

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

|                            |   |                     |
|----------------------------|---|---------------------|
| COMFORT SOLUTIONS, INC.    | ) |                     |
|                            | ) |                     |
| Employer                   | ) |                     |
|                            | ) |                     |
| AND                        | ) |                     |
|                            | ) | Case No. 5-RC-16680 |
| SHEET METAL WORKERS'       | ) |                     |
| INTERNATIONAL ASSOCIATION, | ) |                     |
| LOCAL UNION 100            | ) |                     |
|                            | ) |                     |
| Petitioner.                | ) |                     |

**PETITIONER'S ANSWERING BRIEF**

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## **INTRODUCTION**

Comfort Solutions, Inc. has filed exceptions to the Hearing Officer's decision to sustain Sheet Metal Workers' International Association, Local Union 100's ("Local 100") challenge to the ballot of Carlos Bonilla. The Hearing Officer, in a well-reasoned decision, determined that Bonilla is a statutory supervisor. She concluded that the evidence demonstrates that Bonilla has the authority to responsibly direct the work of Comfort Solutions' installation technicians, and she further concluded that Bonilla exercises independent judgment in carrying out his responsibilities. The Hearing Officer's findings of fact and her credibility determinations are supported by the record evidence, and her legal conclusions are consistent with established law. Accordingly, the Board should adopt the Hearing Officer's Decision, and it should certify Local 100 as the bargaining representative of Comfort Solutions' HVAC technicians.

## **STATEMENT OF THE CASE**

On June 6, 2011, Local 100 filed a representation petition, seeking to represent a unit of Comfort Solutions' employees consisting of "[a]ll full-time and regular part-time sheet metal workers performing service, repair, and installation work." (FD 1(A))<sup>1</sup> On June 22, 2011, Local 100 and Comfort Solutions entered into

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<sup>1</sup> Local 100 will cite to the record in this case as follows: (1) it will reference testimony as recorded in the official transcript as "TR \_\_," giving the official page number(s); (2) it will reference the Formal Documents as "FD \_\_," the employer/respondent's exhibits as "R \_\_," and Local 100's exhibits as "U \_\_;" (3) it will reference the Hearing Officer's January 13, 2012, Decision as "HOD \_\_;" and (4) it will reference Comfort Solution's Brief in Support of Exceptions as "CS Brief \_\_\_\_."

a Stipulated Election Agreement. (R 1) This Agreement provided that a secret ballot election would be conducted on July 15, 2011, to determine whether a majority of the eligible voters wished to be represented by Local 100. (R 1) The Stipulated Election Agreement modifies the unit description from that appearing in the initial petition, providing that the unit shall include “[a]ll full-time and regular part-time technicians performing HVAC service, repair, and installation employed by the Employer at its Springfield, VA facility.” (R 1)

At the July 15, 2011, election, three votes were cast for Local 100, one vote was cast against union representation, and Local 100 challenged two ballots. (FD 1(D)) On November 17, 2011, the Regional Director issued a Report on Challenged Ballots and Notice of Hearing. (FD 1(D)) The Report concluded that the challenges were sufficient in number to affect the results of the election. (FD 1(D)) The Report further concluded that the parties had raised substantial and material factual issues regarding Local 100’s challenges. (FD 1(D)) Accordingly, the Regional Director ordered that a hearing be conducted to resolve the issues regarding Local 100’s challenges.

The hearing was conducted on December 1, 2011, in Washington, D.C. The parties submitted post-hearing briefs on December 8, 2011, and the Hearing Officer issued the Decision on Challenges on January 13, 2012. On January 27, 2012, Comfort Solutions filed exceptions to the Hearing Officer’s Decision. Local 100 is now filing its answering brief.

## SUMMARY OF THE FACTS

Comfort Solutions is engaged in the business of repairing, replacing, and installing air conditioning systems, heating systems, and water heaters. (HOD 2; R 1; TR 21; TR 76) Comfort Solutions' technicians service existing HVAC systems and install new systems. (HOD 2; TR 21; TR 29; TR 30; TR 35; TR 84; TR 112; TR 114-115)

At the time of the election on July 15, 2011, Comfort Solutions had eight employees: Richard Jones, Bill Lee, Carlos Bonilla, James Corum, Trent Davidson, Derek Middleton, Jose Chicas, and Akash Rathie.<sup>2</sup> (HOD 2; FD 1(D); TR 25; TR 78) Jones is the president and part owner of Comfort Solutions. (HOD 2; TR 109) Lee is the office manager. (HOD 2; TR 26; TR 78; TR 125) Bonilla is Comfort Solutions' field supervisor. (HOD 2; TR 27; TR 79; TR 109; U 7) And, at the time of the election, the remaining employees worked as field technicians. (HOD 2; TR 20-21; TR 29; TR 31; TR 33; TR 76; TR 84; TR 85)

Bonilla is responsible for "field service management, installation, field service, weekly reports, fleet stock, fleet neatness and policy reinforcement." (HOD 2; U 7; U 4) Bonilla "runs . . . [Comfort Solutions'] more technical jobs that are more advanced . . . ." (HOD 2; TR 111) Bonilla is "basically the guy that takes care of those problematic jobs." (Id.) Bonilla rarely works with the tools on installation

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<sup>2</sup> The parties referred to the employees by their first and last names throughout the hearing. Local 100 will use the parties' last names in this brief. Accordingly, Local 100 will refer to: Richard Jones, who is referred to as Rich, Richard, and Mr. Jones in the hearing transcript, as Jones; Bill Lee as Lee; Carlos Bonilla as Bonilla; James Corum as Corum; Trent Davidson as Davidson; Derek Middleton as Middleton; Jose Chicas as Chicas; and Akash Rathie as Rathie.

jobsites. (HOD 2; TR 28-29; TR 81) Instead, his role is to deliver the scope of work (*i.e.*, the daily work instructions), direct the installation technicians in the performance of their work, monitor the progress of the work, and review and correct the work of the installation technicians. (HOD 2-4, 6-7; TR 22; TR 27-28; TR 36; TR 38; TR 65; TR 79; TR 80-81; TR 90; TR 111)

Bonilla visits the jobsite at the beginning of an installation job to deliver the scope of work to the installation technicians. (HOD 2-3; TR 27; TR 79) This responsibility includes providing the technicians with information about how a system should be installed, telling the technicians where certain equipment should be placed, and telling technicians whether and how the duct work that attaches to a heating or air conditioning system should be modified. (HOD 3; TR 27; TR 33-34; TR 79; TR 88-89) After delivering the scope of work, speaking to the customer/homeowner, and observing the work of the technicians, Bonilla typically leaves the jobsite for a period of time in order to review work on other jobsites and to perform his other duties. (HOD 2, 7; TR 56; TR 60-61; TR 80)

Bonilla typically returns to an installation jobsite prior to end of the work day to review the installation technicians' work. (HOD 3, 7; TR 27-28; TR 65; TR 80-81) In reviewing the technicians' work at the end of the day – and throughout the day – Bonilla will praise the technicians when they have done a good job (TR 28), and he will tell the technicians that something should be done differently when necessary. (HOD 3, 8; TR 28; TR 80-81) For example, after reviewing Davidson's work and speaking to the homeowner, Bonilla directed Davidson to change the installation of

a line that connected to an attic air handler, telling Davidson to relocate and reinstall the line so that it did not block the homeowner's access to a closet in the attic. (HOD 3; TR 80) Bonilla did not contact Jones prior to telling Davidson to relocate the line. (HOD 3; TR 80)

Bonilla also is responsible for answering the installation technicians' questions throughout the day. (HOD 4, 7; TR 35-36; TR 90-91) Jones expects the technicians to go to Bonilla with questions because Bonilla is "the most knowledgeable person." (HOD 8; TR 152) Indeed, Jones has directed the technicians to call Bonilla, not Jones, with questions. (HOD 4; TR 91; TR 102; TR 151) And questions regularly arise at installation jobsites. (HOD 4; TR 36; TR 151-52) For example, an installation technician would contact Bonilla if the system that was being installed did not function properly. (HOD 4; TR 36) An installation technician also would contact Bonilla with questions regarding how a new system should be set up. (HOD 4; TR 90)

Bonilla is held responsible by Jones for the performance of work on installation jobs that Bonilla supervises. (HOD 3-4, 7; U 2; U 3) When work on a project Bonilla has supervised goes well, Jones praises Bonilla for the work. (U 1; TR 82-83) And when work on a project that Bonilla has supervised goes poorly, Jones holds Bonilla responsible for the problems. (HOD 3-4, 7) Jones has held Bonilla accountable for his supervisory work through write-ups. (HOD 3-4, 7; U 2; U 3; TR 129-130)

## ARGUMENT

### I. The Board Should Adopt the Hearing Officer's Credibility Determinations

The Board's established policy is to adopt a hearing officer's credibility resolutions unless a clear preponderance of all relevant evidence convinces the Board that the resolutions are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). Comfort Solutions cites to numerous Board and court cases in its attempt to persuade the Board to depart from this well-established policy. In all but one of the cited cases, however, the Board and the courts refused to overturn the fact-finder's credibility determinations. *See All Seasons Climate Control, Inc.*, 357 NLRB No. 70, slip op. at 1 (2011) (finding no basis for reversing the ALJ's credibility findings); *Pearson Education, Inc.*, 336 NLRB 979 (2001) (no discussion by Board of credibility findings); *Stolte, Inc.*, 273 NLRB 1316, 1316 n. 1 (1984) (finding no basis to overrule the ALJ's credibility determinations); *Ames Ready-Mix Concrete, Inc.*, 170 NLRB 1508, 1508 n. 1 (1968) (refusing to overrule the trial examiner's credibility determinations); *Standard Dry Wall Prods., Inc.*, 91 NLRB 544, 545 (1950) (adopting the trial examiner's credibility findings); *NLRB v. McClain of Ga., Inc.*, 138 F.3d 1418 (11th Cir. 1998) (accepting the ALJ's credibility determinations); *Eldeco, Inc. v. NLRB*, 132 F.3d 1007, 1011 (4th Cir. 1997) (finding no "exceptional circumstances" to warrant overturning ALJ's credibility determinations); *Fieldcrest Cannon v. NLRB*, 97 F.3d 65, 72 (4th Cir. 1996) (concluding that the record supports the ALJ's credibility determinations, even in the face of concerns over some of the ALJ's conclusions); *NLRB v. Huntington Hosp.*, 550 F.2d 921, 924 (4th

Cir. 1977) (addressing the question whether the ALJ's decision was supported by substantial evidence, and not addressing the ALJ's credibility determinations). *But see NLRB v. McCullough Envtl. Servs.*, 5 F.3d 923, 934 (5th Cir. 1993) (overturning certain credibility determinations where the ALJ did not explain inconsistencies in the testimony of the witnesses the ALJ credited). As demonstrated below, the Hearing Officer's rulings here comport with those in the majority of these cases, and do not raise any of the concerns addressed in *McCullough*.

A. The Hearing Officer Properly Concluded that Middleton and Davidson Provided Credible Testimony (Exceptions 19, 20, 21, 22, 23, 24, 25)<sup>3</sup>

Comfort Solutions contends that the Hearing Officer's conclusion that Middleton and Davidson were credible witnesses should be overturned because (1) they had a motive to lie, (2) their testimony was allegedly inconsistent with their prior affidavits, and (3) their testimony includes unspecified inconsistencies. These arguments are unsupported by the record evidence, and the Board should reject them.

Initially, Comfort Solutions attempts to introduce facts not in evidence to support its allegation that Middleton and Davidson's terminations provided them with a motive to lie. First, the allegation that Middleton and Davidson are salts is unsupported by the record evidence. (CS Brief 7) Comfort Solutions did not introduce any evidence at the hearing – because none exists – to support this allegation. Second, Comfort Solutions' comments regarding the disposition of any

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<sup>3</sup> Two of Comfort Solutions' Exceptions carry the number 24. This reference is to the first Exception 24.

unfair labor practice charges related to Middleton and Davidson's terminations are also unsupported by record evidence and should be disregarded. (CS Brief 7)

The Hearing Officer was well aware that Middleton and Davidson had been terminated by Comfort Solutions prior to the hearing, and she nevertheless found their testimony to be credible. (HOD 2, 3; TR 20-21; TR 76) As her credibility determinations turn on her direct observations of the witnesses' demeanor (HOD 5), the Board should not overturn those determinations.

Comfort Solutions exaggerates the alleged inconsistencies between Middleton and Davidson's testimony and the affidavits they provided to the Region. First, Comfort Solutions suggests that there are inconsistencies with respect to their testimony regarding Bonilla's authority to issue discipline. The Hearing Officer did not need to address these alleged inconsistencies, because they do not exist.

Middleton testified that Jones told him that Bonilla had written him up for poor workmanship. (TR 38-39) His hearing testimony did not include any other statements about Bonilla's power to discipline employees. In his affidavit, Middleton described a conversation he had with Bonilla regarding write-ups. (TR 57) In that conversation, Bonilla said that Jones had asked him to prepare write-ups for work performed by Middleton, Corum, and Davidson for jobs that Bonilla had not reviewed. (TR 57) Middleton explained in his affidavit that Bonilla told him that he had refused to prepare write-ups for jobs he had not reviewed. (TR 57) Middleton's statements from his affidavit are not inconsistent with his hearing testimony that Jones said that Bonilla had written him up.

Davidson's hearing testimony regarding Bonilla's power to discipline also is consistent with his affidavit. In his affidavit, Davidson expressed his opinion that Bonilla "can't issue discipline to us or hire or fire employees." (TR 96) Comfort Solutions does not cite to any conflicting testimony (CS Brief 7) because none exists. Davidson testified the Jones fired him (TR 75), and he testified that he had not been written up for his work performance (TR 91). These two statements, plus his testimony about statements in his affidavit (TR 96), constitute the entirety of Davidson's testimony regarding individuals who have the power to discipline, hire, or fire employees. Davidson did not testify, as Comfort Solutions alleges, that Bonilla had the power to discipline employees. Accordingly, there are no inconsistencies between Davidson's testimony and his affidavit regarding Bonilla's disciplinary authority.

Comfort Solutions next claims that Middleton and Davidson gave inconsistent statements regarding Bonilla's direction of their work. To support its argument, Comfort Solutions takes the witnesses' statements out of context and ignores the explanations offered by the witnesses.

Middleton testified at length about his daily interactions with Bonilla, including instances where Bonilla directed his work, monitored his work, reviewed his work, and directed him to correct his work. (TR 22; TR 27-28; TR 33-36; TR 38; TR 56; TR 60-61; TR 65) Comfort Solutions seeks to discredit this detailed testimony based on an incomplete recitation of a statement in Middleton's affidavit. (CS Brief 8) Comfort Solutions alleges that Middleton stated in his affidavit that he

“never really worked with [Bonilla].” (CS Brief 8) Middleton’s full statement is “I’ve never really worked with [Bonilla] until the last week when I have worked with him about three or four days.” (TR 49-50) Middleton explained the context for this statement by noting that his job duties changed around the time he made the statements in his affidavit. (TR 66-67)

Comfort Solutions contends that Davidson’s testimony regarding Bonilla’s direction of his work should be discredited because he stated in his affidavit that “[Bonilla] pretty much has to report to [Jones] and [Jones] makes the decisions.” (TR 96) Comfort Solutions takes Davidson’s statement out of context. The full quotation from Davidson’s affidavit, as it was read into the record by Comfort Solutions’ attorney, provides the full context for Davidson’s statement.

Q. Continuing the quote, “He can’t issue discipline to us or hire or fire employee,” right? And then the quote continues, “[Bonilla] pretty much has to report to [Jones] and [Jones] makes the decisions.” Is that correct?

A. Yes.

(TR 96) Read in context, it is apparent that Davidson was referring to decisions regarding discipline, hiring, and termination when he stated that Bonilla has to report to Jones and Jones makes the decisions.

Finally, Comfort Solutions alleges “serious inconsistencies between the testimony of the Union witnesses, and the characterization of that testimony in the Hearing Officer’s Recommendation.” (CS Brief 8) Comfort Solutions fails, however, to provide even one example of such an inconsistency.

The Hearing Officer observed the witnesses, evaluated their demeanor, and determined that Middleton and Davidson were credible witnesses. Comfort Solutions has failed to demonstrate that the Board should take the unusual step of overturning these credibility determinations.

B. The Hearing Officer Properly Discredited Portions of Jones' Testimony (Exceptions 24, 26, 27, 38, and 40)<sup>4</sup>

The Hearing Officer discredited certain portions of Jones' testimony. (HOD 7) She based this decision on her observation of Jones during his testimony and on conflicting documentary and testimonial evidence. (HOD 7) Once again basing part of its argument on evidence not in the record,<sup>5</sup> Comfort Solutions takes issue with the Hearing Officer's findings.

The Hearing Officer, who "had the advantage of observing the witnesses while they testified," *Standard Dry Wall Prods., Inc.*, 91 NLRB at 545, determined that Jones' testimony was not wholly credible, in part, because he appeared to be looking to his attorneys for approval of his responses. Her conclusion does not deprive Jones of "his right to counsel." (CS Brief 9) The Hearing Officer was careful to explain that her concern arose from Jones' looking to his attorneys "during his responses as if seeking of approval of his answers." (HOD 5) Her concern was with Jones' demeanor during his responses, not with whether Jones looked at his

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<sup>4</sup> This reference is to the second Exception 24.

<sup>5</sup> Comfort Solutions' unsupported allegations that Board employees, union members, and union supporters "made comments to Mr. Jones as he walked in and out of the courtroom" are not supported by the record and should be disregarded.

attorneys between the asking of the question and the delivery of the response to determine whether his attorneys were going to lodge an objection.

More fundamentally, the Hearing Officer discredited portions of Jones' testimony because it was inconsistent with the testimony of more credible witnesses and with Comfort Solutions' own documents. (HOD 7)

The Hearing Officer discredited Jones' testimony that Bonilla is not responsible for directing the work of the installation technicians. (HOD 7) She concluded that "other testimonial and documentary evidence show that on a daily basis Bonilla instructs the installation technicians on issues and problems . . . ." The Hearing Officer's Decision includes a detailed description of the supporting evidence (HOD 2-4), and her conclusion is supported by the record. (See TR 22; TR 27-28; TR 33-36; TR 38; TR 56; TR 60-61; TR 65; TR 79; TR 80-81; TR 90; TR 111; U 4)

The Hearing Officer also discredited Jones' testimony that Bonilla is not responsible for reviewing work in the field. She explained that this testimony is inconsistent with Jones' *own* testimony that he has made Bonilla responsible for checking the jobs and answering the technicians' questions. (HOD 7) This finding also is supported by the record. (See TR 22; TR 27-28; TR 33-36; TR 38; TR 56; TR 60-61; TR 65; TR 79; TR 80-81; TR 90-91; TR 111; TR 152; U 4)

In addition, the Hearing Officer discredited Jones' explanation of two write-ups issued to Bonilla by Jones. (HOD 7; U 2 and U 3) She concluded that the write-ups demonstrate that Jones has held Bonilla accountable for the work of the

installation technicians under his direction. (HOD 7) The Hearing Officer then concluded that Jones' claim that the write-ups were for work performed directly by Bonilla, rather than for work supervised by Bonilla, was not credible.

The Hearing Officer noted that it is unlikely that the write-ups were for work performed directly by Bonilla because Bonilla rarely performs installation work. (HOD 7) She based this conclusion in part on Jones' own testimony that Bonilla rarely performs installation work. (*Id.*; TR 111-12. *See also* TR 28-29; TR 81) Comfort Solutions claims that Jones' testimony should be ignored because Jones meant to say that Bonilla "now" performs mainly service calls. (CS Brief 10) But that is not what Jones said.

Q. [I]s [Bonilla] installing HVAC units and working on installs, servicing?

A. He's not - - occasionally when we've gotten real busy, [Bonilla's] had to do installs because when we get real busy, we need as many guys as we can to do installs . . . .

(TR 111-12) There is no temporal limitation on Jones' answer, and the Hearing Officer was under no obligation to read one into his answer. Accordingly, the Hearing Officer was justified in concluding that, at the time of the write-ups, Bonilla was responsible for reviewing the work of the installation technicians, not for performing that work himself.

Comfort Solutions next contends that the Hearing Officer's credibility determination regarding Jones should be overturned because the Hearing Officer mischaracterized Jones' testimony by "indicating Mr. Bonilla was a lead man, and therefore, she believed he was responsible for all employees." (CS Brief 11) In fact,

it is Comfort Solutions that has misconstrued the Hearing Officer's statement. The Hearing Officer never stated that Bonilla was a lead man, nor did she state that Jones had called Bonilla a lead man. Instead, she concluded that Jones' explanation that Bonilla was written up for his work as the "inside person" was not credible because Bonilla very rarely performed installation work, making it unlikely that he was serving in the role of "inside person." (HOD 7) Indeed, the only reference to the "inside person" acting as a lead man comes directly from Jones' testimony (TR 130 "[Bonilla] was the lead on the job"), not from the Hearing Officer's Decision.

Finally, Comfort Solutions takes issue with the Hearing Officer's statement that the record does not contain "any indication that Jones issued write-ups directly to other employees." (HOD 7) Comfort Solutions claims that Middleton and Davidson each testified that Jones disciplined them for their poor work. (CS Brief 11) Although Jones terminated Middleton and Davidson, the Hearing Officer accurately concluded that there is no evidence in the record that Jones issued write-ups directly to Middleton and Davidson. Middleton testified that that Jones told him that Bonilla, not Jones, had written him up for poor work (TR 38-39), and Davidson testified that he had not been written up (TR 91).

For these reasons, the Board should adhere to well-established precedent and refuse to overturn the Hearing Officer's credibility determinations.

## **II. The Hearing Officer's Findings of Fact are Supported by Substantial Record Evidence**

The Hearing Officer's findings of fact are consistent with the record evidence, and the Board should reject Comfort Solutions' arguments to the contrary.

### **A. The Hearing Officer Properly Concluded that Bonilla Instructs the Installation Technicians on Issues and Problems not Covered by Written Resources (Exceptions 32, 43, and 52)**

The Hearing Officer concluded that, although the installation technicians follow manuals, checklists, scripts, and diagrams when working on an installation job, "Bonilla instructs the installation technicians on issues and problems that are not covered by those written resources." (HOD 7) This conclusion is supported by the evidence.

Jones testified that Bonilla "runs more of our more technical jobs that are more advanced, where we have problems on a job or if it's something that somebody may not be able to diagnose. He's basically the guy that takes care of those problematic jobs." (TR 111) Thus, Jones acknowledged that Bonilla's responsibilities go beyond simply conveying the information that has been prepared by Jones and Lee. The record demonstrates that, as the individual running Comfort Solutions' more technical jobs, Bonilla is routinely responsible for answering questions that arise during the course of a project. (TR 35-36; TR 90-91; TR 151-52) Indeed, Jones testified that he expects the technicians to go to Bonilla with questions because Bonilla is "the most knowledgeable person." (TR 152) Middleton and Davidson testified that questions regularly arise at installation jobsites. (TR 36; TR 90-91) For example, an installation technician would contact Bonilla if the

system that was being installed did not function properly. (TR 36) An installation technician also would contact Bonilla with questions regarding how a new system should be set up. (TR 90)

Bonilla also is responsible for reviewing and correcting the work of the installation technicians throughout an installation project. For example, after reviewing Davidson's work and speaking to the customer/homeowner, Bonilla directed Davidson to change the installation of a line that connected to an attic air handler, telling Davidson to relocate and reinstall the line so that it did not block the homeowner's access to a closet in the attic. (TR 80) Bonilla did not contact Jones prior to directing Davidson to relocate the line. (TR 80)

Additionally, the record demonstrates that Bonilla has written and issued at least one of the instructional documents relied upon by field employees. (U 5) In a November 2008 memorandum, Bonilla described to the field employees the "[g]uidelines for storage and maintenance of CO and combustion analyzer." (U 5) Bonilla explained, "[t]o achieve, extend and maximize performance of our combustion and CO analyzers I have outlined procedures for your convenience." (U 5) After describing the procedures, the memorandum encourages the field employees to contact Bonilla if they have any questions. (U 5) The fact that Jones reviewed the memorandum before it was sent to the field employees does not alter the importance of this document. (TR 147)

Accordingly, the evidence demonstrates that the Hearing Officer was not required to venture any guesses in determining that Bonilla instructs the

installation technicians on issues and problems that are not covered by written resources prepared by Jones or Lee.

B. The Hearing Officer Properly Concluded that Bonilla is Held Accountable for the Work Performed by the Technicians Under His Direction (Exceptions 36 and 41)

There is direct evidence that Bonilla is held accountable for the job performance of the installation technicians. (U 2; U 3) Taking the most recent example, on March 4, 2009, Jones wrote up Bonilla for work performed on a job he supervised. (*Id.*) The write-up provides, “I recently went to a job you *supervised*. The customer was Mr. Todd Friedman in Arlington. The drain for the humidifier is going uphill. The humidifier also is not working and appear (sic) that it has never worked but I can not (sic) be sure of that.” (U 2 (emphasis added)) The write-up is signed by Bonilla. (*Id.*) Jones testified that he prepared the write-up of Bonilla because the drain for the humidifier was improperly running uphill instead of running downhill. (TR 130) As previously explained, the Hearing Officer properly discredited Jones’ assertion that he wrote-up Bonilla in March 2009 because Bonilla was the one who performed the work. (*See* TR 130) Accordingly, the 2009 write-up demonstrates, on its face, that Jones hold Bonilla accountable for the work of the installation technicians under Bonilla’s direction.

The fact that the write-up is from 2009 also does not undermine the Hearing Officer’s factual conclusion that Bonilla has been held accountable for the work of the employees under his direction. The impact of the timing of the write-up on the Hearing Officer’s conclusion that Comfort Solutions continues to hold Bonilla

accountable for the work of the installation technicians he supervises is addressed below, in Section III.B.2., as that issue relates to the Hearing Officer's legal conclusion, rather than to her factual findings.

C. The Hearing Officer Properly Concluded that the Installation Technicians' Work is not Routine and Requires more than Minimal Guidance (Exceptions 44 and 47)

Jones testified that many of Comfort Solutions' jobs are "very high end design jobs," (TR 120) and that Bonilla "runs more of our more technical jobs that are more advanced . . . ." (TR 111). Thus, Jones' own testimony supports the Hearing Officer's conclusion that the work performed by the installation technicians is not routine. Moreover, Jones' testimony demonstrates that Bonilla is specifically responsible for supervising the work of the technicians on the "technical," "advanced" jobs that require more than minimal guidance. (TR 111) The evidence also demonstrates that Bonilla is responsible for answering the installation technicians' questions throughout the day, demonstrating that their work requires more than minimal guidance. (TR 35-36; TR 90-91)

D. The Hearing Officer Properly Concluded that HVAC Work is Technical and Dangerous (Exceptions 45 and 46)

Again, Jones' testimony supports the Hearing Officer's conclusion that HVAC work is technical. (TR 111; TR 120) Indeed, as explained above, Jones specifically described the jobs that Bonilla is responsible for supervising as being the "more technical jobs that are more advanced." (TR 111)

There is also evidence in the record to support the Hearing Officer's conclusion that HVAC work is dangerous. Davidson testified that Akash Rathie, an

inexperienced Comfort Solutions employee, created a potentially serious safety issue when Rathie was working on an electrical disconnect box. (TR 86) Davidson explained that Rathie left wires that were carrying 240 volts hanging out of an electrical disconnect box. (*Id.*) Davidson's opinion is that if someone touched the exposed wire, "you may live or you may not. But it's a problem for a little kid I guess." (TR 86) The record also includes other testimony regarding the installation technicians working with high and low-voltage electricity. (TR 22-23)

E. The Hearing Officer Properly Concluded that Bonilla "Acts in Consideration of Factors such as the Requests of the Customers, the Technical Requirements, the Experience of the Technicians, Safety, and the 'Comfort Solutions Way'" (Exception 50)

Record evidence supports the Hearing Officer's conclusion that, in exercising independent judgment to direct the work of installation technicians, Bonilla considers customer requests, technical requirements, the technicians' experience, safety, and the "Comfort Solutions Way." Davidson testified regarding a specific instance in which Bonilla directed him to change the installation of a line that connected to an attic air handler. (TR 80) Davidson testified that Bonilla spoke to a customer/homeowner and then relayed to Davidson the homeowner's request that the line be relocated and reinstalled so that it would not block the homeowner's access to a closet in the attic. (TR 80) Middleton also testified that Bonilla was responsible for speaking to homeowners. (TR 37; TR 56)

Jones' testimony supports the Hearing Officer's conclusion that Bonilla considered the technical requirements of each job in directing the work of the installation technicians. As explained repeatedly above, Jones specifically described

the jobs that Bonilla is responsible for supervising as being the “more technical jobs that are more advanced.” (TR 111) Additionally, the following exchange between Comfort Solutions’ attorney and Middleton supports the Hearing Officer’s conclusion.

Q. [Bonilla] was telling you a lot of technical stuff about all of the HVAC installations you did, right?

A. Yes.

Q. And he seemed to be quite knowledgeable about it, right?

A. Yes.

(TR 56)

Bonilla is responsible for training installation technicians. (U 4; TR 22-23) The Hearing Officer appropriately inferred that, as a result of this responsibility, Bonilla is familiar with and considers the experience and safety of the technicians when directing their work. For example, Middleton testified that Bonilla trained him in how to properly work with high and low-voltage systems, including work on transformers and thermostats, which Middleton testified could be destroyed if the work was not properly performed.

Finally, the record supports the Hearing Officer’s conclusion that Bonilla considered, in part, the “Comfort Solutions Way” when directing the work of the installation technicians. (TR 102)

F. The Board Should Reject Comfort Solutions' Additional, Unaddressed Exceptions (Exception 11, 12, 13, 14, 15, 16, 17, 18, 46, 56, and 57)

Comfort Solutions has not provided arguments in support of its Exceptions 11, 12, 13, 14, 15, 16, 17, 18, 46, 56, and 57. To assist the Board in resolving these unaddressed exceptions, Local 100 will briefly demonstrate why each exception should be rejected.

Exceptions 11 through 18 and Exception 46

Exceptions 11 through 18 and Exception 46 are not relevant to the Board's consideration of whether the Hearing Officer properly determined that Bonilla is a statutory supervisor. Nevertheless, these findings are supported by record evidence. (Exception 11: TR 38-39; U 4. Exception 12: TR 39; TR 52-53. Exception 13: TR 39. Exception 14: TR 39. Exception 15: TR 71-72. Exception 16: TR 103. Exception 17: TR 22-23. Exception 18: TR 8-9; TR 24; TR 77. Exception 46: TR 95.)

Exceptions 56 and 57

Exceptions 56 and 57 allege that Comfort Solutions was prejudiced by the Hearing Officer's failure to append the appeal language to the Decision. Comfort Solutions was not prejudiced by this oversight. Comfort Solutions has been on notice since November 17, 2011, that any exceptions to the Hearing Officer's Decision would be due to the Board within fourteen days of the issuance of the Decision. (FD 1(D) at 3)

### III. The Hearing Officer Properly Concluded that Bonilla is a Statutory Supervisor

#### A. The Relevant Legal Standard

Under Section 2(11) of the National Labor Relations Act (“Act”), a supervisor is any person

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.

29 U.S.C. § 152(11). The party asserting supervisory status bears the burden of proving such status. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 694 (2006).

##### 1. Supervisory Direction

In *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), the Board clarified its interpretation of the statutory term “responsibly to direct.” The Board explained that the term was added to the statute to encompass “those individuals who exercise basic supervision but lack the authority or opportunity to carry out any of the other statutory supervisory functions.” *Id.* at 690. Senator Flanders, who proposed the amendment adding the term, explained that the term was intended to capture the supervisor who “is charged with the responsible direction of his department and the men under him.” *Id.* at 691 (quoting NLRB, Legislative History of the Labor Management Relations Act of 1947, 1303). The Board has explained that, for the direction to be responsible, “the person directing and

performing the oversight of the employees 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 employees are not performed properly.” *Id.* at 691-92. To establish that the alleged supervisor is accountable, “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 692 (emphasis added).

## 2. Supervisory Exercise of Independent Judgment

The exercise of any of the functions listed in Section 2(11) will render an individual a statutory supervisor only if the individual exercises independent judgment. In *Oakwood Healthcare*, the Board clarified the standard for determining the exercise of independent judgment, explaining, “to exercise ‘independent judgment’ an individual must at a minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” *Oakwood Healthcare*, 348 NLRB at 692-93. Moreover, “the judgment must involve a degree of discretion that rises above the ‘routine or clerical.’” *Id.* at 693. Finally, the Board explained that “professional or technical judgments involving the use of independent judgment are supervisory if they involve one of the 12 supervisory functions of Section 2(11).” *Id.*

B. The Hearing Officer Properly Concluded that Bonilla Responsibly Directs the Work of the Installation Technicians (Exceptions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 28, 29, 30, 31, 32, 34, 35, 36, 37, 39, 42, 48, 49, 51, 53, 54, 55, and 58)

1. The Hearing Officer Correctly Found that Bonilla is Responsible for Directing, Reviewing, and Correcting the Work of Comfort Solutions' Installation Technicians

The Hearing Officer concluded that Bonilla is authorized to “manage the installation work of the technicians and to take corrective action if the technicians encounter problems or commit errors.” (HOD 6) In support of this conclusion, the Hearing Officer found that Bonilla “gives the technicians specific instructions with respect to each unique job, reviews the status of the installation projects, corrects the technicians work, responds to the technicians’ work-related questions and problems, and adjusts installation plans when required by circumstances or the homeowner.” (HOD 6) Additionally, the Hearing Officer found that “Bonilla drives from site to site instructing the employees and checking work over.” (HOD 7) As explained above, there is ample evidence in the record to support the Hearing Officer’s conclusions. (See TR 22; TR 27-28; TR 36; TR 38; TR 65; TR 79; TR 80-81; TR 90; TR 109; TR 111; TR 152; U 2; U 3; U 4; U 5; U 7)

2. The Hearing Officer Properly Concluded that Bonilla’s Direction is Responsible Because he is Held Accountable for the Job Performance of Comfort Solutions’ Installation Technicians

The Hearing Officer concluded that the evidence demonstrates that Bonilla has been held accountable for work performed by the installation technicians he directs. (HOD 7) The Board should reject Comfort Solutions’ argument that the Board should ignore this evidence. (CS Brief 16-18) *Oakwood* teaches that to

demonstrate that an alleged supervisor has the authority to responsibility direct employees under him it “must be shown that there is a *prospect* of adverse consequences for the putative supervisor if he/she does not take [corrective] steps.” *Id.* at 692 (emphasis added). Thus, *Oakwood* does not establish an obligation on the party asserting supervisory status to demonstrate that the alleged supervisor has suffered adverse consequences. It simply requires a showing of a “prospect of adverse consequences.” *Id.*

Here, there is not just evidence of the prospect of adverse consequences, but evidence of actual adverse consequences related to Bonilla’s direction of the work of the installation technicians. Bonilla was held accountable for the job performance of the installation technicians. (U 2, U 3) As explained above, taking the most recent example, on March 4, 2009, Jones wrote up Bonilla. (U 2) The write-up provides, “I recently went to a job you *supervised*.” (U 2 (emphasis added)) The Hearing Officer properly concluded that this write-up and a second write-up (U 3) are evidence that Bonilla has been held accountable for the work of the installation technicians he directs.<sup>6</sup> (HOD 7)

The fact that the most recent write-up in the record is from 2009 does not demonstrate that Bonilla is no longer held accountable for the work of the

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<sup>6</sup> Write-ups, coachings, and/or counseling forms constitute discipline where they “lay the foundation for future discipline.” *See Oak Park Nursing Care Ctr.*, 351 NLRB 27, 29 (2007). Middleton’s testimony demonstrates that Jones considers write-ups in deciding whether to terminate or discipline his employees. (TR 39)

installation technicians under his direction.<sup>7</sup> Instead, it may simply demonstrate that Bonilla's performance as a supervisor has improved. The Hearing Officer has discredited Jones' attempts to explain away the write-ups, and, for the reasons stated above, her decision should not be disturbed. Accordingly, the Hearing Officer properly concluded that the documentary evidence that Bonilla has actually been held accountable for the work of those he directs demonstrates that Bonilla faces the prospect of adverse consequences should he fail to properly direct the work of his subordinates.

C. The Hearing Officer Properly Concluded that Bonilla Exercises Independent Judgment (Exceptions 29, 42, and 54)

The Hearing Officer concluded that Bonilla "uses independent judgment when he responsibly directs the work of the technicians." (HOD 7) The record evidence supports this conclusion.

Bonilla is expected to independently direct, review, and correct the work of the installation technicians. (U 4) Jones expects Bonilla to "address" problems "with men in the field." (U 4) And the testimony demonstrates that Bonilla independently addresses issues in the field. For example, Davidson testified as to a specific instance in which Bonilla spoke to a homeowner and then directed Davidson to change his work, without first consulting with Jones. (TR 80) Davidson and Middleton also testified that they would go to Bonilla first with questions that arose

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<sup>7</sup> *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006), on which Comfort Solutions relies, does not address whether the Board should place a temporal limitation on evidence of accountability. Instead, it addresses the unrelated question of whether it must be shown that an alleged supervisor currently has the authority to exercise a supervisory function. *Id.*

on the jobsites. (TR 36-37; TR 90-91) Jones' testimony is consistent with the testimony of Davidson and Middleton on this point. Jones testified that the technicians are to call Bonilla if there is a problem that is "on the technical side." (TR 151) Jones also testified that he wants the technicians to call Bonilla because Bonilla is "the most knowledgeable person." (TR 152)

Additionally, Jones' testimony supports the conclusion that Bonilla has the technical expertise to exercise independent judgment in directing, reviewing, and correcting the work of the installation technicians. Jones testified that Bonilla is Comfort Solutions' most experienced employee, and that Bonilla holds many HVAC certifications. (TR 110) Jones further testified that Bonilla "is the most knowledgeable person [he] employ[s]." (TR 110)

Jones' testimony also supports the conclusion that Bonilla's exercise of independent judgment is not routine or clerical. Jones testified that many of Comfort Solutions' jobs are "very high end design jobs." (TR 120) As explained above, Jones testified that Bonilla "runs more of our more technical jobs that are more advanced, where we have problems on a job or if it's something that somebody may not be able to diagnose. He's basically the guy that takes care of those problematic jobs." (TR 111)

Finally, Bonilla's November 2008 memorandum to field employees demonstrates that Bonilla exercises independent judgment in communicating with and directing field employees, and that he does not merely follow established employer guidelines; instead, he creates them. (U 5) In the memorandum, Bonilla

explains, “I have outlined procedures” for the storage and maintenance of CO and combustion analyzers. (U 5) Bonilla also states that any questions regarding the memorandum or “about how to operate the analyzer model testo 325 or testo 327” should be directed to Bonilla. (U 5) On its face, this memorandum demonstrates that Bonilla is responsible for exercising independent judgment in directing employees.

Accordingly, the record evidence demonstrates that (1) Bonilla has the technical knowledge and experience to exercise independent judgment, and (2) that he regularly exercises independent judgment in reviewing the work of the installation technicians and in answering questions of the installation technicians regarding their work, including their work on Comfort Solutions’ most technically complicated jobs.

#### D. Bonilla is not a Working Foreman

In *Shaw, Inc.*, 350 NLRB 354 (2007), the Board concluded that Shaw’s foremen were not statutory supervisors because they did not exercise independent judgment in assigning, directing, disciplining, and rewarding employees at the jobsites. The facts of *Shaw, Inc.* and other cases involving working foreman are distinguishable from the facts here.

Unlike Bonilla, the foremen in *Shaw, Inc.* regularly worked alongside and performed the same tasks as other crew members. *Id.* at 355. Additionally, Shaw’s acknowledged supervisors, its “field supervisors,” were a step above the working foremen and routinely visited the jobsites to check on progress and to provide

assistance in solving problems. *Id.* Shaw’s operations manager also regularly visited jobsites to oversee the job and handle any unexpected problems. *Id.* at 355 n.8. The Board concluded that because Shaw’s management generally visited the jobsite at least once per day to oversee the project and to provide guidance, “such direction as the foremen do exercise is subject to close scrutiny by higher management.” *Id.* at 356

In contrast, there is no evidence here that Jones or Lee regularly visit the jobsites that Bonilla is responsible for supervising. (TR 26; TR 78; TR 125; TR 150-51) Instead, the evidence demonstrates that Bonilla’s role is analogous to the role served by the field supervisors in *Shaw, Inc.* Bonilla is responsible for visiting the jobsites to check on progress and to provide assistance solving problems. Thus, Bonilla’s duties and exercise of independent judgment are more closely aligned with those of the admitted supervisors in *Shaw, Inc.* than with those of the working foreman in that case.

#### E. The Hearing Officer Properly Considered Secondary Indicia<sup>8</sup>

The Hearing Officer properly considered secondary indicia in determining whether Bonilla is a statutory supervisor. Her consideration of this secondary indicia was appropriate in light of her conclusion that Bonilla possessed at least one “characteristic of supervisory status enumerated in Section 2(11),” *i.e.*, the authority to responsibly direct the work of installation technicians (HOD 6-8). *Pacific Beach*

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<sup>8</sup> Comfort Solutions did not file specific exceptions regarding the Hearing Officer’s consideration of secondary indicia.

*Corp.*, 344 NLRB 1160, 1161 (2005). *See also Sheraton Universal Hotel*, 350 NLRB 1114, 1118 (2007).

Comfort Solutions contends that the Hearing Officer erred in not considering the ratio of supervisors to employees. Its argument fails to take into account the duties performed by each of Comfort Solutions' supervisors, and Comfort Solutions misstates the number of employees at the time of the election. As the field supervisor, Bonilla is the only Comfort Solutions supervisor who routinely reviews the work of the installation technicians. (TR 27-28; TR 65; TR 80-81; U 2; U 4; U 7) Indeed, Comfort Solutions admits that Lee does not review the work of Comfort Solutions' technicians (TR 125), and that Jones cannot be present at every job to review the work of the installation technicians. (TR 150-51. *See also* TR 26; TR 78)

At the time of the election, Comfort Solutions employed five field technicians – Chicas, Corum, Davidson, Middleton, and Rathie. (FD 1(D); TR 25; TR 78) Thus, the evidence demonstrates that, during the pertinent period, Comfort Solutions employed one field supervisor – Bonilla – and five technicians. A ratio of one field supervisor for five field employees does not militate against the Hearing Officer's conclusion that Bonilla is supervisor.

F. The Hearing Officer Properly Concluded that the Representation Petition is not Tainted<sup>9</sup>

At the hearing, Comfort Solutions argued for the first time that, if Bonilla is a supervisor, the representation petition is somehow tainted because the union

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<sup>9</sup> Comfort Solutions did not file exceptions regarding the Hearing Officer's determination that the petition is not tainted.

wrote the number five in the box on the petition that is titled “Number of Employees in the Unit.” (TR 11) Because its argument that misstating the number of eligible employees taints a petition is unsupported by any case law, Comfort Solutions now seeks to expand on its argument, claiming that because Bonilla “inquired about the union” the petition is tainted. (CS Brief 21)

The argument that the petition is tainted is untimely raised. Questions of supervisory taint must be raised as objections to the conduct of an election. *See Manhattan Center Studios*, 357 NLRB No. 139, slip op. at 2 (2011) (explaining that “the defense asserted by the Respondent based on alleged supervisory ‘taint’ is a representation-case issue that would properly have been raised as an objection in the representation proceeding following the election”). *See also Harborside Health Care, Inc.*, 343 NLRB 906 (2004) (same). Comfort Solutions had notice on the day of the election, July 15, 2011, that Local 100 considers Bonilla to be a supervisor. (FD 1(D)) It was required to file any objections to the conduct of the election within seven days following the election. *See* Section 102.69 of the Board’s Rules and Regulations. There is no evidence in the record that Comfort Solutions filed an objection alleging supervisory taint. Accordingly, Comfort Solutions’ allegations of supervisory taint are untimely, and they must be disregarded.

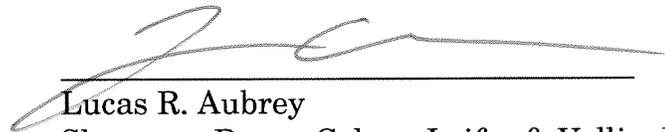
The Hearing Officer properly concluded that Comfort Solutions’ claim of taint also fails on its merits. (HOD 8) As she observed, there is no evidence that Bonilla engaged in any pro-union conduct. (*Id.*) Instead, the only evidence is that Bonilla asked Middleton and Davidson for information about health insurance benefits.

(TR 98) Middleton and Davidson agreed to set up a meeting between Bonilla and union representatives to discuss these benefits, but Bonilla did not attend the meeting. (TR 98-99) The Hearing Officer's conclusion is consistent with the Board's decision in *Fidelity Healthcare & Rehab Center*, 349 NLRB 1372, 1372 (2007). There, the Board concluded that a supervisor's actual pro-union conduct was insufficient to overturn an election. *Id.* That supervisor's pro-union conduct included speaking favorably about the union to an employee, permitting employees to speak with union representatives during working time, and allowing a union pen and flyer to remain in his office. *Id.* at 1373. Bonilla's questions about health insurance benefits cannot reasonably be considered pro-union conduct sufficient to warrant overturning the election.

### CONCLUSION

For these reasons, the Board should adopt the Hearing Officer's Decision, and it should certify Local 100 as the bargaining representative of Comfort Solutions' HVAC technicians.

Respectfully submitted,



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February 3, 2012

## CERTIFICATE OF SERVICE

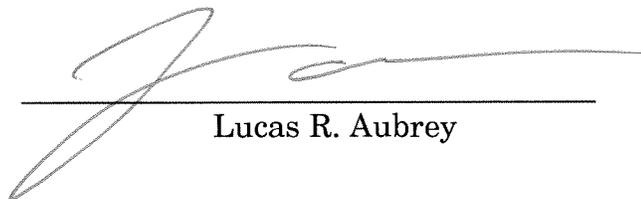
On February 3, 2012, I served, by electronic mail, the foregoing Answering

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