

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

JAKE'S 58 CASINO HOTEL

29-RC-240966

and,

INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL 30

**THE EMPLOYER'S REQUEST FOR REVIEW  
OF DECISION AND DIRECTION OF ELECTION**

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## I. INTRODUCTION

Pursuant to Section 102.67 of the National Labor Relations Board's ("NLRB" or "Board") Rules and Regulations, Jake's 58 Casino Hotel ("Jake's 58" or the "Employer") respectfully submits this Request for Review of Regional Director's Decision and Direction of Election ("Decision" or "DDE") in the above-captioned case.<sup>1</sup>

The record developed at the Hearing was overwhelmingly in favor of finding that the Petition should be dismissed due to the supervisory status of the three Maintenance Supervisors that comprise the entire petitioned-for unit. Indeed, as reflected in the 217 page transcript,<sup>2</sup> both of the witnesses that testified (from the Employer and the Petitioner) confirmed one or more statutory indicia of supervisory status, as well as secondary indicia. However, in erroneously dismissing the Employer's proffered evidence of supervisory status, the Regional Director has essentially re-written the rules relating to burden of proof and has not fairly judged the evidence in this matter, thereby imposing a nearly impossible burden of proof on the Employer, particularly in light of the newly expedited election procedures that afford employers just a few days to prepare a case to challenge the petitioned for unit.

The Employer's witness, Kathleen Parks ("Parks"), Director of Hotel Operations and Security, credibly testified, largely without contradiction, that Maintenance Supervisors have the authority, in the interest of the Employer, to assign, responsibility direct, hire, and recommend discipline for associates who work in the maintenance department. The Petitioner's sole witness, Ronald Kline ("Kline"), one of the three Maintenance Supervisors, *admitted* that he routinely assigns and directs maintenance associates in the performance of their job duties, has played an

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<sup>1</sup> References herein to the Decision and Direction of Election will be abbreviated as "DDE (page number)."

<sup>2</sup> Transcript references are shown as "Tr. \_\_\_."

active role in the hiring of maintenance associates in the past and has previously recommended discipline. Nonetheless, the Regional Director repeatedly found that even the undisputed evidence was “insufficient”, or examples provided were “limited”, or the Employer had “not established” supervisory indicia that the Petitioner did not even dispute.

The record evidence also established that Maintenance Supervisors engage in a multitude of different secondary indicia including:

- attending management only meetings and training sessions;
- being viewed as supervisors by the maintenance associates;
- having a higher salary than maintenance associates;
- having an Employer email address and access to an ordering system unlike maintenance associates; and
- the ratio of supervisors to “employees” would be non-existent if the Maintenance Supervisors were deemed employees under the Act.

All of this evidence was completely disregarded by the Regional Director. (DDE at 9). Moreover, not once did the Regional Director refer to the job description for the Maintenance Supervisor that was created in 2017 and not disputed by Petitioner.<sup>3</sup> (Er. Ex. 4.) This job description requires Maintenance Supervisors to perform several key indicia of supervisory status, including scheduling, training and associate counseling and corrective action, and these functions were confirmed by testimony from both witnesses. Even the description of the “primary job” states that the Maintenance Supervisor: “Assists in the oversight and organization all of the building and grounds Maintenance.” (Er. Ex. 4.) When assessing whether the Maintenance Supervisors were accountable for supervising the maintenance associates, the

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<sup>3</sup> The job description refers to the title as Facilities Supervisor in the Maintenance department, but this title is interchangeable with Maintenance Supervisor. Employer Exhibits are referred to herein as “Er. Ex. \_”.

Regional Director erroneously failed to consider the fact that performing supervisory tasks was the core function of Maintenance Supervisors.

Based on the foregoing, the Board should grant this Request for Review, determine that the Maintenance Supervisors are supervisors under the Act, void certification of the petitioned for unit and dismiss the petition.

## **II. PROCEDURAL HISTORY**

On May 7, 2019, the International Union of Operating Engineers, Local 30 (“Petitioner”) filed a petition seeking to represent the Maintenance Supervisors at Jake’s 58 Casino Hotel. The Employer timely asserted that the Maintenance Supervisors were supervisors under Section 2(11) of the Act. A hearing was conducted on May 16, 2019 and post hearing briefs were submitted on May 23, 2019. The DDE was issued on June 20, 2019, directing an election on July 2, 2019.<sup>4</sup> The election was conducted on July 2, 2019. On July 11, 2019, the Region issued a Certification of Representative, certifying that a majority of valid ballots were cast for IUOE Local 30. The Certification provides the Employer the opportunity to file this Request for Review by July 25, 2019.

## **III. STATEMENT OF FACTS**

The Employer operates Jake’s 58 Casino Hotel in Suffolk County, New York. The maintenance department is responsible for the overall maintenance of the Casino Hotel. As the DDE highlights, the maintenance department is responsible for performing routine maintenance, but is also responsible for resolving work orders sent directly to the Maintenance Supervisors from other departments at the Casino Hotel. (DDE at 2.) The maintenance department has three (3)

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<sup>4</sup> Curiously, in connection with the voter list deadline, footnote 10 of the DDE states that Petitioner waived its right to have the voter list for ten days prior to the election. This means that Petitioner was contacted *ex parte* prior to the issuance of the DDE which we believe is inappropriate.

Maintenance Supervisors who supervise between 4 and 5 maintenance associates each. (Tr. 17). The manager position is vacant and has been since July 2018. (DDE at 2; Tr. 25). Currently, the three Maintenance Supervisors are Ron Kline (7 a.m. to 3:30 p.m.), Carlos Aviles (3 p.m. to 11:30 p.m.) and Ralston Smith (weekends pending completion of his HVAC certification). (DDE at 2.)

All three Maintenance Supervisors report directly to Kathleen Parks, Director of Hotel Occupations and Security. Parks is responsible for managing five (5) different departments at Casino Hotel. For the Casino, Parks is responsible for managing the environmental and security departments. (Tr. 15). For the Hotel, Parks is responsible for managing the front desk, housing and maintenance departments. (Tr. 15). Significantly, each of the five (5) departments have the same hierarchy. Each department has a manager and/or supervisors and associates. The manager and/or supervisors of each department report to Parks. In each department, both the manager and/or supervisors are not represented by a union while the associates are represented by a union.<sup>5</sup> This structure was acknowledged in the DDE, but ignored by the Regional Director in her analysis. (DDE at 2.)

Regarding the reporting structure below the Maintenance Supervisors, Kline has four (4) associates who work for him on the first shift. (Tr. 21). The second shift has four (4) associates who report to Aviles. (Tr. 21). The third shift has three (3) associates, but the Maintenance Supervisor position is currently open. (Tr. 21).

If the DDE is upheld and Maintenance Supervisors are considered an appropriate unit, the maintenance department will have all employees reporting directly to the Director of Hotel Operations (unless and until the Employer hires a manager). The employees in the maintenance department will be represented by two different unions.

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<sup>5</sup> Associates in the environmental and security departments are represented by the Teamsters. (Tr. 18.) Associates in the Hotel, both front desk and housekeeping are represented by Hotel Trades Council.

## **A. Hiring**

There is no question that Maintenance Supervisors are key participants in the hiring process and their judgment is relied on by Parks in selecting the best candidate. Regarding the current vacancy for a maintenance associate, Parks testified that she has discussed the position with Aviles and Smith to obtain their recommendations. (Tr. 22). Without contradiction, Parks also explained the established hiring process for maintenance associates. First, applicants apply online. (Tr. 24). Then, Parks would take the resumes submitted and share them with the Maintenance Supervisors, specifically Smith and Kline. (Tr. 24). Kline in fact admitted he has previously reviewed resumes and if he determined the applicant was qualified, he would provide the applicant with a gaming packet, which contains an application for a gaming license, a requirement to preform work on the Casino floor. (Tr. 153). As the Regional Director even noted, Kline testified that if he did not like the candidate, he would not give the candidate a packet. (DDE at 2.)

Parks further testified that after Smith and Kline reviewed resumes, they would interview candidates. (Tr. 24). Parks testified that Smith and/or Kline had previously interviewed applicants and provided a recommendation to her. (Tr. 24) After that recommendation she would conduct a final interview which would generally be followed by a decision to hire. (Tr. 24). By way of example, Parks testified that a maintenance associate on the third shift, Marcus Guma, was hired after being interviewed and recommended by Smith and/or Kline, members of the disputed bargaining unit. (Tr. 24, 25, 26, 27). Importantly, Parks testified on numerous occasions that Maintenance Supervisors have the power to recommend applicants for hire and that she typically follows that recommendation. (Tr. 24, 140). As Kline testified, if he was going to recommend a candidate for hire, he would give the candidate a gaming packet, an application for a gaming license, in anticipation of the candidate being hired. (Tr. 153, 172.)

Kline admitted that he has been involved in the hiring process and that he has made hiring recommendations to Parks. (Tr. 152, 153). Indeed, Kline admitted that he interviewed applicant Stacey Smith a month ago and gave him a gaming packet. (Tr. 172; Er. Ex. 1).

The Regional Director acknowledged that Kline and Smith “interview people to see who would be a good fit” and noted Kline’s testimony that if he “decides not to interview a candidate, that is the end of the candidate’s application.” (DDE at 2.) The Regional Director also noted that Kline tells Parks his “feeling about a candidate.” (*Id.*) However, the Regional Director downplayed these admissions that demonstrate classic supervisory authority by arguing that Parks could only recall one interview by a Maintenance Supervisor and emphasizing Kline’s conclusory testimony that applicants he interviewed were not always hired. (DDE at 3.) Kline did not provide any examples of that, but nonetheless, his self-serving testimony was given full credit on a core factor. The Regional Director also erred in not considering the fact that Kline’s rejection of a candidate was not subject to review by Parks. (DDE at 2.)

## **B. Discipline**

As the job description for Maintenance Supervisor illustrates, one of the responsibilities and job duties is to “[a]ssist with associate-counseling sessions, including all written, verbal correction action and coachings.” (Er. Ex. 4).<sup>6</sup> Although Parks testified that there is very little discipline in the maintenance department, she also testified, without rebuttal, that the Maintenance Supervisors have “done verbal counseling with their employees.” (Tr. 91). In fact, just a few days before the Hearing, Kline reported to Parks that he found an employee sleeping on the job. (Tr. 91). Parks further testified that Kline “woke him up and told - gave him a job to do outside and told him he had to go out and do that job.” (Tr. 93). This is a classic example of a supervisor

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<sup>6</sup> The job title listed on the job description is Facilities Supervisor in the Maintenance department, but the agreed upon title in the Petition and at the Hearing is Maintenance Supervisor.

deciding to verbally counsel an employee instead of recommending a higher level of discipline. Parks' testimony made clear, although there are few examples because of the lack of actual discipline in that department, that the Employer expects and relies on Maintenance Supervisors to recommend corrective action when appropriate. (Tr. 91, 92; Er. Ex. 4 ).

Although Kline self-servingly testified that he does not have the authority to write-up or suspend associates, he frankly admitted (in questioning from Union counsel) that he makes recommendations regarding disciplining associates. (Tr. 154).

Q. Do you have a role in disciplining associates?

A. Nothing other than a recommendation.

Kline also admitted that if he "saw something [he] didn't like [an associate doing] he would talk to that associate." (Tr. 154). Of course, talking to an associate about deficient job performance is a form of discipline in and of itself. Kline further testified that he has the ability to talk to his supervisor about discipline. (Tr. 154). Despite Kline's insistence that he does not have the authority to take corrective action, even his self-serving<sup>7</sup> May 1, 2019 emails to Parks and another manager, Daniel Fried betray the fact that he does have such authority. Kline's email referred to the fact that he had previously planned a corrective action for an employee (Marcus Guma) who continually reported to work late. (Er. Ex. 12).

The Regional Director completely ignored the fact that the job description lists counseling and discipline of associates as one of the job responsibilities. (Er. Ex. 4.) While the Regional Director noted that Maintenance Supervisors "could make recommendations regarding written discipline," she disregarded that testimony on the basis that the record did not reveal whether the employee was disciplined and how the determination was made. (DDE at 3.) The Regional

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<sup>7</sup> Kline's emails from May 1st, two days before the Petition was filed, were clearly an attempt to downplay his role in disciplining his employees.

Director also disregarded Kline's reference in an email that he "planned corrective action" based on Kline's circular self-serving explanation that he "meant that he had planned to talk to the associates involved to tell them that he would have to report the problem to his superiors." (DDE at 3.)

### **C. Scheduling**

The Maintenance Supervisor job description clearly demonstrates that the Employer relies on Maintenance Supervisors to play a significant role in scheduling maintenance associates, listing "prepare work schedules" as the third bullet point under Responsibilities and Duties. (Er. Ex. 4.) In practice, the Employer relies on the Maintenance Supervisors to manage time off requests and deal with necessary changes in the set schedule, as well as day-to-day assignments. However, the Regional Director seemed to place great weight on the fact that Parks prepares the schedule for the Maintenance department, but this is more of a routine task, given that the associates' regular schedule is consistent. The important elements of scheduling are the inevitable adjustments that have to be made to the set schedule at a moment's notice. (DDE at 4; Tr. 45, 50.)

#### **(i) *Time Off Requests***

It was established at the Hearing that Maintenance Supervisors make changes to maintenance associates schedules, particularly as it relates to paid time off ("PTO") requests, assigning overtime and addressing call outs and other unforeseen issues with the schedule. Maintenance Supervisors have the authority to approve PTO requests for maintenance associates. (Tr. 47-48; Er. Ex. 5A, 5C). If a PTO request is made by a maintenance associate after Parks makes the schedule, Parks testified that this request is made to the Maintenance Supervisor and that she and the applicable Maintenance Supervisor will discuss together whether it is feasible to grant time off. (DDE at 4; Tr. 52). Despite Kline testifying that he doesn't approve PTO requests because he doesn't have the authority to (Tr. 191-192), Parks summarily rejected this and

affirmatively testified that all three Maintenance Supervisors have the authority to approve a PTO request for a maintenance associate without asking her for approval. (Tr. 206) The documentation corroborates Parks. Kline admitted that his signature is on the PTO request submitted into evidence (Er. Ex. 5A), that he has previously signed PTO requests for Maintenance Supervisors as well as PTO requests for maintenance associates. (Tr. 199-200). In addition, the Employer demonstrated that Maintenance Supervisors have the authority to change a schedule to account for a last minute PTO request, such as a personal day or vacation day. (Tr. 77; Er. Ex. 10B, 10D).

The Regional Director disregarded the important role that Maintenance Supervisors obviously play in the consideration to grant time off by citing general language in the Employer's handbook which states that the "department general manager" is "responsible" to permit PTO and to "monitor unit usage to ensure managers are allowing the use of [PTO] benefit as intended." (DDE at 4.) However, the Regional Director failed to consider the obvious fact that this language addresses the overall responsibility of the "department general manager" in a multi-national corporation. It also implies that Maintenance Supervisors have the authority to grant PTO requests, because the only "managers" below the "department general manager" are the Maintenance Supervisors. (Er. Ex. 16.)<sup>8</sup> The Regional Director's reliance on the corporate handbook's general language regarding the responsibility of a "department general manager" is also inappropriate because if the general handbook language stated that supervisors have the authority to issue discipline, this would have been disregarded by the Regional Director. The Regional Director also ignored the job description that specifically relates to the duties of Maintenance Supervisors at the Casino Hotel.

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<sup>8</sup> Before the hearing closed, the Hearing Officer requested that the Employer produce the handbook. The Employer did so by email. The Hearing Officer then closed the hearing without asking any witness questions about the handbook. The Regional Director did not re-open the hearing to question any witness about this vague language that she relies on to dismiss supervisory status.

**(ii) Overtime**

The Regional Director literally did cartwheels to avoid the significant role that Maintenance Supervisors play in assigning overtime. (DDE at 5.) Parks testified that Maintenance Supervisors have the authority to grant overtime requests without approval from her. (Tr. 53-54). While Parks testified that she has spoken with Maintenance Supervisors about “keeping [overtime] down,” she testified that there are times when she is not “in the building” and Maintenance Supervisors have “made the decision they need somebody, [and] just call them in. (Tr. 54). Despite Kline’s claim that he needs permission to approve overtime and that he has never assigned overtime without requesting it from Parks (Tr. 195), the documentary evidence again establishes this is not the case. A text message from Maintenance Supervisor Rolston Smith to Parks establishes that Smith approved overtime for a maintenance associate without obtaining approval from Parks or management. (Er. Ex. 7). Carlos Aviles also approved overtime for a maintenance associate to help him complete a work task without obtaining approval from Parks or management. (Tr. 74; Er. Ex. 10A).

When a maintenance associate calls out, Maintenance Supervisors necessarily have the authority to call another associate in, ask an associate working to stay late to cover the absence (i.e. work overtime), or determine that due to the work load, the department can operate down an associate. (Tr. 53). Parks testified, without rebuttal, this is the Maintenance Supervisor’s decision, which does not have to be approved by her. (Tr. 53). The documentary evidence corroborates this. Emails show that Aviles dealt with a last minute callout and covered the shift with another maintenance associate. (Er. Ex. 10E). The key in this situation is that the Maintenance Supervisor let Parks know what action has been taken, which is critically different than getting approval in advance. Meanwhile, the text messages exchanged between Parks and Smith shows that

Maintenance Supervisors are held accountable for failing to notify Parks about the overtime assigned to James.

The Regional Director dismissed these emails and texts. (DDE at 5.) Smith's text explains why he *made the decision* to assign overtime, but apparently has no value because it was sent the day before the Hearing. Aviles' email from November 26, 2018, that he had an associate stay, is disregarded because it does not provide any detail about the assignment or specify *the amount* of overtime assigned. Aviles' email from January 2, 2019 notifying Parks that he had two associates cover for another associate who called out, is disregarded again because it does not specify *who* was assigned the overtime, as if that makes a difference. Instead, the Regional Director relied on the May 1, 2019 email chain where Kline self-servingly stated (right before the Petition is filed) that he could not adjust *his own schedule*. (Er. Ex. 12.) The analysis here should relate to the authority of Maintenance Supervisors to grant overtime to associates, not Kline's ability or inability to adjust his own schedule.

The Regional Director also ignored evidence that Maintenance Supervisors have the authority to change a maintenance associate's punch in/punch out time if necessary. (Tr. 48). The record evidence reveals that both Aviles and Smith have previously adjusted a maintenance associate's punch in/punch out time. (Er. Ex. 6A-C). As Parks testified, if a maintenance associate "forgot to punch out after lunch" or "forgot to punch out at the end of the day," Maintenance Supervisors have the authority to manually change the maintenance associate's work hours. (Tr. 48-50). Associates cannot manually change a punch in/punch out. (Tr. 48).

Finally, the documentary evidence belies Kline's claim that Maintenance Supervisors have no authority to make any type of schedule change without the approval of Parks or management. By his own admission, on November 28, 2018, Kline emailed Parks requesting that she "make a

few minutes today, to discuss scheduling and staffing for the maintenance department.” (Er. Ex. 11).

In the face of all this testimony and documentary evidence, the Regional Director nonetheless stated: “although there is *some indication* that the Maintenance Supervisors may assign overtime, especially given the text message produced, the record does not reveal *any specific details* about how the decision to assign overtime is made or executed.” (DDE at 5 [emphasis added].) This clearly impermissibly raises the burden of proof beyond the balance of probabilities and adds an inappropriate obligation on the Employer particularly in the context of the newly expedited election timetable.

**(iii) *Assignment of Work***

The supervisory status of the Maintenance Supervisors became apparent moments into the Petitioner’s case when Kline boasted that he “run[s] the [maintenance] department on the daytime shift.” (Tr. 152). Kline then added, “I am the daytime facility supervisor, lead person, mentor, trainer. (Tr. 154). When testifying how he starts each day shift he supervises, Kline testified that “he addresses whatever issues need to be or start to prepare my assignments for the day.” (Tr. 179). Specifically about assigning work to maintenance associates, Kline testified:

depending upon priority, what is most important first, normally, and then thereafter assign, you know, as to -- as needed and who would be...what would be crucial to the operation. Prioritize, in other words.

(Tr. 180).

When the Hearing Officer asked Kline “how do you know what’s more important to prioritize,” Kline responded: [w]ell, if I -- if I have an example -- I’ll give you an example. If I have a leak that occurred from one day to the next, and I come in and there’s a leak, that has to be dealt with. That’s first. That’s priority.

(Id.).

When the Hearing Officer again asked “how do you know that,” Kline emphatically responded:

[t]hat's part of being a lead person and just knowing -- you know, running the operation day to day with -- you know, as the lead person with my crew.”

(Id.).

The testimony of Kline served to corroborate the testimony of Parks that Maintenance Supervisors regularly assign and responsibly direct the work of maintenance associates. Parks testified that maintenance associates report to the Maintenance Supervisor on duty at the start of every shift to discuss what needs to be completed for the shift. (Tr. 29). Parks further testified that Maintenance Supervisors are responsible for making sure maintenance associates get “acquainted with the building and what jobs need to be done and how they expect them to be done.” (Tr. 30.)

Again, the Maintenance Supervisor job description memorializes that Maintenance Supervisors have the authority to, and do in fact assign and direct work of maintenance associates. (Er. Ex. 4.) Parks testified that on a daily basis Maintenance Supervisors “oversee whatever work that has [to be] done [by maintenance associates] to make sure they’re doing what they’ve been trained and taught properly.” (Tr. 44). Kline confirmed that a key component of the job of Maintenance Supervisor is to prioritize the work that needs to be completed on a shift-to-shift basis. Parks also testified “the supervisor of that shift would - would decide what needed to be done first and - how they would proceed for the day.” (Tr. 82). If work needs to be postponed to the next shift due to volume, the Maintenance Supervisor is solely responsible for making that decision. (Tr. 82). These can be crucial decisions in the maintenance department. As Kline testified, he is going to make the decision, using his independent judgment to fix a leak before

dealing with another work order, because if he doesn't, he is not performing his job as the Maintenance Supervisor. (Tr. 180)

Another vital function of the maintenance department is fulfilling work orders and requests in a timely fashion. (Er. Ex. 4). Significantly, the work requests from other departments come directly to the Maintenance Supervisors. (Tr. 32). Once the Maintenance Supervisor receives the work request, he assigns a maintenance associate to perform the task, or performs it himself or with a team of his choosing and then ensures that the task is completed. (Tr. 61-62). As Parks testified, without dispute, Maintenance Supervisors are solely responsible to "choose whoever was on their shift to do that - the work. Depending on what it was, who would have the capability for that project. They would assign it to them or they'd be working with them to do it." (Tr. 61). Parks made clear that she does not tell the Maintenance Supervisor who should be doing the work. (Tr. 61). The documentary evidence confirms this. (Er. Ex. 9C, 10A).

However, in the face of this mountain of evidence supporting the fact that assignment of work is a key function of the Maintenance Supervisor, the Regional Director again heightened the burden of proof by stating that Parks "did not elaborate on *how* a supervisor would weigh" the assignment decision. (DDE at 5.) The Regional Director also noted that Kline "did not explain how he decides to whom to assign each task." (*Id.*) The Act only requires that the supervisor use independent judgment and discretion, not how the supervisor decides which associate performs the task.

The job description also illustrates the Maintenance Supervisors' responsibility for supervising all work that gets contracted out to third-parties and supervising capital projects at the Hotel and Casino. If a specific job assigned cannot be handled by the maintenance department, the Maintenance Supervisor is responsible for finding the vendor who can complete the work and

supervising the vendor while the work is being performed until completion of the work. (Tr. 62). The Maintenance Supervisor escorts the vendor on Employer property, serves as the main point person for the vendor and keeps Parks and management apprised on the status of a job. (Tr. 64-65). Regarding capital projects, which are also contracted out to third-party vendors, the Maintenance Supervisor ensures specific tasks get completed by the third-party vendor and keep management apprised of the status of each project. (Tr. 65-66; Er. Ex. 8A-D, 9A-C). The Regional Director noted these functions and obligations, but appears to have given them no weight, even though they demonstrate the use of independent judgment and discretion. (DDE at 5.)

**D. Secondary Indicia**

The Employer established that Maintenance Supervisors perform multiple secondary indicia. First, Maintenance Supervisors attend management only training sessions which have focused on the important supervisory functions of coaching and team building. (Tr. 33; Er. Ex. 2A-B; DDE at 6). Maintenance associates do not attend these trainings. (Tr. 37). Kline reluctantly admitted to attending this training. (Tr. 173).

Second, Maintenance Supervisors are viewed by maintenance associates as their supervisors. This was evident throughout the Hearing. As Kline boastfully testified, “he runs the daytime shift” and sees himself as a “mentor.” (Tr. 152, 154). It cannot be disputed that maintenance associates go to Maintenance Supervisors for instruction and on the job training and safety tips. (Tr. 31, 33; Er. Ex. 3).

Third, Maintenance Supervisors receive a higher hourly rate than maintenance associates, have Employer provided email addresses and have access to an ordering system called Birchstreet, to order supplies when necessary, which associates are not permitted to access. (Tr. 103).

Finally, if the DDE is allowed to stand, the Maintenance department will have no manager and no supervisors. Not only would this be in direct contrast to every other department in the

Casino Hotel, it would require Parks to directly supervise all the maintenance associates, as well as the three Maintenance Supervisors and it would result in maintenance associates represented by HTC Local 6 working alongside Maintenance Supervisors represented by IOUE Local 30.

#### **IV. LEGAL ARGUMENT**

##### **A. Legal Standard For A Request For Review**

The Board may grant review of a Regional Director's unit determination in certain circumstances. Specifically, review may be granted where:

1. A substantial question of law or policy is raised because of: (i) the absence of; or (ii) departure from, officially reported Board precedent;
2. The Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the right of a party;
3. The conduct of a hearing or any ruling made in connection with the proceeding has resulted in prejudicial error, or;
4. There are compelling reasons for reconsideration of an important Board rule or policy.

*See* NLRB Rules & Regulations § 102.67(d). The Employer's Request for Review in this case is premised on all four (4) grounds.

##### **B. Supervisory Authority Standard**

Under Section 2(11) of the Act, a supervisor is any person having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. 29 U.S.C § 152(11).

It is well settled that an employee may be a supervisor without meeting all the criteria of Section 2(11). *Ohio Power Co. v. NLRB*, 176 F.2d 385, 387 (6th Cir. 1948), *cert. denied*, 338 U.S. 899 (1949). In fact, the Supreme Court has indicated that an employee may be classified as a supervisor if he or she meets *any* of the twelve (12) enumerated personnel actions tests. *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 682 (1980); *see also Queen Mary*, 317 NLRB 1303, 1303 (1985).

Thus, individuals are statutory supervisors if: 1) they hold the authority to engage in *any one* of the twelve (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 addition, while the exercise of one or more of the statutorily described functions in Section 2(11) is always the focal point for assessing supervisory status of an individual, the Board also considers “secondary indicia” in determining whether a particular individual is a “supervisor” within the meaning the Act. *Pacific Beach Corp.*, 344 NLRB 1160, 1164 (2005). Even after *Oakwood Healthcare*, 348 NLRB 686 (2006), the Board has still relied on the presence of secondary indicia of supervisor status where such indicia can “corroborate” a determination that is based on the Section 2(11) test. *Loyalhana Care Ctr*, 352 NLRB 863, 864 (2008).

As the Regional Director repeatedly reminded us in her Decision, the party asserting supervisory status bears the burden of establishing that status. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006); *see also Youville Health Care Center*, 326 NLRB 495, 496 (1998). The party asserting supervisory status must prove it by a preponderance of the evidence, and this requires detailed, specific evidence. *Veolia Transportation*, 363 NLRB No. 188, slip op. at 7 fn. 19 (2016); *see also G4S Regulated Security Solutions*, 362 NLRB No. 134, at \*10 (2015).

Conclusory statements without supporting evidence do not establish supervisory authority. *Lynwood Manor*, 350 NLRB 489, 490 (2007); *see also Austal USA, L.L.C.*, 349 NLRB 561, 561 fn. 6 (2007).

The Regional Director did not acknowledge in her Decision that the burden of proof is by a preponderance of the evidence and this is of great concern given her repeated downgrading of the Employer's evidence and repeated statements that the Employer has not submitted sufficient evidence. In fact, it is respectfully submitted that the Employer is being held to a much higher standard and the Regional Director has disregarded Board precedent regarding the burden of proof. The very fact that the DDE does not address the standard of proof, while emphasizing on several occasions that the Employer has the burden of proof, indicates that the Regional Director has held the Employer to a higher standard than balance of probabilities. It is also respectfully submitted that the Regional Director has ignored the Board and Supreme Court edict that if the Employer has satisfied *any one* of the supervisory indicia, it has met its burden and any fair reading of the Hearing transcript would find that Maintenance Supervisors are supervisors under Section 2(11) of the Act.

**C. Maintenance Supervisors are Intimately Involved in the Hiring Process and Effectively Recommend Decisions to Hire And Decisions Not to Hire**

The Regional Director erred by failing to find that Maintenance Supervisors effectively recommend candidates for hire. The Regional Director stated that the Employer "has not presented sufficient evidence" because the Maintenance Supervisors have only interviewed a couple of candidates for hire since July 2018.<sup>9</sup> (DDE at 7.) However, the Regional Director fails to provide a single authority to support that argument. Just because the Employer has not hired a lot of maintenance associates in the past year should not be suddenly deemed the most critical fact. Parks and Kline both testified that the Maintenance Supervisors select candidates to interview, then the

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<sup>9</sup> It is unclear what the basis for this statement is since there is no citation to the record.

Maintenance Supervisors interview the candidates, provide recommendations to Parks and for the candidates they like, providing gaming packages to speed the hiring process along.

The Regional Director erred in not focusing on the actual evidence submitted regarding actual applicants and instead arguing that the Employer did not present enough examples. This reasoning also amounts to an impermissible effort to hold the Employer to a standard that far exceeds a preponderance of the evidence. The documentary evidence supported by testimony is clear and largely uncontroverted, although not enough for the Regional Director.

The authority to hire or to effectively recommend hiring, utilizing independent judgment, is itself sufficient to convey supervisor status. *Free Meyer Alaska, Inc.*, 334 NLRB 646, 647 (2001). An individual's influence on the hiring process must be based on actual delegated authority to participate in the hiring process and not merely on respect for the judgment of the person making the recommendation. *Plumbers Local 195*, 237 NLRB 1099, 1102 (1978). In determining whether referring applicants for hire constitutes effective recommendation of hiring within Section 2(11), the Board considers the amount of weight the employer gives the referral. *See Empress Casino Joliet Corp.*, 204 F.3d 719, 721 (7th Cir. 2000); *F. A. Bartlett Tree Expert Co.*, 325 NLRB 243, 245 (1997) (critical question is the weight that is given to the alleged supervisor's recommendation to hire or fire). The Regional Director completely ignored this factor, relying instead on *Peacock Productions*, 364 NLRB No. 104 (2016) and the argument that Parks also interviewed candidates. (DDE at 7). The Regional Director erred in relying on this fact, because the Employer produced other evidence supporting the fact that Maintenance Supervisors effectively recommend candidates for hire, including the weight Parks placed on the recommendations. *The Republican*, 361 NLRB No. 15, slip op. at 5 (2015) (“absent additional evidence an individual does not effectively recommend hiring where acknowledged supervisors also interview candidates”). If

Kline is confident enough that his recommendation of a candidate for hire is going to be followed that he provides candidates with gaming packets, it is clear that his recommendation for hire carries significant weight.

Here, Maintenance Supervisors are clearly active and significant participants in the hiring process. In fact, the record evidence reveals that Maintenance Superiors have reviewed resumes, determined if applicants were qualified for a pre-interview or interview, have conducted interviews and have made hiring recommendation to Parks. (Tr. 24-27). In addition, Parks testified that she recently discussed the maintenance associate opening with Aviles and Smith to seek their input on what the best candidate would look like. (Tr. 22). Parks also testified that the last associate hired was hired after she received the recommendation to hire the associate (Marcus Guma) from a Maintenance Supervisor. (Tr. 24 - 27).

Kline admitted that he has previously reviewed resumes, has rejected or approved a resume based off on his determination the applicant is qualified, has interviewed applicants before, interviewed a candidate just over a month ago and has made recommendations to hire to Parks. (Tr. 172; Er. Ex. 1). Tellingly, Kline admitted that there are no guidelines provided to him regarding how to review a resume or to determine if an applicant is qualified and that that he makes that determination himself. (Tr. 198). Indeed, Kline testified that if he rejects a resume it is the end of that applicant's candidacy. (Tr. 196). The authority to effectively recommend against hiring a candidate can also establish supervisory authority. *See HS Lordships*, 274 NLRB 1167, 1173 (1985) (supervisory status found where a recommendation not to hire was followed). All of this evidence was disregarded by the Regional Director because, at least according to her, there have only been two candidates interviewed since July 2018.<sup>10</sup> This essentially disregards Board

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<sup>10</sup> The Regional Director states that before July 2018 there was a manager in the Maintenance department, but there is no evidence or even a claim that the manager would be part of the hiring process.

case law holding that the authority to effectively recommend hiring can satisfy the Employer's burden here. *HS Lordships*, 274 NLRB 1167, 1173 (1985).

**D. Maintenance Supervisors Have the Authority to Discipline**

As the Regional Director pointed out, to confer supervisory status based on the authority to discipline, the exercise of disciplinary authority must lead to personnel action without independent investigation by upper management. (DDE at 7.) *Sheraton Universal Hotel*, 350 NLRB 1114, 1116 (2007). Fortunately, there has been little or no discipline issued in the Maintenance department.

However, the Regional Director failed to acknowledge Board law that employees who possess the *authority* spelled out in the statutory definition contained in Section 2(11) are also "supervisors" even if the authority has not yet been exercised. *Fred Meyer Alaska, Inc.*, 334 NLRB 646, 649 fn. 8 (2001); *see also U.S. Gypsum Co.*, 93 NLRB 91, 92 fn. 8 (1951); *Wasatch Oil Refining Co.*, 76 NLRB 417, 423 fn. 17 (1948).

The Regional Director ignored the Employer's job description for Maintenance Supervisors which makes clear the Employer's expectation that those supervisors "[a]ssist with associate-counseling sessions, including all written, verbal correction action and coachings." (Er. Ex. 4). While discipline is rare, Parks testified that Maintenance Supervisors verbally counsel associates and that they regularly bring issues to her attention. (Tr. 91). In fact, just a few days before the Hearing, Kline reported to Parks that he found a third shift employee sleeping on the job and that he had sent him to work outside. (Tr. 91.) Kline provided this as an example of a verbal counseling. (Tr. 90.)

Despite testifying that he does not have the authority to write-up or suspend associates, Kline frankly admitted that he makes recommendations regarding discipline for associates. (Tr. 154). Indeed, Kline also admitted that if he saw an associate do something he disagreed with, he

would verbally counsel him. (Tr. 154). Finally, irrespective of Kline's contention that he lacks authority to discipline, Employer's Exhibit 12 clearly demonstrates that Kline planned a corrective action for associate Marcus Guma in the past.

All of this evidence was disregarded by the Regional Director. She acknowledged that Maintenance Supervisors issue verbal counseling or warnings, but rejects this evidence because it is not documented as discipline. (DDE at 7.) The Regional Director relied on *Veolia Transportation Services*, 363 NLRB No. 98, slip op. at 7 (2016), which only holds that supervisory authority to discipline "must lead to personnel action without independent investigation by upper management." (*Id.*) Even though there has not been much occasion for discipline Maintenance for associates, the few instances in which associates needed to be called to task by Maintenance Supervisors were not independently investigated by Parks, including the third shift employee who was caught sleeping. Indeed, such verbal counseling and verbal warnings are a critical part of progressive discipline because they serve to correct the employee's behavior and Kline, despite his self-serving, general denials to the contrary, clearly had the authority to discipline and correct associate behaviors and did so. Indeed, verbal warnings issued to maintenance associates can be grieved under the grievance procedure of the HTC Local 6 collective bargaining agreement. (Er. Ex. 15.)

By holding that the Employer "has not established" that the Maintenance Supervisors have the authority to discipline and by ignoring even Kline's testimony about his authority over his crew as well as the job description which delineates the Maintenance Supervisor's *authority* to discipline, the Regional Director again held the Employer to a higher standard of proof than balance of probabilities. The Regional Director even allowed general language in the corporate

handbook about the authority of the “department general manager” to trump specific authority in the job description. (Er. Ex. 4, 16.)

**E. The Regional Director Erroneously Disregarded Compelling Evidence that Maintenance Supervisors Are Consistently Assigning and Directing the Work of Maintenance Associates**

Assignment is defined as the “giving [of] significant overall duties, i.e. tasks to an employee” as well as designating an employee to a place (such as a location, department or win), [and] appointing an employee to a time (such as a shift or overtime period)” *See Oakwood Healthcare*, 348 NLRB 686, 689 (2006). The putative supervisor must also use independent judgment when making such assignments. *Id* at 692-693.

The Board has held that an individual possesses Section 2(11) supervisor authority if that individual prepares has the authority to modify work schedules, has the ability to authorize overtime without prior clearance or has the power to grant time-off. (DDE at 8.) *See Entergy Mississippi Inc.*, 357 NLRB 2150 (2011). *See also HS Lordships*, 274 NLRB 1167, 1174 (1985) (individual at issue possessed authority to grant time off).

Here, the Regional Director erroneously disregarded the testimony of both Parks and Kline that Maintenance Supervisors dictate the work priorities of maintenance associates during each shift, and assign work orders or other tasks for maintenance associates depending on operational needs of the Casino or Hotel. The record evidence showed that whether it is dealing with a work request or a daily issue, by Kline’s own admission, Maintenance Supervisors prioritize the work for their shift “and then thereafter assign, you know, as to -- as needed and who would be -- what would be crucial to the operation. (Tr. 180). Kline further admitted that after he reviews what needs to be done for the day at the start of his shift, he would determine the order of tasks to complete and instruct maintenance associates “who is going to do what first.” (Tr. 179). It cannot be disputed that Kline meets with associates each morning and assigns them to various tasks within

the Casino and Hotel based on operational need. As Parks testified, assigning work is the sole responsibility of Maintenance Supervisors. (Tr. 61). Kline confirmed this and made it clear that assigning and directing (as well as working alongside) maintenance associates is a core function of his job day in and day out.

In the face of this evidence, the Regional Director merely cited case law, but did not apply the case law to the facts of this case. (DDE at 8.) It is not disputed that the supervisor must use independent judgment in assigning tasks and “must make a decision that is free from the control of others.” *Springfield Terrace Ltd.*, 355 NLRB 937 (2010). In this case, Maintenance Supervisors clearly make assignment decisions using their own judgment as to which associate is suited for the task and that these decisions are made free from the control (and even input) of others. Kline’s testimony alone established that, but the Regional Director ignored the facts.

The Regional Director held that “the Employer has not demonstrated” that Maintenance Supervisors use independent judgment in assigning tasks. (DDE at 9.) The basis for this baseless conclusion was “there is no evidence regarding *how* those tasks are assigned to the associates. (DDE at 9.) This is not only wrong, it again impermissibly heightens the standard of proof on the Employer. In assessing this factor, the Regional Director also erred in not fully appreciating the importance of the Maintenance Supervisor and indeed the maintenance department in the day to day running of the Casino Hotel. The determination of who, when and how quickly to fix issues with the plumbing and electrical systems can affect large parts of the Casino and the Hotel. For example, if the fire sprinkler system is not properly maintained by the maintenance department, this could have serious consequences. Yet, the only focus of the Regional Director here was the lack of evidence as to how certain tasks are assigned to associates, a factor that is completely irrelevant to an inquiry as to 2(11) status.

Regarding overtime and time off, it was established at the Hearing that Maintenance Supervisors make changes to associates schedules responding to PTO requests and call outs and in the process make decisions relating to both overtime and time off. (Tr. 206, Er. Ex. 5A, 5C). The record evidence reveals that both Smith and Aviles have granted overtime in the past without prior approval and Parks credibly testified that Maintenance Supervisors have the authority to do so, particularly when she is “not in the building” and they “need somebody.” (Tr. 53, 54). Running a maintenance department at a large hotel is a 24-hour operation, requiring a decision-maker to be on premises at all times. It was also undisputed that Maintenance Supervisors have the authority to call another associate in, ask an associate working to stay late to cover an absence or determine that due to the work load, the department can operate down an associate due to an absence. (Tr. 53). These are the core decisions to be made by the Maintenance Supervisors under this category and they are accountable for such decisions, as reflected by the text message exchange between Parks and Smith about overtime. (Er. Ex. 7.)

Nevertheless, the Regional Director erroneously focused on the fact that Parks sets the overall schedule and that there were “limited examples” of supervisors assigning overtime. (DDE at 8.) The DDE fails to cite a single authority in support of the argument that limited examples warrant denial of supervisory status. Further, the Regional Director erroneously concluded that the Employer had not established that Maintenance Supervisors had the authority to require overtime. (*Id.*) The documentary evidence showed that the Maintenance Supervisors assigned overtime and notified Parks for budgetary purposes. It is spurious to conclude that this does not show authority to require overtime.

Regarding the responsibility to direct factor, Board law provides that the authority to responsibly direct arises “[i]f 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...provided that the direction is both responsible and carried out with independent judgment.” See *Brusco Tug and Barge*, 359 NLRB No. 43, slip op. at 7, citing *Oakwood Healthcare*, 348 NLRB at 691-692. To show that an individual is accountable for a task's performance, a party must show that the individual could suffer adverse consequences if the task is not performed. *Id.*

At hearing, both Parks and Kline testified, after the Maintenance Supervisor prioritize work assignments/orders for the shift, he uses independent judgment to assigns daily tasks to maintenance associates based on their skills. Kline's opening remarks about his job made that abundantly clear. Parks testified that Maintenance Supervisors retain the complete discretion to “choose whoever was on their shift to do that - the work. Depending on what it was, who would have the capability for that project.” (Tr. 61). This is entirely consistent with Kline's view of his own job. Parks also made it perfectly clear that she does not tell the Maintenance Supervisor what associate should be performing the work. (Tr. 62). In other words, it is the responsibility of the Maintenance Supervisor to use his discretion and independent judgement to determine the best associate for each specific task.

Kline's proclamations that “he runs the daytime shift,” is the “supervisor, lead person, mentor, trainer” are, by his own admission, clear evidence that he is responsible for the directing the work of associates in the maintenance department. In doing this, Kline makes clear that in directing other associates, his interest aligns with that of management and are simply not the completion of a simple work task. All of this evidence was ignored by the Regional Director, who instead relied on a perceived and imaginary lack of accountability, based on the fact that Parks “could not recall any incident where she had spoken to a supervisor about work on his or her shift.” (DDE at 9.) This does not mean that Maintenance Supervisors are not accountable, it just means

that Parks has not had occasion to discipline a Maintenance Supervisor for failing to act like a supervisor. The Regional Director just ignored the text message exchange between Parks and Smith about Smith failing to notify Parks about his assignment of overtime hours to James. (Er. Ex. 7.) The Regional Director also ignored Parks' testimony that Maintenance Supervisors are accountable and the fact that the job description describes their "*primary job*" as "assists in the *oversight* and organization of all the building and grounds Maintenance." (Er. Ex. 4 (emphasis added).) The Regional Director erred in her reliance on the lack of evidence of accountability, creating the illogical impression that the maintenance department in a large Casino Hotel operates in a vacuum and that every maintenance issue is somehow resolved without any direction, prioritization or independent judgment.

**F. Maintenance Supervisors Possess Numerous Secondary Indicia**

The Board has held that secondary indicia includes: whether the individual is considered a supervisor in the view of fellow workers, attends management meetings, has different terms and conditions of employment from fellow employees, and the ratio of supervisor to non-supervisor. *See Poly America* 328 NLRB 667, 670 (1999); *Maine Yankee Atomic Power Co. v. NLRB*, 624, F.2d. 347, 365 (1st Cir. 1980); *Dean & Deluca New York, Inc.*, 338 NLRB 1046 (2003); *American River Transportation Co.*, 347 NLRB 925, 927 (2006); *Sheraton Universal Hotel*, 350 NLRB 1114, 1118 (2007).

It was established at the Hearing that Maintenance Supervisors attend management-only training sessions, which do not include associates, and have previously focused on coaching and team building. Kline admitted to attending the training. (Tr. 173). Maintenance Supervisors are also viewed by maintenance associates as supervisors. This was evident throughout the hearing as it was established that maintenance associates routinely look to Maintenance Supervisors for instruction and on the job training and safety tips . (Tr. 31, 33, 37, 38 ; E-3).

In addition, it was established that Maintenance Supervisors receive a higher hourly rate than associates, have an Employer email address and have access to an ordering system called Birchstreet, to order goods and supplies when necessary, which associates are not permitted to use. (Tr. 103). Finally, if the DDE is not overturned by the Board, the Maintenance department will have no manager and zero supervisors. Every other department at the Casino Hotel has a manager and/or supervisors reporting to a Director, with several departments reporting to Parks herself. It simply is not feasible for Parks to adequately manage the maintenance department without any managerial support.

The Regional Director ignored the fact that Maintenance Supervisors possess numerous secondary indicia which should serve to support the fact that Maintenance Supervisors possess several primary indicia of supervisory status.

## **V. CONCLUSION**

The Board should reverse the Decision and Direction of Election, void Certification and hold that the Maintenance Supervisors at the Casino Hotel are statutory supervisors under the Act.

**CERTIFICATE OF SERVICE**

I, Paul Galligan, Esq., certify that on this date I caused a copy of the foregoing Employer's Request For Review Of Decision And Direction Of Election And Request To Stay Election to be served via Electronic Filing through the Board's website on the Board and via E-mail and Federal Express Overnight Mail upon:

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By: /s/ Paul Galligan

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Date: July 25, 2019