

Although Sergeants Jones and Kelly both testified that they generally prefer to counsel officers verbally rather than completing Disciplinary Action Forms, the evidence generally did not indicate the topics or provide any specific examples of this "counseling," which appeared to principally involve general advice about performing duties "professionally." The Board will not rely on conclusory evidence of this type in determining supervisory status. *G4S Regulated Security Solutions*, supra, slip op. at 2. Sergeant Smith's single example of using discretion to verbally warn a cadet for beard growth appears to be an isolated incident. Indeed, he testified that he always issues discipline to Correctional Officers, rather than verbally coaching them, when he observes a rules infraction.

In its brief, the Employer relies heavily on *Oak Park Nursing Care Center*, 351 NLRB 27 (2007), in contending that the Sergeants are supervisors based on their disciplinary authority. Like the Board in *G4S Regulated Security Solutions*, supra, I find that case distinguishable

because of the very limited discretion afforded the Sergeants by the Employer's disciplinary processes. The Board in *G4S* distinguished *Oak Park* on the ground that in that case, "the putative supervisors testified, and the Board majority found, that they alone decided whether the misconduct at issue warranted a verbal warning or written documentation ..." *G4S Regulated Security Solutions*, supra, slip op. at 3, fn. 5. In the instant case, like *G4S*, the Sergeants' authority is circumscribed not only by multiple layers of review, but by the ultimate authority of Human Resources Manager Fernandez, who makes the determination whether and at what level to issue discipline. Unlike the putative supervisors in *Oak Park*, the Sergeants are not authorized to determine what level of discipline will be imposed, or even whether it will be imposed.

### *Secondary indicia*

There are 353 Correctional Officers, 38 Sergeants, and only four Lieutenants. Therefore, if Sergeants are not found to be supervisors, there would be an unusually high ratio of employees to supervisors. However, this ratio is insufficient to establish supervisory status absent any of the statutory indicia, as it is a secondary indicium of supervisory status. *DirectTV US DirectTV Holdings*, supra, slip op. at 4 (supervisory status not found despite ratio of three supervisors to 215 employees); *Ken-Crest Services*, 335 NLRB 777, 779 (2001) (supervisory status not found despite resulting ratio of eight supervisors to 144 employees).

The fact that Sergeants earn higher wages than officers is also a secondary indicium of supervisory status and does not confer supervisory status in the absence of any evidence that Sergeants possess at least one of the statutory indicia. *Sam's Club, a Division of Wal-Mart Stores, Inc.*, 349 NLRB 1007, 1014 (2007).

Moreover, the fact that Sergeants refer to themselves as supervisors in their self-evaluations and are referred to as supervisors in their position descriptions and post orders is insufficient to establish supervisory status. It is well established that an employer's holding out of an individual to employees as a supervisor is not determinative of supervisory status, and an employee will not be found to be a supervisor absent evidence that he or she exercises at least one of the primary indicia of supervisory status as defined by Section 2(11) of the Act. *Willamette Industries*, 336 NLRB 743, 744 (2001); *Polynesian Hospitality Tours*, 297 NLRB 228 (1989), enfd. 920 F.2d 71 (D.C. Cir. 1990).

In sum, I find that the Employer has not met its burden of demonstrating that the Sergeants have any of the indicia of supervisory status. I shall therefore direct an election in the petitioned-for unit. See *G4S Regulated Security Solutions*, supra; *Alternate Concepts*, supra.

## **V. CONCLUSIONS AND FINDINGS**

Based upon the entire record in this matter and for the reasons set forth above, I conclude and find as follows:

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

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner is a labor organization that claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time Sergeants employed by the Employer at the George W. Hill Delaware County Prison in Thornton, Pennsylvania, **excluding** all other employees, office clerical employees, professional employees, and supervisors as defined in the Act.

## **VI. 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 the purposes of collective bargaining by **International Union, Security, Police & Fire Professionals of America (SPFPA)**. 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. Eligible Voters**

The eligible voters shall be unit employees 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 were 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, employees engaged in an economic strike, which commenced less than 12 months before the election date, who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees who are 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 after the designated payroll period for eligibility; (2) employees engaged in a strike 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 engaged in an economic strike which began more than 12 months before the election date 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.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, One Independence Mall, 615 Chestnut Street, Suite 710, Philadelphia, Pennsylvania 19106 on or before **Thursday, January 9, 2014**. No extension of time to file this list shall 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 by mail, facsimile transmission at (215) 597-7658, or by electronic filing through the Agency's website at **www.nlr.gov**. Once the website is accessed, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. 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 2 copies unless the list is submitted by facsimile or electronic filing, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

**C. Notice of 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 a minimum of 3 working days prior to 12:01 a.m. of the date 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 working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on non-posting of the election notice.

## **VII. RIGHT TO REQUEST REVIEW**

Pursuant to the provisions of Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, a request for review of this Decision may be filed with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001.

Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, DC by the close of business on **Thursday, January 16, 2014, at 5:00 p.m. (ET)**, unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically.** If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.<sup>4</sup> A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at **www.nlrb.gov**. Once the website is accessed, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

**DATED:** January 2, 2014



**DENNIS P. WALSH**

Regional Director, Region Four  
National Labor Relations Board

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<sup>4</sup> A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.