

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

Comfort Solutions, Inc.,	*	
Employer/Respondent	*	
and	*	Case No.: 5-RC-16680
Sheet Metal Workers' International Association, Local Union No. 100,	*	
Union/Petitioner.	*	
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**RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS
TO RECOMMENDATION OF HEARING OFFICER**

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**RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS
TO RECOMMENDATION OF HEARING OFFICER**

Respondent, Comfort Solutions, Inc., by counsel and pursuant to Section 102.69 of the National Labor Relations Board's Rules and Regulations, as amended, submits this Brief in support of Respondent's Exceptions to the Recommendation of Hearing Officer Rachael M. Simon issued on January 13, 2012 in the above-captioned case.

I. INTRODUCTORY STATEMENT

Over the last seven months, Comfort Solutions, Inc. ("Comfort Solutions") a small, family-owned HVAC service and installation company with five employees has had to cope with harassing, abusive, and deceitful attacks by the Sheet Metal Workers' International Association, Local Union No. 100 (the "Union"). It is far worse, however, that a Hearing Officer who, either as a result of inexperience, apathy, or a predisposition to decide this case against the employer, issued a Recommendation to this Board that discredited testimony without basis, ignored the evidence, and relied on conclusory assumptions. This was done to support her conclusion that one of the employees holding a deciding vote in this matter -- included in the

Union's unit description in its petition -- is a statutory supervisor. Her unfounded Recommendation (1) denied an employee his right to vote in this election and, essentially, (2) rewarded the Union for duplicity and sandbagging.

It is understatement to say simply that the record in this case does not support the Hearing Officer's Recommendation that Carlos Bonilla, a Comfort Solutions employee, was a supervisor who exercised independent judgment in responsibly directing employees in the performance of their work.¹ Hearing Officer Simon's Recommendation is based on pure speculation and surmise, the invention of testimony that did not exist, and the discrediting of uncontradicted testimony for reasons that are at best, inane, and at worst, mean-spirited and result-oriented. The substantial and credible evidence in the record shows, instead, that Mr. Bonilla is a highly-skilled *employee* who, based on his expertise and instructions from Richard Jones, President of Comfort Solutions, was able to troubleshoot problems for other employees. There was no credible testimony or evidence to the contrary.

This brief explains in concise language, and with pointed citation, that the recommendation of the Hearing Officer is unsupportable. Stated simply, the Hearing Officer supplied fact and conclusions that she determined ought to be present. For example, without a shred of testimony on the topic, she finds certain work to be "highly" technical, and "dangerous." Apparently, she believes that someone should have said so. Similarly, the Hearing Officer divined the thought processes and motives of Carlos Bonilla, including the materials he consulted in doing his job, without ever having met him -- Bonilla did not testify or even appear in the hearing room.

The burden of proof and persuasion was upon the Union. It is a concrete requirement of our legal system that the party in that position provide evidence. The Union

¹ This was the central indicia of supervisor status argued by the Union.

chose not to call Mr. Bonilla, or give evidence about whether the work is precarious. The Hearing Officer cannot supply information through a phantasm of facts just because the Union advanced an argument.

II. STATEMENT OF THE CASE

On June 6, 2011, the Union filed a petition with the Board to represent the employees of Comfort Solutions. Comfort Solutions had five employees working as HVAC service and installation technicians: Carlos Bonilla, Derek Middleton, Trent Davidson, James Corum, and Jose Chicas. A sixth employee, Akash Rathie began work on June 7, 2011, before the eligibility cut-off date. A stipulated election agreement was signed by Comfort Solutions and the Union; all six employees were listed on the *Excelsior* list; and a campaign ensued.

On July 15, 2011, the six employees on the *Excelsior* list attempted to exercise their protected right to vote. The Union, believing (perhaps recognizing) that its campaign had not persuaded Mr. Rathie and Mr. Bonilla to vote in its favor, challenged their ballots. The actual eligibility of these two employees was irrelevant to the Union. They were challenged only to affect the outcome of the election. The Union did not believe it would win if Mr. Rathie and Mr. Bonilla were permitted to vote.

A hearing on the challenges was held on December 1, 2011, before neophyte Hearing Officer Rachael M. Simon.² The Union argued that Mr. Bonilla was a statutory supervisor because he had authority to discipline and responsibly directed the employees in the performance of their work. It argued that Mr. Rathie did not share “a community of interest” with the other employees of Comfort Solutions, Inc. The Union’s primary evidence was the testimony of two union salts, Derek Middleton and Trent Davidson, both of whom had been fired

² The hearing room included Region Five overseers, for reasons that became apparent as the day wore on.

after the election. Combined, they worked approximately six (6) months at Comfort Solutions.³ Mr. Jones testified on behalf of Comfort Solutions. Various documents were admitted into evidence.

Hearing Officer Simon issued a Recommendation on January 13, 2012, that recommended that the challenge to Mr. Rathie be overruled and, despite all evidence to the contrary, that the challenge to Mr. Bonilla be sustained. She credited the testimony of Mr. Middleton and Mr. Davidson, the two union witnesses, while discrediting that of Mr. Jones for untenable reasons; made inferential assumptions against Comfort Solutions, despite the burden of production and persuasion resting with the Union; and issued a decision that was contrary to well-settled Board precedent. In essence, she contorted the facts and law as she saw fit in order to give the Union the Solomon's solution that it had hoped for and, ultimately, a victory it does not deserve.

III. QUESTIONS PRESENTED

- A. Whether Hearing Officer Simon's credibility determinations based solely on new age, unscientific notions of body language, should be set aside because they are unreasonable and contradicted by the evidence.
- B. Whether Hearing Officer Simon's made findings of fact that are contrary to the substantial evidence.
- C. Whether the evidence supports Hearing Officer Simon's conclusion that Mr. Bonilla responsibly directed employees.
- D. Whether the evidence supports Hearing Officer Simon's conclusion that Mr. Bonilla exercised independent judgment.

³ Mr. Middleton worked for CSI for four to six months (Tr. 20:25-21:1). Mr. Davidson worked at CSI for ten weeks. (76:2).

- E. Whether the Hearing Officer erred in her consideration of secondary indicia.
- F. Whether the Hearing Officer erred in her conclusion that there was no supervisory taint in the election.

IV. ARGUMENT

A. Hearing Officer Simon's Credibility Determinations Are Unreasonable And Should Be Set Aside.⁴

A hearing officer's credibility determinations are owed deference only where they are supported by substantial evidence. *See Eldeco, Inc. v. NLRB*, 132 F.3d 1007, 1011 (4th Cir. 1997) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488-91 (1951)). The Board is not compelled to follow the Hearing Officer's conclusions where they are unreasonable, contradict other findings of fact, or unsupported by good reason. *See NLRB v. McCullough Env'tl. Servs., Inc.*, 5 F.3d 923, 928 (5th Cir. 1993); *Stolte Inc.*, 273 NLRB 1316, 1321 (1984). "Where material uncontradicted evidence has been ignored, . . . or where the evidence has been disregarded or eliminated by the casual expedient of discrediting an employer's witnesses, . . . the result is that the Trial Examiner's report . . . will not be accorded the presumption of correctness usually attributed to the trier of fact.'" *NLRB v. Huntington Hospital, Inc.*, 550 F.2d 921, 924 (4th Cir. 1977) (quoting *NLRB v. United Brass Works, Inc.*, 287 F.2d 689, 691 (4th Cir. 1961)).

The record is patent that Hearing Officer Simon's credibility determinations were an abuse of her authority and should be overturned. *Standard Dry Wall Prods, Inc.*, 91 NLRB 544, 544-45 (1950), *enforced*, 188 F.2d 362 (3d Cir. 1951). She credited the two union witnesses based solely on what appears to be empathy, without giving consideration to their

⁴ Comfort Solutions incorporates by reference its discussion of the credibility of the Union's witnesses set forth in its post-hearing brief. Hearing Officer Simon did not address or discuss these points raised by Comfort Solutions; therefore, Comfort Solutions respectfully requests that the Board consider them in its credibility review.

motives to lie, their contradictory affidavits, or the inconsistencies in their testimony. At the same time, she summarily discredited the testimony of Mr. Jones based on her unsupported assumptions about the evidence and because he looked at his counsel when he answered questions. She could have just as easily said that she did not believe him because he would NOT look at his counsel when testifying. She gave no consideration to the substantive testimony in context, *see Ames Ready-Mix Concrete, Inc.*, 170 NLRB 1508, 1511, n.3 (1968), nor any of the relevant determinations that are clearly set forth in Board precedents and the *Guide for Hearing Officers in NLRB Representation and Section 10(K) Proceedings*.⁵

⁵ The Guide for Hearing Officers states:

“It is critical that credibility findings and the basis for those findings be set forth in the report. Accordingly, it is recommended that credibility findings be as clear and explanatory as possible.

To this end, the hearing officer should not only pay careful attention to witnesses’ substantive testimony, but also to their demeanor. The hearing office should take detailed notes while observing the witnesses, particularly where there are multiple witnesses, and look for the specificity of the witness’ testimony; how detailed it was; its vagueness; whether the witness answered questions even on cross-examination in a direct non-combative manner; the witness’ consistency on both direct and cross; whether the witness provided conclusionary [sic] responses or implausible explanations; to what extent the witness’ testimony contradicted documentary evidence or the testimony of other witnesses; and internal inconsistencies. The hearing officer may evaluate the inherent probability of events in assessing consistency or the truthfulness of the witness and may discredit a witness in part and credit a witness in part. *Universal Camera v. NLRB*, 340U.S. 474 (1951). When assessing a witness’ credibility, the hearing officer should keep in mind that not every inconsistency or vague response necessarily warrants discrediting that witness or that one does not have to discredit all of a witness’s testimony.”

Guide for Hearing Officers in NLRB Representation and Section 10(K) Proceedings, at 168-69 (Sept. 2003).

1. The Hearing Officer's Credibility Determinations Must Be Disregarded For Her Failure To Consider The Motives, Lies And Inconsistencies Of The Union's Witnesses.

Mr. Middleton and Mr. Davidson were involuntarily terminated salts testifying against their former employer and, therefore, had a motive to lie in this proceeding.⁶ *See, e.g., All Seasons Climate Control, Inc.*, 357 NLRB No. 70, 12-13 (2011) and *Pearson Education, Inc.*, 336 NLRB 979, 985 (2001) (noting that involuntarily terminated employees have a potential to lie when testifying against their former employer). Their testimony was more vengeful than credible. Both men testified that they believe they were wrongly fired for their Union activities.⁷ (20:21-24; 75:22-25, 94:14-17).⁸ The Recommendation, however, makes no note of this significant motive to lie. Hearing Officer Simon simply glossed over this important fact by stating that the Union witnesses “are no longer employed by the Employer.” (Recommendation, at 2). This consideration is paramount in assessing their credibility. The failure to consider it is clear error.

Second, the Hearing Officer did not consider the numerous instances where the Union witnesses gave testimony that differed substantially from their prior affidavits. The transcript of the cross-examinations of both men is replete with examples of their contradictory testimony. The Hearing Officer's Recommendation does not consider the inconsistencies. It would get tedious to highlight, much less detail, the problems with the testimony of Mr. Middleton and Mr. Davidson; but, for instance, both witnesses testified that Mr. Bonilla had the authority to issue discipline, despite statements to the contrary in their affidavits. Mr.

⁶ Mr. Middleton had the additional motivation to testify against Mr. Bonilla, as he admitted on cross-examination that he did not like him and once accused him of stealing. (*See* Tr. 61:13-24)

⁷ The Regional Director dismissed their unfair labor practice charges as unfounded.

⁸ All citations to the record are to the transcript of the December 1, 2011 hearing provided to Comfort Solutions, Inc. by Free State Reporting, Inc. The citations refer to the page and line number. The page and line numbers are based on a copy of that transcript printed from Microsoft Office Word 2007.

Middleton's affidavit stated that Mr. Bonilla refused to write him up. (57:1-10). Mr. Davidson's affidavit stated: "He [Mr. Bonilla] can't issue discipline to us or hire or fire employees." (96:10-11). Further, both witnesses also testified that Mr. Bonilla directed their work on a daily basis, and determined their work without input from Mr. Jones. Mr. Middleton's June 16, 2011, affidavit, however, stated that he "never really worked with Carlos" and that he "talked to Bill and Rich the most about 10 to 20 phone calls a day." (49:23-25). Mr. Davidson's affidavit stated that "[Mr. Bonilla] pretty much has to report to [Mr. Jones] and [Mr. Jones] makes the decisions." (96:12-13). The Recommendation does not contain a single explanation for why they lied in either their affidavits or testimony, and why this was irrelevant to her so called unbiased credibility determination. Instead, the Hearing Officer credited this testimony in finding that Mr. Bonilla responsibly directs employees.

An examination of the transcript demonstrates serious inconsistencies between the testimony of the Union witnesses, and the characterization of that testimony in the Hearing Officer's Recommendation. Their testimony should not have been credited by Hearing Office Simon at all, much less without any explanation or consideration of the countless inconsistencies and lies.

2. The Hearing Officer Discredited Richard Jones Without Appropriate Basis.

Hearing Officer Simon's credibility conclusions as to Mr. Jones should also be disregarded. She discredited the testimony of Mr. Jones because (1) he looked at his attorneys during his testimony; (2) because of unspecified "testimonial and documentary evidence;" and (3) her mischaracterizations of the nature of his testimony and the evidence. These reasons are irrational and unfounded, if not evidence of a bias against Mr. Jones. It does not reflect a careful

or reasonable consideration of his testimony. *Fieldcrest Cannon, Inc. v. NLRB*, 97 F.3d 65, 69 (4th Cir. 1996); *Eldeco*, 132 F.3d at 1011.

According to Hearing Officer Simon, Mr. Jones was not credible because he “frequently looked at his attorney during his responses” (Recommendation, at 5). She did not give Mr. Jones the benefit, as she did the duplicitous Mr. Middleton, that he may have been nervous testifying in front of a room full of hostile faces, and was looking at perhaps the only friendly face in the room.⁹ Seemingly an expert at body language, mind-reading, or both, she ascribed this not to nervousness, as she had to Mr. Middleton, but to Mr. Jones “seeking approval of his answers, even when answering questions from the Petitioner or myself.” (*Id.*) This is akin to psychiatric gaucherie based on a logical fallacy.

Her credibility determination is inconsistent with her treatment of the Union witnesses. She excused Mr. Middleton’s nervousness because he was “testifying in a hearing in front of several people,” but the same consideration was not extended to Mr. Jones. (*Id.*) No reason for the denial was given. Furthermore, her discrediting of Mr. Jones because he looked at his attorneys denies Mr. Jones his right to counsel. It apparently did not occur to Hearing Officer Simon that Mr. Jones may have looked at his counsel not for assurance, but to see if an objection would be lodged to the question before he answered. For her to discredit his testimony on this basis essentially asserts that his testimony cannot be credited because he expected that his attorneys might do their job.

Hearing Officer Simon further discredited Mr. Jones’s testimony based on nonspecific “other testimonial and document evidence.” (*Id.* at 7). Mr. Jones testified that Mr. Bonilla is not responsible for telling technicians how to perform an installation or for reviewing

⁹ The hearing room was full of individuals watching the proceeding, including an interpreter, several Board employees, and numerous union members and supporters, some of whom made comments to Mr. Jones as he walked in and out of the courtroom.

work in the field. According to Hearing Officer Simon, unspecified (and nonexistent) evidence “shows that on a daily basis Bonilla instructs technicians on issues and problems that are not covered by those written resources.” (*Id.*) It is error to discredit a witness and not to explain why a witness not credible. *NLRB v. McClain of Georgia, Inc.*, 138 F.3d 1418, 1423 (11th Cir. 1998); *Meyer v. Schweiker*, 549 F. Supp. 1242, 1247 (W.D.N.Y. 1982). A credibility determination cannot be sustained when the “evidence” in support of it is simply described as “other.”

Finally, Hearing Officer Simon discredited Mr. Jones’s testimony about two memoranda that he issued to Mr. Bonilla over two years prior to the election. (Local Union 100 Exhibits 2 and 3). The two memoranda, one in 2008, a month after Mr. Bonilla was hired, and another in 2009 detail deficiencies on installation sites, and discipline him for poor work at two installations. One calls him a “supervisor.” Mr. Jones explained that these were for work Mr. Bonilla performed, and he was not held accountable for the work of others. The Hearing Officer discredited this based on her tortured mischaracterizations of Mr. Jones’s testimony and the evidence presented.

First, she claimed that Mr. Jones explanation that these memoranda were issue to Mr. Bonilla for work he performed cannot be credited in light of his testimony that Mr. Bonilla “very rarely performed installation work.” (Recommendation, at 7). This is not an even remotely accurate account of Mr. Jones’s testimony. He testified that Mr. Bonilla *now* performs mainly service calls and that he performs installations only when needed. There was no testimony that this was the case in 2008 and 2009. Because he knows how to perform installations, he has done so in the past. The fact he only does them as needed now does not

render any less credible Mr. Jones's his testimony that he was disciplined for an installation three years ago.

Second, Hearing Officer Simon discredited his testimony by taking it out of context. Mr. Jones was testifying that Mr. Bonilla worked on the project and, as inside man, he was the lead person on the project. She mischaracterized this testimony by stating that Mr. Jones indicated Mr. Bonilla was a lead man, and therefore, she believed he was responsible for all employees. (*Id.*) Mr. Jones clearly testified that Mr. Bonilla is not responsible for any other employee's work, (118:9), that he actually performed the work at the jobs for which he was disciplined (149:4-5), and that he has never been issued discipline for a job where he simply checked over another employee's work (149:9-11).

Finally, Hearing Officer Jones discredited Mr. Jones's testimony about the memoranda because she stated that that the record did not contain "any indication that Jones issued write-ups directly to other employees." (Recommendation, at 7). This is simply not true. Both Mr. Middleton and Mr. Davidson testified that Mr. Jones disciplined them for their poor work, and they were held responsible for jobs. (39:4; 95:20-21). Moreover, evidence of other write-ups issued to employees is irrelevant as to the issue of Mr. Jones credibility in testifying that Mr. Bonilla worked on this job, and was disciplined as a result. This in an impermissible adverse inference against Mr. Jones. Stated bluntly, there is not a wisp of evidence that Mr. Jones did not discipline other employees. The lack of any evidence that other employees were disciplined should not be taken as an adverse inference against Mr. Jones when it is well established that the burden of establishing supervisor status rests on the party asserting that status. *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 711-12 (2001).

B. The Hearing Officer’s Findings Of Fact Were Not Supported By The Record.

Throughout the Recommendation, Hearing Officer Simon made findings of fact that were not supported by the evidence, not fair inferences from the testimony or documents presented, or in direct conflict with the evidence presented. It is upon these erroneous factual findings that she based her conclusion that Mr. Bonilla used independent judgment in responsibly directing the work of employees. There is no reason to give these findings deference. They ignore uncontradicted testimony, and are unreasonable in light of the evidence presented. *Hickman Harbor Serv. v. NLRB*, 739 F.2d 214, 218-19 (6th Cir. 1984) (emphasis added); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951). The record is full of findings of fact that are not supported by the record evidence, or based on assumptions that Hearing Officer Simon made. A few of the more egregious examples follow.¹⁰

1. Erroneous Finding of Fact #1: Mr. Bonilla does not refer to instructions, manuals or consult Mr. Jones in directing or correcting work.

The most telling example of Hearing Officer Simon conjuring facts is where she stated, on at least three separate instances in the Recommendation, that Mr. Bonilla did not rely on instructions, manuals, checklists, or Mr. Jones. She stated that (1) “Bonilla instructs technicians on issues and problems that are not covered by [the employer’s] written resources;” (2) “. . . Bonilla directed and corrected their work without consulting instruction, a manual, or Jones”; and (3) “Bonilla addresses the problematic issues without consulting the manuals or Jones, and instead responds to the situation based upon his own knowledge and expertise in the field.” (Recommendation, at 7, 8). There is no evidentiary support for these guesses on the part of Hearing Officer Simon. They must be disregarded.

¹⁰ Comfort Solutions lists these erroneous factual findings in its exceptions.

Mr. Jones competently and credibility testified in detail about how employees are given thorough instructions in folders that contain pictures, designs for the new systems, and plans telling the employee where and how to install ductwork. (115:11-116:21). Mr. Jones admitted that, because he cannot review every job, Mr. Bonilla may visit a site and provide further instructions, at Mr. Jones's request. (129:3-7).

The Union witnesses testified that Mr. Bonilla helped correct them in routine matters, such as if they put a "filter rack" or a "humidifier" in the wrong position, (28:7-11) or "things that "Rich brought to his attention, stuff of that nature." (83:19-25). Neither testified, however, that Mr. Bonilla did so beyond the instructions, manuals, or advice of Mr. Jones. They did not cite a single example of Mr. Bonilla directing their work in a non-routine manner without consulting with Mr. Jones. Mr. Davidson and Mr. Middleton's testimony is, in fact, contrary to Hearing Officer Simon's finding. They referred to Mr. Jones's instructions as "the Comfort Solutions way" and stated that Mr. Bonilla was most familiar with them. (102:5-7). Mr. Middleton testified that, when he had a problem diagnosing a problem, "we would start basically at step one and kind of walk through it together and see if there's anything that I missed. . . ." (36:21-24). Mr. Davidson testified that, if they had a problem, "we talked to Carlos [Bonilla] who talked with Rich [Jones]." (91:7-8). There is no evidence that Mr. Bonilla ever provided help without first referring to the instructions that were provided by Mr. Jones or based on knowledge that was independent of Mr. Jones's instructions. The lack of any evidence cannot be drawn as an inference against Comfort Solutions. *Kentucky River Cmty Care, Inc.*, 532 U.S. at 711-12.

2. Erroneous Finding of Fact #2: “Bonilla is held accountable for the work performed by the technicians under this direction.” (Recommendation, at 7).

The Union did not present evidence that Mr. Bonilla is currently held accountable for employees’ work. Mr. Middleton and Mr. Davidson did not testify that Mr. Bonilla was held accountable for their work, or the work of others. When asked if Mr. Bonilla was responsible for the work of other employees, both stated, “I believe so,” but did not cite a single example that occurred during their employment. (29:8, 81:9).

With respect to the 2008 and 2009 memoranda, Mr. Jones testified that Mr. Bonilla actually worked on these jobs, and that is why he was disciplined. That Mr. Bonilla actually performed the work on those jobs was not refuted. At best, those memoranda are evidence only that, at one time, over two years ago, Mr. Bonilla was held accountable for his own work. It is not, however, a demonstration that he currently is held accountable for the work performed by other employees. Indeed, both Union witnesses testified they were terminated for poor workmanship. There was no record, however, that Mr. Bonilla is presently being held accountable for the poor work of any other employee, including the Union witnesses. Again, the failure to adduce this evidence cannot be held against Comfort Solutions.

3. Erroneous Finding of Fact #3: “[T]he installation technicians’ work is not routine and requires much more than minimal guidance.” (Recommendation, at 8).

There is no evidence to support this statement. There was no testimony about the complexity or skill required to be an installation technician. Mr. Middleton testified that certain certifications were needed; however, they did not testify as to the requirements for or difficulties in obtaining those certifications. Moreover, neither testified that their work was not routine. They testified only that they occasionally encountered problems. Mr. Jones testimony, which

Hearing Officer Simon credited, that he created “manuals, checklists, scripts, and diagrams” belies any finding of fact that the work is other than routine or requires more than minimal guidance. Without evidence, this is not a matter of which the Hearing Officer could take notice. A decision maker may not make up facts in order to reach a pre-determined conclusion.

4. Erroneous Finding of Fact #4: “HVAC installation work is highly technical and very dangerous.” (Recommendation, at 8).

Similarly, there is nothing that in the record to support her finding that it is “highly technical” or “very dangerous.” Mr. Jones testified that service jobs are more “technical,” but nothing in the record suggest that the installation work was “highly technical.” (111:9). Indeed, both Mr. Middleton and Mr. Davidson testified that they performed installation work, despite each having only a CFC license. (22:6, 76:22). There is nothing in the record to suggest that the HVAC work is “dangerous.” That word does not appear anywhere in the record. The complexity, technicality, or risk associated with HVAC installation and servicing work is not something within the general realm of common knowledge. Absent any evidence, this fact finding is speculation.

5. Erroneous Finding of Fact #5: “Bonilla . . . considered factors such as the requests of the customers, the technical requirements, the experience of the technicians, and the Comfort Solutions Way.” (Recommendation, at 8).

This assertion is guesswork by Hearing Officer Simon. There was no testimony about what Mr. Bonilla considered when helping his fellow employees. The Union witnesses were inexperienced employees, who often had to call Mr. Bonilla because he knew the “Comfort Solutions Way,” *i.e.*, how Mr. Jones had instructed the work be performed. (102:5-7). Their testimony about direction from Mr. Bonilla concerned routine matters such as the placement of air handlers, filter racks, and humidifiers. They did not testify that, in answering these questions,

Mr. Bonilla considered customer requests or technical requirements. Similarly, there was no testimony or evidence that he considered their experience. The evidence was that he answered their questions. Neither knew how he obtained the answer. This statement cannot even be characterized as a fair inference from the evidence.

C. The Preponderance of the Evidence Does Not Demonstrate That Mr. Bonilla Responsibly Directed His Fellow Employees.

Regardless of her flawed credibility determinations and erroneous findings of facts, even assuming the truth of her findings, the evidence upon which Hearing Officer Simon relied is insufficient to demonstrate by a preponderance of the evidence that Mr. Bonilla responsibly directed employees. In *Oakwood Healthcare, Inc.*, 348 NLRB 686, 688 (2006), the Board clarified the meaning of “responsibly to direct” under Section 2(11) of the Act. The Board defined “responsibly to direct” as involving a “a finding of accountability, so that ‘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,’ and also that ‘there is a prospect of adverse consequences for the putative supervisor,’ arising from his or her direction of other employees. *Entergy Miss, Inc.*, 357 NLRB No. 178, 18 (2011) (quoting *Oakwood Healthcare*, 348 NLRB at 692). That does not include lead men that function like quality control employees in inspecting and reporting on the work of others. *Somerset Welding & Steel, Inc.*, 291 NLRB 913, 914 (1988). Instead, the supervision of the work must come under “the dynamics of hierarchical authority,” such that “the directing employee will have, if and to the extent necessary, an adversarial relationship with those he is directing.” *Oakwood*, 348 NLRB at 692.

According to the Recommendation, Hearing Officer Simon found that Mr. Bonilla is accountable for the work performed by technician because she found “the 2008 and 2009 memoranda from Jones to Bonilla to be persuasive.” (Recommendation, at 7). These

memoranda, however, are insufficient to show that Mr. Bonilla is presently held responsible for the work of others. *See Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006). The evidence in support of responsible direction must show with “specificity” the existence of supervisory authority. *Id.* This requires temporal specificity, *i.e.*, that the evidence of supervisory authority held in the past is not proof of present supervisory authority. *Id.*

Any evidence that Mr. Bonilla was previously held accountable for the work of other employees is immaterial to his present accountability. The examples upon which Hearing Officer Simon relies were during a period years ago when Mr. Jones had hoped that Carlos would take a role in management and supervision. During 2008, Mr. Jones encouraged Mr. Bonilla to bring a more business-like approach to the job. Mr. Bonilla did not do so. After that, the trail ends. Mr. Jones asked Mr. Bonilla to do things he expects all skilled workers to do with time, but Mr. Bonilla never did so, and Mr. Jones gave up trying. (117:20 -118:5).

Mr. Bonilla was treated as any other employee. Each employee is responsible for the work that he performs:

Q. And if Mr. Bonilla saw something wrong with the technician’s work on a jobsite, when he was checking it over, you would expect him to tell the technician to correction [sic] his work. Isn’t that correct?

A. I would not.

Q. You would not even though

A. I would not.

Q. -- his responsibility is to check jobs?

A. His job is to report back to me what he saw. Then I address the situation.

Q. If Mr. Bonilla had reviewed the work on a jobsite, you would hold him responsible if something was wrong with the work. Isn't that correct?

A. I would hold the individual that did the work incorrectly responsible.

(128:13-129:2). Mr. Bonilla only checks over the job to get information for Mr. Jones. (129:3-7). In this way, he functions more as a lead man, not a supervisor. In fact, Mr. Bonilla has only been disciplined for work that he has actually performed. (129:22-131:9;149:1-8; Local Union 100, Ex. 2 and 3). There is nothing in the record that suggests, let alone demonstrates, that he is held accountable for the work of others.

D. The Preponderance of the Evidence Does Not Demonstrate That Mr. Bonilla Exercises Independent Judgment.

Independent judgment involves a degree of discretion that rises above the routine or clerical. *Croft Metals, Inc.*, 348 NLRB 717, 721-22 (2006). The putative supervisor “must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” *Id.* A judgment is not independent when it is dictated by instructions, *i.e.*, company policies, rules, or verbal instructions of a higher authority. *Id.* “The authority to effect an assignment . . . must be independent [free of the control of others], it must involve a judgment [forming an opinion or evaluation by discerning and comparing data], and the judgment must involve a degree of discretion that rises above the ‘routine or clerical.’” *Id.* (citing *Oakwood*, slip op. at *8). Routine acts do not fall into the category of work that requires independent judgment.

The evidence upon which Hearing Officer Simon relied does not demonstrate that Mr. Bonilla exercised independent judgment. Hearing Officer Simon accepted as true that employees are given detailed instructions, checklists and steps, but nonetheless, found that Mr.

Bonilla exercised independent judgment because he handled “unforeseen problems.” (Recommendation, at 8). She explained that he “answered employee questions multiple times per day” and he “considered factors such as the requests of the customers, the technical requirements, the experience of the technicians, and the Comfort Solutions Way.” (*Id.*) In fact, the testimony shows only that the questions that Mr. Bonilla answered were of a routine and common sense nature. They did not require independent judgment.

Asked to give examples of when Mr. Bonilla directed him, Mr. Middleton testified that Mr. Bonilla instructed him about putting a filter rack or humidifier in the wrong position; (28:7-10) and assisted him when he had trouble igniting a system or diagnosing a problem with a unit (36:14-18). Mr. Davidson testified that Mr. Bonilla directed him regarding the placement of an air-handler that blocked a customer’s attic storage space (80:15-23). Neither instance goes beyond routine tasks to require independent judgment. Mr. Bonilla corrected the placement of the filter rack and humidifier, but the testimony was only that Mr. Middleton placed them in the wrong position, not that Mr. Bonilla decided on a completely new design or layout. As for troubleshooting, Mr. Middleton testified that Mr. Bonilla walked him through “the steps” to determine how to diagnose the problem. The existence of pre-determined steps contradicts a notion of independent judgment. Similarly, the determination of the placement of the air-handler, as testified to by Mr. Davidson, was a common sense determination that an air-handler should not block a customer’s storage area.

The only testimony of a circumstance where Mr. Bonilla arguably could have exercised independent judgment demonstrated that he called Mr. Jones for instructions. Mr. Davidson testified that he often had “random questions about what needs to go where,

what sheet metal goes here, how they want this, how they want that, the customer, how they want the system to be ran pretty much.” (90:21-25). In those instances, he called Mr. Bonilla, but only because “Rich [Jones] didn’t like people calling him, more than one person calling him. So it was kind of -- we talked to Carlos [Bonilla] who talked with Rich.” (91:5-8).

Significantly, the Union’s witnesses did not testify that Mr. Bonilla made non-routine decisions without calling Mr. Jones first. In discussing the air-handler, Mr. Davidson stated that “on that instance” Mr. Bonilla did not call Mr. Jones. (80:24-25). A fair inference from this statement is that in other, non-routine instances Mr. Bonilla consulted with Mr. Jones. Mr. Middleton similarly testified that with “large items,” *i.e.*, beyond routine, Mr. Bonilla had to check with Mr. Jones before making a decision. (72:15-18). The evidence that the Hearing Officer cited as exercise of independent judgment is far from demonstrating that Mr. Bonilla was discretion free from the control of Mr. Jones.

E. The Hearing Officer Erred In Relying On Secondary Indicia Of Supervisor Authority And In Failing To Address The Indicia That Weighed Against Mr. Bonilla’s Status As A Supervisor.

“[S]econdary indicia should not be considered in the absence of at least one characteristic of supervisory status enumerated in Section 2(11).” *Pacific Beach Corp.*, 344 NLRB No. 140 (2005). This is because in the absence of one of the enumerated primary indicia, secondary indicia, standing alone, are insufficient to establish supervisory status. *St. Francis Medical Center-West*, 323 NLRB 1046, 1047 (1997); *see also General Security Servs. Corp.*, 326 NLRB 312 (1998), *enf’d*. 187 F.3d 629 (8th Cir. 1998); *Billows Electric Supply of Northfield, Inc.*, 311 NLRB 878, 879 n. 2 (1993). Given the lack of primary indicia of supervisory authority, it was error for Hearing Officer Simon to consider secondary indicia.

Hearing Officer Simon also erred in not addressing the significance of the secondary indicia of the ratio of supervisors to employees, which contradicts any finding that Mr. Bonilla is a supervisor. *See, generally, NLRB v. Beacon Light Christian Nursing Home*, 825 F.2d 1076 (6th Cir. 1987). The evidence demonstrated that there currently are six employees of Comfort Solutions: Mr. Jones, Mr. Lee, Mr. Bonilla, Mr. Rathie, and two others. If Mr. Bonilla is a supervisor, that would mean that there are three supervisors (Mr. Jones, Mr. Lee and Mr. Bonilla) for the three bargaining unit employees. No employer could function with such a ratio. This further evinces the absurdity of her Recommendation.

F. The Hearing Officer Erred In Stating That Comfort Solutions Did Not Object To Supervisor Taint And In Asserting There Was No Evidence Of Supervisor Taint.

Comfort Solutions argued in its post-hearing brief that, if Mr. Bonilla is a supervisor, the election is tainted.¹¹ *Sutter Roseville Medical Ctr.* 324 NLRB 218 (1997), *cited with approval in Millsboro Nursing & Rehab. Ctr., Inc.*, 327 NLRB No. 153 (1999). Hearing Officer Simon addressed Comfort Solution's argument about election taint in a footnote. Her treatment of this issue was dismissive, bizarre, and erroneous.

First, Hearing Officer Simon dismissed the issue as not before her because Comfort Solutions did not file an objection on this basis. This assertion is illogical. Comfort Solutions has consistently maintained that Mr. Bonilla is an employee. Accordingly, it could not have objected on the basis of supervisor taint. The issue of supervisor status was raised by the Union. Comfort Solutions cannot not now be foreclosed from raising an issue that could only arise if the Hearing Officer erroneously found Bonilla to be a supervisor.

Second, contrary to her statement, if Mr. Bonilla is a supervisor, there is evidence of supervisor taint. Mr. Bonilla inquired about the Union with at least two co-workers, Mr.

¹¹ Comfort Solutions incorporates that argument by reference.

Middleton and Mr. Davidson. He expressed interest in joining the Union for insurance purposes. This interest in the Union could have been seen by other employees as coercive and a sign that they, too, should support the Union. If Mr. Middleton and Mr. Davidson testified truthfully about Mr. Bonilla's day-to-day interaction and supervision of employees then, because of his position, Mr. Bonilla would have had undue influence on any employees with whom he spoke, thus tainting the outcome of the election. *See, e.g., Conn. Humane Soc'y*, 2011 NLRB Lexis 287, *6-8 (2011) (regarding the influence of supervisors in the bargaining unit). Even one instance of Union support by a supervisor, in such a small unit, is enough to raise serious questions about the impartiality of the election.

V. CONCLUSION

The Recommendation in this case reflects amateurish findings of fact and conclusions of law, and ludicrous attempts at body language analysis. It makes wholesale assumptions, creates inferences out of thin air, goes beyond the record, and discredits testimony merely to support the ultimate decision. Hearing Officer Simon relied upon evidence that provides no rational basis for reaching the conclusions that she did. The Recommendation in this case is fundamentally flawed in almost every aspect. Had the Union not made these specious arguments, there is no way Hearing Officer Simon could have reached these conclusions based on the record alone. Comfort Solutions respectfully requests that its Exceptions to the Decision be sustained, that the Challenges be overruled, and that the employees of Comfort Solutions be given their right to vote.¹²

¹² To the extent any individual Exceptions were not specifically referenced in this Brief, Comfort Solutions asserts that there was not sufficient record evidence to support the findings of fact or conclusions of law made and that the Board should decline to adopt those findings or conclusions. Further, Respondent incorporates by reference the statement of facts and arguments contained in its Post-hearing Brief to Hearing Officer Simon.

Respectfully submitted,

/s/ Peter S. Saucier

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of January, 2012, a copy of the foregoing Exceptions to Recommendation of Hearing Officer and Brief in Support of Exceptions to the Recommendation of Hearing Officer was filed electronically with the National Labor Relations Board via the E-filing system on the Board's website at www.nlr.gov. A copy was filed via hand-delivery with Regional Director Wayne R. Gold, Region 5, National Labor Relations Board, 103 S. Gay Street, 8th Floor, Baltimore, Maryland 21202. A copy was also sent via email and first-class mail, postage prepaid to Lucas R. Aubrey, Esq., Sherman, Dunn, Cohen, Leifer & Yellig, P.C., 900 Seventh Street, N.W., Suite 1000, Washington, D.C. 20001, Attorney for Sheet Metal Workers, International Association, Local Union No. 100, and sent via first-class mail to Rachael M. Simon, Hearing Officer, Region 5, National Labor Relations Board, 103 S. Gay Street, 8th Floor, Baltimore, Maryland 21202.

/s/ Peter S. Saucier

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