

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

In the Matter of

RHODE ISLAND SCHOOL OF DESIGN

Employer

and

NEW ENGLAND COALITION OF PUBLIC  
SAFETY

Petitioner

Case 01-RC-073853

**DECISION AND DIRECTION OF ELECTION**<sup>1</sup>

The Employer, Rhode Island School of Design (RISD), operates a private non-profit college in Providence, Rhode Island. The Petitioner, New England Coalition of Public Safety (NECOPS), seeks to represent a unit of sergeants employed in the college's Public Safety Department, including three full-time sergeants and one on-call sergeant.

The Employer asserts that the petition should be dismissed on the ground that the sergeants are statutory supervisors, based on their authority to direct and assign work,

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<sup>1</sup> Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

Upon the entire record in this proceeding, I find that: 1) the hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed; 2) the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this matter; 3) the labor organization involved claims to represent certain employees of the Employer; and 4) a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

discipline, effectively recommend termination, adjust grievances, and effectively recommend hiring and promotion.

I find that RISD has not met its burden of demonstrating the supervisory status of the sergeants, and I shall direct an election in the petitioned-for unit.

#### Public Safety Department operations

As the Director of Public Safety and Chief of the Public Safety Department at RISD, Kenneth Bilodeau is the overall commander for security and emergency medical services at the college. Lieutenant Antone Souza reports directly to Bilodeau.<sup>2</sup> The Department employs three full-time sergeants, Jodie Fattibene, Thomas Rudolph, and William LaPierre, and one on-call sergeant, Bertram Peltier, who are the subjects of this petition.<sup>3</sup> The sergeants report to the Lieutenant and ultimately to the Chief.

Fourteen to sixteen public safety officers (PSOs), four full-time and one part-time dispatcher, and four building monitors report directly to the sergeants.<sup>4</sup> The PSOs, dispatchers, and building monitors are currently represented by the Rhode Island School of Design Public Safety Officers' Association and are covered by a collective-bargaining agreement.<sup>5</sup>

The Department operates in three shifts. The day shift works from 7 a.m. to 3 p.m., the evening shift works from 3 p.m. to 11 p.m., and the night shift works from 11 p.m. to 7 a.m. Chief Bilodeau generally works from 7 a.m. to the late afternoon or early evening. Lieutenant Souza normally works from 7 or 7:30 a.m. to 3:30 or 4 p.m. Each shift is staffed, ideally, by one sergeant, three patrol officers, one dispatcher, and one building monitor. Sergeant Fattibene works the day shift, Sergeant LaPierre works the evening shift, and Sergeant Rudolph works the night shift. Bilodeau testified that he and the Lieutenant and the sergeant run day-to-day operations on the first shift, and the sergeant generally makes day-to-day decisions on the other shifts.

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<sup>2</sup> The parties have stipulated, and I find, that Lieutenant Souza is a statutory supervisor who should be excluded from any unit found appropriate.

<sup>3</sup> On-call sergeant Bertram Peltier works a minimum of two shifts per month and more when shifts are open. No party has contended that Peltier is anything other than a regular part-time employee.

<sup>4</sup> There are currently 14 PSOs and two vacancies for PSOs. There are two classifications of PSOs: PSO II and PSO III. The PSO II position, which is the entry-level classification, does not require an EMT license. PSO IIIs must have an EMT license.

<sup>5</sup> In addition to the employees described above, the Public Safety Department employs a crime prevention officer who reports directly to the Lieutenant and two card access control employees who report directly to the Chief. These employees are not included in the existing bargaining unit. The Employer does not assert that the sergeants exercise supervisory authority over these three employees.

The function of the patrol officers is to patrol the campus in motor vehicles as well as by foot and by bicycle. The officers identify and detain violators to turn over to the proper authorities. They conduct initial investigation of incidents and file written incident reports. They respond to medical emergencies and to calls for service, such as lockouts, requests for escorts, and noise complaints. They report fire hazards and enforce college parking regulations.

The dispatcher sits in a cubicle in the Department's facility at 30 Waterman Street. The dispatchers send and receive calls over a two-way radio system and the telephone relating to emergency and non-emergency requests for service. They monitor a fire alarm system and operate a dorm intercom system.

The building monitor sits in a dormitory building at 15 Westminster Street, checking IDs, monitoring building access, and handling lockout situations.

### The sergeants' role in assigning work and responsible direction

#### Responsible direction and assigning PSOs to posts and overall duties

Every shift starts with a roll call, during which the sergeants make sure that the PSOs are clean and orderly, are wearing the proper uniform, and have the proper equipment, which includes batons, flashlights, pepper spray, and handcuffs. Bilodeau testified that the sergeants have authority to send officers home to get a proper uniform or equipment, if they come to work unprepared, but he did not know if that has ever happened. A PSO completes a required checklist for the ambulance that must be completed for every shift, and gives it to the sergeant.

Each shift is generally staffed by a sergeant and three patrol officers. There are three "posts" that must be covered during the shift, with each post consisting of a small geographic area of the campus and the buildings within it. The PSOs cover their assigned post for the entire shift and do not rotate during the shift. The sergeants normally patrol the entire campus, but will cover one of the geographic posts themselves if there are only two PSOs working on their shift. In addition to making sure that the three geographic posts are covered, the sergeant decides which officer will be the designated EMT for medical calls during the shift, i.e., the PSO who drives the Department's transporting ambulance, and which officer will drive the Department's non-transporting ambulance.

Chief Bilodeau testified that, during roll call, the sergeant tells the PSOs which post they will be covering for the shift. Alternatively, the sergeant may ask the officers which post they would prefer to cover and which officer wants to be the EMT for the shift. The Department sometimes has to operate a shift with no sergeant, in which case the officers decide among themselves which post to cover. In most cases, the officers patrol the campus in a motor vehicle, but the sergeant may also tell the officers, on an ad hoc basis, to patrol the campus by foot or by bicycle.

Sergeant LaPierre testified that, on his shift, he plays no role in assigning officers to their posts. Rather, the practice is that the officers select the posts they prefer during roll call, by seniority. Sergeant Rudolph testified that, on his shift, he never has the option to assign officers to their posts, because of seniority. One very senior officer on his shift prefers to work a certain detail and rarely works the road. With respect to the EMT designation, there is usually only one officer on his shift who is an EMT, so that officer automatically takes the ambulance, and Rudolph has no discretion in that assignment.

The College maintains a Manual of Policies and Procedures that includes a section entitled “Direction of Supervision.” Pursuant to Section 2.6 of that section, “Supervisory officers will be held accountable for the performance of the members under their immediate supervision. Although Supervisory Officers may free themselves of the actual performance of a given task, a Supervisory Officer cannot rid himself/herself of responsibility or accountability for the accomplishment of the task.” Sergeants are included in the chain of command described in this section.

After roll call, the sergeants complete required paperwork in the sergeants’ office and read reports covering the last 24 hours.<sup>6</sup> Then they may get into their vehicle and patrol the entire campus.

If a patrol officer finds a car illegally parked on campus, the patrol officer must contact the sergeant on duty for permission to have the car towed. The Department tries to contact the owner first and calls a tow truck service if the owner cannot be found. Only sergeants may authorize the towing of a vehicle.

#### Assigning officers to their shifts

Sergeant Fattibene prepares a weekly schedule for the PSOs, dispatchers, and monitors for all three shifts.<sup>7</sup> Each of the three shifts is optimally manned by one

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<sup>6</sup> Chief Bilodeau testified that patrol officers are required to complete incident reports in certain circumstances, for incidents ranging from misdemeanor thefts to serious matters such as fires or medical calls. The reports may be used for such purposes as insurance claims or crime analysis. The sergeants review the reports completed by patrol officers. The sergeants may approve the reports or ask the officers to do some additional work on them. Bilodeau reviews the reports daily and has, on rare occasions, sent them back to the sergeants if he believes they are deficient, e.g. they need spelling corrections or he believes the officer should dig a little further. Sergeant LaPierre testified that he, himself, does not approve incident reports, because that work is tasked to Sergeant Rudolph.

<sup>7</sup> The Department’s Manual of Policies and Procedures states at Chapter 1.3A, “A member shall report for duty as scheduled by the Officer in Command unless on authorized leave such as a regularly scheduled day off, a personal day, during vacation, etc., as outlined in the Union contract or by reason of injured-on-duty status, or as a result of authorized sick leave.” Bilodeau testified that the “officer in command” would be his designee.

Sergeants LaPierre and Rudolph each testified that they have no role in preparing the schedule.

sergeant, three patrol officers, one dispatcher, and one monitor, seven days a week.<sup>8</sup> The schedule sometimes stays the same, or it may change from week to week or day to day. Bilodeau testified that the PSOs ask the sergeants if they may change their schedule or take a day off and that they call in sick to the sergeants. Sergeant LaPierre testified that sergeants do not approve the PSOs' requests for vacation days or requests to swap shifts. Rather, Lieutenant Souza is in charge of approving requests for vacations, personal days, and that type of request. The PSOs fill out request forms, and LaPierre takes the forms to the Lieutenant's office.

Bilodeau testified that he does not get involved in preparing the schedule. The record does not reveal whether any provisions in the collective-bargaining agreement govern the regular scheduling of the employees in any way,<sup>9</sup> nor does it reveal what considerations Sergeant Fattibene takes into account when scheduling employees to their shifts.

The Public Safety Department employees are entitled to breaks during the course of their shifts, but there has to be at least one officer who is able to respond to an emergency call. PSOs call in to the dispatcher when they wish to take their lunch break. Sometimes the dispatcher tells the officers that they cannot take a break just then because the other officers are tied up. Bilodeau testified that he has heard sergeants tell officers on the radio that they will have to wait for their break because things are too busy or another officer is already on break.

Sometimes RISD employs PSOs for extra details to staff special events at the college. These details are assigned pursuant to the collective-bargaining agreement, under which PSOs bid on the details and are assigned to them on a rotating basis.

Sometimes there is a need for an extra PSO due to an unexpected event<sup>10</sup> or due to the absence of a PSO who was scheduled to work. A sergeant can work one of the three posts if there is one absent PSO, but an extra PSO is required if there are fewer than two PSOs coming on to a shift. Bilodeau testified that he has told the sergeants they have his blessing to bring in an officer on an overtime basis as they see fit, and they are not required to call him first.<sup>11</sup> They have authority to require a PSO who is not scheduled to

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<sup>8</sup> It appears that the sergeants generally work five days a week. On the days that they are off, another sergeant or the lieutenant may fill in for them. For some shifts, there is no sergeant on duty.

<sup>9</sup> The only part of the collective-bargaining agreement that was submitted into evidence was the contractual grievance procedure.

<sup>10</sup> For example, there have been occasions in which a "party bus" brought an influx of people to an area adjacent to the RISD campus.

<sup>11</sup> Department's Manual of Policies and Procedures provides at Chapter 1.3B, "A member shall report for duty whenever so ordered by an Officer in Command, consistent with the power and

work to come in, called a mandatory call back, and to require a PSO who is already working to stay over for another shift, called a mandatory holdover. Bilodeau testified that, although sergeants are not required to communicate with him in such cases, they have traditionally told him that they need an extra officer, and he has taken their word for it. Bilodeau could not recall a situation, however, when a sergeant called in an extra officer without first contacting him. The sergeant may call the PSOs himself or may instruct the dispatcher to call. If a monitor or dispatcher calls in sick, the Department tries to find another monitor or dispatcher to come in, but a PSO can work a monitor or dispatch position if needed.

Sergeant Rudolph, who works the night shift, testified that, based on past practice, he is not allowed to bring in an extra officer for a special event and that he would have to call the Chief or the Lieutenant for permission. He testified that he does not believe he has the authority to order an officer to cover a shift on overtime without the approval of the Lieutenant. If his shift is short of the required number of people, due to people on leave or calling in sick, the dispatcher from the prior shift usually takes steps to call people in voluntarily. The dispatchers use lists to get the minimum staffing required by company policy.

Sergeant LaPierre testified in more detail about the procedures used to obtain extra coverage when needed. Coverage problems are usually handled by the preceding shift. If LaPierre receives a call that an employee will not be in for the shift following his shift, he tries to call in a replacement, or the dispatcher does this if LaPierre is not there. First, off-duty employees are asked to come in to work the shift on a voluntary basis, based on a list that is required by the union contract. LaPierre calls the first person on the list and, if they do not answer, he calls the next person on the list, on a rotating basis.

If LaPierre cannot find a volunteer to come in to work using that list, he may and has required an officer from his shift to stay over for an additional shift. This is called a “holdover,” and LaPierre also referred to a non-voluntary holdover list. LaPierre testified that there is a policy about holdovers and that there is also a provision in the union contract concerning holdovers.<sup>12</sup> The Department’s Manual of Policies and Procedures at Chapter 13.3.D states:

The process for holding over a member will be as follows:

1. The OIC will be responsible for coordinating mandatory overtime. Mandatory overtime will be on a rotating basis in accordance with section 7.5 of the CBA between the Rhode Island School of Design and the PSOA.

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authority of the Director of Public Safety to call to duty any member when occasion requires such action.”

<sup>12</sup> As noted above, the collective-bargaining agreement was not submitted into evidence, with the exception of the grievance and arbitration procedure.

2. Mandatory overtime may be for a period of time sufficient to allow for voluntary replacement coverage or for the entire shift, if necessary.

3. Every effort will be made to minimize the inconvenience of holdovers.

Finally, if LaPierre has exhausted the holdover list, for example, because all of the officers on his shift have already done double shifts, then he makes calls to order an off-duty employee to come in to work on a non-voluntary basis. LaPierre has never mandated an off-duty employee to come in to work, however, without obtaining prior authorization from the Chief or the Lieutenant.

### The sergeants' role in discipline

#### Disciplinary authority prior to November 2, 2011

RISD employs a progressive disciplinary system that includes verbal warnings, written warnings, suspension, and termination. Chief Bilodeau testified generally that sergeants have authority to mete out discipline and do so routinely. Sergeants have never had authority to suspend or terminate employees but, at least until November 2, 2011, had authority to issue verbal and written warnings.<sup>13</sup> During that period, sergeants would generally give discipline documents to employees themselves and leave a copy for the Chief or the Lieutenant. They were not required to give copies of verbal warnings to the Chief or the Lieutenant. The sergeants had the discretion to issue warnings for infractions or to look the other way.

RISD submitted into evidence numerous disciplinary documents issued by sergeants prior to November 2011, along with testimony about some of the incidents. In several cases, the sergeants issued verbal or written warnings to officers or dispatchers that had no apparent impact on their job status beyond a warning that further infractions could result in disciplinary action.<sup>14</sup> In the case of four of those warnings, the record reflects that, before issuing the warning, the sergeant consulted with his superiors, who approved the warning.<sup>15</sup>

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<sup>13</sup> The verbal warnings were written disciplinary documents called "verbal warnings."

<sup>14</sup> These warnings, Employer Exhibits 24(a), (b), (e), (h), (l), (m), (n), (q), (s), (t), and Employer Exhibit 30, were issued between 2002 and October 2011.

<sup>15</sup> In the case of Employer Exhibit 24(m), Sergeant Rudolph sent a 9/28/09 e-mail to Lieutenant Souza and Chief Bilodeau asking them to review a verbal warning he intended to present to dispatcher Jim Silverton. Bilodeau agreed with the discipline and initialed the document. In the case of Employer Exhibit 24(k), a written warning issued by Sergeant LaPierre on April 3, 2009, the warning was initialed by Bilodeau, who testified that LaPierre talked to him before issuing it, that this is where the sergeant wanted to go, and Bilodeau supported him. A warning issued by Sergeant Fattibene in February 2011 (Employer Exhibit 24(t)) was countersigned by Bilodeau, and Bilodeau testified with respect to a January 2011 warning by Sergeant LaPierre (Exhibit

In a few instances, however, the sergeants issued verbal or written warnings that affected the employees' job status. In April 2004, Sergeant Peltier issued a written warning for attendance issues in which he stated that, in accordance with the Shift Substitution Procedure, the officer would not be eligible to participate in future shift substitutions for the next six months.<sup>16</sup> In 2005, Sergeant Peltier gave notice to an officer that he would receive a written warning for being a "no call no show" and that further violations would mean future suspension from extra event overtime.<sup>17</sup> In 2008, Sergeant Fattibene issued three warnings to Officer LeDoux for failure to show up.<sup>18</sup> In the first of the three, a verbal warning, Fattibene revoked Officer LeDoux's Voluntary Special Detail privileges for 15 days. In the subsequent two written warnings, Fattibene revoked LeDoux's Voluntary Overtime and Voluntary Special Detail privileges for 30 and 45 days respectively. With respect to two of the 2008 warnings, Chief Bilodeau testified that he does not remember being consulted himself, but he did not know if Lieutenant Souza was consulted. Bilodeau testified that the sergeants had discretion concerning the corrective action to be taken in the case of attendance issues, a matter not dictated by any RISD rules. In November 2010, Sergeant Fattibene issued a verbal warning in which he required the officer to pay the cost of a \$75.00 traffic citation he incurred while driving a RISD vehicle. In that case, however, Bilodeau testified that he advised Fattibene to have the officer pay the ticket.

In two instances, a sergeant's disciplinary decision was later overturned by a superior. A July 2011 written warning issued by Sergeant Rudolph was later downgraded to a verbal warning by Lieutenant Souza, after a meeting with the Union.<sup>19</sup> In a June 2010 incident, Sergeant LaPierre got into an altercation with Dispatcher Donald Vota over Vota's alleged misconduct. LaPierre ordered Vota to leave, Vota refused to leave, and LaPierre felt physically threatened. LaPierre called Bilodeau, who ordered Vota to leave and not to return to work until contacted. LaPierre sent a memo to Souza and Bilodeau reporting the facts of the incident, and he discussed the matter with Bilodeau, after which LaPierre issued a written reprimand to Vota. At a subsequent Step 2 meeting between Bilodeau, Vota, and Vota's union representatives, Bilodeau increased the penalty to a 10-day suspension without pay, a final written warning, and anger management counseling.<sup>20</sup>

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24(s)), that LaPierre brought the issue to his attention, recommended the warning, and Bilodeau supported him in his recommendation.

<sup>16</sup> Employer Exhibit 24(c).

<sup>17</sup> Employer Exhibit 24(d). This warning, thus, only threatened future consequences for further violations.

<sup>18</sup> Employer Exhibits 24(i), (j), and (k).

<sup>19</sup> Employer Exhibit 24(u).

<sup>20</sup> Employer Exhibits 24(o) and (p).

With respect to the sergeants' authority to enforce RISD's rules, Bilodeau testified that sergeants have authority to send an officer home if they come to work improperly dressed or equipped. On July 30, 2011, Sergeant LaPierre issued a memorandum to all uniformed officers, reminding them that it is against RISD policy to smoke in patrol vehicles and stating that he would be speaking to the Chief upon his return and would ask for the termination of any employee who violates the policy. Bilodeau testified that he did not play any role in preparing this directive from LaPierre.

With respect to the sergeants' authority to effectively recommend termination and other discipline, Bilodeau testified that two or three years ago, Sergeant LaPierre recommended the termination of Officer Petraca. Bilodeau agreed and terminated Petraca, based on "a totality of situations." Liz Rainone, RISD's Director of Employee and Labor Relations, testified that Petraca was terminated twice, the first time being in October 2010. Petraca had broken various rules. Chief Bilodeau and LaPierre investigated the matter and met with Rainone. They gave her the facts and recommended termination. Rainone agreed with their recommendation, RISD terminated Petraca, and the Union grieved his termination. After Vice President for Human Resources Candace Bayer heard the grievance at Step 3, Bayer met with Chief Bilodeau, Lieutenant Souza, Sergeant LaPierre, and Rainone. At this meeting, LaPierre recommended that the college take Petraca back and give him a 60-day suspension, one-year probation, a final warning, retraining, and loss of seniority rights. The college accepted his recommendation completely, and Petraca returned to work.

Chief Bilodeau testified that a sergeant may suspend an employee with pay in an out-of-control situation, where a cooling off period is needed, although the sergeants do call him in those cases. As noted above, Sergeant LaPierre ordered Officer Vota to leave in the June 2010 confrontation described above, although Vota refused to leave until ordered to do so by Bilodeau. LaPierre testified that after this incident, Chief Bilodeau told the sergeants that the Human Resources Department had told him to tell the sergeants that they did not have authority to send an employee home or suspend an employee. He said that the sergeants were to call Bilodeau and he would make the determination if an employee would be sent home.

On October 28, 2011, Sergeant LaPierre attempted to send another officer home as a result of a confrontation. In a memorandum to Lieutenant Souza, LaPierre described an incident in which he had an argument with Officer Mefford over LaPierre's accusation that Mefford had been smoking in a patrol vehicle. The confrontation escalated, LaPierre ordered Mefford to leave the building, and Mefford refused to leave. LaPierre testified that he never told Mefford he was suspended and did not have authority to do so. LaPierre immediately called the Chief, who was at home. The Chief told LaPierre to call Souza and tell him to tell Mefford that he was being suspended with pay.

### Disciplinary authority after November 2, 2011

After the October 28, 2011 incident described above, Officer Mefford filed a complaint with RISD's Human Resources Department, asserting that LaPierre had acted unprofessionally. On October 29, 2011, Chief Bilodeau sent an e-mail to LaPierre stating that, if LaPierre had not issued a written warning to Mefford yet, to wait until the Chief got back, because the wording needed to be reviewed first.

Director of Employee and Labor Relations Rainone testified about a discussion she then had with Chief Bilodeau in connection with the Mefford incident and discipline issues in his department in general. In her view, the sergeants were feeling frustrated about the ineffectiveness of the discipline that had been issued. She saw that the department was continuing to issue too many reprimands without looking in employee files for prior discipline. Further, there were differences among the sergeants in the "aggressiveness" of their disciplinary practices, leading to inconsistent discipline. Rainone suggested that the sergeants continue to take actions "in the moment," but rather than committing ideas to paper immediately, talk with the broader supervisory team first as a way to get more consistency. She recommended that the Chief partner with her and bring her in as a consultant in disciplinary matters.

On November 2, 2011, Chief Bilodeau sent the following e-mail to Souza and the sergeants:

It is abundantly clear that a few rank and file wish to contest every minor correction, verbal warning and written warning that we as supervisors put out to manage the department. What I feel is happening is that supervisors are being singled out one at a time and becoming a target for complaints of creating a hostile work environment. I don't know if this will ever change but until further notice we will issue a verbal correction if you see something wrong happening. The facts will be told to Lt. Souza and myself. I will present this to HR and if a reprimand comes down it will already be approved by the college and will come with the weight of the college and not just one supervisor. This will be done every time an incident raises to the level of a verbal or written warning [*sic*]. HR will keep track of infractions and the ladder of discipline followed....

The policy outlined in the November 2, 2011 memo is currently in effect. As for the meaning of this memo, Chief Bilodeau testified that, under this policy, no sergeant may issue discipline without going through the Chief, Lieutenant, and Human Resources. Sergeants may issue an "immediate correction." For example, sergeants may tell officers who are smoking in a place where they should not be smoking to put out whatever they were smoking. Then the sergeants are to discuss the incident with Bilodeau and Souza, who will review the employee's prior warnings and issue any necessary discipline with wording approved by Human Resources. Bilodeau insisted, however, that the change has more to do with getting the wording right than with the sergeants' ability to issue discipline.

Bilodeau testified that, in issuing this memo, he did not intend to take away the sergeants' authority to effectively recommend discipline. Rainone also testified that, although not mentioned in Bilodeau's memo, sergeants should still recommend the action they want to happen, and that she would like their participation in crafting discipline that will stick and be effective.

Bilodeau also testified that, although this is not mentioned in his November 2 e-mail, sergeants still have authority to suspend an officer with pay/send the officer home, e.g., to de-escalate an explosive situation.

Sergeants LaPierre and Rudolph testified that they could discipline until the November 2, 2011 e-mail was issued, but that since the e-mail was issued, they may do no more than issue a verbal correction. LaPierre testified that, shortly after the November 2 e-mail was issued, he had a long meeting at Human Resources concerning the Mefford incident, during which Rainone told LaPierre not to take any discipline without first consulting the Chief or the Lieutenant. LaPierre asked if he would be able to stop Mefford from operating a vehicle if LaPierre smelled alcohol and saw that Mefford was visibly drunk. Rainone said he was not allowed to do so, that he should ignore Mefford, and that anything he did would be seen as retribution.

There is no evidence in the record of any disciplinary incidents that have taken place since the Chief issued the November 2, 2011 e-mail.

#### The sergeants' role in hiring and promoting PSOs

When the Department seeks to hire new patrol officers, Lieutenant Souza reviews the applications and decides which applicants warrant an interview. Souza also administers an aptitude test to those applicants who are interviewed. A committee composed of one or two sergeants and one or two PSOs interviews the candidates. After the interviews, the committee, including the patrol officers, meets to come up with a group recommendation and then meets with the Chief and the Lieutenant to make its recommendation to them. On some occasions, the committee has recommended only one candidate. On one occasion, the committee recommended three candidates. In any event, after the committee makes its recommendation, the Chief interviews the recommended candidates, sometimes with the Lieutenant and sometimes alone. In the one example where the committee recommended three candidates, the Chief did not remember the committee indicating any preference among the three candidates. The Chief interviewed all three candidates and made the final decision to offer jobs to two of them, Officer Woyner and Officer Fournier, for the two openings that existed at the time. In some instances, the Committee has recommended a particular candidate. In one example, the committee recommended only one candidate, Katie Symons. The Chief interviewed only Symons and offered her the job. The Chief could not think of a single instance in which he did not make a job offer to the candidate recommended by the committee.

Sergeants have no authority to promote patrol officers themselves but play a role in recommending their promotion. When the Department seeks to promote a PSO to a sergeant position, two committees interview the candidates. One committee is composed of managers from other RISD departments, such as Student Affairs, Facilities, Museum Security, and another department. A second committee is composed only of sergeants;<sup>21</sup> patrol officers do not participate in interviews for promotion to sergeant. Both committees rank the candidates and make a verbal recommendation to the Chief.

In the one specific example described by Chief Bilodeau, the two committees interviewed four candidates for a sergeant position. Each committee met separately with the Chief and each recommended a candidate named Lovell. The Chief testified that he did not interview any of the candidates himself after the committee interviews, because all of the candidates were long-term employees, meaning he already had an opinion about their abilities and qualifications. He testified that Public Safety is a small department and that he knew the strengths and weaknesses of the candidates from working with them. Lovell was within the top two in the Chief's rankings, but the Chief had been leaning in another direction. When he listened to the reasoning of the two committees, however, he followed their recommendation and offered the position to Lovell.

#### The sergeants' role in the grievance process

The PSOs, dispatchers, and building monitors are covered by a collective-bargaining that includes a grievance and arbitration procedure. Pursuant to Step I of the procedure, employees with a grievance meet with the "Immediate Supervisor," who is to provide a written answer. The sergeants are the "immediate supervisors" for purposes of the contractual grievance procedure. The Director of Public Safety or his designee is the college's Step II representative, and a Human Resources manager is the Step III representative.

Bilodeau testified that sergeants hear grievances routinely and that every sergeant has heard a grievance at some point, although there are not a lot of grievances. Sergeant LaPierre testified that he has never received a grievance in five years. Sergeant Rudolph testified that he understands he has the ability to hear grievances but that he has never received one in his six years as a sergeant.

RISD submitted into evidence three grievances answered by Sergeant Fattibene, one in 2008 and two in November 2011.<sup>22</sup> The grievances concerned a transfer to a different shift, failure to contact a part-time dispatcher for an open shift, and failure to

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<sup>21</sup> Sergeant Thomas Rudolph testified that he has not participated on a hiring committee for the last three to four years and has never participated in a committee to interview candidates for promotion to sergeant.

<sup>22</sup> Bilodeau testified that these three are not the only grievances adjusted by sergeants, that these three are the grievances he was able to find, and that the sergeants would keep their own grievance documents.

pay time and a half for a special detail. Sergeant Fattibene denied all of them at Step I. One of the three grievances was heard by Chief Bilodeau at Step II, who also denied it. The other two grievances denied by Fattibene were never brought to Step II. Bilodeau testified that many grievances are handled at the sergeants' level and never reach his desk for a final decision.

Sergeant LaPierre testified that he is aware that other sergeants have responded to grievances on behalf of the college and, at one time, could grant or deny them. He testified, however, that in July or August 2011, in a meeting with the Chief and the Lieutenant, the sergeants were told that, if they receive any grievances, the sergeants should deny the grievances outright, so the Lieutenant and the Chief could address them properly.<sup>23</sup> As a result, LaPierre does not believe he has authority to address grievances.

Bilodeau denied that he has ever issued an order that sergeants should deny every grievance and let him and Lieutenant Souza deal with grievances. He testified that sergeants can settle grievances and reach a "compromise" with the employee and the union. He testified that there may have been some grievances handled by sergeants that ended in a compromise, but he could not remember the specifics of any grievance that ended in a compromise, independent of Bilodeau's involvement.

#### Secondary indicia

Sergeant and PSOs wear the same uniform, with the exception that the sergeants' uniform includes stripes that signify their rank. The Lieutenant and the Chief wear a different uniform with a white shirt.

The sergeants drive a vehicle with the word "supervisor" on it. The sergeants have their own office, as does the Lieutenant. The PSOs, dispatchers, and building monitors do not have an office, although they have a report-writing room and a break room. The sergeants have mail boxes, while the PSOs have mail slots in a different area of the building. The sergeants attend "supervisory" meetings with the Lieutenant and the Chief.

Sergeants are hourly paid. Their position is the highest level job grade in the Physical Plant and Safety job group, and they are paid about \$23 to \$24 per hour. Sergeants earn about \$3 to \$4 per hour more than the highest level PSOs and about \$5 per hour more than the other PSOs. The building monitors earn about \$13 per hour. The record does not reveal the wages of the dispatchers, the Lieutenant, or the Chief.

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<sup>23</sup> LaPierre later testified on cross examination that the Chief said the "easiest thing to do" was deny grievances outright, and the Lieutenant and Chief would handle them. When asked to clarify which version of his testimony was accurate, LaPierre then testified, "I don't remember the exact words, if they said easier or not, that might be me making a mistake. We were specifically told to deny it outright so that the Lieutenant and the Chief could handle it."

The benefits of the PSOs, dispatchers, and building monitors are governed by their collective-bargaining agreement. The sergeants receive various benefits received by other college personnel.

The job description for the sergeants and some annual evaluations of sergeants that were submitted into evidence refer to the sergeants as “supervisors” or “managers” or to the fact that they “supervise” the shift and “manage” the staff on their shifts.

## **ANALYSIS**

Pursuant to Section 2(11) of the Act, the term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, where the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. To qualify as a supervisor, it is not necessary that an individual possess all of the powers specified in Section 2(11) of the Act. Rather, possession of any one of them is sufficient to confer supervisory status. *Chicago Metallic Corp.*<sup>24</sup>

The burden of proving supervisory status rests on the party alleging that such status exists. *NLRB v. Kentucky River Community Care.*<sup>25</sup> The status of a supervisor under the Act is determined by an individual’s duties, not by his title or job classification. *New Fern Restorium Co.*<sup>26</sup> The Board will refrain from construing supervisory status too broadly, because the inevitable consequence of such a construction is to remove individuals from the protection of the Act. *Quadrex Environmental Co.*<sup>27</sup>

### **The sergeants’ role in directing employees and in assigning work**

In *Oakwood Healthcare, Inc.*,<sup>28</sup> the Board refined its analysis of the terms “assign,” “responsibly direct,” and “independent judgment” in assessing supervisory status. The Board announced that it construes the term “assign” to refer to “the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.”<sup>29</sup>

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<sup>24</sup> 273 NLRB 1677, 1689 (1985).

<sup>25</sup> 532 U.S. 706, 121 S.Ct. 1861, 167 LRRM 2164 (2001).

<sup>26</sup> 175 NLRB 871 (1969).

<sup>27</sup> 308 NLRB 101, 102 (1992).

<sup>28</sup> 348 NLRB 686 (2006).

<sup>29</sup> *Id.* at 689.

With respect to “responsible direction,” the Board explained in *Oakwood* that, if a person 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. For direction to be “responsible,” the person directing the oversight of the employee must be accountable for the performance of the task by the other. To establish accountability, it must be shown that the employer delegated to the putative supervisors authority to direct the work and take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisors if they do not take these steps.<sup>30</sup>

Finally, the Board held in *Oakwood* that to establish that an individual possesses supervisory authority with respect to any of the statutory functions, the individual must also exercise independent judgment in exercising that authority, which depends on the degree of discretion with which the function is exercised. “[T]o exercise independent judgment, an individual must at a minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.”<sup>31</sup> “[A] judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.”<sup>32</sup> The Board also stated that the degree of discretion exercised must rise above the “routine or clerical.”<sup>33</sup>

#### Responsible direction

I find the Employer has failed to establish that the sergeants responsibly direct the security officers. In this regard, sergeants do direct PSOs to perform certain discrete tasks, such as ordering them to patrol by foot or by bicycle rather than in a vehicle, authorizing them to have an illegally parked vehicle towed, or directing them to complete an incident report or the ambulance checklist. The Employer has failed to establish, however, that any of these directions require independent judgment. For example, there is no record evidence concerning the types of judgments made by the sergeants in directing PSOs to patrol by one means versus another. *Croft Metals, Inc.*<sup>34</sup> (Board will not conclude that the degree of discretion involved rises above the routine or clerical

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<sup>30</sup> Id. at 689-692.

<sup>31</sup> Id. at 693.

<sup>32</sup> Id.

<sup>33</sup> Id.

<sup>34</sup> 348 NRLB 717, 721 (2006).

where the employer adduced almost no evidence regarding the factors weighed or balanced by the lead person in making production decisions and directing employees).

Further, in order to establish supervisory status on the basis of responsible direction, *Oakwood Healthcare* requires the Employer to demonstrate that the sergeants are held accountable for the performance of the security officers on their shifts. There is no record evidence that the sergeants have ever actually faced or been told they would face any material consequences to their own terms and conditions of employment, based on the performance of their subordinates. The only evidence concerning this factor is general language in the Policy and Procedures Manual to the effect that supervisory officers “will be held accountable” in some unspecified way for the performance of the members under their immediate supervision and that they cannot free themselves of responsibility or accountability for the accomplishment of tasks performed by their subordinates. This policy, which does not suggest any particular consequence for the sergeants, adverse or positive, is far too vague to establish the requisite accountability. *Golden Crest Healthcare Center*<sup>35</sup> (employer presented no evidence that any charge nurse has experienced any material consequences to her terms and conditions of employment, either positive or negative, as a result of her performance in directing CNAs, nor any evidence that a charge nurse was ever informed that any such material consequences might result from her performance in directing CNAs); *Alstyle Apparel*<sup>36</sup> (respondent must present evidence of “actual accountability” to prove responsible direction).

#### Assignment to a place or overall duty

The sergeants’ role in assigning PSOs to their geographic posts during the course of their shifts could arguably be deemed as authority to assign them to a place or to an overall duty. The record reflects that, in many instances, the sergeants do not assign PSOs to their posts at all. Rather, the general practice, at least on some shifts, is for the PSOs to select their posts themselves based on their own preferences and/or based on seniority. To the degree that sergeants do assign PSOs to their geographic posts, RISD has failed to establish that it requires independent judgment to make these assignments, in the absence of any evidence that the sergeants consider the relative skills or characteristics of the officers in sending them to one post versus another. *Network Dynamics Cabling, Inc.*<sup>37</sup> (no independent judgment proved absent evidence that putative supervisor assessed the relative skills of employees in shifting them from one task or crew to another). For similar reasons, RISD has failed to show that the sergeants’ role in designating a PSO to the overall duty of EMT for the shift establishes supervisory status. The record shows that sergeants sometimes ask the officers who wants to be the EMT, or the officers decide among themselves who will be the EMT, or the sergeants have no

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<sup>35</sup> 348 NLRB 727, 731 (2006).

<sup>36</sup> 351 NLRB 1287, 1287 (2007).

<sup>37</sup> 351 NLRB 1423, 1425 (2007).

discretion in the matter because there is only one EMT on the shift to choose from. To the degree that sergeants ever have to choose between more than one PSO in making the EMT designation, RISD has adduced no evidence concerning the types of judgments the sergeants make in doing so.

#### Assignment to a time

The Board has held that an individual's role in scheduling employees does not necessarily establish that the individual is a statutory supervisor, often finding this to be a clerical function in the absence of evidence that the scheduling requires independent judgment. *Dean and DeLuca New York, Inc.*;<sup>38</sup> *Boston Medical Center Corp.*;<sup>39</sup> *Sav-On Drugs, Inc.*<sup>40</sup> Here, the record shows only that each shift must be staffed by a predetermined number of employees in each classification and that Lieutenant Souza must approve the PSOs' requests for time off. The record is devoid of any evidence concerning the types of judgments Sergeant Fattibene makes in assigning available employees to their shifts. Thus, RISD has failed to demonstrate that Sergeant Fattibene's preparation of the schedules demonstrates his supervisory status.<sup>41</sup>

The record reflects that the PSOs generally determine themselves when they wish to take a lunch break, although the sergeants may tell them they have to wait if things are busy or another officer is already on break. The Board has found that assignment of breaks and lunch periods are routine and do not require the use of independent judgment. *Springfield Terrace LTD*;<sup>42</sup> *Regal Health & Rehab Center*;<sup>43</sup> *Los Angeles Water & Power Employees Assn.*<sup>44</sup>

With respect to the sergeants' role in assigning PSOs to work when a shift is understaffed, the record reveals that extra details for special events are assigned on a rotating basis, as prescribed by the collective-bargaining agreement. Thus, no independent judgment is required to offer those assignments. As for finding a replacement in the event of an absent employee, the record reflects that the sergeants first attempt to find a volunteer by calling employees on a rotating basis from a list required

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<sup>38</sup> 338 NLRB 1046, 1048 fn. 15 (2003).

<sup>39</sup> 330 NLRB 152, 203 fn. 153 (1999).

<sup>40</sup> 243 NLRB 859, 861 (1979).

<sup>41</sup> I note that the other sergeants play no role in preparing the schedules, and the record does not reveal whether the collective-bargaining agreement imposes any constraints on Sergeant Fattibene's scheduling decisions.

<sup>42</sup> 355 NLRB No. 168, slip op. at 6 (2010).

<sup>43</sup> 354 NLRB No. 71, slip op. at 9 (2009).

<sup>44</sup> 340 NLRB 1232, 1234 (2003).

by the collective-bargaining agreement. Again, no independent judgment is required in determining whom they will ask to work. Further, the Board has held that seeking off-duty volunteers to help out when the facility is shorthanded falls short of supervisory authority to assign. *Golden Crest Healthcare Center*;<sup>45</sup> *Heritage Hall, E.P.I Corp.*;<sup>46</sup> *Youville Healthcare Center, Inc.*<sup>47</sup> If no PSO is willing to volunteer, sergeants do have authority to mandate a “holdover” from the prior shift or, failing that, to order an off-duty PSO to work on a non-voluntary basis. Despite Bilodeau’s testimony that sergeants are not required to communicate with him in such cases, LaPierre testified that he has never mandated an off-duty employee to work without prior authorization from the Chief, and Bilodeau could not recall a situation when a sergeant called in an extra officer without first consulting him. *Golden Crest Healthcare Center*<sup>48</sup> (employer has not met its burden to establish that charge nurses have authority to require CNAs to stay past the end of their shifts or come in from home, where the charge nurses only make “mandating” phone calls when authorized to do so by an admitted supervisor; charge nurses exercise a merely ministerial function in placing such calls). Further, no independent judgment is required to select the officer who will be required to work, because RISD procedures and the collective-bargaining agreement require mandatory overtime to be assigned on a rotating basis.

#### The sergeants’ role in the disciplinary process

The evidence demonstrates that, prior to November 2, 2011, the sergeants had authority to issue verbal and written warnings. Although some of their warnings were reviewed by their superiors, and the sergeants’ determinations regarding the level of discipline imposed were occasionally reversed, it appears that, at least in some cases, they issued warnings that were not reviewed by their superiors, and at least a few of the warnings included a penalty that affected the employees’ job status, i.e., the revocation of shift substitution, special detail, and voluntary overtime privileges. I find, however, that Chief Bilodeau’s November 2, 2011 e-mail rescinded the sergeants’ authority to issue verbal and written warnings, as well as whatever prior authority they may have had to effectively recommend more serious discipline. Accordingly, I find that the sergeants’ role in discipline no longer constitutes statutory authority.

RISD asserts in its post-hearing brief that, per the terms of the e-mail, sergeants have retained the authority to issue verbal warnings as they deem appropriate. That is not the case. The e-mail and the testimony about it make it clear that sergeants will no longer be able to issue on their own the type of “verbal warning” that they were previously authorized to issue, i.e., a verbal warning that is reduced to writing. It is clear from the e-

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<sup>45</sup> 348 NLRB at 729.

<sup>46</sup> 333 NLRB 458, 459 (2001).

<sup>47</sup> 326 NLRB 495, 496 (1998).

<sup>48</sup> 348 NLRB at 729.

mail and the testimony about the e-mail that written discipline of any kind must now be discussed with the Chief and the Lieutenant and approved by the Human Resources Department before it is issued.

The e-mail, which states that “we will issue a verbal correction if you see something wrong happening,”<sup>49</sup> does permit the sergeants to issue a “verbal correction,” or what Chief Bilodeau referred to in his testimony as an “immediate correction.” An example of an immediate correction, according to the Chief, would be a sergeant telling an officer who is smoking in a place that he should not be smoking to put out the cigarette. Rainone also explained that she suggested to Bilodeau that sergeants continue to take actions “in the moment,” but that they should talk to the broader supervisory team before committing anything to paper. I find that the sergeants’ authority to issue this sort of verbal correction on the spot, i.e., a verbal reprimand that is not reduced to writing, is too minor to establish their supervisory status. *Ohio Masonic Home, Inc.*;<sup>50</sup> *Passavant Health Center.*<sup>51</sup>

RISD’s contention that the e-mail did not rescind the sergeants’ authority to effectively recommend termination or other discipline has no merit. First, it is not entirely clear that the sergeants ever had authority to effectively recommend termination. The authority to “effectively recommend an action generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed. *DirectTV U.S.*;<sup>52</sup> *Children’s Farm Home.*<sup>53</sup> With respect to the termination of Officer Petraca, Rainone testified that Chief Bilodeau investigated the matter along with Sergeant LaPierre, before recommending Petraca’s termination to Rainone, and Bilodeau testified that he agreed with LaPierre’s recommendation to terminate Petraca based on a “totality of situations,” which he did not describe further. In these circumstances, the Employer has failed to meet its burden of proving that LaPierre’s recommendation to terminate Petraca was followed without independent investigation by Bilodeau. The Human Resources Department later accepted LaPierre’s recommendation to reduce the penalty of termination to a suspension, probation, and a final warning, but it cannot be said that Human Resources followed LaPierre’s recommendation without any independent investigation, where the Vice President for Human Resources had just held a Step 3 hearing on the case, where she would have had the opportunity to hear the Union’s and/or Petraca’s view of the case.

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<sup>49</sup> “We” presumably refers to the sergeants.

<sup>50</sup> 295 NLRB 390, 393-394 (1989).

<sup>51</sup> 284 NLRB 887, 889 (1987).

<sup>52</sup> 357 NLRB No. 149, slip op. at 3 (2011).

<sup>53</sup> 324 NLRB 61, 61 (1997).

Even assuming that the sergeants once had authority to effectively recommend termination or other discipline, that authority was clearly rescinded by the Chief's November 2, 2011 e-mail. Bilodeau and Rainone testified at the hearing that, by issuing this memo, RISD did not intend to take away the sergeants' authority to effectively recommend discipline. The e-mail itself, however, explicitly directs the sergeants only to convey "the facts" of incidents to Souza and Bilodeau, who, in turn, will present "the facts" to the Human Resources Department. The e-mail makes no mention of the sergeants playing any role in recommending a particular disciplinary penalty to the college. Assuming the sergeants have authority to recommend a particular disciplinary action under the new policy, RISD has failed to show that the Human Resources Department intends to follow such recommendations with no independent investigation. I find that RISD has failed to meet its burden of demonstrating that sergeants currently possess authority to effectively recommend discipline.

RISD asserts, finally, that sergeants still have authority after issuance of the new policy to suspend officers with pay, pending a more coordinated response that includes input from the Human Resources Department. In this regard, Chief Bilodeau testified that, although not mentioned in his e-mail, sergeants still have authority to suspend officers with pay/send officers home, for example, to de-escalate an explosive situation. Assuming that sergeants still have authority to order employees to leave the facility in the case of an explosive situation, the Board has long held that authority to send employees home for flagrant violations or egregious misconduct does not require the use of independent judgment and does not, therefore, constitute supervisory authority. *Bredero Shaw*;<sup>54</sup> *Michigan Masonic Home*;<sup>55</sup> *Vencor Hospital-Los Angeles*;<sup>56</sup> *Washington Nursing Home*.<sup>57</sup>

#### The sergeants' role in hiring and promotion

The sergeants' role in participating in the hiring process for new PSOs does not confer supervisory status. Both sergeants and PSOs participate in group interviews of candidates and make a group recommendation to the Chief, who then interviews the candidates himself, with or without Lieutenant Souza. I note that there is no contention by RISD that the PSOs' participation in this process, which is identical to that of the sergeants, confers supervisory status on them. The fact that the chief has followed the hiring recommendations of the sergeants and PSOs does not demonstrate, in and of itself, that the sergeants effectively recommend hiring, because the Chief and/or the Lieutenant, who are admitted supervisors, independently investigate the suitability of the candidates

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<sup>54</sup> 345 NLRB 782, 783 (2005).

<sup>55</sup> 332 NLRB 1409, 1411 fn. 5 (2000).

<sup>56</sup> 328 NLRB 1136, 1139 (1999).

<sup>57</sup> 321 NLRB 366 fn. 4 (1996).

by conducting their own interviews. *J.C. Penney Corp.*;<sup>58</sup> *Los Angeles Water and Power Employees' Association*;<sup>59</sup> *Ryder Truck Rental, Inc.*;<sup>60</sup> *California Beverage Co.*<sup>61</sup>

Nor does the sergeants' role in interviewing candidates for promotion to sergeant establish their supervisory status. I note at the outset that the impact of the sergeants' recommendation is diluted by the participation of a second committee, composed of managers from other departments, which also interviews candidates and makes its own recommendation to the Chief. Although the Chief did not interview the candidates himself during the one promotional process specifically described, the Chief's testimony made clear that he had independent knowledge of the abilities, qualifications, strengths and weaknesses of the candidates, who were all long-term employees with whom he had worked for years. *Custom Mattress Mfg.*<sup>62</sup> (employer failed to show that employee "Din's" recommendations for wage increases were indicative of supervisory status, where the Employer's operation was relatively small, the plant manager testified that he observes employees while they work, there is no contention that the plant manager is not generally familiar with all of the employees' work, and the record shows that the plant manager is sufficiently knowledgeable to act without any input from Din). In light of the Chief's independent knowledge of the candidates' suitability, it cannot be said that the Chief relied exclusively on the recommendation of the sergeants in selecting a candidate for promotion. Therefore, their recommendations, even if followed, were not effective recommendations.

#### The sergeants' authority to adjust grievances

The Board has held that an individual's role as the representative of the employer with respect to the first step of a contractual grievance procedure may demonstrate supervisory authority. *Comprehensive Health Planning Council*<sup>63</sup> (managers are supervisors, where they are the representatives of the employer at the first step of a grievance procedure established by a collective-bargaining agreement, they have exercised their authority to adjust grievances on behalf of the employer to some degree, and the employer has relied on this authority in the handling of at least one grievance).

Here, however, Sergeant LaPierre testified that the Chief told the sergeants in the summer of 2011 that they were to deny any grievances they received outright, so that the

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<sup>58</sup> 347 NLRB 127, 129 (2006).

<sup>59</sup> 340 NLRB 1232, 1233, 1234-1235 (2003).

<sup>60</sup> 326 NLRB 1386, 1387-1388 fn. 9 (1998).

<sup>61</sup> 283 NLRB 328, 329 (1987).

<sup>62</sup> 327 NLRB 111, 112 (1998).

<sup>63</sup> 256 NLRB 1191, 1192 (1981).

Lieutenant and the Chief could handle them.<sup>64</sup> If that is the case, the sergeants no longer have any discretion to “adjust” or “resolve” grievances and possess only rote authority to deny them, so that grievances may be handled, if requested by the Union, at a higher level of the grievance procedure. If the sergeants are permitted only to deny every grievance presented to them, such limited authority does not require the exercise of any independent judgment.

Chief Bilodeau denied that he ever issued such an order. He testified that sergeants can settle grievances and reach a “compromise” with the employee and the Union. There is no record evidence, however, of any occasion in which a sergeant presented with a grievance did anything but deny it. The only grievances handled by sergeants that were submitted into evidence -- one dated before the alleged change in policy and two dated after the alleged change -- were denied by Sergeant Fattibene. Bilodeau testified that there may have been some grievances handled by sergeants that ended in a “compromise,” but he could not remember the specifics of any grievance that ended in a compromise without his own involvement. The Board has held that testimony utterly lacking in specificity does not meet the Employer’s burden of establishing supervisory status. *Avante at Wilson, Inc.*<sup>65</sup> (unit manager’s general testimony that she was familiar with staff nurses’ sending a CNA home, did not establish supervisory status, where she failed to particularize her testimony in any way, such as by specifying when any such incident took place, who was involved, what the alleged insubordination consisted of, whether higher-level managers had been consulted, or whether the situation was anything more than a one-time occurrence). Any lack of specific evidence is construed against the party asserting supervisory status. *Dean & Deluca New York, Inc.*<sup>66</sup>

In sum, there is, at most, conflicting testimony as to whether the sergeants currently possess authority to adjust grievances using independent judgment. Whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory authority has not been established, at least on the basis of those indicia. *Springfield Terrace LTD*;<sup>67</sup> *Custom Mattress Mfg.*;<sup>68</sup> *The*

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<sup>64</sup> In its post-hearing brief, the Employer asserts that LaPierre’s testimony on this subject changed in that, in one instance he testified that the Chief said the sergeants should deny all grievances outright, and in another instance he testified that the Chief said “the easiest thing to do” was to deny grievances. My review of the record shows that LaPierre later clarified that, although he did not remember the Chief’s exact words, the Chief specifically told the sergeants to deny grievances outright.

<sup>65</sup> 348 NLRB 1056, 1057 (2006).

<sup>66</sup> 338 NLRB 1046, 1048 (2003).

<sup>67</sup> 355 NLRB No. 168, slip op. at 5.

<sup>68</sup> 327 NLRB at 112.

*Door*;<sup>69</sup> *Phelps Community Medical Center*.<sup>70</sup> Thus, I decline to find that the sergeants possess supervisory on the basis of their authority to adjust grievances.

### Secondary indicia

In concluding that RISD has failed to meet its burden of establishing the sergeants' supervisory status, I acknowledge that the sergeants' possess several secondary indicia of supervisory status. In this regard, the sergeants wear stripes that signify their higher rank, have their own office, are higher paid than the already represented employees, and drive a vehicle with the label "Supervisor." Further, the sergeants' job description and annual evaluations refer to them as "supervisors" or "managers." The Board has long held, however, that secondary indicia are insufficient by themselves to establish supervisory status when there is no evidence presented that an individual possesses any one of the several primary Section 2(11) indicia. *Golden Crest Healthcare Center*; <sup>71</sup> *Ken-Crest Services*.<sup>72</sup>

Accordingly, based upon the foregoing and the stipulations of the parties at the hearing, I find that the following employees of the Employer constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time sergeants employed by the Employer at its Providence, Rhode Island facility, but excluding supervisors as defined in the Act.

## **DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by New England Coalition of Public Safety. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

### **Voting Eligibility**

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees

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<sup>69</sup> 297 NLRB 601 fn. 5 (1990).

<sup>70</sup> 295 NLRB 486, 490 (1989).

<sup>71</sup> 348 NLRB at 730 fn. 10.

<sup>72</sup> 335 NLRB 777, 779 (2001).

who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

### **Employer to Submit List of Eligible Voters**

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining whether there is an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before March 19, 2012. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website, [www.nlr.gov](http://www.nlr.gov),<sup>73</sup> by mail, or by facsimile transmission at 617-565-6725. To file the eligibility list electronically, go to the Agency's website at [www.nlr.gov](http://www.nlr.gov), select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

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<sup>73</sup> To file the eligibility list electronically, go to [www.nlr.gov](http://www.nlr.gov) and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu, and follow the detailed instructions.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

### **Notice of Posting Obligations**

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by March 26, 2012. The request may be filed electronically through the Agency's website, [www.nlr.gov](http://www.nlr.gov),<sup>1</sup> but may not be filed by facsimile.

**DATED:** March 12, 2012

/s/ Rosemary Pye

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Rosemary Pye, Regional Director  
First Region  
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