UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

SODEXO AMERICA, LLC,[1]

Employer,

and Case 27-RD-1229

SERVICE WORKERS UNITED,

Union,

and

DONNA CHRISTIE,

Petitioner.

DECISION AND DIRECTION OF ELECTION

On July 14, 2009, Donna Christie, an individual (Petitioner), filed a petition under Section 9(c) of the National Labor Relations Act (the Act), seeking an election to decertify Service Workers United (Union). The Union had been recognized based on card check on April 14, 2009, by Sodexo America, LLC, (Employer), as the collective-bargaining representative of its food service employees at its kitchen facilities in located in Billings, Montana public and Catholic schools.

[1] The name of the Employer appears as amended at the hearing.

On October 20 and 21, 2009, a hearing regarding the above petition was conducted before Isabel C. Saveland, a hearing officer of the National Labor Relations Board.[2] Following the close of the hearing, the parties timely filed briefs.

The issue to be resolved is whether the Petition should be dismissed, as the Union contends, on the basis that Petitioner Donna Christie possesses and exercises Section 2(11) supervisory authority, and, as a supervisor, was prohibited from filing the petition herein. Donna Christie is one of eight persons classified as either a "lead/multiple site" or "lead/single site".The Union further urges that these eight "lead/multiple site" or "lead/single site" employees (referred to by the parties and herein as "kitchen managers"), should be excluded from the unit in accordance with the Memorandum of Understanding executed by the Union and Employer on September 2, 2009, after the Petition herein was filed.

I conclude for the reasons enunciated below that that the Union has failed to meet its burden of establishing that Donna Christie was a statutory supervisor at the time she filed the petition. See e.g., NLRB v. Kentucky River Community Care, 532 U.S. 706 (2001), and its progeny discussed fully below. I also determine that the Memorandum of Understanding which excludes the classifications of "lead/multiple site" and "lead/single site" from the recognized unit is appropriate.

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[2] Prior to the hearing, the Union had served the Employer with an extensive subpoena duces tecum. The Employer timely filed a petition to revoke said subpoena, and the Union filed a response thereto. The petition to revoke was referred to the hearing officer for ruling. The hearing officer adjourned the hearing on the supervisory status issue shortly after the start, and conducted a separate hearing on the subpoena issues. Notwithstanding the statement at page 19 of the Union's post-hearing brief that: "the Employer refused to provide copies of evaluations from Christie's kitchen," the record clearly establishes that before the record on the supervisory status issue was closed, the parties reached an agreement on the subpoena issues resulting in the Employer providing certain documents to the Union, and the Union withdrawing its request for the remaining documents. The record further establishes that neither party objected to the hearing officer's statement on the supervisory status record that the parties were satisfied

Under Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me. Upon the entire record in this proceeding, I find:

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

2. The parties stipulated, and I find, that the Employer is engaged in commerce within the meaning of section 2(6) and (7) of the Act and that it is subject to the jurisdiction of the Board. Specifically, I find that the Employer is a limited liability corporation headquartered in Gaithersburg, Maryland, with an office and place of business in Billings, Montana. The Billings, Montana operations are the only operations at issue herein. In the course and conduct of its business operations in Billings, Montana, the Employer annually purchases and receives goods and services valued in excess of $50,000 directly from points located outside the State of Montana.

3. The parties stipulated, and I find, that Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

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, and it will effectuate the purposes of the Act to assert jurisdiction herein.

5. It is appropriate to direct an election in the following unit of employees:

INCLUDED: All fulltime and regular parttime employees employed by the Employer through its facility located at 101 10th Street, Billings, Montana in the following classifications: food service worker, food service worker/cashier, food prep worker/assistant cook, lead food service worker/elementary, lead food service worker/cashier/elementary, storeroom clerk, and cook.

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EXCLUDED: All other employees, lead/multiple site employees, lead/single site employees, managers, clerical employees, confidential employees, professional employees, active students of the Client or any students employed in connection with a vocational education or work study program, casual/substitute employees, temporary employees, guards, and supervisors as defined in the National Labor Relations Act.

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with the subpoena resolution. Accordingly, I find no basis to conclude that the Union's failure to meet its burden herein was a result of its inability to access Employer records.

STATEMENT OF THE CASE

A. Procedural History

On April 14, 2009, the Employer recognized the Union as the collective-bargaining representative of its food service employees at its facilities in Billings, Montana. This recognition resulted from a card-check accord between the Employer and the Union. A collective-bargaining agreement was executed by the Employer and the Union on July 6, 2009, which is in effect by its terms from August 1, 2009 through July 31, 2012.

On July 14, 2009, Petitioner Donna Christie filed a petition seeking an election to decertify the Union. The parties stipulated that the Petition was timely filed during the 45-day voluntary recognition notice posting period in Case No. 27-VR-12.[3] The recognition agreement of the Employer and the Union is embodied in Article 1 of the collective-bargaining agreement. Specifically, the recognition clause in Article 1 – Recognition states:

> The Employer recognizes the Union as the sole and exclusive bargaining representative with respect to salaries, hours of employment and other conditions of employment for all full-time and regular part-time employees at Sodexo School Food Services, Billings Public Schools, 101 10th Street, Billings, MT in the classifications identified in Appendix A. Excluded from the bargaining unit shall be employees in classifications not identified in Appendix A, managers, confidential and clerical employees, professional employees, active students of the Client or any students employed in connection with a vocational education or work study program, casual/substitute employees, temporary employees, supervisors, and guards as defined in the National Labor Relations Act.

Appendix A of the contract lists the classifications encompassed by the Article 1 as:

> Food service worker, food service worker/cashier, food prep worker/asst cook, lead food service worker/elementary, lead food service worker/cashier/elementary, storeroom clerk, and cook.

[3] See, *Dana Corp.*, 351 NLRB No. 28 (2007).

During the course of negotiations for the collective-bargaining agreement in July 2009, the name of the historical "kitchen manager" classification, which had originated some 25 years ago at the time the food service employees were employed by the school district, was changed by the Employer and the Union to "lead/multiple site" and "lead/single site" classifications. "Multiple site" refers to what the Employer calls a "base" kitchen, which prepares food for the school at which the kitchen is located and eight or nine elementary schools, which do not have kitchens. The recognized bargaining unit includes the Sodexo employees assigned to serve the food at those elementary schools. "Single site" refers to what the Employer calls a "stand-alone" kitchen, which prepares food only for the school at which the kitchen is located.

On September 2, 2009, representatives of the Employer and the Union met in Gaithersburg, Maryland, and signed a Memorandum of Understanding – Bargaining Unit Modification, which stated:

> The Parties agree that due to the nature of their duties, those workers classified within the Collective Bargaining Agreement as "Lead/Multiple Site" and "Lead/Single Site" should be more appropriately classified as supervisors and are therefore excluded from the Bargaining Unit.

The Billings Montana managers who had participated in the local bargaining did not participate in negotiations of the Memorandum of Understanding.

The Union represented in its post-hearing brief that the basis for this September 2, 2009 Memorandum was that: "Upon closer examination of the Kitchen Managers' specific duties, the Union reached the conclusion that the Kitchen Manager position was a supervisory position, and entered into discussion with Sodexo Labor Relations about

excluding the Kitchen Managers from the unit."[4] Although the specific issue to be resolved is the status of Christie as a supervisor when she filed the petition, the parties developed the functions of not only Christie but other kitchen managers as relevant to resolving this issue.

B. The Billings, Montana Food Service Operations

The Employer has had a contract for 15 years to provide food services to the Billings, Montana public and Catholic school systems. The Employer currently employs approximately 135 employees to provide food services to 34 schools, from school kitchens located in 8 schools. The Employer operates three so-called "base" kitchens, which provide food to the school at which they are located, as well as the eight or nine elementary schools assigned to their kitchen. The base kitchens produce 1500 to 2500 meals per day, depending on the size of the schools they serve. These base kitchens are located at Castle Rock High School, Riverside Middle School, and West High School. There are also five "stand-alone" kitchens located at the following public and Catholic middle and high schools: Lewis and Clark Middle School, Will James Middle School, Senior High School, Skyview High School, and Catholic Central High School. These stand-alone kitchens produce 200-500 meals per day, depending on the size of the school.

[4] Union's post-hearing brief, at page 3. While I have determined that the Union has not met its burden of establishing that Petitioner Christie was a statutory supervisor at the time she filed the petition, I have excluded these kitchen managers, formally classified as "lead/multiple site" and "lead/single site," from the bargaining unit on the basis of the September 2, 2009 agreement between the Union and the Employer. In this regard, while the parties litigated the supervisory status of the kitchen managers, they did not expressly litigate the unit placement of the kitchen managers in the event I found them not to be statutory supervisors. Accordingly, I find no basis to overturn the agreement of the parties to remove the kitchen managers from the bargaining unit, absent their express intent to litigate this unit placement issue on the record.

The Billings, Montana operations are overseen by General Manager Bette Hunt. Reporting to her are two salaried food service managers, Sandra Bettise and Steve Harris. The 8 kitchens, and 34 schools they serve, are divided between these two food service managers, so each manager oversees about 17 schools. All three managers work out of the Employer's food service office located at 101 10th Street, West, Billings, Montana. The two food service managers are responsible for implementing and overseeing the corporate standards relating to customer service, production, personnel safety and food quality and nutrition. The menus are set by food service manager Sandy Bettise, who has a background in nutrition. During the summer, the menus are prepared and then analyzed by a computer software program called NutriKids for nutritional and caloric content as required by the United States Department of Agriculture. The menus are prepared for the entire year at the food service office and sent to the kitchens for implementation at the start of the school year.

The two food service managers and general manager are responsible for the entire hiring process, including determining when there are job openings, reviewing applications, and selecting applicants for hire, transfer, or promotion. The food service at the various schools are set up like food courts, with specific stations for sandwiches, main dishes, or ethnic foods such as pizza and Mexican food. Applicants are hired for a specific school, position, or set of tasks. For instance, an employee may be hired to be a cook or to be a cashier, or to prepare and serve pizza for the pizza station, or prepare and serve the main dishes at the hot food station. While employees may be cross trained to cashier, or to be able to assist on other food stations in an emergency, they do not rotate among the various food stations, but work at the station for which they

were hired. Likewise, food service workers do not rotate from one school to another unless there is an emergency, or they were hired specifically as a substitute. Some employees are also hired to serve functions at more than one school, such as cashier at one school for breakfast, and another school for lunch.

The general manager and food service managers have the sole responsibility for setting work schedules, approving time off, and implementing the Employer's progressive discipline program. They also perform new employee orientation on the Employer's policies and procedures. Since the food service industry is highly regulated by the Federal and Montana State governments, the general manager and food service managers train newly hired employees, and provide on-going training for current employees, on the mandatory Hazard Analysis Critical Control Point (HACCP) food safety program, hygiene, customer service, and work safety. At the start of each school year, the Employer conducts mandatory safety training concerning the physical safety of the food service workers in areas such as proper lifting methods and knife and equipment safety. Prior to the collective-bargaining agreement, employees were also given a safety handbook.

The general manager makes only sporadic visits to the food service kitchens. The two food service managers visit the schools they oversee about once a week unless there are specific problems they need to address, and spend between 30 to 45 minutes at each school during such visits. The food service managers also have daily contact with the kitchen managers by telephone. These school visits include talking with the employees, and observing the employees as they work for their personal and food safety and customer service. The food service managers also make specific visits

to each school to conduct formal food safety audits. This entails inspecting the food temperature charts which employees are required to maintain for each station by HACCP, checking the cooler temperatures, observing food presentation to ensure that the Employer's presentation requirements are being met.

Reporting to the two food service managers are 26 lead employees from each of the 26 elementary schools served by the "base" kitchens, and the 8 kitchen managers at issue herein. The five stand-alone kitchen managers are Petitioner Donna Christie at Lewis and Clark Middle School, Terry Parnell at Will James Middle School, Sharon Lose at Senior High School, Lisa Stahl at Skyview High School, and Julie Lawrence at Catholic Central High School. The three base kitchen managers are: Verna Steglich at Castle Rock High School, Terry Stahl at Riverside Middle School, and Sandra Gunderson at West High School.

The number of food service workers at each school relates to the number of meals served. For instance, Catholic Central High School has about 200 students so there is a kitchen manager, one food service worker, and a cashier who also serves as cashier at other schools each day. The four other stand-alone kitchens have a kitchen manager and five to six food service workers. (There are six food service workers at Lewis and Clark where the Petitioner is kitchen manager.) The three base kitchens each have six to eight food service workers, and each of the elementary schools for which they provide food has a lead and one to three food service workers.

C. Terms and Conditions of Employment

The food service employees, including the kitchen managers, all work Monday through Friday, but only on the 168 days a year school is in session. The kitchens are

closed for Christmas break, certain other holidays, spring break, school in-service days, and over the summer, with the exception of one school which operates a summer program. At the end of the school year, the food service employees, including the kitchen managers, are placed on what is called a "job-attached" leave-of-absence, which allows them to collect unemployment compensation over the summer, and to be reinstated when school commences in the fall. The food service employees are also treated as being on temporary layoff during the Christmas break so they are eligible for unemployment. With regard to the summer program, the Employer posts summer job openings in February or March, seeking employees who are willing to work during the summer session.

The food service workers and kitchen managers all enjoyed the same benefit package prior to and under the collective-bargaining agreement.[5] They currently wear the same uniform consisting of a purple polo shirt, black slacks, black non-slip shoes, and a name tag. They are not allowed to wear jewelry except for a smooth surface wedding band, and are required to wear job-specific gloves for food and personal safety.

The eight kitchen managers are classified as fulltime, and work 40 hours per week during the school year. The current kitchen managers, with one exception, are long term employees, who have been with the Employer from 9 to 28 years. The newest kitchen manager was hired about three years ago.

There are about 30 food service workers classified as full time, who work between 30 to 40 hours a week during the school year. The remaining food service

[5] The record does not establish whether the Kitchen Manager benefit package changed after their exclusion from the unit under the September 2, 2009 agreement.

employees, including most of the elementary school leads, are classified as parttime. The leads generally work 20-30 hours per week. The non-lead food service workers work 2 to 5 hour shifts, resulting in 10-25 hours per week, depending on the position for which they are hired.

Prior to the collective-bargaining agreement, the kitchen managers wage rates ranged from $10.16 per hour to $15.85 per hour, with a correlation to their lengths of service. Under the collective-bargaining agreement, the wage rate for lead/single site was set at $11.00 and lead/multiple site was set at $12.50.

Prior to the collective-bargaining agreement, the food service worker wages ranged from entry level at $6.75 to a high of $12.74. Under the contract, the rates are set at $7.40 for employees classified as food service worker; $7.65 for food service worker/cashier; $7.85 for food prep worker asst. Cook; $8.00 for lead food service worker/elementary; $8.05 for lead food service worker/cashier/elementary; $8.25 for storeroom clerk; and $8.90 for cook. The contract provides for across-the-board wage increases of 35 cents per hour in 2010 and 2011 for the food service workers, and kitchen managers. The record and contract are silent as to whether the employees and kitchen managers with higher wage rates were grandfathered in at their higher rates.

D. Kitchen Managers

1. General duties and responsibilities

The kitchen managers are responsible for making sure that the food is prepared in a timely manner, meets the Employer's nutritional requirements, meets the Hazard Analysis Critical Control Point (HACCP) food safety requirements, and is attractive and tastes good to eat. The kitchen managers also work with the school administrators

regarding complaints, and with the parents regarding food allergies or special diets, payments, and free and reduced price breakfast and lunch applications. In addition to these tasks unique to their position as kitchen manager, they also are involved in food preparation and serving. Petitioner Christie is specifically responsible for preparing and serving breakfast at her school, and preparing and serving the lunch main dish.

The kitchen managers have offices at their respective schools. The office at Lewis and Clark Middle School, which was described by one employee as “a cubbyhole,” is adjacent to the kitchen. The record is silent as to the location of the offices at the other base and stand-alone kitchens, and as to whether the leads have offices at the elementary schools. The food service employees have access to these offices to use the telephone or computer, to get forms, and to review various notices which are posted, including notices brought in by parents regarding food allergies or special dietary restrictions. The cashiers also use the kitchen managers’ offices to count their tills, and some employees use the office to take breaks.

The record establishes that the kitchen managers hold weekly production meetings with their food service employees, but does not provide a great deal of detail about what transpires at these meetings. Petitioner Christie testified that she uses these meetings to go over the menu for the week with the employees, and alert the cooks to the food items they will need to be prepare based on the up-coming menus.

The State of Montana Food and Consumer Safety Section conducts regular inspections at all the kitchens and requires that each food station maintain an hourly food temperature log. These logs are turned in to the kitchen managers monthly for filing on-site and to provide to the State inspectors upon request. While the food service

managers check to see that the employees are filling out the HACCP charts, and collect them for review by Montana food safety inspectors, the record establishes only that they remind the employees to fill out the chart if they are not doing so, but there is no evidence that the kitchen managers have the authority to take any disciplinary action if they fail to do so.

The kitchen managers are responsible for escorting the inspectors around the kitchen facility, and posting the reports in the kitchen after the inspection, which is mandated by the State. The kitchen manager will also alert the employees to any adverse findings from the inspection. The only example of an adverse inspection finding contained in the record was given by employee Tracy Goodwin involving a minor infraction found by an inspector at Lewis and Clark. Specifically, the inspector wrote that kitchen up for having the dishwasher spray nozzle dangling rather than hanging up. After the inspection, kitchen manager Christie pointed this out to the food service workers and told them to hang the nozzle back up after they used the sprayer.

Kitchen managers are responsible for seeing that food and supply Inventories are preformed on both a monthly and perpetual basis. The person who works on each given food station is responsible for the perpetual inventory of their food items, and for alerting the kitchen manager, or store room clerks when they need food and supplies ordered. The monthly inventories are done in teams with one person doing the counting, and another person doing the writing. In the larger kitchens, there are multiple teams doing the monthly inventory. With regard to deliveries, in the smaller kitchens, the kitchen manager or cook receives the deliveries. In the larger kitchen, there are food service store room clerks who handle deliveries.

At the start of the school year, the kitchen managers and leads in the elementary school receive a book containing monthly five-minute safety talks for the entire year based on the program established by the general manager. Christie and the other kitchen managers and leads give these weekly 5-minute safety talks to the food service employees.

2. Petitioner Donna Christie

Kitchen manager Christie testified that she starts work at 5:30 am. On delivery days, she is responsible for receiving and stocking the Sysco food delivery, or the bread or milk deliveries. She then cooks the breakfast items and starts preparations for her main dish menu items. The food service employees begin arriving about an hour after Christie. One employee arrives at 6:30 a.m., another at 8:15 a.m., and the rest arrive at 9:15 a.m. These six employees all leave at 1:15 p.m, and Christie leaves at 2:00 p.m. One of these employees is responsible just for prepping the food for the next day. The others are responsible for preparation of food for their station and clean up after service is done, or cashiering. After serving breakfast, Christie works throughout the morning on the main dish preparations, begins food prep for the other employees as time allows, does a deposit of the breakfast money she collected, and completes any necessary paperwork such as orders, inventories, and production sheets, and on Thursdays, reviewing timesheets. During lunch service, Christie cooks hamburgers and chicken patties, and bakes the second half of the pizzas while the first half are being served by the pizza station employee. After lunch is served, Christie helps the food service workers pull their lines down and begin clean up. She then makes the lunch deposit, and meets with parents or school administrators if necessary regarding students'

special dietary needs. Christie estimates that she spends 70-75 percent of her time actually doing food preparation and serving, and 25-30 percent doing paperwork, or meeting with parents, or school administrators. According to Christie, Harris visits her kitchen an average of twice a week, although some weeks he may come more often and then he may skip the next week.

Christie prepares weekly food production sheets which outline what needs to be cooked for the various menus. The production sheet lists the name of the employee hired for the specific type of food, and the tasks associated with the food preparation. The record is silent as to whether the tasks are routine or involve special assignments.

The Union called food service employee Tracy Goodwin to testify. Goodwin is the prep cook and runs the hot foods line at Lewis and Clark Middle School. Her duties include prepping the frozen foods for the next day's service, prepping her hot foods line, serving lunch, cleaning up and doing the dishes. If she has extra time at the end of her duties, she either helps her follow employees finish their clean up, finds something that needs cleaning, or reviews the safety manual. Goodwin testified that when she was hired last April, Donna Christie and the other employees showed her what she was supposed to be doing and how to do it. Goodwin also testified that if equipment breaks down, Christie calls repairmen, and that if someone calls in sick, they all "pull together" to make up for being shorthanded.

Goodwin recently pulled a muscle in her back when she lifted a case of chocolate milk using an improper lifting method. She immediately reported the incident to Christie, who assisted Goodwin in filling out an incident report. Christie asked if Goodwin realized she had lifted the case the wrong way and Goodwin said she did know it.

Christie explained the proper lifting method to Goodwin, and told her that she was also going to remind the rest of the employees of the proper lifting method.

Goodwin also testified about one instance where she and another employee asked Christie if they could change the preparation procedures for making pizzas. When Goodwin was hired, she would prep pizzas at the start of her shift. Another employee suggested they instead do them at the end of the shift for the next day and that they use pizza pans rather than flat pans. They asked Christie if they could try the new method, and she said they should try if for a week or two and see how it worked out. According to Goodwin, It worked out well because it reduced the number of sheet pans they had to use, and improved the pizzas, so the change has remained in place. With regard to the unpopular tasks such as deliming the dishwasher or wiping the cafeteria tables, Goodwin testified that Christie's practice is to rotate the duties so no one is stuck with them.

3. Kitchen operations at other schools

The Union called four employees to elicit testimony about how the kitchen managers at other schools assign work to, and direct the work of, the food service workers.

Mary Ballantyne is a cashier at Castle Rock Middle School. There are about nine food service workers at that kitchen, including the kitchen manager Verna Steglich. Castle Rock is a base kitchen which serves eight elementary schools. Ballantyne was hired in January 2008. She works the breakfast line making breakfast burritos, sausage and eggs, and egg sandwiches on muffins or bagels. During lunch, Ballantyne is responsible for ringing up the food purchases as the children come through the cash

register line. After lunch, she counts the till and makes the bank deposit. Ballantyne testified that she occasionally is asked by kitchen manager Verna Steglich to clean and sanitize the cafeteria tables and break room table, clean the cooler vents, make coffee, or sweep and mop the stock room floor. Ballantyne believes that she is asked to do these additional tasks because many of the food service employees at that school are over 60 years old, and she is much younger and faster at these tasks. She also testified that sometimes the school children are involved in cleaning and sanitizing the cafeteria tables. Finally, Ballantyne testified that a few weeks ago, food service manager Sandy Bettise, who was at the Castle Rock kitchen that day because the kitchen manager was out, instructed Ballantyne to assemble sack lunches. Ballantyne has continued to do this task ever since.

Suzie Woods is also an employee at Castle Rock Middle School. Woods was hired as a substitute for an employee undergoing chemotherapy at Skyview High School. After the employee was well enough to return to work, Woods contacted food service manager Sandy Bettise and asked if she could continue working at Skyview. Bettise told her there were no positions open at Skyview, but she did have position at Castle Rock. Woods currently slices meats, and runs the hot food line. The kitchen manager tells her the amount of meat that needs to be sliced, and then she slices it and portions and packages it in the necessary amounts for shipping to the elementary schools. Woods testified that she observes both kitchen managers Lisa Stahl and Verna Steglich work on the food lines and help anywhere they are needed.

Donna Holman is a food service worker at Senior High School, which has a stand-alone kitchen, but also does catering for district functions such as meetings and

retirement parties. Holman has worked at Senior High School for about 11 years. The kitchen manager is Sharon Lose. Senior High School has about 500 students. According to Holman, Lose spends about half her time working on food preparation including baking and catering, and the rest of her time performing other duties. Holman starts work at 5:30 a.m., and is responsible for preparing and serving breakfast. After she is finished cleaning up from breakfast, Holman begins preparations for lunch. She runs the soup cart which is set up down the hall from the kitchen to alleviate some of the congestion in the lunch room. The soup is served with a dinner roll or a sack lunch, milk and veggies. After lunch is over, she cleans up her cart, counts her till, and begins food preparations for the next day's breakfast.

Kathy Anderson testified that she was hired by food services manager Steve Harris on January 28, 2008, to work at West High School, which is a base kitchen that prepares food for eight elementary schools. Anderson works the breakfast line and cashiers at lunch time. Sandy Gunderson, the kitchen manager at West High School, trained Anderson on how to work the cash register, and on how to put out the breakfast foods. Anderson testified that her duties are basically the same every day, but if there are addition duties such as cleaning tables or mopping the floor, they all take turns doing them. Anderson testified that Gunderson is responsible for calling equipment repairmen, and if they run out of food they are prepping for the next day, Gunderson goes to Sysco and gets it for them. Anderson testified that Gunderson occasionally reminds her to put her gloves on when performing certain tasks. Anderson testified that her mother passed away last year and she told Gunderson she needed time off.

She also informed Harris that she needed the time off because he happened to be at the school. She filled out a form and believes Gunderson sent it to the office.

C. Supervisory Indicia

1. Hiring process for food service employees

The record establishes that the kitchen managers' role in the hiring process is limited to showing a potential new hire around the kitchen if they want to observe the operations to decide if they are really interested in the job. In this regard, the Employer posts open food service positions at the office and on bulletin boards at the school kitchens. Job openings are announced to the public through newspaper advertisements and Montana job services. If a current employee wishes to transfer to an open position, they make a written request to the food service office. The request is forward to either Harris or Bettise for consideration. These two food service managers are responsible for the interviewing candidates for hire, performing sexual predator background checks, and making the final recommendations to general manager Hunt, who has final approval for all hiring. After an applicant is selected for hire, the general managers sometimes suggests that they go to the specific school for which they are being hired to watch work in progress so they can make sure they really want the job. The applicant is shown around by the kitchen manager, and if feasible, will also spend time with the employee performing the duties for which they are being hired.

2. Work schedules

The record establishes that the kitchen managers have no role in setting the work schedules of the employees. The work schedules are set by the general manager and food service manager prior to the start of the school year, at a time when the

kitchen managers are on layoff status. During the summer, the general manager and food service managers evaluate the number of students in each school, whether lunch is served in a one-hour or two-hour time period, what time breakfast and lunch are being served, and then determine how many food service workers will be needed and what their work hours of work will be. Employees are notified of their hourly wage rate and work schedule by letter before the beginning of the school year. The work schedules are sent to the leads in the elementary schools, and the kitchen managers in the base and stand-alone kitchens. The leads and kitchen managers do not have the authority to make schedule changes on their own. The leads and kitchen managers can call their respective food service manager if they determine that it might work better if someone's schedule was adjusted slightly. For instance, a lead or kitchen manager may determine that it would be helpful to bump an employee's schedule back a half hour because the employee needs less prep time and more time to clean up after lunch service. The record is silent as to how often such requests are made by the kitchen managers or leads, or whether schedule changes are ever requested for personal needs of a given employee.

3. Discipline and discharges

The record establishes that the kitchen managers do not play any role in the Employer's progressive discipline system. That system provides for coaching or counseling which is documented on a form, two to three written warnings, then termination. All of these levels of discipline are meted out exclusively by the food service managers and general manager. There is no evidence that the kitchen managers document any discussions they have with employees about work issues,

which could form the basis for later discipline. Rather, if a kitchen manager believes that an employee has engaged in conduct which might warrant discipline, the kitchen manager informs the food service manager over that school. Harris or Bettise go to the school in question and conduct an independent investigation into the incident. After the investigation, the food service manager informs the general manager of the results of the investigation. Harris, in turn, discusses it with human resources before she makes a determination as to whether discipline is warranted. All discipline is approved by the general manager before being meted out. The employee being disciplined is called to the food service office where the discipline is meted out, usually in the general manager's office. General Manager Hunt could not recall any instances were the kitchen managers were present for the disciplinary meeting. Food service manager Harris believe that less than five written disciplinary actions were issued in the past year. The record does not contain any specifics as to what the discipline involved, or at which schools it occurred. There is no evidence that any of those instances have occurred at Lewis and Clark Middle School, or involved Petitioner Christie.

The record establishes that the only discharges in recent years have been for employees who have not shown up for work three consecutive days. In those cases, the employee is sent a certified letter by the food service office informing the employee that they must contact the office immediately or they will be deemed to have abandoned their job.

4. Incident reports

If a food service worker is injured on the job, they are required to contact the food service office immediately, even if they do not require medical attention. These calls

can be made by either the employee or the kitchen manager. The employee also fills out an incident report which is forwarded to the office. The safety committee reviews all incident reports and if it is determined that the employee is at fault, the employee is written up by the food service manager. There is no evidence that the kitchen managers participate on the safety committee.

5. Time keeping and time-off requests

The employees record their hours daily on individual time sheets. They record their start and end times and any break times. The time sheets for food service employees in base and stand-alone kitchens are turned in to the kitchen manager. In the elementary schools, the time sheets are turned in to the lead kitchen worker. The time sheets are reviewed by the lead or the kitchen manager and signed off on, signifying that the employee actually was at work on the days and hours listed. If the person reviewing the time sheet believes the hours stated are incorrect, they discuss it with the employee and if there is still an issue, they contact their food service manager for investigation. The general manager signs off on all the payroll which is then entered into the payroll system.

If an employee is sick or has an emergency, they may, as a courtesy, call their lead person if they work in an elementary school, or the kitchen manager if they work in a base or stand-alone kitchen, but they are required to call the food service office, so that a substitute can be located by the receptionist While food service manager Harris testified that Christie plays some role in deciding if her kitchen can work without a substitute if someone calls in sick, the record is silent as to specifics about how often such situations arise or how such determinations are made.

For scheduled absences, the Employer has a form which employees fill out when they need to request time off for vacation or sick leave. The employees fill out the form and either take it directly to the food service office, or send it through the school district inter-office mail system. The food service managers approve requests for time off and then alert the food service office receptionist who is responsible for finding a substitute. According to Christie, if one of the Lewis and Clark employees wants time off, they generally ask Harris when he is visiting the school. If not, they fill out a time off request form and Christie puts it into interoffice mail for them so that the food service manager can address the request. Christie does not have any input into whether the time off request is granted or denied.

6. Grievances

Prior to the collective-bargaining agreement taking effect, if a food service worker had a problem or concern, they would talk to their kitchen manager first, and then bring the matter to their food service manager. Only the food service managers possessed the authority to make changes to terms and conditions of employment. If the employee was not satisfied, they would talk to the general manager, or contact human resources at the corporate level. There is no evidence record evidence of instances where employees attempted to resolve issues related to wages, hours, or working conditions, or the process they followed. There is no record evidence that the kitchen managers possessed or have exercised independent authority to resolve grievances related to wages, hours, or working conditions, prior to the collective-bargaining agreement, or that since the collective bargaining agreement was negotiated they play any role in the

contractual grievance procedure. There is, in fact, no evidence that any grievances have been filed under the contract.

7. Merit Evaluations

Prior to the 2008-2009 school year, the Employer gave merit-based raises based on a merit evaluation system. The record establishes that both the kitchen managers and the lead employees at the elementary schools played a significant roll in that merit evaluation process. The Employer abandoned the evaluation system after the 2007-2008 school year and the last evaluations were performed in May, 2008. The merit evaluation system was abandoned in anticipation of its recognition of the Union. There is no record evidence that the Employer has substituted a different evaluation system for the abandoned system, or intends to implement a new evaluation system in the future. The current collective-bargaining agreement does not provide for an evaluation system, and raises are no longer merit based. The negotiated raises are 35 cents per hour across-the-board increases, awarded annually, on specified dates.

Under the old evaluation system, the food service worker evaluation form was posted in the schools at the start of the school year so the employees would know the evaluation criterion. The Employer then conducted training each spring for the lead employees in the elementary schools, and the kitchen managers in the base and stand-alone kitchens so they would understand the evaluation process. The leads and kitchen managers began the evaluation process by filling out evaluation forms for the food service employees in their respective kitchens. The food service workers were evaluated on their quality of work; job knowledge; productivity; versatility; initiative; teamwork/attitude; customer satisfaction; physical and food safety, and appearance.

Each section provided for a rating of 5 to 1, with 5 being failure to comply and 1 being always in compliance. The evaluation form contained a comment section which was used to explain the basis for the numerical ranking. The categories also had assigned percentage values: 5% for appearance; 10% for quality of work, job knowledge, versatility, initiative, and physical safety and food safety; and, 15% for productivity, team work/attitude, and customer satisfaction. For each evaluation category, the ranking sections gave explicit criterion to support the ranking. For instance, for the category of appearance, a number 5 ranking states: Associate consistently out of uniform dress. Name tag never on. Personal appearance/hygiene not appropriate. A number 3 ranking states: Associate in uniform dress on most occasions. Name tag most always on. Acceptable appearance/hygiene. A number 1 ranking states: Associate always in uniform dress with name tag on. Uniform always clean. Excellent appearance/ hygiene. (Approved hair restraint, non-slip shoes. No jewelry except smooth surface wedding band.)

The forms were then given to the food service managers who completed the physical safety and food safety and attendance related sections of the form which were left blank by the leads and the kitchen managers. The food service managers also reviewed the rankings which had been done by the leads and kitchen managers, and contacted them if they disputed a ranking or had questions about a ranking. The record establishes that the food service managers and the general manager all have exercised their authority to change the rankings done by the leads and kitchen managers. Christie testified that she could think of one instance where her number 3 ranking of an employee in several categories was changed to a number 2 ranking by

food service manager Harris. Harris testified that there had been times when he has not agreed with Christie's evaluation of an employee and that he has final say on the scoring of any individual.

After completing their portions of the evaluation forms and their review, the food service managers tallied the points from the evaluation and calculated the raises to be awarded based on a percentage schedule set by the general manager in accordance with budgetary constraints. After completion, the Employer did not conduct interviews with the employees under review, but rather, either sent the forms to the employees during the summer, or delivered them to the school at the start of the year in sealed envelopes for distribution to employees. The raises took effect during the new school year. While the employees were free to discuss the evaluation with the kitchen manager or food service managers, Christie testified that no employees had ever talked to her about their evaluation.

Christie testified that she did not know the wage rates of the employees at Lewis and Clark during the time she was involved in the evaluation process, and that at the time she filled out her portions of the forms, the employee wage rates were not on the evaluation forms. She also testified that she did not know the amount of any potential raises which the employees might be awarded based on her rankings.

Prior to the 2008-2009 school year, the kitchen managers were also evaluated on an evaluation form unique to their duties and responsibilities. The record is silent as to whether the lead employees were evaluated on the food service worker form, had a form specific to their lead classification, or were evaluated on the kitchen manager form.

The kitchen manager form included evaluation sections similar to the food service workers, namely, quality of work; job knowledge; productivity; versatility; initiative; teamwork/personal work approach; customer satisfaction; physical and food safety. Two of those sections, namely quality of work, and physical and food safety, contain language establishing that it was the Employer's intent to hold the kitchen managers accountable for the performance of the food service workers in their kitchen. Specifically, category 1, quality of work, on the kitchen manager evaluation form stated:

> Manager takes pride in what they do <u>striving to maintain the highest operational daily standards for themselves as well as holding staff accountable to maintain the highest standards</u> each day in their respective work areas. Work reflects excellence and care. Accuracy is reflected in areas of production records, cash reports and cash control (-/+) Staff members are held accountable to perform their work duties at operation standards established for their respective work areas. [Emphasis added.]

Similarly, category 8, physical and food safety stated;

> <u>Manager personally complies with food and physical safety requirements and holds staff accountable to the same requirements for food/physical safety.</u> Manager and staff follow mandatory safety procedures. Manager has completed all mandatory safety trainings. Has completed all required audits thoroughly with staff follow up. HACCP sheets are completed accurately. Manager has had no accidents as well as in-house kitchen staff. [Emphasis added.]

While food service manager Harris testified that the kitchen manager evaluations of Christie were not affected by the performance of the other employees at Lewis and Clark because Christie is a long term employee who gets Harris involved early in the process of resolving issues that arise at her school, the evaluation form language belies this assertion.

ANALYSIS AND FINDINGS

The Union asserts that Petitioner Donna Christie, like other kitchen managers, is a statutory supervisor: "due to their authority to responsibly direct and assign employees, effectively reward them and adjust their grievances, and because of a host of secondary indicia of supervisory status."[6] The Union further urges that the Petition herein must be dismissed based on its contention that Donna Christie is a statutory supervisor, because it is well settled that a statutory supervisor may not file a decertification petition.[7] The Employer and Petitioner, contrary to the Union, contend that Donna Christie was not a statutory supervisor at the time the Employer recognized the Union, and accordingly, the Petition should not be dismissed.

A. Applicable Legal Authority

1. Supervisory indicia under the Act

Section 2(11) of the Act defines a "supervisor" as:

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

Section 2(11) is to be read in the disjunctive, and the possession of any one of the Section 2(11) powers will establish supervisory status. See *KGW-TV*, 329 NLRB 378, 381 (1999). The requirement of use of independent judgment, however, is conjunctive; thus, an individual is not a supervisor unless the individual exercises

[6] Union's post-hearing brief, at page 1.
[7] *Clyde J. Morris*, 77 NLRB 1375 (1948).

supervisory authority with the use of independent judgment, and holds the authority in the interest of the employer. Id.

The requirement that independent judgment be exercised imposes a significant qualification that limits the definition of "supervisor" to include only people who do not exercise the 12 stated Section 2(11) indicia in a merely routine manner. In adding the independent judgment requirement in the definition of "supervisor," Congress sought to distinguish between truly supervisory personnel, who are vested with “genuine management prerogatives," and employees - such as "straw bosses, leadmen, set-up men, and other minor supervisory employees” - who enjoy the Act's protections even though they perform “minor supervisory duties." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-281 (1974) (quoting S. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947)).

Consistent with the congressional intent to distinguish between truly supervisory personnel and those who merely perform minor supervisory duties, the Board is careful not to construe supervisory status too broadly, for a worker who is deemed to be a supervisor loses his organizational rights. See *KGW-TV*, 329 NLRB 378, 381 (1999). The burden of proving supervisory status is on the party asserting it. See *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001).

2. The Board’s recent decisions concerning supervisory status

Recently, in light of the Supreme Court’s decision in *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001), the Board issued three decisions in which it refined and clarified the analysis to be applied in assessing supervisory status regarding assigning work, direction of work, and independent judgment: *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006); *Croft Metals, Inc.*, 348 NLRB 717 (2006); and *Golden Crest*

Healthcare Center, 348 NLRB 727 (2006). In *Golden Crest*, supra (2006), the Board also reaffirmed existing case law holding that for supervisory status to exist, the alleged supervisor's authority with regard to Section 2(11) functions must include the power to require employees to undertake certain actions. The Board reiterated that supervisory authority is not established where the putative supervisor has the authority merely to request that an employee take a certain action. Id. at 729.

a. Responsible direction:

The Board in *Oakwood* held that for responsible direction to exist within the meaning of Section 2(11), the putative supervisor must direct and perform oversight of employees, and be accountable for the performance of tasks by those employees such that adverse consequences may befall the putative supervisor if the employees do not properly perform the tasks. *See Oakwood*, supra, at 692. Thus, embodied in the *Oakwood* "accountability" analysis, is the element that the putative supervisor must have the authority to take corrective action if an employee refuses such direction. Specifically, the Board stated:

> The person directing and performing oversight of [an] employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly. . . . 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." Id at 691-692. [Emphasis added.]

b. Assignment of work:

The Board in *Oakwood* construed the Section 2(11) term "assign" to refer to "the act of designating an employee to a place (such as a location, department, or wing),

appointing an individual to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks to an employee." *Oakwood*, supra, at 689**.** Specifically, the Board stated: "[T]o '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." Id.

c. Independent judgment:

In *Oakwood,* the Board adopted an interpretation of "independent judgment" that focuses on the degree of discretion involved in making a decision, not on the kind of discretion involved (e.g. professional or technical). For an individual's judgment to be "independent" within the meaning of Section 2(11), the individual must form an opinion or evaluation by discerning and comparing data. Id. at 692-693. As the Board explained, "actions form a spectrum between the extremes of completely free actions and completely controlled ones, and the degree of independence necessary to constitute a judgment as 'independent' under the Act lies somewhere in between these extremes." Id. at 693. The Board found that "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[,]" but that a judgment is independent even where there is a guiding policy so long as that policy allows for discretionary choices. Id.

Additionally, the independent judgment that a putative supervisor exercises must "rise above the merely routine or clerical" for it to be truly supervisory within the meaning of Section 2(11). Id. at 693. As stated by the Board:

> If there is only one obvious and self-evident choice (for example, assigning the one available nurse fluent in American Sign Language (ASL)

> to a patient dependent upon ASL for communicating), or if the assignment is made solely on the basis of equalizing workloads, then the assignment is routine or clerical in nature and does not implicate independent judgment, even if it is made free of the control of others and involves forming an opinion or evaluation by discerning and comparing data. Id.

B. Application of legal authority to the facts

As noted above, the Union asserts that the kitchen managers are supervisors within the meaning of Section 2(11) of the Act because the kitchen managers possess and exercise the following four supervisory indicia 1) Authority to responsibly direct employees; 2) authority to assign work to employees, 3) authority to effectively reward employees; and, 4) authority to adjust employee grievances. I will separately address each of these four indicia below.

The Union does not contend that the kitchen managers possess or exercise the remaining eight supervisory indicia enumerated in Section 2(11) of the Act. I specifically find, based on the record as a whole, that the kitchen managers do not possess or exercise the authority to hire, transfer, suspend, lay off, recall, promote, discharge, or discipline food service workers.

The Union also asserts that the kitchen managers are statutory supervisors based on a "host of secondary indicia," namely, kitchen managers are considered supervisors by other employees; kitchen managers attend management meetings; kitchen managers receive higher wages; kitchen managers have their own office, and the ratio of supervisor to non-supervisor employees.[8]

It is well settled that secondary indicia of supervisory status cannot transform an individual into a statutory supervisor if the individual does not possess any of the

[8] Union's post-hearing brief, at page 20.

powers enumerated in Section 2(11). *Central Plumbing Specialties, Inc.,* 337 NLRB 973, 975 (2002); *Beverly Enterprises--Ohio, d/b/a Northcrest Nursing Home*, 313 NLRB 491, 508, 509 (1993). Based on my finding that the Union has failed to meet its burden that the kitchen managers possess and exercise primary supervisor indicia, discussed next, I find that this assertion does not warrant significant discussion. I do note, however, that while the employee witnesses did testify that they consider their respective kitchen managers to be supervisors, they generally relied on indicia not encompassed in Section 2(11) of the Act. For example, when asked why she considered her kitchen manager to be her supervisor, employee Donna Holman answered: "She's the kitchen manager. She's the one who knows how to do every position. She handles the money, the bank deposit. She knows how to do all of that. She does the ordering. She's in charge of the inventory." With regard to the Union's assertion that the kitchen managers attend management meetings, the record only establishes that they attend monthly kitchen manager meetings, and there is no evidence as to who else attends those meetings or what transpires at the meetings. Accordingly, I find the Union's characterization that these are "management" meetings is misplaced, and the Union has failed to establish that these are in fact management meetings.

Finally, the Union asserts that the petition herein must be dismissed based on well-settled Board law which establishes that a petition filed by a statutory supervisor must be dismissed because it does not raise a valid question concerning representation. While the Union is correct in this assertion, and the authority upon which it relies, based on my determination that the Union has failed to meet its burden

of establishing that the kitchen managers possess and exercise indicia warranting a determination that they are statutory supervisors, I shall direct an election in the bargaining unit established by agreement of the parties, and embodied in their collective-bargaining agreement, as modified by their September 2, 2009 memorandum of understanding.

1. Supervisory indicia

At the outset, I find that much of the evidence adduced by the Union regarding kitchen managers' purported supervisory authority to "direct" and "assign" work is merely conclusory, and lacks the necessary evidence of the decision making factors underlying the purported direction or assignment to establish that the kitchen managers employ "independent judgment" in decision making as defined by the Board in *Oakwood*. It is well settled that such conclusory evidence is not sufficient to establish supervisory status. See e.g., *Golden Crest*, supra, at 731 (2006).

A. Authority to responsibly direct

The Union asserts that the kitchen managers "responsibly direct" the work of the food service employees in their respective kitchens based on the fact that the kitchen managers ensure that employees follow food and physical safety standards and rules, hold production meetings with the food service workers, and are required to sign off on employee time cards. I find that the evidence adduced by the Union regarding kitchen managers' purported direction of employees relating to safety matters falls well short of meeting the Union's burden to establish that the kitchen workers "responsible direction of employees is exercised with independent judgment, and involves a degree of

discretion that rises above the 'routine or clerical.'" *Croft*, supra, at 722. The record is replete with evidence that the food service operations are highly regulated by both the Federal and Montana State governments, and that the Employer has added its own set of personal and food safety requirements. Accordingly, in the absence of concrete evidence regarding the decision making process underlying personal and food safety instructions made by a kitchen manager, I cannot determine whether they are merely based on rigid policies, or the use of "independent judgment" as defined by the Board in *Oakwood*. This is also true as it relates to the production meetings relied upon by the Union where the record is devoid of meaningful evidence of what kitchen managers do to prepare for such meetings, and what actually happens at the meetings.

The Union primarily relies on language in the performance evaluations of the kitchen managers to support its position that the kitchen managers responsibly direct the work of the food service workers. As cited by the Union it its post-hearing brief, the Board in *Oakwood* held that for direction to be "responsible," "it is not adequate to show that supervisors direct employees; it must also be shown that they are held responsible for employees' performance."[9] The Union asserts that the kitchen managers are held accountable for the performance of the other kitchen workers through the kitchen manager evaluation process. While I agree with the Union that language contained in the "quality of work" and "physical safety and food safety" sections of the historical kitchen manager evaluation forms establishes that in the past, the kitchen managers were arguably held accountable for the performance of the kitchen workers at their respective schools, the Union places its reliance on an evaluation system no longer in existence.

The record establishes that the Employer abandoned the kitchen manager and food service worker evaluation systems after the 2007-2008 school year, and that no evaluations were conducted for either the kitchen managers or food service workers for the 2008-2009 school year. Moreover, the record does not contain any evidence that the Employer implemented, or intends to implement in the future, any other *de facto* or *de jure* systems of accountability to replace the historical evaluation systems. Moreover, in *Croft*, supra, at 722, the Board found that even though the evidence established that the lead persons at issue faced adverse consequences if their crew failed to meet production goals or because of other shortcomings, thereby satisfying the *Oakwood* "accountability" standard, the direction of employees by the lead persons still did not involve a degree of discretion that rose above the "routine and clerical." Thus, I find that even if the performance evaluation systems had not been abandoned by the Employer, the record herein similarly lacks evidence that degree of discretion exercised by the kitchen managers in the areas of quality of work and safety, is other than routine or clerical in nature under *Croft*. In this regard, the record herein is devoid of evidence that the kitchen managers have the authority to take corrective action if they direct an employee to perform a task, or abide by a safety requirement, and the employee refuses.

Finally, the Union asserts that the kitchen managers signing off on weekly time sheets establishes responsible direction of work. Initially, I note that nothing the Board's analysis in *Oakwood* or its companion cases suggests that signing time sheets relates to "direction" of work. Moreover, the evidence establishes that both the leads and kitchen managers sign off on the weekly time sheets to signify that the employees were

[9] Union's post-hearing brief, at page 13.

at work on the days and hours in question. The record establishes that if a kitchen manager or lead finds any discrepancies they discuss it with the employee, and if the discrepancy cannot be resolved, the food service manager is contacted to resolve the issue. Thus, I find that the leads and kitchen managers are only engaging in reportorial function, unrelated to direction of work, and insufficient to render supervisory status within the meaning of Section 2(11).

b. Authority to assign

The Union asserts that the kitchen managers have and exercise the authority to assign work to the food service employees because the kitchen managers give newly hired food service workers "their initial assignments" and "tell them what to do;" evaluate if employees can cover for an absent co-worker or if a substitute is needed; create whole new assignments such as adding a remote pizza cart; and assign "additional duties" such as deliming the dishwasher or washing cafeteria tables.[10]

As discussed above, assignment within the meaning of Section 2(11) refers to the act of designating an employee to a place (location, department, or wing); giving significant overall duties (tasks) to an employee; or appointing an individual to a time (shift or overtime period). I find that the examples relied on by the Union, and the record evidence as a whole, fail to demonstrate that the kitchen managers exercise supervisory authority to assign employees as required by the Board in *Oakwood* and its companion cases.

The Union asserts that the fact that kitchen managers give newly hired employee "their initial assignments, and tell them what to do," can be considered designating

[10] Union's post-hearing brief, at page 16-17.

employees to a place as well as giving them significant overall duties."[11] . I do not find either of these arguments to be persuasive. The record establishes that when employees are hired, it is the food service mangers who assign the new-hires to work at a specific school, and on specific sets of tasks such as cashiering, running the hot food line, or running the pizza line. Thus, these "place" and "duty" assignments are made exclusively by the food service managers, and there is no evidence the kitchen managers have any input into these decisions. The fact that the kitchen managers train the new-hires on how to do their tasks and set the pace for the training does not establish supervisory authority to assign employees to work at a "place, time, or overall tasks" under *Oakwood,* supra, at 689.

With regard to the Union's reliance on the conclusory testimony that Petitioner Christie "evaluates" whether they can function short-handed if someone is off work, the Union failed to adduce any evidence of what is entailed in this "evaluation" process, or how a determination is made and what considerations are taken into account as to who will take on extra work if a substitute is not used. The record is also devoid of evidence regarding how often such situations arise. The evidence, in fact, establishes that employees are required to call the food service office if they are unable to work, and the receptionist is the person responsible for finding a substitute. The Board in *Croft* stated:

> The occasional switching of tasks by the lead person does not implicate the authority to "assign" as the term is described in *Oakwood Healthcare* because the activity does not constitute the "designation of significant overall duties . . . to an employee." (Citation omitted.] This sporadic rotation of different tasks by the lead persons more closely resembles an 'ad hoc instruction that the employee perform discrete tasks during the

[11] Union's post-hearing brief, at page 16.

shift and as such is insufficient to confer supervisory status on the lead persons pursuant to Section 2(11) under *Oakwood Healthcare*. Id at 722.

With regard to the Union's assertion that employee Donna Holman was assigned by her kitchen manager to staff the newly instituted pizza cart at her school.[12] Holman testified that she runs the soup cart, not the pizza cart, and the record is silent as to how long she has done so and how she was assigned. The record is also silent as to how the woman who runs the pizza cart was assigned. Thus, the Union relies on a misreading of the facts to support its assertion.

Finally, the Union argues that the five employee witnesses it called testified that they sometimes are asked to clean or sanitize tables, delime the dishwasher, and sweep and mop the stockroom floor, and that these tasks constitute "significant overall duties" within the meaning of *Oakwood*. I disagree. The Union concedes that the record does not establish what "proportion of employees' duties" consist of these tasks. I would add that the record is also silent as to how often employees do these added tasks. Moreover, several of the employees testified that their kitchen manager rotates these duties when they arise to equalize the work, and employee Mary Ballantyne testified that she has a belief as to why she is often assigned these tasks, but her testimony did not establish that her belief was based on anything told her by her kitchen manager. I find that assigning employees to these extra tasks appears to constitute an equalization of work loads, and does not constitute assigning them to "overall duties," or involve "a degree of discretion that rises above the 'routine or clerical." *Croft*, supra, at 721. The Union also failed to adduce any testimony that the kitchen managers can

[12] Union's post-hearing brief, at page 17.

require the employees to perform additional tasks or that their refusal will result in adverse consequences. *Golden Crest*, supra, at 730.

Finally, even if it could be construed based on the above facts that the kitchen managers may have some involvement in assigning tasks to employees, the Union has not demonstrated that the performance of such function requires enough discretion that it could be concluded that they exercise supervisory independent judgment rather than routine judgment based on their years of work experience.

c. Authority to reward

The Union asserts that the kitchen managers are statutory supervisors because they have the authority to reward employees through the evaluation process. As noted above, the Employer abandoned the evaluation process after the conclusion of the 2008 school year The collective-bargaining agreement does not provide for evaluations or for merit pay or bonuses, but rather, provides for annual non-merit based wage increases. In the absence of evidence that the Employer has implemented a new evaluation system in which the kitchen managers play a role which directly affects the wages and/or job status of the employee being evaluated, I find that there is insufficient evidence to establish that the kitchen managers are statutory supervisors based on their authority to reward employees. See, e.g., *Franklin Home Health Agency*, 337 NLRB 826, 831 (2002).

d. Authority to adjust grievances

The Union's final assertion is that the kitchen managers are statutory supervisor because they have the authority to adjust employee grievances. There is no evidence that the kitchen managers play in role in adjusting grievances under the grievance

procedure contained in Article 20 of the collective-bargaining agreement which defines grievances as "any dispute arising out of the expressed terms or conditions contained within this Agreement." Likewise, before the collective-bargaining agreement took effect, the employees were instructed to contact their food service manager, the general manager, or human resources if they had an "issue" they wanted resolved. The record does not contain any examples of grievances arising either under the collective-bargaining agreement or before it took effect. The only example of a "grievance" cited by the Union involved two employees suggesting to Petitioner Christie that they try preparing pizzas the day before they are served, rather than the same morning, that they use a different style pan.

I find that the example relied upon by the Union does not constitute the adjustment of a grievance relating to wages, hours of work, working conditions, or a conflict between two employees. Tracy Goodwin gave this example when asked to whom she would go to if she wanted to "do something differently." Moreover, even if this example does constitute an adjustment of a grievance, the Board has held that the limited authority to resolve minor disputes is insufficient to establish supervisory status. *Ken-Crest Services*, 335 NLRB 777 (2001)(offering suggestions to resolve a personality dispute, assisting an employee seeking a pay raise, and relaying grievances to upper management do not constitute the adjustment of grievances).

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of

Election to issue subsequently, subject to the Board's Rules and Regulations.[13] Eligible to vote are those in the unit as described above who are employed by the Employer during the payroll period ending immediately preceding the date of this Decision and Direction of Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such a strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement of that strike and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by:

SERVICE WORKERS UNITED

[13] Your attention is directed to Section 103.20 of the Board's Rules and Regulations. Section 103.20 provides that the Employer must post the Board's Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

LIST OF VOTERS

In order 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 in the election should have access to a list of voters and their addresses, which may be used to communicate with them. See *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly it is hereby directed that within seven (7) days from the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with the Undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, National Labor Relations Board, 600 17th Street, 700 North Tower, Dominion Plaza, Denver, CO, 80202, on or before **November 25, 2009**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by electronic filing through the Agency's website, **www.nlrb.gov**,[14] or by facsimile transmission to (303) 844-6249. The burden of

[14] To file the list electronically, go to **www.nlrb.gov** and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Regional, Subregional and Resident Offices** and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, the user must check the box next to the statement indicating that the user has read and accepts the E-Filing terms and then click the "Accept" button. The user then completes a form with information such as the case name and number, attaches the document containing the election eligibility list, and clicks the Submit Form button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter, and is also located under "E-Gov" on the Board's web site, **www.nlrb.gov**.

establishing timely filing and receipt of the list will continue to be placed on the sending party.

Since the list is to be made available to all parties to the election, please furnish a total of 4 copies, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

NOTICE OF POSTING OBLIGATIONS

According to the Board's Rules and Regulations, Section 103.21, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three (3) working days prior to the day of the election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least five (5) full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. See *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

PROCEDURES FOR FILING A REQUEST FOR REVIEW

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, D.C., by close of business on **December 2, 2009, at 5 p.m. Eastern Time,** 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.[15]

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, select the E-Gov tab, click on E-Filing, and follow the detailed directions. The responsibility for the receipt of the request for review rests exclusively with the sender.

A failure to timely file an appeal electronically will not be excused on the basis of a claim that the receiving machine was off-line or unavailable, the sending machine malfunctioned, or for any other electronic-related reason, absent a determination of technical failure of the site, with notice of such posted on the website.

[15] 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.

Dated at Denver, Colorado this 18th day of November 2009.

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Michael W. Josserand, Regional Director
National Labor Relations Board, Region 27
600 Seventeenth Street
700 North Tower, Dominion Plaza
Denver, Colorado 80202-5433