

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

G4S Government Solutions, Inc. d/b/a WSI)
Savannah River Site a/k/a WSI-SRS,)
)
Employer,) Case 10-RC-126849
)
and)
)
International Guards Union of America,)
)
Petitioner.)
)
_____)

EMPLOYER'S BRIEF ON REVIEW OF REGIONAL DIRECTOR'S
DECISION AND DIRECTION OF ELECTION

Stephen T. Savitz
Christopher W. Johnson
GIGNILLIAT, SAVITZ & BETTIS, L.L.P.
900 Elmwood Ave., Suite 100
Columbia, SC 29201
Tel.: (803) 799-9311
Fax: (803) 254-6951
ssavitz@gsblaw.net
cjohnson@gsblaw.net

ATTORNEYS FOR EMPLOYER

TABLE OF CONTENTS

TABLE OF AUTHORITIES -----	iii
EMPLOYER’S BRIEF ON REVIEW -----	1
STATEMENT OF CASE -----	1
ISSUES PRESENTED AND BASIS FOR REVIEW -----	2
STATEMENT OF FACTS -----	2
1. Background -----	2
2. Authority of lieutenants to responsibly direct employees -----	5
A. Tactical direction -----	6
B. Non-tactical direction -----	10
C. Responsibility for subordinates’ performance -----	12
3. Authority of lieutenants to assign subordinates-----	13
4. Authority of lieutenants to discipline -----	15
ARGUMENT -----	20
1. Contrary to RD’s Decision, lieutenants responsibly direct their employees-----	20
A. Tactical direction -----	21
B. Non-tactical direction -----	26
C. Responsibility for subordinates’ performance -----	27
2. The RD incorrectly held that the lieutenants do not assign employees-----	28
3. The RD’s determination that lieutenants do not discipline, or effectively recommend discipline is in error -----	32
4. Secondary indicia also support supervisory status -----	35
CONCLUSION -----	36

TABLE OF AUTHORITIES

Cases

<i>Brusco Tug and Barge, Inc.</i> , 359 NLRB No. 43 (2012).....	22
<i>Burns Int’l Security Servs., Inc.</i> , 278 NLRB 565 (1986).....	21, 23, 26, 32
<i>Croft Metals, Inc.</i> , 348 NLRB 717 (2006).....	24
<i>E&L Transport Co. v. NLRB</i> , 85 F.2d 1258 (7 th Cir. 1996)	35
<i>Fluor Hanford</i> , 19-RC-15019 (Nov. 6, 2007)	passim
<i>G4S Regulated Security Solutions</i> , 358 NLRB No. 160 (2012)	21, 22
<i>Glenmark Associates, Inc. v. NLRB</i> , 147 F.3d 333(4 th Cir. 1998).....	26
<i>Maine Yankee Atomic Power Co. v. NLRB</i> , 642 F.2d 347 (1 st Cir. 1980).....	22
<i>NLRB v. Kentucky River Community Care, Inc.</i> , 532 U.S. 706 (2001)	21, 24, 30
<i>NLRB v. Noel Canning</i> , --- U.S. ---, 199 LRRM 3685 (2014)	22
<i>NLRB v. Quinnipiac College</i> , 256 F.3d 68 (2 nd Cir. 2001).....	26, 30
<i>Oakwood Healthcare, Inc.</i> , 348 NLRB 686 (2006).....	passim
<i>Pinkerton Government Services</i> , 10-RC-15511 (May 2, 2005).....	23, 26, 29
<i>Sheraton Universal Hotel</i> , 350 NLRB 1114 (2007).....	35
<i>Woodman’s Food Market, Inc.</i> , 359 NLRB No. 114.....	35

Statutes

S.C. Code §§ 23-7-10 through -70.....	4
42 U.S.C. § 2014.....	2

Regulations

10 CFR § 1047	3
10 CFR § 712	19, 20, 34, 35

EMPLOYER'S BRIEF ON REVIEW

Pursuant to § 102.67 of the NLRB's Rules and Regulations, the Employer, G4S Government Solutions, Inc. d/b/a WSI Savannah River Site a/k/a WSI-SRS ("WSI"), files this brief in support of its position that the lieutenants¹ at the Savannah River Site are supervisors within the meaning of the Act and requesting that the Regional Director's decision to the contrary be overturned.

STATEMENT OF THE CASE

WSI is a private security contractor responsible for providing security for the national nuclear stockpile, personnel and government property at the United States Department of Energy's Savannah River Site ("Site" or "SRS"). On or about April 17, 2014, Petitioner filed an election petition seeking to represent "[a]ll Sergeants [sic] and Lieutenants in the protective forces" of WSI. (Petition, 10-RC-126849) Four days of hearings were held before Hearing Officer Kerstin Meyers to determine whether the lieutenants and sergeants are supervisors excluded from the coverage of the Act. Both parties submitted briefs to Region 10, and the Regional Director ("RD") issued his Decision and Direction of Election ("Decision") on May 23, 2014, finding that the sergeants and lieutenants were not supervisors under the Act.

WSI filed a timely petition for review before the Board of the RD's Decision on June 6, 2014. The Board issued its Order on July 7, 2014, granting the petition in part, finding that a substantial issue was raised with respect to whether the lieutenants are statutory supervisors based on their authority to assign, direct and discipline.

¹ WSI maintains that the sergeants are also statutory supervisors, as argued to the RD and in its petition for review. Because the Board has granted review only as to lieutenants and only as to assignment, direction and discipline, however, this brief is limited to addressing those matters.

STATEMENT OF FACTS

1. Background

The Savannah River Site, where WSI's employees are employed, is a U.S. Department of Energy ("DOE") facility that stores and processes weapons grade nuclear material. (R 22, 58) The exact amount stored and processed is classified, but it is in the "tons." (*Id.*) The Site's mission includes receiving and storing Special Nuclear Material ("SNM")² as part of the Nuclear Non-Proliferation Treaty. (R 22) It also includes tritium production for use by the military in the nuclear weapons program. (R 22-23) In addition, the Federal Bureau of Investigation maintains an office at the Site for conducting radiological evidence processing. (*Id.*) The Site encompasses some 310 square miles in three South Carolina counties, including 17 miles along the Savannah River. (R 25, Ex. E-1)

The unique nature of the Site cannot be over-stressed. SRS is one of only eight federal sites handling SNM. The others are Nevada Test Site, Idaho National Laboratory, Pantex, Oakridge, Los Alamos National Laboratory, Lawrence Livermore National Laboratory and Hanford. These are not nuclear power plants, as the RD mischaracterized SRS in his Decision, these are highly sensitive federal government operations critical to the national nuclear security.

WSI's mission at SRS was summarized by then-Director Lennie Upshaw: "to keep it all safe and secure, protect the [special nuclear] material and the lives of everybody that comes on site, so in the event of a security emergency, if a terrorist or anybody were to actually get material and remove it from the area, our job is to get it back under that situation." (R 53, *ll.* 3-9) Put another way, the job is nothing less than to ensure the national security by safeguarding the

² "Special nuclear material" is defined in the Atomic Energy Act as "(1) plutonium, uranium enriched in the isotope 233 or in the isotope 235 . . . or (2) any material artificially enriched by any of the foregoing, . . ." 42 U.S.C. § 2014 (aa).

vast quantities of weapons grade nuclear material at the Site, as well as protecting the individuals and government property on the Site. (R 26-28)

WSI is organized on a para-military model. (R 53) All armed protective force members are designated as Security Police Officers, or SPOs. These officers are authorized by federal law to make warrantless arrests. (R 28-29) 10 CFR § 1047 (arrest authority of DOE protective force officers). SPOs are classified according to their level of tactical ability and training, as SPO I (primarily defensive forces), SPO II (offensive forces), or SPO III (Special Response Team, or “SRT”). (R 64-65) A small number of unarmed members, stationed primarily at the Site’s outer barricades, are designated Security Officers, or SOs. (R 30) Non-supervisory members of the protective forces are represented by the United Professional Pro-Force of Savannah River (UPPSR), Local 125. (R 73-74)

The protective forces are assigned to various areas within the Site. The Site’s outermost layer of security, the fence lines and barricades, are manned by the Perimeter Protection Department, or “PPD.” PPD staffs all entry points into the Site and is also responsible for the 700 A-Area, which includes DOE’s Savannah River National Laboratory. (R 66, 452) The two highest security facilities within the Site, H³ and K-Areas, have armed protective forces assigned to them within the areas. The protective forces within these areas are responsible for manning the access points to the areas, various points within the areas, and providing roving patrols of the areas.⁴ (R 179-180) These areas also each have a Central Alarm Station, or “CAS,” which monitors a variety of cameras, alarms, infrared sensors and similar security measures for the

³ H-Area is sometimes also referred to in the record as “H/T/L.”

⁴ The location and number of posts and patrols, along with the exact number of protective forces on duty at any given time in the areas is classified.

areas. (R 180) The CAS functions as a communications center for information on what is going on in an area. (R 181)

The vast area within the Site's perimeter but outside H, K and 700-Areas falls under the Law Enforcement Department. These officers, in addition to being SPOs like the rest of their counterparts, are commissioned law enforcement officers of the State of South Carolina, possessing the same authority within the Site as do deputy sheriffs or police officers within their jurisdictions. (R 28) S.C. Code §§ 23-7-10 through -70.

The SRT, or Special Response Team, is responsible for operation of the Site's armed helicopters, providing roving patrols within and without the more sensitive areas of the Site, and handling any situation that exceeds the capabilities of the Site's SPO I or SPO II forces. (R 498, 500-501) In addition, SRT is responsible for securing SNM in transit to or between areas and for any operation that involves the recovery of stolen or captured SNM. (R 533-535)

Within PPD, H, and K-Areas, there are two lieutenants on duty for each 12-hour shift. (R 168, 201-203, 648-649) The shift lieutenants divide administrative duties and supervision of daily security duties so that the lieutenant who is designated the Response Force Leader ("RFL")⁵ for his area does the in-facility administrative duties. (*Id.*) This keeps the RFL lieutenant close to the area's headquarters from which he will direct a response in the event of an incident or alarm. The other lieutenant conducts post-checks and leads the protective force from the ground in the event of an incident. (*Id.*) The two shift lieutenants swap roles each shift. (*Id.*)

In the LE and SRT departments, there is only one lieutenant on duty per shift. (R 309, 519-520) The LE duty lieutenant commands the LE SPOs directly, except in the canine division.

⁵ The terms "response force leader" and "incident commander" were used interchangeably by the witnesses. (R 309-310) Either term refers to the lieutenant responsible for directing the protective force's response to an incident that happens within their area. (R 201-202)

(R 66) The canine supervisor, a lieutenant, has a sergeant under his command, who in turn has ten handler and dog teams. (R 66, 386) Under the command of the SRT duty lieutenant are several SRT teams, each with a sergeant who supervises a tactical team of three protective force members. (R 21, 500-504, 595)

During the day, a headquarters element is also present for most of the areas/departments, consisting of a number of lieutenants and protective force members who serve as relief to the lieutenants and protective force members assigned to shift. (R 177-178) Some headquarters lieutenants provide relief – *i.e.*, supervise a shift – for a shift lieutenant six to ten times a year, and some do so as often as half the time or more that they work, depending on staffing. (R 309, 604) Headquarters lieutenants supervise the headquarters staff under them, the CAS (for H and K-Areas) and the Operational Security Specialists (“OSS”), who are not protective force members. Headquarters lieutenants, in addition to being expected to serve in shift relief, participate in various review committees that update the Security Orders and similar documents, draft revisions to their area documents following updates, recommend new procedures, and serve on hiring boards. (R 179-180, 184-189, 507-514) The canine lieutenant has the additional responsibilities of budgeting for the canine program and development of canine procedures. (R 294, 307) Lieutenants and sergeants are routinely transferred between shift and headquarters assignments, as well as among the various areas. (R Ex. E-57)

2. Authority of lieutenants to responsibly direct employees.

Lieutenants direct employees in two broad categories of work – tactical work and non-tactical work. Tactical work is absolutely crucial to the protection of the Site and is the sole reason for having a protective force. While there has never been an actual terrorist or force-based

attack on the Site, WSI frequently trains and conducts exercises⁶ designed to simulate attacks, spending four to five days per month on such training. (R 34-35, 146, 553) In fact, the most recent exercise took place just days prior to the hearings. (R 908) Non-tactical direction includes daily supervision of the protective force and non-protective force personnel assigned to the lieutenants.

A. Tactical direction.

During exercises or actual emergencies, lieutenants direct the SPOs under their command, which may range from those operating within their areas to all protective forces on the Site. In either situation – an actual event or an exercise – the lieutenant in the impacted area becomes the response force leader (“RFL”) or incident commander (“IC”). (R 35, 42-43) When that happens, the lieutenant “directs the other protective force members. He or she is not out responding themselves.” (R 162)

The company maintains response plans that guide the lieutenants, but the response plans only take you so far. (R 198, 593) Lt. Hornung testified:

A response plan will get you to a point. That is it. The response plan does not resolve the situation. It gets you to a point to get you in a standard for that type of incident. *From that point, it is the discretion of the lieutenant or sergeants to maneuver and resolve the situation.*

(R 593 (emphasis added)) The response plans only tell the protective force where to respond *initially*. (R 57). Moreover, as Lt. Kent Spruill testified, “[t]he lieutenant has the authority or the responsibility depending on the situation to redirect certain forces or – to respond to a different

⁶ The terms “exercise,” “training,” “training exercise,” “tactical exercises,” “drill,” “force on force,” or “FOF” reference training events that replicate actual security events and provide opportunities for lieutenants direct their teams to execute plans, tactics, command and control, and succession of command that will be used in an actual attack, natural disaster or other contingency. (R 33-40)

location than what's already preplanned.” (R 199) Further, where orders are ambiguous, Lt. Spruill and Petitioner's witness Lt. McIver testified that they interpret the orders and procedures and instruct the SPOs. (R 237, 736-737)

The lieutenants testified to actual instances of directing employees under them during emergencies or exercises and some of the factors they consider. Lt. Paul Gerstenberger testified that, just two days prior to his testimony, he was training a new dog and handler team, having the team observe an experienced on-duty team inspect the mail room. (R 351) During the inspection the on-duty team's dog unexpectedly responded on a package – *i.e.*, indicated the presence of explosives. (*Id.*) Lt. Gerstenberger took charge of the incident, isolating the area and interviewing the mail room handler about the package. (R 351-352) Through the interview, Gerstenberger determined the package had been delivered on a UPS truck that he had witnessed come through the barricades during a post check. (R 352) He also knew that the truck had been subject to a canine search when it came through. (*Id.*) Gerstenberger learned from the group that was to receive the package that they used the container in the past to handle explosives and evidence. (R 353) Further, he knew the first dog to hit on the package was able to detect very small quantities of explosives. (R 353-354)

Gerstenberger testified that the situation would normally call for a particular level of response, to include ordering evacuation of the building. (R 352-353) However, based on the information he had gathered, he decided a different response was warranted. Instead of ordering evacuation of the building, Gerstenberger advised management and the DOE of the situation and proceeded to direct a second dog team to search the mailroom. (*Id.*) Observing the second dog, he noted that it slowed down but did not “give a final response like the first dog.” (R 353) Based

on this information, Gerstenberger ordered the package opened and discovered “it was just envelopes and documents and stuff from that office – that worker.” (R 354)

Lts. Stephen Johnston⁷ and Gerstenberger both testified that active shooter scenarios were commonly drilled. (R 380-382, 626) In those drills, Lt. Johnston declared a phase⁸ and directed forces to the situation, trying to take out the shooter as quickly as possible. (R 626)

Among the other factors driving his response:

You would also want to consider containing the area, and that is a good use for your law enforcement units, just to make sure if he breaks out, he doesn't get outside of the area. In situations like that, you can request the helicopter just for a particular – if nothing else, to get you some extra guns in the battle and also maybe provide some spotlight looking for the suspect.

(*Id.*) Regarding calling in the helicopter, Johnston testified that he had done so in an actual incident several years prior in which there was a suspicious individual in the Site's wood line. (R 645) In that case, he called in the helicopter to provide light to the area where the individual was.

(*Id.*) Similarly, Gerstenberger testified that the RFL lieutenant makes the decision for forces to enter a building and directs the protective forces arriving in support. (R 383) He also testified that the lieutenants' command of the situation goes beyond neutralizing the shooter:

... even though the shooter is down, you still got other activities to go. . . . You got injured. You got, you know, the rest of the facility. You're still looking for site operations folks that might be, you know, hiding in the building just trying to protect themselves. So it doesn't just stop when the guy is done shooting. So you're working that whole resolution out.

(R 383)

⁷ Mr. Johnston was a lieutenant for 21 years, most recently in PPD. He transferred to SRSOC, a non-protective force position, in June 2013. (R 603-604)

⁸ A phase is an alert level, ranging from one to four, that corresponds to the level of perceived threat or security issue. (R 50, 147-148)

Lt. Hornung⁹ testified that, in SRT, he is the response force leader “[o]nce the adversary has the product . . .” (R 535) At that point, he has command of “everybody . . . Law enforcement, area personnel, SRT, PPD and on the L Area [sic], depending on the area that is being hit.” (*Id.*) As the response force leader for SRT, his job is to maneuver his forces to recover the stolen SNM. Hornung testified to factors he considers in deciding how to direct his forces – including dynamic factors, such as opposing force movements, that no response plan can script:

Well, to dictate what the adversary is doing, if he has the product and is staying within the area, the response force leader will have to determine what he needs to send in to retrieve that product back. He wants to take into consideration -- he doesn't want to send everybody in. Then he sends in a driver. He has no buffer from that product getting off the site.

So determining that, he is also maneuvering units to link up with each other to make that unit bigger. If the product does get outside the area, say the product gets out at 12:00 of the area or any clock position, he is moving that outside parameter [sic] of individuals a little bit tighter to the area where they have escaped, to take the product back.

(R 534-535) In certain areas on the Site, SRT members require authorization from their sergeants to fire machine guns. (R 556-561) Lt. Hornung testified that, if the sergeant is disabled and unable to give the order, the SRT member must seek authorization from the lieutenant, even in exigent circumstances. (R 560) The lieutenant considering that authorization takes into account the size of the area and friendly force movements within the area before authorizing machine gun fire. (R 560-561)

Lt. McIver, a witness for petitioner, testified that, during an exercise, he may or may not decide to move forces around in order to allow other players – the CAS and various SPOs, for

⁹ At the time of the hearing, Lt. Hornung had just recently been promoted from sergeant to lieutenant and had not yet conducted a force-on-force exercise as the RFL. (continued...) (... continued) However, he testified regarding his experience as a sergeant being directed by a lieutenant in those exercises. (R 497, 533)

example – to also practice how to respond. (R 743) Lt. McIver further testified that, when he is the RFL for an incident in his area, he directs the SRT units located within his area to respond. (R 745)

Q. So in the exercise, you do direct them [SRT units] where to go?

A. Yes. If I need them to – if I feel like we have a threat in a part of the area, . . . I would call that Delta unit and tell them what we have, and they should respond on that.

(*Id.*) Lt. McIver further testified that, in a particular exercise, he graded the exercise unsatisfactory and counseled the SPO participating in the training on the need to slow down and be more thorough, directing the SPO on how to perform in the future. (R 761-763)

B. Non-tactical direction.

In addition to tactical exercises and emergencies, lieutenants direct their subordinates in day-to-day matters. Lieutenants conduct a muster¹⁰ at the beginning of shifts and also conduct post checks during the shift. (R 157, 183, 347, 387, 499, 501, 605, 606) During both muster and post checks, many of the things covered are rote, but some require independent judgment and discretion, such as determining fitness for duty or sending an employee for a for-cause drug or alcohol test.

Lt. Paul Gerstenberger testified that the things the lieutenant is looking for with each employee prior to arming them for the day and sending them to post is “for anything that’s aberrant, something bothering the employee or he’s over-vocal or whatever. He just doesn’t seem to be normal for that person’s demeanor. Then of course if you smell something, the guy is wobbling, unsteady on his feet.” (R 349) In that case, the lieutenant does not allow the employee

¹⁰ “Muster” is the pre-duty assembly of on-coming shift of SPOs for inspection, communication of the day’s activities, and issuing weapons.

to be armed and may send him for occurrence testing for drugs and alcohol. (*Id.*) In addition, throughout the shift, Gerstenberger testified that lieutenants are expected to monitor their protective force members, including for alertness. (R 350) Further, if the lieutenant determines that the employee is performing inadequately during a post check, he will correct the employee. (R 608-609) The lieutenants testified that they frequently deal with alarms going off in various areas of the facility. Alarms, also called “10-94s,” typically require a predetermined response. (R 234, 657) The SPOs responsible for responding to the given alarm will respond upon being notified by the CAS of the alarm. (*Id.*) However, the uncontradicted testimony of Lts. Spruill and Gerstenberger and Petitioner’s witness, CAS Operator Martin Hewitt, was that alarms can only be cleared – *i.e.*, a determination made that no further action is required, or what further action is required – *by the lieutenant in charge of the area.* (R 238, 310-314, 962) That determination is made by the lieutenant based on what is reported back to him by the individuals on scene observing the area in which the alarm is located. (R 311-312) In particular, the lieutenant is looking for evidence of intrusion and whether there are others factors that could have tripped the alarm, such as a thunderstorm, a power surge, or animal. (R 312, 681)

Lieutenants also conduct on-the-spot corrections and provide or arrange for training in areas they believe need improving. Lt. Spruill testified that he recently stopped a SPO filling in on a post under his command. The SPO was inspecting vehicles at an entry point into the area. He was not properly inspecting the vehicle, and Lt. Spruill instructed the SPO on the proper way to perform the inspection. (R 213) After doing that, Spruill contacted the employee’s regular supervisor, another lieutenant, who decided to conduct extra training for his SPOs on inspections. (R 213-214) Spruill also testified that he instructed his CAS operators to maintain

radio discipline by cutting out unnecessary information and focusing on just information needed for the situation. (R 181-182)

As is more fully explained in subsection 3, *infra*, lieutenants direct their OSS's in the scheduling of SPOs and the adjustment of those schedules. Thus, while the schedule is put together by their OSS, the lieutenant must approve the schedule before it can be published. (R 517) As Lt. Hornung testified, "[t]he OSS does nothing without my permission." (R 579) Lt. McIver also testified that, when there were requests for time off, he was responsible for approving his OSS's proposed scheduling of that time off. (R 769-771) McIver further testified that, while his OSS will generally take the call from a SPO needing to be late and needing coverage, the OSS gets that approved by the lieutenant. (R 718-720) If McIver believes the SPO is abusing the privilege, he instructs the OSS to let him speak to the SPO and verbally counsels the SPO. (*Id.*) He could also ask for a doctor's note.¹¹ (*Id.*)

C. Responsibility for subordinates' performance.

Not only are lieutenants responsible for overseeing the work of their subordinates and directing corrective training, they are responsible when their subordinates fail to carry out their duties. WSI introduced evidence of a lieutenant suspended for 45 days and then demoted to a non-protective force position for failing to ensure that his SPOs had replaced door seals on a door that was breached during an exercise. (R Ex. E-23) Captain LeRoy Benjamin testified that, when exercises are to take place in an area, the lieutenant must ensure various employees of Savannah River Nuclear Solutions ("SRNS"), the prime contractor on the Site, are notified. (R

¹¹ McIver testified it was not his practice to ask his SPOs for a doctor's excuse because he believed that a pattern of tardiness was simply abuse by the SPO. However, McIver agreed that he had the authority to ask for doctor's note if he decided he needed to do so. (R 720-721)

423-424) In this case, the Shift Operations Manager, called the “SOM,”¹² must be notified of the doors within the facility that would be used during the exercise. (R 429-430, Ex. E-23) More importantly, when a door is breached, the SPOs must reseal the door following the exercise. (R 424-425) In the exercise in question, the SOM was not notified and, as a result, no one was present from radiological control to ensure that there was no contamination of “clean” areas due to the breach. (R 427) Further, the SPOs failed to reseal the door, and they did not discover their error on routine patrols after return to normal conditions, resulting in its going unsealed until the error was discovered by the next shift. (*Id.*) Not only were the SPOs disciplined, but so was the lieutenant, for “[n]ot ensuring that the door was resealed and placed back in its original condition [which] is a duty of all Shift Lt’s when MAA doors are used.” (R Ex. E-23, p. 3)

3. Authority of lieutenants to assign subordinates.

Lieutenants assign their subordinates on a daily basis through setting and changing, or approval of setting and changing, their schedules. Lieutenants are responsible for approval of scheduling and time off of the employees under them. Lt. Gideon Hornung testified that part of his daily duties was to ensure vacation time was properly recorded for anyone taking vacation and also ensuring their position was filled on the shift. (R 500) Typically, the schedule is put together by the OSS, an administrative assistant who is supervised by the lieutenant, and the lieutenant must approve the schedule before it can be published. (R 517) Lt. Hornung testified that “[t]he OSS does nothing without my permission.” (R 579) In addition, Hornung testified that he troubleshoots the schedule when problems arise. (*Id.*) Further, Hornung determines whether to grant vacation requests submitted by his employees, basing his decision on variables such as staffing requirements and how many others have already requested the day off. (R 518) Hornung

¹² The SOM is not a WSI employee. He works for the prime contractor and is in charge of the general operations in his area. (R 429-430)

also has discretion to approve personal time off submitted on short notice if he determines that there is adequate staffing. (R 518-519)

Petitioner's witness Lt. Darren McIver testified that, although his OSS handled the mechanics of scheduling a vacation, Lt. McIver was responsible for approving the OSS's proposed scheduling. (R 769-771) McIver also testified that, while the OSS will generally take the call from a SPO needing to be late and needing coverage, the OSS gets that approved by the lieutenant. (R 718-720) If McIver believes the SPO is abusing the privilege, he instructs the OSS to let him speak to the SPO and verbally counsels the SPO. (*Id.*)

Lt. Stephen Johnston testified that, within PPD, he reviewed the post rotation schedule produced by the OSS to determine if it was correct. (R 642) He also deviated from the schedule when they needed to pull SPOs from other areas to work in PPD, due to the need to station them at a post that required relatively less experience to work. (R 643)

Petitioner's witness Lt. Alex Neupert testified that when there was an inconsistency in the scheduling and time records, the lieutenant was responsible for sorting it out by reviewing the records and correcting them to reflect the employees' time accurately. (R 792-793) Neupert also corroborated Johnston's testimony concerning deviations from post rotation schedules. (R 827-829)

In addition to time off, Lt. Hornung testified the lieutenants can require an employee to report for work. If there is a need for overtime, Hornung testified that he will first ask for volunteers. (R 550) If no one volunteers he will turn to a list of employees ranked by how much overtime they worked last month and in the current month. (*Id.*) Hornung can require the "low man" on the list to work the overtime, but he does not have to. (R 575-576) Instead, if the low

man has a valid reason for not working, Hornung has discretion to move down the list and take the next available employee. (R 576)

When employees will be late for work, they are required to gain approval from their lieutenants. In fact, employees have been disciplined for reporting to the OSS that they will be late instead of seeking approval of the lieutenant to be late. (R Ex. E-51)

Lt. Hornung testified that, in addition to training required by WSI or DOE, he assigns his teams to engage in training in matters that he observed need work through his involvement with his team and as part of the opposing force in exercises conducted against other teams. (R 579-583) He coordinates the training with the lieutenants in the areas he intends to train with, or they may approach him about training they want to conduct. (*Id.*) Lt. Hornung also determines whether or not to have the helicopter involved in training based on operational and logistical needs, such as maintenance needs, whether the helicopter is needed for non-training overflights, or has already been flown multiple times that day. (R 582) If there are multiple training exercises going on and requesting the helicopter, the lieutenant has discretion to select from among the exercises that will have use of the helicopter based on which one he wants the helicopter involved in. (*Id.*)

4. Authority of lieutenants to discipline.

Lieutenants are authorized by WSI's discipline policy and the Job Task Analyses to issue discipline at least up to written warning. (R Ex. E-9, p. 8; Ex. E-14, p. 15; Ex. E-25, p. 11) In addition, lieutenants investigate contested discipline and recommend discipline to captains and majors based on their findings. (R 369-377)

Upshaw testified that the discipline policy allows for the employee to contest the discipline for serious offenses by requesting a hearing. (R 82-83) For less serious offenses a

hearing may not be conducted. (R 83) Similarly, if the employee does not contest the discipline, no hearing will be held. (*Id.*) When discipline is necessary, a lieutenant will fill out a Notice of Pending Discipline, setting forth the reason for the discipline. (R Ex. E-10) If a hearing is requested, a lieutenant will be assigned to investigate the matter and make a recommendation on the discipline to be imposed. (R 85, Ex. E-10)

Several examples of the lieutenants' role in WSI's progressive disciplinary process are in the record. Employer's Exhibit 10 is a Notice of Pending Discipline issued to a security officer in PPD. (Ex. E-10, p. 1) The incident was investigated by Lt. Michael Willis. (*Id.*, p. 4) In the incident in question, the SO allowed an improperly badged foreign national onto the Site. (*Id.*) Lt. Willis investigated the matter and determined that the matter fit a violation of two work rules with nearly identical definitions but differing levels of severity. (*Id.*, p. 5) Because the foreign national had only accessed the general Site, however, the lieutenant determined the lesser of the two penalties (written reprimand) was warranted. (*Id.*) Subsequently, the SO was in fact issued a written reprimand. (*Id.*, p. 2)

Employer's Exhibit 11 is an example of a relatively low-level disciplinary matter. There, the SPO overslept and missed weapons training. (R Ex. E-11) The same lieutenant wrote the Notice of Pending Discipline, conducted the investigation and issued the written warning. (*Id.*)

Lt. Gerstenberger also testified concerning his role in discipline. In one instance, he disciplined a handler under him for taking the canine vehicle off road, resulting in the vehicle's getting hung up and causing \$2,000 in damage. (R 334-335, 364-365, Ex. E-20) Gerstenberger reviewed the facts, interviewed the employee and spoke with the investigating traffic officers in determining that the handler was negligent and that the discipline warranted written reprimand. (R 334-335)

In a subsequent incident involving the same employee, Gerstenberger was not the issuing lieutenant but instead the investigating lieutenant. (R Exs. E-21, E-22) There, the handler was notified of a tanker needing inspection. (R Ex 22) However, the handler was the only canine handler on duty, and arguably conflicting instructions required that he complete feeding and care of the canines in time enough before the next shift to avoid “bloat” from being overworked too close to the time they were fed. (*Id.*, p. 3) When the shift lieutenant sent another SPO to determine where the handler was, the handler told the SPO, apparently sarcastically, that he may just let the midnight shift handler do the inspection. (*Id.*, pp. 6-7) Subsequently, the shift lieutenant personally went to the canine runs and told the handler he had 10 minutes to get to the barricades and inspect the truck.¹³ (*Id.*, p. 5-6) The lieutenant believed that the handler’s response had been inappropriate and that he had no intention of inspecting the truck. (*Id.*)

Gerstenberger concluded in his investigation, in which he interviewed the shift lieutenant, the handler, the SPO sent to get the handler, and the SRSOC (dispatch) employee, that the handler’s sarcasm may have given the impression he did not intend to inspect the tanker, but that he nevertheless intended to inspect it when he completed his canine care duties. (*Id.*, p. 8) He further determined that the handler should not have given completion of the canine care duties precedence over the inspection. (*Id.*, pp. 8-9) According to the progressive discipline policy, the infraction should have led to suspension due to the prior discipline Gerstenberger had issued the employee. (R 375; Ex. E-22, pp. 8-10) However, based on the circumstances, Gerstenberger believed lesser discipline was warranted because he did not believe the handler had refused to inspect the truck. (*Id.*) Gerstenberger testified that, while management was initially hesitant to

¹³ The shift lieutenant’s order to the canine handler is further evidence of the supervisory indicium of responsible direction.

reduce the discipline because they did not want it to set a precedent with the union, he was able to get the union's agreement and management concurred in his recommendation. (R 376-377)

Petitioner's witness Sgt. Fish was disciplined by Lt. Dale Deal. (R. Ex. E-51) In that case, Fish had informed the OSS that he would be late to work. (*Id.*) Deal issued Fish a written warning for "fail[ing] to gain supervisory approval for arriving late for work," noting that he "did not request to speak with the on duty Lieutenant." (*Id.*)¹⁴

Lt. Hornung and Petitioner's witness Lt. Neupert both testified that they excused tardies that would otherwise result in discipline. Tardies lead to discipline under WSI's policies. (R Ex. P-1, p. 1) Specifically, "[f]our attendance discrepancies within a 90-day period" lead to a written warning, which in turn forms the basis for more severe discipline.¹⁵ (*Id.*) Lt. Hornung testified that if an employee had a legitimate excuse – he gave the example of a flat tire – he considered the reason, the employee, and his history of past tardies and determined whether to excuse the tardy. (R 540) Petitioner's witness Lt. Neupert also testified that, in some circumstances – he cited "act of God" or an accident on the highway – he excused tardies. (R 818-819) Lt. Neupert also testified that he could grant pay in lieu of taking the time unpaid even when he did not excuse the tardy. (R 819) Similarly, Lt. Gerstenberger testified to an example in which he had excused a tardy that would have otherwise counted against one of his subordinates. (R 341-342) In that case, the employee had accidentally left his Site credentials in a car he had put in the shop and would be delayed getting to work while he retrieved them. (*Id.*)

¹⁴ The discipline for failure to gain "supervisory approval" for the tardiness from the "on duty Lieutenant" further supports the lieutenants' authority to assign and/or responsibly direct.

¹⁵ A written reprimand results from further written discipline "while a written warning is active in an employee's file." (R Ex. P-1, p. 1, item 16) And a suspension results from discipline "while a written reprimand is active in an employee's file." (*Id.*, p. 2, item 31) Finally, termination results from the issuance of discipline "while a suspension is active in an employee's file." (*Id.*, p. 3, item 44)

In addition to formal discipline, lieutenants issue corrective counseling. (R Ex. E-9, p. 4; Ex. E-16) These informal disciplines form the basis of more severe progressive discipline. (R 250-251, Exs. E-16, E- 9) Corrective counseling is informal, but is designed to correct matters that, “if left uncorrected, could lead to violations of work rules or substandard performance.” (R Ex. E-16) The discipline policy further provides, “[c]orrective counseling is the lowest level of informal discipline intended to provide the employee initial notice of a minor infraction or performance issue *that may result in a higher level of formal discipline if repeated.*” (R Ex. E-9 (emphasis added)) These corrective counselings are not reviewed by the lieutenants’ superiors and are kept as part of the lieutenant’s file on his employee for up to one year. (*Id.*) While the lieutenants testified that they only rarely issued written corrective counselings, there is uncontradicted evidence in the record that they do, in fact, issue them. Employer’s Exhibit 16 contains seven examples of corrective counselings issued by lieutenants ranging from as recently as last summer back to 2011. (R Ex. E-16)

In addition to the more traditional discipline discussed above, lieutenants are required by federal regulations to evaluate their protective force subordinates’ ability to function in their high-stress roles annually and any time they believe an evaluation is warranted. (R Exs. E-55, 56) These evaluations are part of the DOE’s Human Reliability Program (“HRP”) found at 10 CFR § 712.

The lieutenant must rate the SPO’s overall job performance and determine whether the SPO had any incidents in which he “has displayed poor judgment or inappropriate responses while on the job.” (R Exs. E-55, 56) The lieutenant must also determine if the SPO had difficulty coping with stress. (*Id.*) A check list of potential problems to note and report is provided; however, the form does not prescribe or even suggest for the lieutenant how to determine the

ultimate question on the form – “In your opinion, should this employee be allowed to continue his/her HRP duties?” (*Id.*) If the lieutenant believes the employee should not be allowed to continue, he must immediately remove the employee from the HRP position. 10 CFR § 712.13(d).

Petitioner’s witness Lt. Vince Harmon testified to the consequences that flow for an SPO from the lieutenant’s HRP evaluations. In the case of Officer M¹⁶, Harmon recommended that the employee be allowed to continue performing HRP duties at his annual evaluation. (R 1003-1004, Ex. E-56) However, three months later Lt. Harmon filled out another, non-routine, HRP form on the same employee, this time recommending that he be removed from his HRP duties. (R 1005-1006, Ex. E-55) While Lt. Harmon was uncertain if the incident described in the form was the reason for the employee’s temporary removal from HRP, or whether it was a different incident he remembered being concerned about, Harmon confirmed that the individual was removed from his normal HRP duties. (R 1001-1002, 1005) Although WSI does not consider the HRP process to be disciplinary, the result is the same.¹⁷ As a result of the lieutenant’s determination, the employee’s terms and conditions of employment were materially altered in that he was temporarily disarmed and removed from regular duty.

ARGUMENT

1. Contrary to the RD’s Decision, lieutenants responsibly direct their employees.

The RD applied incorrect legal standards and made factual findings without support in

¹⁶HRP Evaluation forms are covered by the Privacy Act and should not be released without redaction of identifying information. Accordingly, the employee’s initial is used in this brief to protect the employee’s privacy.

¹⁷ To the extent the Board may determine the HRP evaluations are not discipline, they certainly qualify as assignment because the result of the lieutenant’s decision is removal from HRP, necessarily requiring reassignment to an unarmed post.

the record in determining that the lieutenants do not responsibly direct their teams. Accordingly, the RD's Decision must be reversed.

“If a person on the shop floor has ‘men under him,’ and if that person decides ‘what job shall be undertaken next or who shall do it,’ that person is a supervisor, provided that the direction is both ‘responsible’ . . . and carried out with independent judgment.” *Oakwood Healthcare, Inc.*, 348 NLRB 686, 691 (2006). The touchstone of “responsibility” is “accountability,” “such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly.” *Id.* at 692. Further, the standard for determining if the direction is carried out with independent judgment is no different than for determining if any of the other indicia of supervision was carried out with independent judgment. *Id.*; see also, *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 715-16 (2001).

A. Tactical Direction.

Regarding tactical direction, the most relevant case to the one at bar is *Fluor Hanford*, 19-RC-15019 (Nov. 6, 2007), because it comes from another federal site within the DOE complex.¹⁸ The RD relied heavily on *G4S Regulated Security Solutions*, 358 NLRB No. 160 (2012), in finding – as did the Petitioners in arguing – that the lieutenants were not supervisors.

¹⁸ There are no reported Board cases addressing supervisory status of protective force supervisors within the DOE complex, and the *Flour Hanford* decision appears to be the only RD decision on the topic. Throughout the complex, protective force supervisors are considered by DOE and the security contractors as statutory supervisors, and are part of the DOE's strike contingency force. (R 93-94, 630-631) The strike contingency force is necessarily made up of non-bargaining supervisors. See e.g., *Burns Int'l Security Servs., Inc.*, 278 NLRB 565, 571 (1986) (“Connecticut Yankee's site security plan includes sergeants as part of the contingency security force; under Nuclear Regulatory Commission regulations unit employees may not be part of that force.”) It is responsible for providing security in the event of a strike by the non-supervisory protective forces, which are unionized throughout the complex. This case has implications that reach far beyond the parties, impacting DOE contractors' ability to provide a strike contingency force and, ultimately, impacting the national nuclear security.

As an initial matter, that case was decided by an improperly constituted recess-appointment board and, therefore, is not binding precedent. *NLRB v. Noel Canning*, --- U.S. ---, 199 LRRM 3685 (2014). More importantly, the operations of a privately-owned nuclear power plant, such as that in *G4S Regulated*, do not come close to the critical nature of federal DOE sites like SRS. Of particular importance is the fact that nuclear power plants do not use weapons grade nuclear material. By contrast, storage and production of weapons grade nuclear material is the reason SRS exists – and it is stored and produced by the tons. (R 22-23) The consequences that flow from a lapse in security by the lieutenants, who lead all of the Site’s security responses, are grave beyond imagination and far worse than would result from a lapse at a power plant. The gravity of the consequences of such a lapse must be taken into account in determining supervisory status. *Maine Yankee Atomic Power Co. v. NLRB*, 642 F.2d 347, 349 n.4 (1st Cir. 1980) (“The scale of the employer’s potential exposure to loss and liability in event of accident has some bearing on the extent of the responsibility assumed by the employees in question, and the reasonableness of the Company’s insistence that such employees are, and should be, supervisory, *i.e.*, exclusively identified with the interests of the employer.”).

The present case is also readily distinguishable from cases like *Brusco Tug and Barge, Inc.*, 359 NLRB No. 43 (2012), relied on by the RD. In *Brusco Tug*, the Board determined that the fact that tug boat crewmembers gave instructions to other crewmembers during emergencies on board the vessel did not make them statutory supervisors. Critically, however, the tug boat crew’s job is, simply, to drive the boat. Emergency response is not a regular part of their job. By contrast, emergency response is the primary job of WSI’s protective forces, and the Company frequently trains and conducts exercises designed to simulate emergencies. (R 34-35, 146) WSI had just conducted an exercise days prior to the hearings. (R 908)

Applying the Board's *Oakwood Healthcare* opinion, the Regional Director for the 19th Region held in *Fluor Hanford* that lieutenants at DOE's Hanford Site possessed supervisory authority where they directed their teams in emergency situations. *Fluor Hanford*, p. 10. There, the RD cited testimony concerning a lieutenant's response to an auto accident, in which the lieutenant had his men set up a road block and divert traffic, assigning tasks to "whoever could get there the quickest." *Id.* 4. The RD held:

. . . the emergency encountered by [Lt.] Cantu required him to evaluate the emergency by discerning and comparing the incident with an appropriate response. He had no checklist to consult and, instead, relied on his experience and training in devising a plan of action that he then used to direct his team during the emergency. I find the independent judgment required of shift lieutenants in directing their teams when faced with certain kinds of emergency situations sufficiently demonstrates 2(11) supervisory authority.

Id. Similarly, in *Pinkerton Government Services*, 10-RC-15511 (May 2, 2005), another guard case, but one involving the TVA's Watts Barr nuclear power plant *and decided by Region 10*, the RD held that sergeants who conducted post-checks, evaluated whether officers possessed required equipment, determined if the officers were properly performing their duties and evaluated the officers' fitness for duty responsibly directed those officers. *Id.* p. 5.; *see also*, *Burns Int'l Security Servs., Inc.*, 278 NLRB 565, 570 (1986) (sergeants that conducted post checks, issued weapons and lead response teams were supervisors).

In the case at bar, there is overwhelming evidence of responsible direction and independent judgment. During exercises or actual emergencies, lieutenants direct the SPOs under their command – ranging anywhere from those operating within their areas to all protective forces on the Site – as the response force leader. (R 35, 42-43) The lieutenant directs his protective force members from a war room. (R 162, 203) "He or she is not out responding themselves." (R 162) Incidents and exercises to which the lieutenants testified leading responses

included intruders (R 645), active shooters (R 626), bombs or explosives (R 351-354), and force-on-force attacks against areas or shipments of special nuclear material. (R 541-543) In exercises, which occur frequently, lieutenants will determine which of their forces to deploy in order to allow various segments of their operation to practice how to respond. (R 743) Lieutenants also correct¹⁹ their forces when necessary during exercises and training in order to improve their performance or bring it in line with expectations. (R 761-763)

The Supreme Court and the Board have both rejected the RD's line of reasoning that the lieutenants' direction of their subordinates lacks independent judgment because it was based on their "expert knowledge" and "intense training."²⁰ *Kentucky River*, 532 U.S. at 715-16; *Oakwood Healthcare*, 348 NLRB at 692. Thus, all that remains to support the RD's conclusion that the lieutenants are not supervisors is his incorrect factual determination that the lieutenants' direction is based on precise application of policy. This finding is not supported in the record.

The testimony and evidence was that the company's response plans do not dictate how the lieutenants resolve incidents – real or simulated. (R 198, 593) Rather, the response plans only tell the protective force where to respond initially. (R 57). The lieutenant must then use his judgment to direct his forces to resolve the threat. (R 593) The lieutenant must consider whether to authorize fire in secure areas, considering the size of the area and friendly force movements (R 560-561); whether to request the helicopter to help contain a shooter or intruder, taking into account the need for aerial weaponry, or lighting at dark (R 626); and which forces to direct to which locations, accounting for the availability of other forces, the adversary's movements, the proximity of escape routes and his estimation of his forces' own ability to contain the adversary

¹⁹ Such correction is an element of responsible direction. *See Croft Metals, Inc.*, 348 NLRB 717, 722 (2006) (evidence supported finding of direction where, among other things, crew leader corrected improper performance).

²⁰ Decision, p. 17.

to an area. (R 534-535) Further, if the lieutenant believes a different response is called for, he has authority to deviate from the response plan's initial battle stations altogether. (R 199) When an incident is contained, the lieutenants must direct operations to re-secure the area, locate Site operations personnel and ensure the injured are treated. (R 382) Lieutenants also interpret ambiguous orders for their subordinates. (237, 736-737)

Lt. Gerstenberger's decision not to follow the standard protocol and evacuate a building following detection of explosives by a canine team within the building was a prime example. (R 351-354) Like Lt. Cantu in *Fluor Hanford*, Gerstenberger had no check list to follow for his response but had to make judgment calls based on his knowledge of his teams' canines and the information he gathered about the suspected package. (*Id.*) Ultimately, Gerstenberger had to weigh the disruption of evacuating the building – which was the standard protocol – against his assessment of the threat, relying only on his own experience, knowledge and judgment.

Besides lacking any support in the record, the assertion by the RD and Petitioners that the lieutenants' reactions to the myriad of security situations that confront them – both real and simulated – are scripted by the response plans strains all bounds of credulity. No amount of procedures could dictate the responses to the various scenarios facing the protective force on a 310-square-mile Site housing weapons grade nuclear material. And even if it were possible to write the necessary tomes, the speed and fluidity of warfare do not permit the lieutenants and their protective force subordinates the luxury of calmly looking up procedures while being attacked.

Even more fantastical is the idea that, after hours, on weekends and holidays and during inclement weather – all times when the lieutenants are the highest ranking officers on Site and are in charge (R 41-42, 519-520) – there are no statutory supervisors at a Site chock full of

weapons grade nuclear material. *See Glenmark Associates, Inc. v. NLRB*, 147 F.3d 333, 341 (4th Cir. 1998) (“We cannot fathom . . . that for more than two-thirds of the week at a nursing home providing twenty-four hour care, where patient conditions can change on a moment’s notice, there is no one present at the facility exercising independent judgment . . .”). While there is evidence that lieutenants are expected to notify their superiors of problems that occur during off hours, there is no evidence that their superiors, who are not present, then take charge of the situation. Mere notification is not inconsistent with the exercise of independent judgment. *See NLRB v. Quinnipiac College*, 256 F.3d 68, 75 (2nd Cir. 2001). Fortunately, the Board need not entertain such fantasy because the record is replete with examples of lieutenants’ authority to direct their forces using independent judgment.

B. Non-tactical direction.

Equally as important as the tactical and emergency supervision by lieutenants is their supervision of their teams’ day-to-day activities to help prevent emergencies. Among these activities are muster and post-check fit-for-duty assessments, coaching on proper procedure, spot-training, and documentation of disciplinary offenses. All are activities that have been found to confer supervisory status. *Pinkerton Government Services*, p.5; *Burns Int’l Security Servs., Inc.*, 278 NLRB at 570.

Lieutenants conduct a muster at the beginning of shifts and also conduct post checks during the shift. (R 157, 183, 347, 387, 499, 501, 605, 606) During both muster and post checks, some of the things covered are routine, but some require independent judgment and discretion, such as determining fitness for duty or sending an employee for a for-cause drug or alcohol test.

Testimony indicates the factors considered and judgments that must be made include determining “anything that’s aberrant, something bothering the employee or he’s over-vocal . . .

He just doesn't seem to be normal for that person's demeanor. Then of course if you smell something, the guy is wobbling, unsteady on his feet." (R 349) Then the lieutenant must determine if what he observed is serious enough that he should not allow the employee to be armed, or to send him for occurrence testing for drugs and alcohol. (*Id.*) During the shift, lieutenants monitor their subordinates' performance. (R 350) If the lieutenant determines that the employee is performing inadequately during a post check, he will correct the employee and may conduct on-the-spot or remedial training. (R 181-182, 213-214, 608-609) Such correction also includes handling SPOs they believe are abusing short-notice call-outs or tardy overrides, taking into consideration staffing, the employee's usual attendance and whether there is a pattern of absences. (R 540, 718-720)

In addition to muster, post-checks and attendance issues, lieutenants must direct their SPOs in response to frequent alarms going off in various areas of the facility. Alarms, also called "10-94s," typically require a predetermined response. (R 234, 657) However, the uncontradicted testimony of WSI's and Petitioners' witnesses was that a determination that no further action is required, or what further action is required can only be made by the lieutenant. (R 238, 310-314, 962) The lieutenant must consider the information reported to him by his SPOs, who are on scene observing the area in which the alarm is located, and the likelihood of some explanation for the alarm other than human intrusion. (R 311-312, 681)

C. Responsibility for subordinates' performance.

The record evidence is that lieutenants are held accountable for their subordinates' failures. "[T]o be 'responsible,' the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the

employee are not performed properly.” *Oakwood Healthcare*, 348 NLRB at 691-92. In the context of DOE security forces, responsibility has been found where lieutenants were disciplined for not enforcing the employer’s rules. *Fluor Hanford*, p. 11.

Here, WSI presented evidence that lieutenants are held accountable for their subordinates’ failures. WSI suspended and then demoted a lieutenant whose SPOs failed to replace door seals on a door that was breached during an exercise. (R 423-430, Ex. E-23) Not only did the lieutenant’s SPOs fail to reseal the door, but they failed to notice their error during routine checks for the remainder of the shift, because the error was not caught and corrected until the next shift. (*Id.*) Contrary to the RD’s finding that the lieutenant was disciplined for his own mistake (Decision, p. 20), the lieutenant was disciplined because his subordinates failed to do their job properly. Further, both the testimony of witnesses and WSI’s policies show that WSI expects its lieutenants to enforce its rules by taking corrective action when lieutenants observe failures in performance. (R 181-182, 213-214, 608-609, Ex. E-9, p. 8; E-14, p. 15; E-25, p. 11) *See Oakwood Healthcare*, 348 NLRB at 695 (analyzing whether charge nurses had authority to take corrective action in determining whether they engaged in responsible direction).

2. The RD incorrectly held that the lieutenants do not assign employees.

The RD’s determination that the lieutenants do not assign employees is legally and factually flawed on the record evidence and must be overturned. “The ordinary meaning of the term ‘assign’ is ‘to appoint to a post or duty.’” *Oakwood Healthcare, Inc.*, 348 NLRB at 689 (quoting *Webster’s Third New Int’l Dictionary* 132 (1981)). Accordingly, “[t]he assignment of an employee to a certain department (e.g., housewares) or to a certain shift (e.g., night) or to certain significant overall tasks (e.g., restocking shelves) would generally qualify as ‘assign’ within [the Boards’s] construction.” *Id.* In the context of plant guards at a nuclear facility,

protective force supervisors that made post assignments and assigned officers to training were considered statutory supervisors. *Burns International Security Servs., Inc.*, 278 NLRB at 571; *Pinkerton Government Servs.*, p. 10.

As noted in WSI's Petition for Review, the RD appears to have confused the indicia of "assign" and "responsibly direct." The Decision sets up the strawman by reciting a litany of supervisory direction activities by the lieutenants that have nothing to do with assigning, only to knock him down by saying those activities, in fact, have nothing to do with assignment. As discussed above, all of those activities support a finding of responsible direction. *Oakwood Healthcare* 348 NLRB at 689-90 (*ad hoc* instructions on performance of discrete tasks is directing, not assigning). Viewed against the Board's teachings in *Oakwood Healthcare*, it is clear, however, that the lieutenants also assign their employees. The record is replete with testimony that the lieutenants are responsible for approval of the setting and changing of the schedules of their SPOs. (R 500, 517-519, 718-720, 769-771) Lts. Hornung and McIver both testified that their OSS, an administrative employee they supervise, puts the schedule together for their review. The schedule must then be approved by the lieutenant before it is published. (*Id.*) Contrary to the RD's Decision, the fact that the lieutenants are assisted in the more routine aspects of scheduling by an administrative employee under their command supports rather than undercuts a finding of supervisory status.

If a problem with the schedule arises, such as an improper rotation among the crews, Lt. Hornung testified that he troubleshoots that problem. (R 517) The lieutenants also determine whether to grant vacation or approve personal time off submitted on short notice. (R 518-519, 718-720) Employees who do not gain approval from their lieutenant to be late for work are disciplined. (R Ex. E-51)

Lieutenants have discretion to deviate from the schedule when they are short-staffed and need to pull in others to work. (R 642, 827-829) And they can require off-duty employees to report for work when they are short staffed. (R 575-576) In addition, lieutenants have broad discretion to assign their SPOs to training. (R 579-583) If a lieutenant judges an employee unfit for duty, he may send the employee for a for-cause drug screen (R 349), relieve him from duty (R 349, 981²¹), or cause him to be reassigned to a non-HRP position. (R Exs. E-55, 56)

The record also amply demonstrates that the lieutenants assign their personnel using independent judgment. “[T]o exercise ‘independent judgment’ an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” *Oakwood Healthcare*, 348 NLRB at 692-93. Where there is only one self-evident choice, or the assignment is made solely on the basis of equalizing the workload, there is no independent judgment. *Id.*, at 693. On the other hand, people are “not widgets” and where the supervisor assesses the individual and the employer’s need, he is exercising independent judgment. *Id.*, at 695-698. In the context of security forces, the authority to override predetermined scheduling, to allow employees to leave work early, to pull employees from other shifts, or call in employees when needed constitutes the use of independent judgment where those decisions are made using the supervisor’s expertise and experience. *Quinnipiac College*, 256 F.3d at 75-76. Further, “the existence of governing policies and procedures and the exercise of independent judgment are not mutually exclusive.” *Id.* (citing, *Kentucky River*, 532 U.S. at 713).

²¹ Although it was a sergeant who relieved the employee of duty in the example at 981, the undisputed testimony was that sergeants and lieutenants exercised the same authority with respect to SPOs in the PPD area. (R 453, 462)

Here, the record testimony was that lieutenants must handle problems with the schedule when they arise. (R 579) Further, lieutenants determine whether to grant vacation requests based on staffing requirements and how many others have already requested the day off, and may approve personal time off submitted on short notice if they determine that there is adequate staffing. (R 518-519) Lieutenants have discretion to deviate from call lists for overtime where they believe the employee who is up for mandatory overtime has a valid excuse for not working the assignment. (R 575-576) Similarly, absences and tardies require approval of the lieutenants. (R Ex. E-51) If the lieutenant determines that the SPO is abusing use of personal time off on short notice, he may disapprove of the absence, ask for a doctor's note, or counsel the SPO on the need to be at work on time. (R 718-720)

When adequate staffing simply cannot be obtained, the lieutenant can drop a post, which requires him to determine which post to drop and whom to assign to cover the remaining posts. (R 577-578) To avoid dropping a post, the lieutenant may pull SPOs from other areas to cover the post and must determine at which post to station the replacement SPOs due to their relative inexperience in the area. (R 642-643, 827-829)

In addition to training required by WSI or DOE, lieutenants have authority to and do assign their teams to engage in training in matters they have observed need work. They determine the matters on which to train through involvement with the team and as part of the opposing force in exercises conducted against other teams. (R 579-583) Such training is coordinated by the lieutenants with other lieutenants over the areas they intend to train with. (*Id.*) Further, the SRT lieutenant determines whether or not to have the helicopter and its crew involved in training based on a variety of factors, including scheduled overflights, maintenance needs, the relative importance of the helicopter to the training, other exercises requesting the

helicopter, and how many times the helicopter has already flown that day. (*Id.*) If a lieutenant observes conduct by an SPO that goes beyond a simple need for more training and exhibits a need for review by DOE's HRP program, the lieutenant removes the employee from the armed HRP post and completes an evaluation. (R 1001-1006, Exs. E-55, 56) There is no policy or rule that governs the lieutenant's determination, and he must use his judgment and experience as a protective force supervisor. (Exs. E-55, 56)

3. The RD's determination that lieutenants do not discipline, or effectively recommend discipline, is in error.

The RD erred in determining that the lieutenants do not discipline or effectively recommend discipline. Within the context of a paramilitary organization in the DOE complex, lieutenants' authority to issue discipline, their participation in formal investigations and their making recommendations of discipline all demonstrate authority to discipline or effectively recommend discipline. *Fluor Hanford*, pp. 12-13.

The authority of the lieutenants to issue discipline is not seriously contested in the record. WSI's policies clearly provide that lieutenants may issue informal corrective counseling and written warnings on their own authority. (R Ex. E-9, p. 5) The Job Task Analyses that set out the various functions of the lieutenants' jobs also clearly give them authority to administer discipline, up to written reprimands. (R Ex. E-14, p. 15) The record contains evidence of the lieutenants' exercise of their authority. Seven examples of corrective counseling issued by lieutenants are included in Employer's Exhibit 16. Corrective counselings are not reviewed by superiors and are kept as part of the supervisor's file for up to one year. (R Ex. E-9) Further, corrective counselings are not referred to in, or governed by, WSI's work rules. (R Ex. P-1) Accordingly, their issuance is entirely at the discretion of the lieutenant.

Corrective counselings form the basis of formal discipline if the conduct is repeated. (R 250-251, Ex. E-16, p. 4) *See Oak Park Nursing Center*, 351 NLRB 27, 28 (2007) (authority to discipline shown where supervisor may issue discipline that forms basis for higher levels of discipline). Contrary to Petitioner's arguments and the RD's Decision, the Company *does* consider corrective counseling to be discipline. The RD based his contrary finding solely on the stale testimony of Martin Hewitt, a non-supervisory SPO and former president of the non-supervisory bargaining unit's union, who claimed he was told while he was president that corrective counseling is not discipline. (R 946) Hewitt admitted under cross examination that he was no longer president of the union after July 2013 (R 958-959), and the update to WSI's discipline policy in which corrective counseling forms the basis of further discipline was issued in October 2013. (R Ex. E-9) The only evidence in the record is that corrective counseling does form the basis for further progressive discipline.

Formal discipline is handled much like in the *Fluor Hanford* case, SRS's sister site, with major infractions resulting in an investigation assigned to a lieutenant and minor infractions being handled all by the same lieutenant. *Fluor Hanford*, pp. 6-7; (R Exs. E-10, E-11) When an investigation is conducted, the lieutenant gathers the facts, decides which level of discipline is warranted and issues a recommendation which, in all but one instance in the record, was followed. (*Id.*, R 375-377, Ex. E-22) There is no evidence of any interference by superiors in the lieutenants' investigations or recommendations. Further, the lieutenant often must determine which of two similar infractions with differing levels of severity to recommend. For example, a written warning is called for in the event of "minor performance/behavior problems" but a written reprimand results from "deficiency in job performance." "[F]ailure to follow instructions" is punishable by written warning but "failure to follow orders..." results in

suspension. (R Ex. P-1) No guidance is provided in the work rules for how to choose between the alternatives. (*Id.*) Accordingly, it is clear that the lieutenants exercise independent judgment in recommending discipline. *See Fluor Hanford*, p. 13 (finding disciplinary authority in discipline system in which lieutenants investigate and make recommendations). Further, because the warnings and reprimands issued and recommended by the lieutenants form the basis of further discipline – and ultimately termination (R Ex. P-1)²² – the lieutenants possess sufficient disciplinary authority under § 2(11) of the Act. *Oak Park*, 351 NLRB at 28.

In addition to formal and informal discipline, lieutenants evaluate their SPOs under the DOE’s Human Reliability Program (HRP). 10 CFR § 712. Under the HRP program, the lieutenants must “immediately remove an HRP-certified individual from HRP duties, pursuant to § 712.19, and temporarily reassign the individual to a non-HRP position if the supervisor believes the individual has demonstrated a security or safety concern that warrants such removal.” 10 CFR § 712.13(d). Once removed from the HRP position, the lieutenant submits an HRP Evaluation Form on the SPO. (R Exs. E-55, 56) On the form, the lieutenant uses his judgment to determine whether the SPO “has displayed poor judgment or inappropriate responses while on the job” (R Exs. E-55, 56); had difficulty coping with stress (*id.*); and whether, “In your opinion, should this employee be allowed to continue his/her HRP duties?” (*Id.*) A list of items to review and report on is included, but no guidance is provided to the lieutenant in determining the SPO’s performance or ability to cope with stress. Most importantly, there is no guidance to drive the lieutenant’s opinion on whether the SPO should be allowed to continue in armed duty. (*Id.*) *See Oakwood Healthcare*, 348 NLRB at 693 (“[T]he mere

²² *See* footnote 15, *supra*.

existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices.”)

When a lieutenant removes a SPO from an HRP position, he is temporarily reassigned to unarmed duty. 10 CFR § 712.13(d) (R 1001-1005; Exs. E-55, 56) Because the HRP certification is necessary to perform armed work, the lieutenant’s recommendation could ultimately result in separation from employment if the SPO’s HRP certification is not restored. (R Ex. P-5, Art 13.5(j) (providing for termination from employment for failure to meet qualifications))

4. Secondary indicia also support supervisory status.

Where at least one of the enumerated indicia in § 2(11) is present, secondary indicia will support a finding of supervisory status. *Woodman’s Food Market, Inc.*, 359 NLRB No. 114, p. 9 (slip op.) (citing, *E&L Transport Co. v. NLRB*, 85 F.2d 1258, 1270 (7th Cir. 1996) (“Although not determinative on their own, where one of the enumerated indicia in Sec. 2(11) is present, secondary indicia support a finding of statutory supervisor.”)). Such secondary indicia may include attendance at management meetings, having the title of supervisor and being held out as a supervisor, and differences in pay. *Id.*; *see also, Sheraton Universal Hotel*, 350 NLRB 1114 (2007). WSI submits there is ample evidence of primary indicia of supervisory status. In addition, the record contains much evidence of secondary indicia that also support supervisory status.

Lt. Gerstenberger testified that budgeting, including capital expenditure budgeting, for the canine program is among his duties. (R 307) Lieutenants also develop many of the policies, procedures and security orders used by WSI within the protective forces. (R 184-190, 307, 509-511) Like other managers, lieutenants are paid a salary and classified as exempt from overtime. (R 135)

Further supporting the lieutenants' supervisory status is the fact that nearly every policy issued to the protective force refers to them as "supervisors." (*See e.g.*, R Ex. E-8 §§ 2.2.1, 3.5, 4.17, 4.2, 4.9.3, 6.19.1.a, 6.19.1.b; Ex. E-9 § II.B, Ex. E-15, p. 3) Consistent with their rank, they wear the single bar rank insignia of a lieutenant on their uniforms. (R 294) In addition, the various forms used by WSI provide for lieutenants to sign them as supervisors. (*See e.g.*, R Exs. E-10; E-11; E-16; E-20; E-39-42; E-43; E-55) Further, non-supervisory members of the protective force refer to lieutenants as supervisors as did Petitioner's witness, SPO Martin Hewitt. (R 948, 950, 952) WSI is required to have a contingency plan for strikes by the bargaining unit, and lieutenants are part of WSI's strike contingency force. (R 93-94, 630-631) Lieutenants also receive three to four days of tactical leadership training and four or five days of basic instructor training when they first become supervisors. (R 295-296, 514) Each year they also receive annual supervisor training on both tactical supervision and topics related to managing employees, such as FMLA, rewards and recognition, and administering discipline. (R 299-303, Ex. E-18) Most importantly, lieutenants are the highest ranking officer on Site during nights, weekends, holidays and anytime non-essential personnel are away from the Site. (R 41-42, 519-520)

CONCLUSION

As demonstrated in the record, WSI's Post-Hearing Brief, Petition for Review and in this brief, there is ample evidence that the lieutenants are statutory supervisors under § 2(11) of the Act. Accordingly, the RD's Decision should be overturned and the petition dismissed as to the lieutenants.

Columbia, South Carolina

August 4, 2014

s/ Christopher W. Johnson _____
STEPHEN T. SAVITZ
CHRISTOPHER W. JOHNSON
GIGNILLIAT, SAVITZ & BETTIS, L.L.P.
900 Elmwood Ave., Suite 100
Columbia, SC 29201
Tel.: (803) 799-9311
Fax: (803) 254-6951
ssavitz@gsblaw.net
cjohnson@gsblaw.net

ATTORNEYS FOR EMPLOYER

Certificate of Service

The undersigned certifies that he has served a copy of the Employer's Brief on Review of Regional Director's Decision and Direction of Election in this matter by e-mail on the following on the date indicated below:

Irwin H. Cutler, Jr., Esq.
Priddy, Cutler, Naake & Meade, PLLC
429 W. Muhammad Ali Blvd
800 Republic Building
Louisville, KY 40202-2346
Attorney for Petitioner

Mr. Claude T. Harrell, Jr.
Regional Director
NLRB Region 10
Harris Tower
233 Peachtree St. N.E., Suite 1000
Atlanta, GA 30303-1531

Date: August 4, 2014

s/ Christopher W. Johnson

Christopher W. Johnson
Gignilliat, Savitz & Bettis, LLP