

Community Education Centers, Inc. and District 1199J, NUHCE, AFSCME, AFL-CIO, Petitioner. Case 22-RC-106424

January 9, 2014

DECISION ON REVIEW AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA
AND MISCIMARRA

The Employer's Request for Review of the Acting Regional Director's Decision and Direction of Election is granted as it raises a substantial issue solely with respect to the Acting Regional Director's finding that the shift and unit supervisors (collectively, Supervisors) at the Employer's Logan Hall facility do not possess the authority to responsibly direct the Employer's operations and unit counselors (collectively, Counselors). (Regional Director's Decision and Direction of Election is attached as an appendix.) In all other respects, the Request for Review is denied.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having carefully examined the entire record with respect to the issue on review, we disagree with the Acting Regional Director that the Supervisors do not possess the required authority to take corrective action regarding a Counselor's deficient performance. However, we affirm on different grounds the Acting Regional Director's finding that the Supervisors do not responsibly direct within the meaning of Section 2(11) of the Act and therefore are not statutory supervisors.¹

Specifically, we find merit in the Employer's argument that the Acting Regional Director erred in finding that the Employer had not demonstrated that the Supervisors possess the required authority to take corrective action regarding a Counselor's deficient performance. The Acting Regional Director based that finding on the absence

of evidence that the Supervisors can recommend discipline, or cause a dismissal through an unsatisfactory evaluation. We agree with the Employer that the Acting Regional Director set the standard for corrective action too high, as the threshold of corrective action for purposes of demonstrating responsible direction falls below that of other Section 2(11) indicia, including disciplinary and promotion authority. See *CGLM, Inc.*, 350 NLRB 974, 974 fn. 2, 983-984 (2007), enf. mem. 280 Fed. Appx. 366 (5th Cir. 2008); see also *Croft Metals, Inc.*, 348 NLRB 717, 722 fn. 13 (2006) (issuing verbal warnings or taking a recalcitrant employee to personnel office constitutes "corrective action"). Applying the correct standard, we find that the Supervisors do possess authority to take corrective action. The evidence (for example, the disciplinary notices issued by Supervisors to Counselors) indicates that the Supervisors can take corrective action by recording Counselors' failures to follow proper procedures and by providing related training. While these corrective actions fall short of "disciplinary authority" under Section 2(11) because the Supervisors cannot impose or effectively recommend discipline, they do involve reporting deficiencies in the Counselors' performance to the disciplinary committee,² which then forwards the information to the corporate office for a final decision. See *Croft Metals*, supra.

Having found that the Supervisors can take corrective action as to the Counselors, we further find, however, that the Employer did not satisfy its burden of proof as to the other elements required to establish that the Supervisors' direction of the Counselors constitutes responsible direction under Section 2(11): accountability and the exercise of independent judgment. First, based on the record evidence, we find that the Employer did not demonstrate that the Supervisors "responsibly" direct the Counselors because there is insufficient evidence that there is a prospect of adverse consequences for the Supervisors if the Counselors perform poorly. See *G4S Regulated Security Solutions*, 358 NLRB 1701, 1704 (2012); *Entergy Mississippi, Inc.*, 357 NLRB 2150, 2154-2156 (2011). In reviewing the disciplinary and supervision notices and evaluations issued to Supervisors submitted into evidence by the Employer—which we assume represent at least "the prospect of adverse consequences" to the Supervisor—we find that they concern the Supervisors' own performance rather than that of the Counselors. Therefore, the notices and evaluations do not demonstrate that the Employer holds the Supervisors

¹ In *Oakwood Healthcare, Inc.*, 348 NLRB 686, 692 (2006), the Board interpreted the phrase "responsibly to direct" as requiring accountability. To establish accountability, "it must be shown that the employer delegated to the putative supervisor the authority to direct the work [of others] and the authority to take corrective action, if necessary[.]" and also "that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps." The Board emphasized that "the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other." *Id.* In addition, supervisory status under Sec. 2(11) requires the exercise of independent judgment in carrying out a supervisory function. "[A] purported supervisor does not exercise independent judgment when making assignments based on an employer's detailed policies, a collective-bargaining agreement, or other such directives, or when such assignments are routine in nature." *Alternate Concepts, Inc.*, 358 NLRB 292, 295 (2012) (citing *Oakwood Healthcare*, supra at 693).

² The disciplinary committee is comprised of the supervisor of operations at Logan Hall, a human resources official, and the assistant to Logan Hall's director.

accountable for the Counselors' poor performance. See *id.*

Second, the Employer did not demonstrate that the Supervisors direct the Counselors using independent judgment. The notices and evaluations issued by the Supervisors to the Counselors, also submitted into evidence by the Employer, fail so to establish. These documents merely indicate that the Supervisors correct Counselors in such tasks as writing reports on resident behavior, maintaining the logbooks, filling out unit inspection/tour sheets, and addressing the residents. We find that the Employer has not demonstrated that the Supervisors' direction of Counselors in performing these tasks is not controlled by the Employer's own policies and procedures or involves a degree of discretion rising above the merely routine. See *Oakwood*, supra, 348 NLRB at 692–693.

Therefore, we agree with the Acting Regional Director's conclusion that the Supervisors do not possess the supervisory authority under Section 2(11) to responsibly direct the Counselors. Accordingly, we remand this proceeding to the Region for further action in accordance with our Decision.

MEMBER MISCIMARRA, concurring in part and dissenting in part.

I join my colleagues in granting the Employer's request for review of the Acting Regional Director's Decision and Direction of Election with respect to his finding that the shift and unit supervisors (Supervisors) do not possess authority to responsibly direct the operations and unit counselors (Counselors), and in denying review in all other respects. I agree with my colleagues that the Acting Regional Director applied the wrong standard to find that the Supervisors lack authority to take "corrective action" when the Counselors' performance is deficient, and that, under the applicable standard, the Employer has shown that the Supervisors do have that authority. My colleagues then find that the Supervisors are not statutory supervisors because they are not held accountable for the Counselors' poor performance and they do not exercise independent judgment. I reach the same result, but solely for the latter reason.

I disagree with my colleagues' interpretation of "accountability," which would find that a putative supervisor is not accountable unless he or she faces adverse consequences directly as a result of others' poor performance. This restrictive interpretation improperly fails to recognize that "accountability" can exist based on "the supervisor's own conduct and judgment in exercising oversight and direction of employees in order to accom-

plish the work."¹ Under this standard, the Employer here does hold the Supervisors accountable for their direction of Counselors because the evidence establishes that Supervisors have suffered adverse consequences for failing to adequately oversee the Counselors' performance of their tasks.²

I agree, however, with my colleagues that the Employer has not shown that the Supervisors exercise independent judgment in directing the Counselors. The burden of proof rests with the Employer as the party seeking to demonstrate Section 2(11) status,³ and the Employer has not adduced any evidence to show that the Supervisors' direction of the Counselors was other than routine and narrowly circumscribed by the Employer's policies and procedures. To be sure, "the mere existence of [such] policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices,"⁴ but the Employer did not make that showing.

Accordingly, I join in finding that the Supervisors do not possess the Section 2(11) authority to responsibly direct the Counselors, and in remanding this proceeding to the Acting Regional Director for further appropriate action.

APPENDIX

DECISION AND DIRECTION OF ELECTION

I. INTRODUCTION

Petitioner, DISTRICT 11991, NUHCE, AFSCME, AFL-CIO (the Union) filed a representation petition pursuant to Section 9(c) of the National Labor Relations Act. The Union seeks to represent all full-time and regular part-time shift supervisors and unit supervisors employed by Community Education Centers, Inc. (the Employer) at the Employer's Logan Hall facility (Logan Hall) located at 20 Toller Place, Newark, New Jersey.¹ The Employer argues that the peti-

¹ *Entergy Mississippi, Inc.*, 357 NLRB 2150, 2158 (2011) (Member Hayes, dissenting) (citing *Oakwood Healthcare, Inc.*, 348 NLRB 686, 692 (2006)).

² For example, Employer Exh. 9 includes "Performance Discussions" and a "Disciplinary Action" issued to Unit Supervisor Ira Hooper for his failure to properly oversee the Counselors' performance of their tasks. Supervisor of Operations Tommy Odom testified without contradiction that the Performance Discussions were the "first part . . . of our disciplinary stage" for Supervisors. And in a "Rebuttal" to the Disciplinary Action, Hooper wrote that he felt "this last warning, disciplinary write up is unwarranted." Thus, Hooper and Odom both understood that Supervisors are held accountable for their failure to properly direct and oversee the Counselors.

³ See *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711–712 (2001).

⁴ *Oakwood Healthcare, Inc.*, 348 NLRB 686, 693 (2006).

¹ The petition was amended at the hearing to remove an Assistant II classification. In this regard, the parties stipulated that the Employer voluntarily recognized the Union as the collective-bargaining representative for the Assistant II classification. Accordingly, my decision in this matter will concern only the classifications of the shift supervisor and unit supervisor.

tioned-for unit is inappropriate inasmuch as the shift supervisors and unit supervisors are supervisors as defined in the Act, and that the petition should be dismissed.² The Employer argues that the shift supervisors and unit supervisors (collectively Supervisors) are supervisors as defined in the Act because they discipline and effectively recommend discipline of the Employer's operations counselors and unit counselors (collectively Counselors), responsibly direct and assign the work of the Counselors, have the authority to adjust grievances, effectively recommend applicants for hire and because they are responsible for performing formal annual evaluations of the Counselors which can affect a Counselor's employment status. Based on the following facts and analysis, I reject the Employer's arguments and order an election as set forth below.

Pursuant to the provisions of Section 3(b) of the Act, the Board has designated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding³ the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed;
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdictions herein⁴
3. The labor organization involved claims to represent certain employees of the Employer;⁵
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c) (1) and Section 2(6) and (7) of the Act;
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act for the reasons described infra:

All full-time and regular part-time shift supervisors and unit supervisors employed by the Employer at its Logan Hall facility in Newark, New Jersey, excluding all other employees, guards, and supervisors as defined by the Act.

II. FACTS

A. Background

The Employer, Community Education Centers, Inc. (CEC) is a Delaware Corporation engaged in providing "re-entry" social services and drug/alcohol treatment programs to incar-

² The parties stipulated that if the issue of whether shift supervisors and unit supervisors are statutory supervisors under the Act were set aside, the unit and shift supervisors are an appropriate unit for collective bargaining.

³ Briefs filed by the Petitioner and the Employer have been duly considered.

⁴ The parties stipulated at the hearing that during the preceding 12 months the Employer derived gross revenue in excess of \$250,000 and that, during the same period of time, the Employer purchased and received at its Newark, New Jersey facility goods and supplies valued in excess of \$5000 directly from enterprises located outside the State of New Jersey.

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

cerated and/or paroled individuals at various New Jersey facilities including its Logan Hall facility at 20 Toller Place, Newark, New Jersey, the only facility involved here. Some of the Logan Hall residents come to the program upon their own application, while others are referred from the criminal justice system. Logan Hall can accommodate approximately 600 residents.

Logan Hall is hierarchically structured into two general divisions: Operations and Clinical. The facility has three residential units: two male units and one female unit. The main units are further divided into smaller housing units or "pods" which can accommodate up to 75 residents each. The Operations Division (Operations) is responsible for security at the facility and monitoring the residents' movements throughout the facility. The Clinical Division (Clinical) is responsible for providing treatment services and for providing security within the units.

Within the units, in the Clinical Division, the residents are monitored by unit counselors, who are responsible for monitoring resident behavior, documenting resident behavior, and supervising all resident movements and activities within their assigned areas. Unit counselors are overseen by unit supervisors, who in turn report to the unit managers. In the Operations Division, Operations Counselors function as the unit counselors' counterparts, monitoring and overseeing resident movements outside of the units. The Operations Counselors are overseen by shift supervisors, who in turn report to the Supervisor of Operations.⁶

CEC operates Logan Hall on three shifts. The first shift is from 7 a.m. to 3 p.m. There are usually five operations counselors and one shift supervisor scheduled for this shift in Operations, with eight unit counselors and four to five unit supervisors scheduled in Clinical. The second shift runs from 3 p.m. to 11 p.m., typically with three to four Operations counselors, one shift supervisor, eight unit counselors and three unit supervisors. The third shift runs from 11 p.m. through 7 a.m. Unit counselors and unit supervisors do not work this shift. Typically, there are eight or nine Operations counselors and two shift supervisors working on the third shift. Unit managers work from either 8 a.m. to 4 p.m. or 9 a.m. to 5 p.m., while the Supervisor of Operations works from 9 a.m. through 5 p.m.

At the time of the hearing, there were six shift supervisors at Logan Hall: Karriem Curl, Frederick Austin, Durwin Smalls, Thomas Jacobs, Wasi Willoughby, and Raymond Hopkins. There were also seven unit supervisors: Ira Hooper, Nathaniel Ghant, Celeste Muhammad Darryl Wells, Sherrie Belle, Yolanda Daval, and Lucandy Manley. Unit supervisors and shift supervisors are cross-trained to prepare them to function in either capacity.⁷

⁶ Although unit managers and the supervisor of operations occupy the same level at the employer's organizational chart, the employer's witness, Supervisor of Operations Tommy Odom, testified that the supervisor of operations supervises the unit managers.

⁷ As the unit and shift supervisors' job functions are nearly identical and these individuals are cross-trained to perform either job and, as the record often does not distinguish between the two classifications, unit and shift supervisors will sometimes be referred to

At the hearing, the Employer's only witness was Tommy Odom (Odom), the Supervisor of Operations at Logan Hall. Odom oversees the operation of the entire facility. Odom has worked for CEC since 2001, first as a Counselor, then as a unit supervisor. Odom was promoted to Supervisor of Operations in 2005 and has worked in that capacity ever since. The Union's only witness was Ira Hooper⁸ (Hooper), a unit supervisor at Logan Hall. Hooper has been a unit supervisor for approximately 6 years. During the 2 years prior to that, Hooper worked as a unit counselor and property manager at Logan Hall.

B. Hire, Transfer, Layoff, and Promote

Although the Employer has had occasion to lay off employees, the unit and shift supervisors do not participate in that decision-making process. Odom stated that Supervisors make recommendations for employee transfers, though the record is not clear as to what that process is and the extent of the Supervisors' participation. According to Odom if a position opens up, a Counselor may request a transfer. Odom also stated that Supervisors could not transfer employees without first discussing the issue with a unit manager, the Deputy Director or the Director.

Odom also stated that supervisors frequently refer potential employees for hire and make recommendations on their employment applications. According to Odom, the supervisors' hiring recommendations are typically followed. Odom stated that Hooper had made recommendations around three or four times but could not recall if any of the persons Hooper recommended were hired. Hooper testified that he had referred approximately ten persons for *employment, none of whom were hired*. Hooper also stated that he had no knowledge as to the qualifications of those applicants with respect to the Employer's hiring requirements. Odom testified that while in the past, Supervisors have sat in on interviews of potential hires, Supervisors do not regularly participate in the hiring process and that the Director makes the hiring decisions. Hooper testified that he had sat in on interviews in the past. He also stated that he had participated in the interviewing process on three occasions by asking questions and making hiring recommendations. However, Hooper has not participated in the interview process in approximately 3 years.

C. Suspension and Discharge

When asked if Supervisors have the authority to suspend or discharge an employee, Odom did not address the issue of discharges and the record is otherwise devoid of evidence relating to Supervisors' authority to discharge employees. With regard to suspensions, Odom stated that a Supervisor has the authority to send an employee home if, for example, the Supervisor observes the employee engaging in improper touching or hitting or sleeping on the job. He further testified that, in this type of situation, the employee

herein simply as "Supervisors," unless it is necessary to make a distinction between the two classifications.

⁸ Hooper testified at the Hearing pursuant to a subpoena.

would be sent home pending investigation and the issue would be forwarded to the appropriate staff for follow up. Odom was unable to provide specific examples within the past 2 years where an employee was sent home by a Supervisor and the situation was documented and addressed the following day. Hooper testified that he has never sent an employee home from work.

D. Discipline

Odom testified that the Supervisors' role in the discipline of Counselors⁹ is to document the situation and make a verbal recommendation as to the nature and extent of the discipline. According to Odom, these recommendations are taken under advisement by the Disciplinary Committee and finally forwarded to the corporate office, where the final decision on the nature and extent of the discipline is made. The Disciplinary Committee is comprised of Odom; Chris Maslenko from Human Resources; and Miss Johnson, assistant to the Director. Hooper testified that his role in filling out a *Disciplinary Action Form* is to provide a description of the incident in the witnesses section of the document and then submit the form to his Clinical Director. Hooper stated that he does not check the box on the disciplinary form in the sections marked "Disciplinary action to be taken" and further stated that in the past, he was specifically told by his Clinical Director *not* to check that box. Hooper further testified that he had never been asked to make a disciplinary recommendation.

Odom testified that the Supervisors make verbal recommendations which are followed 85 to 90 percent of the time. Odom stated that Supervisors are not expected to make any written recommendations for specific discipline. He further testified that he has specifically instructed Supervisors *not* to check the boxes on the disciplinary forms which indicate the level of discipline the employee will receive. Odom also testified that the boxes which reflect the recommended disciplinary action (i.e., verbal, written, suspension, final warning and termination) are not checked by the Supervisors or the Disciplinary Committee. Instead, the Disciplinary Committee sends the disciplinary forms to the corporate office without a specific written disciplinary recommendation.

Odom testified that the *Staff Supervision* or *Staff Performance* forms are "supervisions," which are prepared by Supervisors and could lead to discipline. Odom stated that the Employer uses two different types of forms to address employee issues: a disciplinary form and a supervision form. He further stated that supervision forms are not disciplinary in nature, that the forms are essentially a training tool and a means of documenting different situations. Odom also stated that a Supervisor could not write up another Supervisor for disciplinary action and that for discipline to occur the matter would have to go through the Disciplinary Committee and then to the corporate office for a final decision.

⁹ It should be noted that Odom testified that the Employer uses the same job description for unit counselors and Operations counselors. Thus, any reference to "Counselors" in this analysis will reference either or both unless, for the purposes of this inquiry, some meaningful distinction is necessary.

E. Adjust Grievances

The Employer's unit and Operations counselors are represented for collective bargaining by District 1199J. Under the parties' collective-bargaining agreement, an employee with a grievance, or the employee's union delegate, shall submit a written grievance to the employee's supervisor within 72 hours of the incident. The supervisor, in turn, shall provide the employee and the union delegate a written response within 5 working days.¹⁰ Odom acknowledged that Supervisors do not have the authority to resolve a suspension grievance by rescinding a suspension. He further testified that only at step two of the grievance procedure, which involves the Director, can that type of remedy be approved. When asked whether a Supervisor could resolve a grievance claiming an employee was skipped on the overtime list, Odom replied that the Supervisors could resolve it in the sense of substantiating the grievance facts but that the final resolution would have to go through the same process as a suspension -via the Director. When pressed to provide any example of a type of grievance which a Supervisor could resolve on his own authority, Odom could provide only one general example. He stated that where a Counselor's tardiness caused another Counselor to be relieved late from his or her shift, the Supervisor could ensure that the Counselors fill out tardy slips.

F. Assign

Supervisors are responsible for the Counselors' training. Odom testified that shift supervisors and unit supervisors assign specific tasks to Counselors and prioritize their daily work. Odom stated, for example, that Supervisors will assign Counselors to conduct room searches, to facilitate orientation or to monitor meal movements. Odom stated that the Operations counselors' duties, such as signing residents in and out, monitoring meal and recreation (rec) movements, and conducting searches, are carried out in accordance with company policy. With respect to whether Supervisors have discretion to change the order in which the Counselors' tasks are performed, Odom testified that the physical plant inspection, counts, rec movement, and meal movements all run according to prescribed times and schedules. In response to the question of whether the Supervisors had discretion over the time during which any particular task was to take place, Odom said, "[m]aybe Clinical Intervention Committee." The record does not indicate, however, what a Clinical Intervention Committee is, what role the Supervisors play regarding the Committee, who comprises the Committee, or how often the Committee meets.

Odom testified that Supervisors have the authority to allow a Counselor to leave early, if requested. He further stated that, in the event that additional manpower is needed, the Supervisors have the authority to call in additional workers, even if the decision would cause the Employer to incur overtime. Odom stated that the Supervisors can bring in additional manpower when a Counselor calls out sick. Odom stated that the proce-

cedure a Supervisor would follow is to ask someone from the previous shift to stay for an additional shift. Odom also stated that the Supervisors follow a procedure where they must utilize one of two rotating lists, a mandatory rotating list and a voluntary rotating list. Supervisors do not have the discretion to deviate from these lists. Hooper testified that he is not responsible for calling in replacement employees when someone calls out sick.

Odom testified that he personally makes the schedule for the Operations and Clinical Divisions, with regard to how many Counselors and Supervisors are assigned to each unit. The specific post assignments are then made by the Supervisors when Counselors arrive for their scheduled shift. According to Odom, the Supervisors make the specific assignments because, due to their daily interaction with the Counselors, they are better able to assess the Counselors' strengths and weaknesses. As an example, Odom stated that a Supervisor might assign a certain Counselor to a pod because it has a population of younger residents. Odom stated that the Operations Counselors all have the same skills set and educational requirements. He further stated that the Supervisors responsibilities are identical on all the shifts and without regard to the particular pod or unit to which they are assigned.

Odom testified that the posts for Operations are in main reception, the "white mile," the "green mile," and "meals." The posts for Clinical are in the units and pods. The required number of Counselors and Supervisors for each unit and pod is predetermined. The specific posts in each unit and pod are also predetermined and the posts for each shift are always the same. Hooper testified that, as a unit supervisor, he does not assign Counselors to those particular posts. He further stated that two of the four Counselors with whom he typically works have documents in their employee files which dictate what their assignments will be. Hooper stated that he does have the authority to assign the Counselors to different pods, if their assignments are not specified in their employee file.

G. Responsibly Direct

According to Odom, Supervisors perform annual written evaluations for Counselors. Odom stated that these evaluations could form the basis for an employee's loss of employment or promotion, depending upon the nature of the evaluation. On cross-examination, Odom stated that Supervisors do not, on the Counselors' annual performance appraisals, make recommendations with regard to promotions. The evaluation forms the Supervisors initiate are the only forms used for the purposes of evaluating the Counselors' performance. Odom also stated that the appraisal is essentially "the Supervisor's observation of the employee."

Hooper testified that, while it is part of his job responsibilities to fill out annual appraisals for Counselors, he has never recommended that someone be promoted based on his appraisal. He further stated that his responsibilities as a unit supervisor were to take care of the discipline of the residents, to make sure the clinical schedule was followed, and to make sure the log books are being properly maintained. Hooper stated that Coun-

¹⁰ Odom was not familiar with this aspect of the contract and, after reviewing the contract to refresh his memory, incorrectly stated that a supervisor had 72 hours to respond after a grievance was filed.

selors maintain the logbooks or keep the units clean in accordance with their job description and not at his direction.

Odom testified that Supervisors can receive discipline for not properly supervising the Counselors. To evidence this, the Employer provided various documents,¹¹ including a written “*Performance Discussion*” for Unit Supervisor, Ira Hooper, from 2009. The issue, as reflected in this *Performance Discussion*, was workplace cleanliness. Under a section heading entitled “Impact on Performance” the document states that “[u]nsatisfactory supervision of unit maintenance cannot and will not be allowed to continue.” The section of the document entitled “Available Support” notes that “[i]t’s very important that you as a leader train and support your subordinates”. Hooper’s immediate supervisor, as identified on this 2009 document, was Unit Supervisor Nathaniel Ghant (Ghant). At the bottom of the document, below the signature line for Hooper’s immediate supervisor, the signature of a second level supervisor appears as well.

Other documents were provided by the Employer to support the claim that Supervisors are held accountable for the performance of the Counselors.¹² A “*Disciplinary Document*” from 2010 indicates that Hooper’s unsatisfactory supervision of unit maintenance and unit logbooks had an impact on the Employer’s operation. Hooper’s written objection to the discipline states that he followed the proper procedures with regard to holding the counselors responsible for not following procedures. A “*Staff Supervision*” document, dated January 18, 2012, shows that Nathaniel Ghant, as Hooper’s supervisor, questioned Hooper’s supervisory skills “due to the lack of reinforcing or evaluating previous unit areas . . .”. The document also states that the unit inspection sheet should eliminate a lot of the unit issues in question and directs Hooper to have the Counselors log in their tours, bathroom clean-up, etc. Hooper testified that there are policies and procedures governing the use of the log book with specific examples of the information to be entered. He also stated that keeping the units clean is part of the Counselors’ daily responsibilities. Hooper also stated that the *residents* actually perform the unit cleaning and the Counselors and Supervisors ensure that this cleaning is done properly. Hooper maintained that he was disciplined for not holding the residents responsible for cleaning the units. Hooper then acknowledged that the discipline was also issued for failing to supervise the Counselors with regard to cleanliness in the unit.

Another document submitted by the Employer, a *Staff Supervision*, dated December 1, 2011, criticizes Hooper’s performance for not providing supervision to staff about fire drill procedures. Finally, a *Staff Supervision*, dated October 20, 2011, documents concerns that Hooper was not ensuring that plans and policies were being implemented properly.

In further support of the Employer’s claim that Supervisors are accountable for the performance of the Counselors, the Employer provided “*Job Performance Appraisals*” for Shift Supervisors Saleema Williams and Karriem Curl and Unit Supervisor Ira Hooper. According to the *Job Performance*

Appraisals, supervisory skills account for 20 percent of the overall rating of the Supervisors.

H. *Secondary indicia*

Supervisors are salaried employees, exempt from overtime and earn between \$32,000 and \$40,000 dollars annually. Written offers of employment for shift and unit supervisor positions indicate that Supervisors may participate in the Employer’s 401(k) plan. Written offers of employment provided by the Employer reflect that Counselors hired in 2013 made \$11.07 hourly. Odom testified that Counselors are non-exempt hourly employees and typically earn approximately \$23,000 dollars annually.

Odom testified that, although he does not work the third shift, he is very often called by Supervisors during this time to discuss incidents at the facility. Additionally, Odom stated that Mr. Palumbo, the Deputy Director, and Miss Leslie, the Director, are also on call if problems occur. Odom further testified that during the third shift, Supervisors are the highest ranking administrative officials in the building. Odom also stated that the Supervisors are required to call him for every major issue that occurs during the third shift.

III. LEGAL ANALYSIS

A. *Standard for Supervisory Status*

Section 2(3) of the Act excludes from the definition of the term “employee” “any individual employed as a supervisor.” Section 2(11) of the Act defines a “supervisor” as:

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

Individuals are “statutory supervisors if: 1) they hold the authority to engage in any one of the 12 listed supervisory functions, 2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment, and 3) their authority is held in the interest of the employer.” *NLRB v. Kentucky River Community Care*, 532 U. S. 706, 713 (2001).

In applying this three part test, the Board continues to follow certain established principles. First, the party asserting supervisory status bears the burden of proof. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006); *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711–712 (2001). Second, any lack of evidence is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535, 536 fn. 8 (1999). Third, purely conclusionary evidence is not sufficient to establish supervisory status. *Volair Contractors, Inc.*, 341 NLRB 673, 675 (2004); *Sears, Roebuck & Co.*, 304 NLRB 193, 194 (1991).

With regard to the exercise of supervisory authority, the Board has determined that individuals who possess the authority as defined in Section 2(11) of the statute can be held to

¹¹ See Employer Exh. 9.

¹² See Employer Exh. 9.

be supervisors even if the authority has not been exercised. *Fred Meyer Alaska, Inc.*, 334 NLRB 646 (2001). Although the Act demands only the possession of Section 2(11) authority, not its exercise, the evidence still must be persuasive that such authority exists. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006). Job titles, job descriptions, or similar documents are not given controlling weight and will be rejected as mere paper, absent independent evidence of the possession of the described authority. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006), citing *Training School at Vineland*, 332 NLRB 1412, 1416 (2000); See also *Chevron Shipping Co.*, 317 NLRB 379, 381 fn. 6 (1995) (conclusionary statements without specific explanation are not enough).

Additionally, the Board cautions against finding supervisory authority based only on infrequent instances of its existence. *Family Healthcare, Inc.*, 354 NLRB 254 (2009) (overruled on other grounds); *Golden Crest Healthcare*, supra at 730, fn. 9. To separate straw bosses from true supervisors, the Act prescribes that the exercise of supervisory indicia be in the interest of the employer and requires the use of independent judgment. Accordingly, “the exercise of some supervisory authority in a merely routine, clerical, perfunctory or sporadic manner does not confer supervisory status on an employee.” *Somerset Welding & Steel, Inc.*, 291 NLRB 913 (1988), quoting *Feralloy West Co.*, 277 NLRB 1083, 1084 (1985).

Thus, “the Board . . . exercise[s] caution not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied rights which the Act is intended to protect.” *Oakwood Healthcare, Inc.*, 348 NLRB 686, 688 (2006), quoting *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995); *Azusa Ranch Market*, 321 NLRB 811, 812 (1996).

B. Layoff, Transfer and Hire

The record clearly indicates that unit and shift supervisors do not participate in decisions regarding layoffs. Although the Employer’s witness Odom made conclusionary statements that Supervisors make recommendations for employee transfers, the example Odom provided showed only that a *Counselor* may request a transfer. The Employer provided no specific evidence as to what the transfer process entails and what, if any role a Supervisor plays in that process. As stated, supra, purely conclusionary evidence is not sufficient to establish supervisory status. The burden of proof being on the party asserting supervisory status, the Employer has not met its burden with regard to layoffs and transfers.

Turning to the question of whether the Supervisors exercise authority to hire or recommend candidates for employment, the evidence is insufficient to answer in the affirmative. The Employer’s sole witness, Mr. Odom, made a general statement that the Supervisors’ hiring recommendations were typically followed. However, Odom provided no specific examples of hiring decisions made either by Supervisors or on the recommendation of a Supervisor. Though Odom and Hooper had differing recollections as to the number of candidates Hooper had recommended in the past, both testified that none of the individuals Hooper recommended were actually hired. Thus,

the evidence as to Hooper’s recommendations shows only that the Employer did not follow those recommendations. Additionally, the record does not provide any evidence of the process whereby the Employer takes a Supervisor’s hiring recommendation under advisement in its hiring decisions. Nor does the record provide a single specific example of a hiring decision made based upon a Supervisor’s recommendation. Thus, the Employer has not met its burden of proof on this point. Turning to the Supervisors’ participation in the interviewing process, Hooper stated that, on three occasions during his 6 years as a Supervisor, he participated in interviews with employment candidates. He also testified that, during these interviews, he had questioned the candidates and made recommendations whether or not to hire them. However, Hooper also stated that he has not participated in the interview process in about 3 years. In support of the Employer’s contention that the Supervisors have the authority to meaningfully participate in the hiring process, Odom stated that Supervisors have sat in on interviews for potential hires. However, Odom also stated that Supervisors do not regularly participate in the interviewing process and that the Director makes the hiring decisions. As noted in *Somerset Welding & Steel*, “the exercise of some supervisory authority in a merely . . . sporadic manner does not confer supervisory status on an employee.” The evidence on this issue shows that, at most, Supervisors have participated in interviews only sporadically. The evidence further shows that the actual hiring decision-making authority resides with the Director, not the Supervisors.

Given the scant evidence as to the Supervisors’ role in hiring, effectively recommending for hire, and interviewing potential hires, and the principle that any lack of evidence will be construed against the party asserting supervisory status, I find that the evidence does not support the Employer’s claim that Supervisors have authority, as defined in Section 2(11) of the Act, to hire or effectively recommend persons for hire.

C. Suspension and Discharge

The record is devoid of any evidence that the unit and shift supervisors have the authority to discharge employees. With regard to suspensions, Odom testified that Supervisors have the authority to send employees home if they observed an employee engaged in improper physical contact or sleeping on the job. In that case, according to Odom, the Supervisor would send the employee home pending investigation. However, in response to the Hearing Officer’s request for a specific example of this type of incident within the past 2 years, Odom had nothing to offer. Hooper testified that he had never sent an employee home. As stated, supra, conclusionary statements without specific examples are insufficient to establish evidence of Supervisory status. Therefore, with regard to its assertion that Supervisors have the authority to suspend and discharge employees within the meaning of Section 2(11) of the Act, the Employer has failed to meet its burden of proof.

D. Discipline

In *ITT Lighting Fixtures*, the Board stated that to support a claim that LPNs had the authority effectively to recommend

discipline, the Employer must prove that the putative supervisors: (a) submit actual recommendations, and not merely anecdotal reports, (b) their recommendations are followed on a regular basis, (c) the triggering disciplinary incidents are not independently investigated by superiors, and (d) the recommendations result from the putative supervisors' own independent judgment. *ITT Lighting Fixtures*, 265 NLRB 1480, 1481 (1982), enf. denied on other grounds. 712 F.2d 40 (2d Cir. 1983), cert. denied 466 U.S. 978 (1984). Additionally, the Board has consistently refused to find supervisory status when the alleged supervisor's role in discipline is found to be merely reportorial. *Hillhaven Rehabilitation Center*, 325 NLRB 202, 203 (1997); *Ten Broeck Commons*, 320 NLRB 806, 813 (1996); *Northwest Nursing Home*, 313 NLRB 491, 497-498 (1993); *The Ohio Masonic Home*, 295 NLRB 390, 394 (1989).

In *Ten Broeck Commons*, the Board found that the LPNs' mere involvement in discipline did not render them supervisors within the meaning of the Act. *Ten Broeck Commons* at 812. In support of its conclusions, the Board noted that the role of the LPNs was merely to report incidents of unacceptable work performance or behavior and they made no recommendations with respect to discipline. *Id.* The Board stated that because written reports and warnings issued by the putative supervisors did not, by themselves, affect job tenure or status, they were not supervisors. *Id.*

The facts in the instant inquiry are similar to *Ten Broeck Commons*. Here, as in *Ten Broeck Commons*, because the putative supervisors merely report incidents of unacceptable work performance and do not make recommendations with respect to discipline, their written reports do not, by themselves, affect job tenure or status.

The Employer introduced two different forms as evidence that Supervisors discipline employees. One is a *Disciplinary Action Form* and the other is a *Staff Supervision* form. Hooper and Odom both testified that the Supervisors' role in discipline is to document a particular situation in writing. Both testified that the Supervisors do not make a written recommendation as to the form of discipline and do not check the boxes on the *Disciplinary Action Form* indicating the level of discipline the employee will receive. In fact, the Employer's *Disciplinary Action Form* has a section heading entitled "Witness." In this section, the Supervisors document the details of the incident they observed, then the form is forwarded it to the "Disciplinary Committee", a three person committee comprised of one Human Resources employee, the assistant to the Director, and Odom, the Supervisor of Operations. The Disciplinary Committee does not make a determination as to the level of discipline, nor do they make a written recommendation in this regard. Rather, they forward the document to the corporate office where the final disciplinary decision is made and documented before being sent back to the facility for implementation. According to the evidence, the Supervisors' role with regard to the *Disciplinary Action Forms* is to document what is witnessed, not to recommend or to impose discipline.

With regard to the *Staff Supervision* forms, Odom stated that the forms were prepared by Supervisors to document coun-

selor performance and they could be used for discipline. However, Odom also clearly acknowledged that the *Staff Supervision* forms were not disciplinary. He further acknowledged that these forms were intended as tools for training and documenting certain events which transpired on the units. Finally, Odom acknowledged that, for any discipline to occur the matter would first have to be reviewed by the disciplinary committee and sent to the corporate office for a final decision.

The Employer, in its brief, contends that the Supervisors' recommendations regarding discipline are followed 85 to 90 percent of the time. Odom testified that Supervisors make verbal recommendations and further asserted that these recommendations have been followed 85 to 90 percent of the time. However, he provided no specific examples of Supervisors making verbal recommendations which were followed. Nor did he provide evidence of any specific process whereby a Supervisor's disciplinary recommendations were followed. With regard to written recommendations, Odom clearly and specifically stated that he has instructed Supervisors *not* to check the boxes on disciplinary forms which indicate the level of discipline, that the Disciplinary Committee does not make a written recommendation as to the level of discipline, and that the actual disciplinary decision is made at the corporate office and sent back to the facility for implementation.

In *ITT Lighting Fixtures*, the Board required evidence that the putative supervisors (a) submitted actual recommendations, and not merely anecdotal reports, (b) that their recommendations were followed on a regular basis, (c) that the triggering disciplinary incidents were not independently investigated by superiors, and (d) that the recommendations resulted from the putative supervisors' own independent judgment. These four elements are conjunctive and must all be satisfied to support a finding that the employees in question possess the authority to issue discipline as defined in Section 2(11) of the Act. In the instant matter, the evidence is clear that the unit and shift supervisors do not submit actual written recommendations. Thus, the evidence with regard to written recommendations fails to meet the first requirement. Furthermore, there is no evidence that verbal recommendations, if submitted, are actually followed on a regular basis. Thus, the analysis need not proceed any further under *ITT Lighting Fixtures*, as the first requirement has not been met with regard to written disciplinary recommendations and the second requirement has not been met with regard to verbal recommendations.

Additionally, it is clear from the record that the Supervisors' role in discipline in the instant matter is reportorial. The Supervisors merely provide information as witnesses, report the facts, and do not submit disciplinary recommendations. The Board will not find supervisory status based on these facts. Accordingly, I find that the Supervisors in the instant matter do not discipline or effectively recommend discipline within the meaning of Section 2(11) of the Act.

E. Adjust Grievances

Although the authority to adjust grievances can evidence supervisory status, the resolution of minor employee complaints regarding workload, lunch and break schedule conflicts, or personality conflicts have not been found to be sufficient to establish 2(11) supervisory status. *Regal Health and Rehab Center, Inc.*, 354 NLRB 466 (2010) (overruled on other grounds); *Beverly Enterprises*, 304 NLRB 862, 865 (1991); *Ohio Masonic Home*, 295 NLRB 390 (1989).

In the instant matter, the Counselors are represented by District 11991 for the purposes of collective-bargaining. The parties' collective-bargaining agreement provides that an employee's written grievance is to be submitted to their supervisor within 72 hours of the incident and that the supervisor is required to provide a response within 5 working days. The Employer contends that Supervisors possess the authority to adjust Counselors' contractual grievances. For the following reasons I find this argument unpersuasive. Employer witness Odom acknowledged that Supervisors lack the authority to redress a grievance involving a suspension and Odom could not provide any examples of a Supervisor exercising independent judgment in adjusting any employee grievance. Instead, when pressed for an example of the type of grievance a Supervisor *could* adjust on his own authority, Odom provided a general example where the Supervisor would merely ensure that a tardy employee fill out the proper paperwork. This authority can only be characterized as routine and clerical and not requiring the use of independent judgment. As previously noted, the exercise of authority that is merely routine or clerical clearly does not suffice to show supervisory authority as defined by Section 2(11) of the Act. *Kentucky River Community Care*, supra at 713.

F. Assignment of Work

The Board in *Oakwood Healthcare, Inc.* defined "assigning work" as the "the act of designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee." *Id.* at 689. To "assign," for purposes of Section 2(11), "refers to the [putative supervisor's] designation of significant overall duties to an employee, not to the [putative supervisor's] ad hoc instruction that the employee perform a discrete task." *Id.* The Board further clarified that "the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices," but that judgment "is not independent if it is dictated or controlled by detailed instructions," such as those set forth in company policy. *Oakwood Healthcare*, supra at 697-698.

The Board has also held that calling in employees, without the authority to compel an employee to come to work and, the switching of tasks, does not confer supervisory status. *Golden Crest Healthcare Center*, supra at 729; *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006). For example, in *Regal Health & Rehab Ctr., Inc.*, the Board found that the overall evidence did not reflect that LPNs used independent judgment

indicative of a Section 2(11) supervisor where, in determining when additional CNAs were needed or in selecting the CNAs to be called in for additional work, the LPNs consulted a list containing the names and telephone numbers of current CNAs and there was no testimony which indicated that LPNs evaluated the skill level of CNAs in determining who they would call. *Regal Health & Rehab Ctr., Inc.*, 354 NLRB 466, 471 (2009).

In *Oakwood Healthcare, Inc.*, the Board found that the employer failed to establish that rotating charge nurses exercised supervisory authority for a substantial part of their worktime where the patient rooms were assigned to CNAs in a routine and established manner. *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006). The Board has consistently found these types of decisions do not establish the use of independent judgment. *Oakwood Healthcare Inc.*, supra at 694. *Regal Health & Rehab Ctr., Inc.*, 354 NLRB 466, 472 (2009).

In its *Oakwood* decision, the Board sought to clarify its interpretation of the terms "independent" as well as the terms "assign" and "responsibly direct." In addition to defining critical terms, the Board concluded that assignment and responsible direction must have "a material effect on the employee's terms and conditions of employment" in order to confer supervisory status. *Oakwood Healthcare, Inc.* at 695.

Assignment or responsible direction will produce a finding of supervisory status only if the exercise of independent judgment is involved. Independent judgment will be found where the alleged supervisor (1) acts free from the control of others, (2) is required to form an opinion by discerning and comparing data, and (3) makes a decision not dictated by circumstances or company policy. *Id.* at 693. Independent judgment requires that the decision "rise above the merely routine or clerical." *Id.* For example, the *Oakwood* Board applied these criteria and found that "if the registered nurse weighs the individualized condition and needs of a patient against the skills or special training of available nursing personnel, the nurse's assignment involves the exercise of independent judgment." *Id.* at 693.

The Employer herein contends that although Odom personally develops the schedule with regard to which Counselors are assigned to each unit, the specific post assignments are made by the Supervisors who also assign specific tasks to Counselors, prioritize their work and have the authority to send Counselors home and call in additional manpower, when necessary.

The record establishes however, that the specific tasks the Counselors engage in as part of their daily work are carried out pursuant to company policy and according to prescribed times and schedules. No definitive evidence was presented regarding whether Supervisors had discretion over the time when any particular task was scheduled or if Supervisors evaluated the skill set of the individual Counselors in light of specific tasks or the Employer's needs. Rather, the record establishes that all Counselors have the same skill sets and educational backgrounds and that their responsibilities are identical on all shifts regardless of their particular pod assignments. The instant facts do not support a conclusion that the Supervisors exercise independent judgment in the Counselors' assignments.

Turning to the issue of whether the Supervisors have statutory authority to adjust manpower needs, the Employer again failed to produce sufficient evidence to support a finding of statutory supervisory authority. Odom testified that the Supervisors possess the authority to allow a Counselor to leave early, if requested. However, he provided no specific examples in support of this statement.

The required number of Counselors and Supervisors for each post and the specific posts for the pods on each shift are predetermined by Odom. To find coverage when a Counselor calls out sick, the Supervisors follow a procedure whereby they would ask employees from the previous shift to stay while utilizing one of two rotating overtime lists, a mandatory and a voluntary list. The Supervisors do not have the discretion to deviate from those lists. The instant matter is similar to *Regal Health & Rehab Ctr., Inc.*, where the Board ruled on similar facts that the use of call-in lists precluded finding the exercise of independent judgment. *Regal Health & Rehab Ctr., Inc.*, supra at 471.

G. Responsibly Direct

For direction to be responsible, the person directing must have oversight of another's work and be accountable for the other's performance. To establish accountability, it must be shown that the putative supervisor is (1) empowered to take corrective action, and is (2) at risk of adverse consequences [or accountable for] others' deficiencies. *Oakwood Healthcare*, supra at 691–692, 695.

The Employer has failed to establish that the Supervisors direct responsibly. Missing here is evidence that the Supervisors are empowered to take or even to recommend corrective action. While the Employer asserts that Supervisors perform annual written evaluations of Counselors, the Supervisors do not make recommendations for promotions as part of the evaluation process. The Employer provided no evidence that a Counselor can suffer a loss of employment as the result of a poor evaluation. Odom further stated that the evaluations are simply the Supervisors observations of the employee. This statement suggests that the Supervisors do not draw conclusions or make recommendations about the job status of the individual they are evaluating and, therefore, these evaluations cannot be construed as evidence of responsible direction. Hooper's testimony supports this conclusion. He confirmed that part of his job responsibilities was to fill out annual appraisals for Counselors but, he also stated that he never recommended anyone for promotion as part of that process. Also missing from the record here is evidence that Supervisors are empowered to discipline or effectively recommend the discipline of Counselors. As stated earlier, Supervisors document a particular incident as a witness, but do not make written recommendations for discipline and have been specifically instructed by management *not* to check boxes on disciplinary forms which indicate the level of discipline an employee will receive. Absent evidence that the Supervisors are empowered to take corrective action, I cannot find that they responsibly direct the Counselors.

In this regard, the "authority simply to evaluate employees without more is insufficient to find supervisory status." *Passa-*

vant Health Center, 284 NLRB 887, 891 (1987) (nurses merely performing a reportorial function by documenting incidents and issuing written warnings which did not contain any recommendations for discipline lacked discretion to determine what corrective action should be taken). The preparation of written warnings and incident reports does not evidence the exercise of statutory supervisory authority. See *Vencor Hospital-Los Angeles*, 328 NLRB 1136 (1999) (ability to issue oral warnings in itself does not demonstrate supervisory authority); *VIP Health Services v. NLRB*, 164 F.3d 644, 648 (D.C. Cir. 1999) (mere reporting is insufficient to establish that nurses effectively recommend discharge or discipline); *Lynwood Health Care Center, Minnesota, v. NLRB*, 148 F.3d 1042, 1046 (8th Cir. 1998) (mere authority to effectively recommend warnings that "have no tangible effect on [an employee's] job status . . . is not sufficient for supervisory status"). The Employer also provided Unit Supervisor and Shift Supervisor job descriptions to support a showing that the Supervisors' functions include supervision of unit counselor and operations counselors. I reject the Employer's reliance on these documents as evidence of supervisory indicia. The Board has long cautioned that evidence of actual authority trumps mere paper authority. *Avante at Wilson*, 348 NLRB 1056, 1057 (2006); *Golden Crest Healthcare Ctr.*, supra at 731.

The Employer, in its brief, argues that the Supervisors responsibly direct Counselors because they have been disciplined for failing to improperly oversee the Counselors performance of their duties. While the Employer has provided some evidence in support of this proposition, the instant inquiry need not proceed to a consideration of this issue. Nothing in the foregoing analysis supports a finding that the unit supervisors or shift supervisors exercise authority as defined by Section 2(11) of the Act and the relevant case law. Thus, whether, and the extent to which, the Employer holds Supervisors accountable for duties which, under the law, are not supervisory is irrelevant for the purposes of this inquiry. This is consistent with the principles followed in *Golden Crest Healthcare Ctr.*, where the Board has stated that where there is no showing of direction, one need not reach the issue of accountability, and vice versa. *Golden Crest Healthcare Ctr.*, 348 NLRB 727, 730 (2006).

H. Secondary Indicia

While secondary indicia can be a factor in establishing statutory supervisory status, it is well established that where, as here, putative supervisors are not shown to possess any of the primary supervisory indicia, secondary indicia alone are insufficient to establish supervisory status. *Golden Crest Healthcare*, supra at 730 fn. 10; *Ken-Crest Services*, 335 NLRB 777, 779 (2001).

The Employer cites *American River Transportation Co.*, 347 NLRB 925 (2006), for the proposition that higher pay and better benefits are secondary indicia of statutory supervisory status. In *American River Transportation Co.*, the Board overruled the judge's determination that the employees in question, the employer's towboat pilots, were not statutory supervisors. *American River Transportation Co.*, at 927. The Board found that the pilots had the authority to assign

and order crew members to particular tasks, used independent judgment to determine which tasks would be undertaken under different circumstances, and had authority over the crews during emergencies. *Id.* In addition to these primary factors, the Board found that the pilots also possessed certain secondary indicia indicative of supervisory status, such as better benefits, higher pay and better sleeping quarters. *Id.*

Unlike the pilots in *American River Transportation Co.*, however, the Supervisors here have not been shown to have the authority to assign employees to particular tasks, to use independent judgment to determine which tasks should be completed in various circumstances and to exercise authority over the employees during emergencies. Absent evidence that the Supervisors possess the primary indicia of supervisory status, the secondary indicia which the Employer advances are insufficient to establish supervisory status. See *Golden Crest Healthcare*, supra at 730.

The Employer also argues that the Supervisors here must be statutory supervisors or employees would have no supervision during certain hours/shifts of operation. However, the Board in *Riverside Health Care Center* rejected an employer's similar argument that its facility would be without statutory supervisors 76 percent of the time unless the nurses in question were deemed supervisors. *Riverside Health Care Center*, 304 NLRB 861 (1991). The Board's decision in this regard was based on the fact that the nurses in question had procedural and instructional handbooks at their disposal during the periods of time in question.

Here, the Supervisors have a great deal more to rely on than handbooks and instructions. They have three managers whom they are required to call should a serious situation arise. The Supervisors here exercise even less independent judgment than the nurses in *Riverside Health Care Center* because they do not have the task of reading and applying instructions and procedures: they merely call in to their superiors and receive direction. Moreover, the Board has long held that the mere fact that employees are at certain times the highest ranking employee on site does not, by itself, establish supervisory authority. See *McCullough Environmental Services*, 306 NLRB 565, 566 (1992). Thus, the Employer's argument that

an indicia of 2(11) status is established because its Supervisors may be the highest ranking employees physically present at Logan Hall during certain times of day is unpersuasive.

Citing *Burns Security*, 278 NLRB 565 (1986), the Employer makes an additional secondary indicia argument that a finding that the Supervisors are not Section 2(11) supervisors would create an irrational ratio of staff-to-supervisory employees. However, in *Burns Security*, as in *American River Transportation Co.*, the Board's consideration of secondary indicia proceeded only after the evidence showed that the employees first possessed statutory authority under the primary indicia. Thus, the cases upon which the Employer relies do not support its secondary indicia arguments.

The Sergeants whose status was at issue in *Burns Security* participated on the board for promotions, made recommendations for commendations, had the authority to remove guards from their posts, consulted with their superiors on promotions and were involved with rating employee performance. The Board first found on these facts that the Sergeants had significant roles in evaluating and disciplining guards and then proceeded to address the issue of ratio. Unlike the Sergeants in *Burns Security*, however, the Supervisors here do not meaningfully participate in employee evaluations and discipline and do not satisfy any other primary requirements. Thus, the Employer here, unlike the employer in *Burns Security*, cannot rely upon secondary indicia arguments. The law is clear that ratio, as with all secondary indicia, cannot by itself provide a basis for a supervisory finding. *Northcrest Nursing Home*, 313 NLRB 491, 499 (1993).

Conclusion

Based on the above and the record as a whole, I find that the Employer has failed to meet its burden of establishing that its unit supervisors and shift supervisors possess the indicia sufficient to meet the definition of statutory supervisors under Section 2(11) of the Act. Therefore, I find them to be employees as defined in the Act and order their inclusion in the petitioned-for bargaining unit.