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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20, SUBREGION 37

FOODLAND SUPER MARKET, LIMITED,

Employer,

v.

UNITED FOOD & COMMERCIAL
WORKERS UNION, LOCAL 480,

Petitioner.

CASE NO. 20-RC-308657

**EMPLOYER FOODLAND SUPER
MARKET LIMITED'S REQUEST FOR
REVIEW; MEMORANDUM IN SUPPORT
OF REQUEST FOR REVIEW; EXHIBITS
A-D; BOARD EXHIBITS 2 & 4; JOINT
EXHIBIT 1; EMPLOYER EXHIBITS 1-2,
5-6, 8-9; CERTIFICATE OF SERVICE**

EMPLOYER FOODLAND SUPER MARKET LIMITED'S REQUEST FOR REVIEW

Pursuant to § 102.67(c)(1) and (2) of the National Labor Relations Board's (the "Board") Rules and Regulations, Employer FOODLAND SUPER MARKET, LIMITED ("Employer" or "Foodland") hereby requests the Board review and set aside the Region 20 Regional Director's Decision and Direction of Election dated February 1, 2023 (the "Decision").

The Decision raised substantial questions of law but either no Board precedent is available or the Decision departed from Board precedent in attempting to address those questions. Board precedent requires a finding employees are statutory supervisors when they are given authority to perform just *one* of the functions listed under Section 2(11) of the National Labor Relations Act (the “Act”). The Regional Director’s Decision contravened longstanding Board and judicial precedent holding that statutory supervisors do not need to *actually* exercise their authority to meet the Act’s definition of an exempt supervisor. The Regional Director’s unwarranted findings and misapplication of Board and judicial precedent in this regard prejudice Foodland’s rights under the National Labor Relations Act (the “Act”) and abuse the discretion afforded under the Act.

This Request for Review is supported by the attached memorandum, the exhibits attached hereto, the record in this matter, and any further evidence or argument allowed by the Board.

DATED: Honolulu, Hawaii, February 15, 2023.

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**MEMORANDUM IN SUPPORT OF
REQUEST FOR REVIEW**

MEMORANDUM IN SUPPORT OF REQUEST FOR REVIEW

I. PRELIMINARY STATEMENT

This Request for Review seeks to have the National Labor Relations Board (the “Board”) review and set aside the Decision and Direction of Election issued by the Regional Director for Region 20, dated February 1, 2023 (the “Decision”). Exhibit (“Exh.”) A. In the Decision, the Regional Director concluded Foodland’s Bakery Department Managers (“Bakery Managers”) and Deli Department Managers (“Deli Managers”) (collectively, “Managers”) are not supervisors within the meaning of the National Labor Relations Act (the “Act”), as amended, 29 U.S.C. § 152(11). The Regional Director’s determination failed to meaningfully consider probative evidence in the factual record supporting Employer Foodland Super Market Limited’s (“Foodland”) position. The Decision also improperly applied the preponderance of the evidence standard as well as the Board’s standard for defining supervisors under the Act, as set forth in *Oakwood Healthcare, Inc.*, 348 NLRB 686, 694 (2006).

Foodland presented both testimonial and documentary evidence supporting by a

preponderance of the evidence that its Managers are supervisors as defined under Section 2(11) of the Act. The Regional Director's Decision, however, failed to consider the full scope of evidence presented in support of Foodland's position and disproportionately favored Petitioner United Food & Commercial Workers Union (the "Union") where Foodland and Union (collectively, the "Parties") presented conflicting evidence. The Decision, which acknowledged at least some evidence supporting Foodland's position, also erroneously decided not to consider any secondary indicia of supervisory status, potentially slanting its decision further in Union's favor.

Additionally, the Decision misinterpreted the Parties' collective bargaining agreement ("CBA"). Union explicitly agreed to recognize Foodland's Managers as supervisors under the Act. Union's acquiescence on that point necessarily results in one conclusion: Union voluntarily agreed not to represent Foodland's Managers or accept them into membership. Under Board precedent, Union is therefore precluded by agreement from representing, or seeking to represent, Foodland's Managers and from accepting them into membership.

As more fully shown below, the Board should set aside the Regional Director's Decision for the following reasons: the Decision incorrectly answered substantial questions of law, either because it departed from Board precedent or no Board precedent exists, and made erroneous factual findings when it concluded (1) Managers are not statutory supervisors under the Act; and (2) the Union did not expressly agree to refrain from seeking to represent Managers or from accepting them into membership.

II. STATEMENT OF FACTS

A. Company Background

Foodland owns and operates 31 Foodland, Foodland Farms, Sack N Save, and Kahala Market stores ("Foodland Stores"). See Hearing Transcript Volumes 1 and 2 attached as Exhs. B

and C (“Tr.”) 21:8–10. Each Foodland Store has a single Store Director and several operating department managers for each of its several operating departments, including the deli and bakery departments’ Managers at issue here. Tr. 21:11–12; 23:13–21; 24:9–10; 98:23–99:3; 168:21–169:7; *see* Tr. 52:24–53:7. Managers in each department supervise an assistant manager and several department clerks. *See* Tr. 100:3–8; 169:16–18. The assistant managers and clerks are bargaining unit members of the Union. Tr. 158:18–23; 169:11–13; 170:7–8. Foodland schedules Managers’ pay higher than the bargaining unit employees they supervise and historically increases Managers’ pay annually after changes in their subordinates’ pay rates. Tr. 36:20–23, 37:10–14; 37:19–38:3; 38:8–17.

B. Region 20 Decision and Direction of Election in 2015 (the “2015 Decision”)

In 2015, the Regional Director of Region 20 (the “Region”) directed an election involving the same Manager positions at issue here. Exh. D (Decision and Direction of Election in Case 20-RC-155684, dated Aug. 12, 2015). At that time, the Region decided Managers were not supervisors under the Act. The Region conducted a hearing, after which it directed an election among Managers for union representation. Decision at 1. Union lost that election. The 2015 Decision, however, only decided Foodland *failed to satisfy its burden* the Managers were supervisors under the Act. Exh. D at 2, 17. This determination did not foreclose the legal possibility that Managers, as they were classified and delegated authority in 2015, were statutory supervisors – only that Foodland had not met its burden to prove they were. *See id. Nor did the 2015 Decision preclude future additions to the authority of the Managers that satisfied the statutory definition of a supervisor.*

C. Union’s Agreement with Foodland

The Parties’ operative CBA states in relevant part: “Bake-off and deli managers shall ***not*** be covered under the Collective Bargaining Agreement. **They shall be recognized as**

supervisors and (sic) defined in the Act. The Company acknowledges the recent ruling by the NLRB, on August 12, 2015, as it pertains to the bake-off and deli managers.” Decision at 2; Board (“Bd.”) Exh. 2 at 2-20 (emphasis added).

Just nine days after signing the CBA and agreeing to recognize Manager as supervisors under the Act, Union filed an RC petition seeking to be certified as their representative.¹ In the hearing on Union’s present petition, the Regional Director denied the admission of evidence or testimony relating to interpretation of the above provision. Tr. 17:22–18:8; 32:4–10; Bd. Exh. 4.

D. Duties of Managers Changed Since 2015 Decision

During the Region’s hearing in this matter, Union took pains to emphasize the duties of Foodland’s Managers in 2023 had not changed since the last representation election. Tr. 48:18–25; 131:22–25; 132:1–6; 132:19–25; 133:7–12; 134:20–21; 137:13–15; 180:23–181:1; 181:6–8; 181:20–22; 186:14–22; 209:24–210:1; 217:25–218:2; 220:5–18; 276:19–20; 277:1–2.

The Decision, however, recognized Foodland made significant modifications to its organizational structure when it eliminated multiple supervisory positions previously in place over the Managers. Decision at 3. Upon implementing those changes, Foodland expressly delegated to its Managers responsibility for directing the employees in their respective deli and bakery departments. See Tr. 21:12–19; 24:9–12.

Managers’ responsibilities, and the corresponding level of authority required to execute them, are officially published and described in Foodland’s job descriptions for Bakery and Deli Managers. Employer’s (“Er.”) Exhs. 1 and 2 (Bakery and Deli Manager Job Descriptions). Foodland’s Human Resources Department writes those job descriptions. Tr. 30:8–10. After the 2015 Decision, though, Foodland reallocated responsibility for deli and bakery departments to

¹ Union signed its current CBA with Foodland on November 12, 2022 and Employer signed November 18, 2022. Bd. Exh. 2 at 2-15. Union then filed RC Petition in NLRB Case No. 20-RC-307522 on November 21, 2022.

each store's Store Director and its respective Managers. Tr. 22:12–17, 20–25; 23:15–17; 24:9–12; 55:25–56:9; 56:25–57:7; 57:17–58:2; 58:9–11. Foodland instructed its Store Directors that the Managers possessed the requisite supervisory authority to be more involved with hiring, scheduling employees, approving leave, granting overtime, and both issuing and recommending discipline on a consistent basis. Tr. 24:16–25:1; 25:2–11; 51:12–22.

Foodland's Director of Human Resources emailed Store Directors the Managers' job descriptions and re-emphasized to each Store Director the enhanced level of Managers' authority. Tr. 24:16–25:1; 25:7–11; 30:20–23. Even if, as the Decision noted, Foodland did not inform Managers of this information as it did Managers' supervisors, Foodland's communication to Store Directors still indicated it permitted Managers more supervisory authority than in 2015. Tr. 24:16–25:1; 25:7–11; 30:20–23; *see* Decision at 3 fn. 7.

Foodland also told Store Directors to train Managers on completing GIGs, **which Union witness confirmed occurred**, corroborating Foodland's testimony it granted Managers more involvement in supervisory functions since 2015. Tr. 56:3–19; 260:21–24; 261:4. The fact Managers actually exercised this authority served as further proof of Foodland's substantial operational changes since 2015 – which included substantial changes in Managers' authority that the Decision denied occurred or disregarded. Tr. 51:17–22; 69:12–23; 85:12–14; Er. Exhs. 5 and 6 (Employee Warning Notices, dated June 24, 2021 and Sept. 3, 2021, issued by Manager Mia Ferreira); Decision at 3–4.

E. Managers Possess Multiple Forms of Supervisory Authority and Exercise Their Authority with Independent Judgment in Foodland's Interest

1. Managers possess supervisory authority to responsibly direct department employees.

The Decision did not consider evidence Managers assign and responsibly direct employees. *See* Decision at 12–13. Testimony, however, showed Managers are held accountable

as the “keepers of their departments,” **independently** handling employee performance issues with those employees under their respective supervision. Tr. 64:10–13, 20–24. Relevantly, Managers are the only non-bargaining unit employees in each department and are evaluated on their supervision of the department’s bargaining unit employees. Tr. 147:20–148:15; 151:2–17, 18–25; 152:10–25; 157:21–23; 158:10–21; Er. Exh. 8.

In overseeing their departments and directing their subordinate employees, Managers regularly assign department employees work beyond mere discrete tasks. Tr. 120:12–15 (Q: . . . “how are the employees assigned to perform tasks for each department? A: The - - deli or bakery managers, like, give them tasks. They are the ones.). For example, Managers assign employees to different stations within a department each shift. Tr. 120:18-24. Assignment to stations, where clerks are then expected to execute station-specific responsibilities, ***amounts to more than assignment of specific, discrete tasks.***

Managers are then held accountable for the performance of the employees completing those tasks in their departments. Tr. 71:15–17; 109:17–18 (“A: Okay. So basically, Dalia has the full responsibility with deli and delegating the crew, yeah.”). When tasks are not completed, Store Directors hold Managers responsible for the incomplete work. Tr. 121:13–17. The accountability of Managers also extends to ensuring monetary goals for the department are met. Tr. 134:7–10. If departments over produce product, it will be reflected on Managers’ evaluations. Tr. 156:19–157:1. Managers are therefore held responsible for the performance of their department and the employees in it. Tr. 148:7–15; 152:17–25 (A: I’m looking at how they actually work with the - - their department. If I - - I see - - I see a lot of, you know, problems or - or complaints, then basically that would need improvement . . . But pretty much, if they run their department smooth, then it would be met expectation or exceed expectation); 162:9–13.

Managers must therefore exercise their authority to direct and communicate with their teams to ensure proper levels of production to meet department goals. Tr. 157:21 (Q: So I basically require my - - my managers to do the huddles in their department, and tell them, (audio interference) do they want to do - - how they're going to do things, yeah.). During slow periods, Managers may assist assistant managers and clerks with production duties, but their primary job is to manage those employees and department operations. *See* Tr. 142:22–143:6 (Q: . . . If it's slow, then she shouldn't be helping; she shouldn't - - she should be managing them . . . A: but for the most part, her job is to manage these guys, and not produce.); Tr. 103:12–22 (“A: Yeah. Basically, the – [Managers] are in charge of their department . . . I get on my bakery or deli managers if something is behind, or you know, something that I don't like.”).

2. Managers possess supervisory authority over scheduling and actually exercised that authority.

Testimony from Employer's witnesses showed Managers control scheduling of employees, including scheduling shifts, days off, approving changes to the work schedule, vacations, making adjustments to ensure coverage during each shift, and scheduling and approving overtime. Tr. 32:24–33:9; 33:13–14; Tr. 67:11–13; Tr. 102:5–23; 115:21–24; 172:4–13 (Q: . . . what happens after the clerk goes to them for overtime? A: **They either approve it or don't approve it.**); 178:18–179:1 (Q: And who approves the request? A: I let Ranelle and Danette. They - - **they approve it all** depending on the needs of the store.); 179:2–7; 185:7–11. According to even Union's witness, Managers schedule employees independently according to their own evaluation of employees' “position and availability **and the -- the strength of the -- of the workers.**” Tr. 205:10–12, 17–20; *see also* Tr. 208:22–209:5 (stating testimony from Union witness that work schedule she creates determines employees' start and end times and is based on needs of department).

Testimony also showed Store Directors do not change the schedules Managers create for department employees. Tr. 171:25–172:2 (Q: Do you ever change the work schedules that they’ve created. A: No). Managers are also able to flexibly *and independently* change approved schedules **without Store Directors’ prior approval**, even when those adjustments result in overtime. Tr. 33:6–9; 33:13–14; 116:2–11; 160:1–4; 178:14–179:7. *Even Union’s witness* admitted Store Directors do not often make changes to schedules Managers create and submit to them. Tr. 302:8–16 (stating Store Director only changed the schedule Union witness created two or three times a year).

3. Managers possess supervisory authority and actually exercised that authority to effectively recommend disciplinary action that is then taken by Store Directors without further investigation.

- a. Foodland uses a well-defined and uniformly followed progressive discipline process.

The Decision plainly admitted that evidence presented at both the 2015 hearing and the 2023 hearing indicated Foodland uses a “well-defined” and “uniformly followed” progressive discipline process.” Decision at 12. The Decision failed to consider, however, Managers’ independent role in determining whether this progressive discipline process would be initiated for any employee or continued in any instance. Tr. 70:1–4; 9–17; 82:8–13; 85:12–14; 86:3–6, 12–13 (stating Manager (Mia) “made the ultimate decision” to issue verbal warning); 86:22–87:3 (describing Manager (Mia) no further disciplinary notice was processed for the employee “because Mia had said to do it as a verbal”).

- b. Managers possess authority to effectively recommend disciplinary action and actually exercised that authority.

Employer’s witnesses explained Managers possess authority to recommend and issue employees disciplinary actions (“GIGs”). Tr. 35:3–7. GIGs are disciplinary actions, including written warnings, processed through Foodland’s employee system. Managers can also

independently issue verbal warnings, which are kept at the store-level or documented in Foodland's disciplinary system. At either level, verbal warnings lead to more severe discipline including discharge if violations or deficiencies are repeated. Tr. 34:22–25; *see* Er. Exhs. 3–6. Managers independently decide whether to report deficiencies to Store Directors. Store Directors will then process the GIGs recommended by Managers **without further independent investigation**. Tr. 92:14–17; 177:5–11; 182:11–23 (describing example of when Store Department executed Manager's recommendation to discipline deli clerk who did not make the bread needed for sandwiches the next day.); Tr. 34:6–25; 68:6–10; 184:3–10 (Q: Okay. So you talk about the situation, and you decide together what the best way to proceed is? A: No. If they request - - a lot of the times - - I know sometimes they just - - they would just want us to talk to them or bring the clerk in and talk to them. We'll do that. How - - how they want to proceed, it's up to them. If [Managers] want us to GIG, we'll go follow through with the GIG. If they want to sit down the employee and talk to them, then they can do that also.).

Stated another way, Store Directors **always** follow recommendations from Managers to issue discipline – when Managers actually recommend them, which testimony showed they do. Tr. 63:4–9; 87:10–13; 183:21–184:2 (Q: And - - and do you - - when - - when the bakery deli manager has come to you about a problem in their department, do you have a conversation with them about whether it warrants discipline. A: Usually, we will just talk about the situation. . . if they want us to write the - - the particular (audio interference), we write them out); Tr. 69:1–3, 7; 92:14–17; 110:8–13 (Q: And when employee's don't perform to standards, how – how are those issues addressed? A: So basically, Dalia or Marsha [Managers] will come to me and ask to GIG employees that are – that – that are not performing. Q: Okay. And what happens from there. A: Then I create an GIG and we serve the GIG to employee. **Q: Do you take steps to investigate**

what they told you? A: I pretty much trust them because they are the ones who are working side-by-side with this employee.); Tr. 177:12–14.

Thus Managers have the authority to initiate and have initiated the disciplinary process. Tr. 87:20–22; 93:3–6. The Region should have credited more weight to Store Directors’ testimony in this regard since it would be the Store Directors doing – or in this case, not doing – the necessary, or here unnecessary, follow-up investigations. Union’s witnesses, which included Managers and a union representative, would not know whether Store Directors conduct a follow-up investigation before inputting GIGs recommended by Managers.

The Decision further misconstrued the evidence by disregarding **corroborating testimony from a Union witness** explaining Managers possess authority to effectively recommend discipline. Union’s own witness admitted Foodland trained her on its disciplinary system and when to issue discipline, evidencing Foodland’s grant of authority to Managers to participate in issuing and/or recommending discipline. Tr. 214:9–15; 244:5–7; 260:21–24.

- c. Managers possess authority to issue disciplinary action and actually exercised that authority.

Testimony explained Managers do more than effectively recommend discipline, although effectively recommending discipline should be enough to find Managers are supervisors under the Act. Managers also have authority to issue the initial GIGs to employees and to issue the completed GIG after approval from Foodland’s Human Resources Department. Tr. 35:3–10; 48:11–14; 69:12–23; Tr. 81:12–16; 82:5–7; 85:12–14 (A: “So this is a first-step GIG. So Mia issued the first-step GIG to let – to let Keali’i know what he failed to perform.”); Er. Exhs. 5 and 6.

Managers are the only employees in the bakery and deli departments assigned authority or trained to recommend and actually issue employees GIGs, Tr. 83:18–21; 111:12–22. Further,

upon receipt of a GIG in Foodland's disciplinary system, Human Resources ***always*** processes the GIG and does not override the imposition of disciplinary action requested from the store level.

Tr. 36:2–13; 87:17–19; 187:24–188:1 (Q: Steve, have you ever seen HR decline processing a GIG that you submitted? A: No.).

- d. Managers also possess authority to independently issue oral counselings without Store Director approval that serve as basis for future disciplinary action and actually exercised that authority.

The Decision incorrectly concluded Managers only provide “oral coaching” and therefore do not possess authority to discipline or effectively recommend discipline. Contrary to the Decision's misrepresentation of the evidence, Managers provide more than mere “oral coaching.” Managers possess authority to, and actually exercised that authority to (1) ***independently*** counsel employees orally without Store Director approval and (2) effectively recommend or decide when verbal counselings should be elevated to more formal disciplinary actions. Tr. 35:11–12, 35:17–36:1; Tr. 68:6–8; 70:6–9; Er. Exh. 5. If Managers do not recommend verbal counseling be elevated to formal disciplinary action in Foodland's electronic disciplinary system, verbal warnings are recorded and kept at the store level. ***Foodland then relies upon the verbal warnings recorded at the store-level when considering whether future repeated violations should result in more severe discipline.*** Tr. 70:6–9; 87:1–3; 87:23–88:1; 90:17–19. One Store Director explained a concrete example where Managers exercise authority to effectively recommend discipline. The Store Director at Foodland Ke'eau explained a specific instance where Deli Manager Mia Ferreira (“Ferreira”) issued a verbal warning to an employee. ***The Store Director's testimony was further supported by tangible documentary evidence.*** Er. Exh. 5 (Employee Warning Notice Issued by Mia Ferreira, dated June 27, 2021). In this example, the Store Director relied on Ferreira to decide on her own whether ***Ferreira's independently issued*** verbal warning would be a sufficient level of discipline in that instance. Tr.

82:8–13. The Store Director also explained in this example the verbal warning is saved at the store level and can lead to subsequent discipline if the same violation is repeated. Tr. 70:8–14. Thus, at the store level, Managers such as Ferreira effectively recommend whether discipline – or no discipline – be imposed and those recommendations lead to more severe discipline. Tr. 69:24–70:14; 86:3–6; 86:12–13; 86:22–87:3; 87:10–13; 87:23–88:1. As at the store-level, Foodland’s Human Resources Department will also consider past verbal counselings, such as those issued by Ferreira, when assessing the approval of more severe disciplinary actions in the future. Tr. 44:18–22. The Decision discredited the foregoing testimonial and documentary evidence despite its being both a specific and concrete example where Managers effectively recommend and issue disciplinary action or verbal warnings that lead to disciplinary action in accordance with Foodland’s well-defined and uniformly followed progressive discipline process. Managers can use Foodland’s electronic disciplinary system to submit disciplinary actions to Human Resources.

In disregarding the testimony provided, the Decision concluded Managers cannot input GIGs in Foodland’s electronic disciplinary system. The Region considered testimony from Employer’s witness to conclude specific access to Foodland’s electronic employee disciplinary system is limited to Store Directors or Assistant Store Directors, but did not consider why this was so. Employer’s witnesses testified the *only* intranet connection is found in Store Directors’ offices and Foodland does not resource its Managers their own computers. Tr. 53:12–15; 53:21–54:2. Thus, the system limitations of Foodland’s electronic disciplinary system results from logistical factors and the configuration of office space, **not** because Managers do not possess authority to input GIGs. Managers **are** allowed to input GIGs but would have to use Store Directors’ computers. Tr. 53:16–19. In any case, whether in the electronic disciplinary system or

in actual practice, testimony from **both** Employer and Union explained Managers actually recommended discipline, issued discipline, or were at least trained on how to do so – all of which should have demonstrated Managers *possess* the authority to issue or effectively recommend issuance of discipline.

4. Managers possess supervisory authority to reward employees without prior approval and actually exercised that authority.

Managers have authority to issue employees Shaka Bucks exclusively at their own discretion and without prior approval from Store Directors or any other higher level management. Tr. 70:21–25 (“Limitations on who, no”); 116:16–25; Tr. 178:1–3. No other employee in the bakery or deli departments can issue Shaka Bucks. Tr. 219:3–5. Shaka Bucks are awarded for good employee performance. Tr. 42:11–43:6; 219:1–2. Shaka Bucks can be redeemed for store products. Tr. 177:15–25; 218:21–25. There is no limitation on how many \$1 Shaka Bucks Managers can issue, Tr. 43:7–10., 70:23–25, 71:10–12, 117:7 (“If they run out, they come to me, and I give them more.”); 178:9–10 (Q: When you run out of books, can you ask for more? A: Yeah, yeah.), except some Store Directors may limit Managers to awarding Shaka Bucks within a reasonable amount. Tr. 70:23–71:3. Despite the presentation of testimony explaining the exact monetary value of ShakaBucks, the Decision erroneously stated, “**There was no testimony regarding . . . their precise monetary value.**” The Decision’s factual finding in this regard frustratingly demonstrated its disregard for the testimony more plainly than in any other example. Union’s own witness testified Shaka Bucks hold a \$1 value. Tr. 219:1–2 (“Q: And what is the value of the shaka bucks? A: One shaka buck is \$1.”). The Decision similarly and incorrectly found Foodland limited Managers’ access to Shaka Bucks to ten per month and that such Shaka Bucks have “an unspecified de minimis value.” Decision at 11. Again, testimony from the Union indeed specified the value of each Shaka Buck. Also, testimony from Employer

explained Managers can always request more Shaka Bucks if they run out, which contradicted the Decision's finding Shaka Bucks have a de minimis value. *Compare* Decision at 11 with Tr. 117:7; 178:4–10.

5. Managers possess supervisory authority to effectively recommend hiring and actually exercised that authority.

Regarding Managers' involvement in hiring, the Decision again improperly discounted or entirely disregarded testimony provided. Managers participated in hiring interviews at Foodland stores, even when sources of the applicants vary, i.e., walk-in, third-party, referral. Tr. 112:9–10; 125:11–23; 129:11–22; 147:13–19. Despite what the Decision described, testimony provided managers do sometimes screen job applicants. *Compare* Decision at 11 (“applicants are screened by either the store director or a third-party company”) with Tr. 129:9–18 (“Q: And what is -- who speaks to someone first when they are a walk-in or a referral? A: So first, if -- oh, referral. Yeah, for referral, they actually -- if they -- they want to apply to deli, **they go straight to deli manager**. Q: Okay. And then what happens? A: Then, the deli manager or bakery manager . . . would come and tell me, like, hey, I -- I have an applicant, and I want to interview them. I said okay, then we'll do it.”); 113:4–12 (describing specific example manager spoke to job applicant first before recommending Store Director conduct interview).

Store Directors also rely on Managers' hiring recommendations when evaluating whether or not to hire job applicants in the bakery or deli departments. Tr. 61:6–13; 129:1–4. Some Store Directors always follow their Managers' hiring recommendations. Tr. 61:20–22; 78:21–79:3; Tr. 88:5–7; 115:17–20; 147:10–12. In one case, one Store Director who testified at the hearing specifically recalled recently hiring a walk-in applicant after his Deli Manager conducted the first interview then recommended hiring her. **Upon his Manager's recommendation, the Store Director hired that applicant.** Tr. 113:8–12. In spite of this concrete example, the Decision

decided Managers do not effectively recommend hiring actions presumably because the Manager in the Store Director's example did not use the magic words "I recommend we hire this applicant". Decision at 11 (stating, "Store Director Natan testified that the manager told him that the applicant 'seems like a good worker,' but didn't make an express recommendation to hire the applicant."). Such a conclusion takes what Board precedent requires – specific examples – and demands more from Foodland than is proper – specific words of recommendation. Importantly, the Decision also failed to consider Managers possess authority to **reject** job applicants, further showing Managers' role in the hiring process. Tr. 61:14–19; 88:2–4; 112:11–17, 19–20; 115:16–20.

6. Managers possess supervisory authority and exercised that authority to train and evaluate whether department employees pass probation or are terminated.

Managers evaluate new employee performance and determine whether new employees pass probation or not. Tr. 62:1–20; 113:17–114:5; 215:11–22. Store Directors have then accepted their Managers' recommendations to pass or fail a probationary employee. Tr. 115:3–6; 179:24–180:3; 284:1–20. The Decision discredited Employer's testimony on this point because it provided no specific example where it terminated an employee because it failed probation but that detracts from the fact Managers' recommendations to pass an employee **directly** result in Foodland's decision to retain the employee. Just because a supervisor has not actually terminated an employee does not disprove its authority to terminate the employee if necessary.

Managers also train department employees. Tr. 61:23–25. When performance is below standard, Managers follow up with the employees to make sure problem performance is not repeated and improves. Tr. 114:25–115:2. Relevantly, this performance counseling may relate to what the Decision called "oral coaching," but this performance counseling is far more informal than the verbal or written warnings Managers issue or effectively recommend that the Decision

also deemed “oral coaching.”

7. Managers exercise independent judgment in the performance of their supervisory duties.

In the exercise of the above described supervisory functions, Managers must and do exercise independent judgment in the interest of Foodland. Managers are expected to schedule employees based on the needs of the departments, Tr. 178:14–179:1; 208:22–24, and the Decision plainly acknowledged Managers do so based on their independent assessment of employees’ strongest skills, Tr. 205:10–12, 17–20; 275:20–22; 276:2–6; Decision at 7. The Decision then inexplicably ignored this fact when it concluded Managers’ “assignment of work is in strict accordance with the House Rules and is largely formulaic” and therefore not a reflection of independent judgment. Decision at 13. Such a contradiction between the Region’s factual findings and legal conclusions implores the Board’s further review.

When assigning and prioritizing production tasks in their department, Managers must first assess what is needed, evaluating which products are required before prioritizing employee assignments. Tr. 65:21–24; 66:1–7. Managers then assign employee responsibilities on their own, Tr. 66:10–12, 13–18, by determining which employees possess the strongest skills for the needed tasks. Tr. 67:3–10; 262:22–263:3. Store Directors are not involved in the Managers’ direction of their assistant manager and clerks but do hold them accountable for department failures. Tr. 22:22–25; 23:15–17; 64:10–13; 64:20–65:5; 67:8–10; 71:15–17, 19–24; 147:20–148:6.

Some, like Union’s witness, Manager Sherice Santos-Shoaf (“Santos-Shoaf”), stated she independently developed *entire* production routines determining the complete flow of work in her department. Tr. 292:20–22, 293:2–8, 293:12–23. While this admission by Union’s own witness demonstrates the delegation of authority granted Managers to direct more than just

discrete tasks, it even further proves as corroborating testimony Managers' exercise of **independent judgment in determining how, when, and what** clerks do at every part of the day to assure success of Foodland's deli and bakery departments. **The Decision wholly ignored this testimony from Union's witness although it is significantly relevant, corroborating, and probative evidence Foodland's Managers possess and independently exercise supervisory authority to direct work as defined by the Act.** Compare Decision at 13 ("[M]anagers' assignment of work is in strict accordance with House Rules and is largely formulaic. The tasks are routine and are often assigned by schedule[.]").

Managers also exercise independent judgment when they manage department production. Managers draft production logs prioritizing tasks for employees each shift. Tr. 65:1–5, 11–18; 104:12–24. Managers determine priorities independently by identifying which products should be promoted and how much of each product should be produced. Tr. 66:19–23. This authority impliedly entails Managers independently determine how much of each product to purchase. Tr. 66:24–67:2. When Managers order too much product or do not manage quality control or department production effectively, Store Directors hold Managers responsible. Tr. 147:20–148:15; 155:15–22; 156:13–18; 171:11–19; 175:19–176:5. Managers are then required to determine where an error was made, which could include addressing department employees who did not do a part of their job. Tr. 175:23–176:3.

III. ARGUMENT

The Act delegates to the Board authority to determine what constitutes an "appropriate" employee unit for collective bargaining and representation election purposes. *Country Ford Trucks v. NLRB*, 229 F.3d 1184, 1189 (D.C. Cir. 2000). Supervisors are excluded from representation under the Act. *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 674 (1980); see *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 712–13 (2001).

A. **Review of the Decision is warranted because the Regional Director departed from Board precedent when it concluded the *Briggs Indiana* doctrine does not apply to Union's express agreement to recognize Managers as supervisors under the Act and barred evidence relevant to that agreement.**

1. **The Regional Director's Decision not to apply the *Briggs Indiana* rule where a union expressly promises to treat employees as supervisors departs from precedent or is unsupported by the precedent available.**

The Decision incorrectly decided not to apply the *Briggs Indiana* rule to the Parties' CBA, a rule that should otherwise bar Union's present petition to represent Foodland's Managers. The *Briggs Indiana* rule uses a disjunctive to explain when the provision of a collective bargaining agreement serves as a contract bar precluding union's representation of a group of employees during the term of the agreement. *Cessna Aircraft Co.*, 123 NLRB 855, 857 (1959). The *Briggs Indiana* doctrine therefore applies to situations, as here, where a union promises not to seek representation of certain employees **or agrees to refrain from accepting certain employees into membership**. *Id.* (emphasis added); *see also Briggs Indiana Corp.*, 63 NLRB 1270 (1945).

Here, the Parties' CBA contains an express promise Union will recognize Managers as supervisors under the Act. Bd. Exh. 2 at 2-20. The Regional Director specifically acknowledged this provision and quoted it in its Decision:

Bake-off and deli managers shall not be covered under the Collective Bargaining Agreement. **They shall be recognized as supervisors and (sic) defined in the Act.** The Company acknowledges the recent ruling by the NLRB, on August 12, 2015, as it pertains to the bake-off and deli managers.

Decision at 16 (emphasis added); *see also* Bd. Exh. 2 at 2-20.

The Decision, however, departed from the Board's precedent in *Cessna* when it concluded this provision does not warrant application of the *Briggs Indiana* doctrine. In *Cessna*, the Board stated:

A union which agrees by contract not to represent certain categories of employees

during the term of a collective-bargaining agreement may not during that period seek their representation. However, **this rule will be applied only where the contract itself contains an express promise on the part of the union** to refrain from seeking representation of the employees in question or **to refrain from accepting them into membership; such a promise will not be implied from a mere unit exclusion**, nor will the rule be applied on the basis of an alleged understanding of the parties during contract negotiations.

Cessna Aircraft Co., 123 NLRB 855, 857 (1959).

As reflected in the Board's explanation of the *Briggs Indiana* doctrine, the operative provision in *Cessna* involved a promise certain inspection employees would be excluded from unit membership. The provision here, however, *does not merely include a "unit exclusion."*

Here, the Union specifically promised to recognize Managers as supervisors, excluding them *from the Act*. This distinction is relevant and dispositive of the present question because the Union's agreed terms *necessarily* indicate Union's agreement not to accept Managers into its membership. This is, legally and textually, *more* than mere exclusionary language. *Compare UMass Memorial Med. Ctr.*, 349 NLRB 369 (2007); *Women & Infants' Hosp. of Rhode Island*, 333 NLRB 479, 479 (2001), *Cessna Aircraft Co.*, 123 NLRB at 856; *Standard Oil Co.*, 107 NLRB 1524 (1954); *Chase Brass & Copper Co., Inc.*, 102 NLRB 62, 63 (1953) (deciding contract language stating certain employees excluded from *the contract's* coverage did not bar union's attempt to seek representation of those employees in the future) *with* Decision at 16 (quoting terms of Parties' CBA stating Union will recognize Managers as supervisors).

By contractually agreeing in good faith to recognize Foodland's Managers as supervisors, the Union agreed to no less than Managers being legally ineligible for membership under the Act. See Bd. Exh. 2 at 2-20. This is distinguished from the facts and analysis in *Cessna*. In *Cessna* and similar cases, the Board was asked to imply that, by agreeing to a mere *unit* exclusion, a union impliedly agreed not to seek representation of the subject group of employees. The Board utilized "[a]n analysis of the language of the pertinent provisions of the contract" in

Cessna to conclude a mere unit exclusion “did not have the effect of creating an obligation on the part of the Union not to accept seek [certain employees’] representation during the life of the contract.” *Cessna Aircraft Co.*, 123 NLRB at 857 . Using a similar analysis here, Union’s agreement *does* have such an effect. The Union’s agreement did not just exclude the Managers from the bargaining unit, it actually acknowledged that Managers are statutory supervisors. **Thus the Union obligated itself to refrain from seeking to represent or accepting Managers into membership because Members are supervisors and not even eligible for membership under the Act.**

Unlike the parties in *Cessna* or other cases not covered by the *Briggs Indiana* doctrine, Foodland makes no request of the Board to assume the effect of Union’s agreement – the effect is plain, unless Union’s knowledge of the Act is ignored. **The Board therefore need not infer or guess as to Union’s intended meaning when it agreed to recognize Managers as supervisors under the Act.** To permit continued dispute over Union’s express promises ignores Union’s obvious knowledge of the Act and allows Union to play word games with Foodland during what should be a good faith bargaining process. The Act, however, is meant to balance the power dynamic between labor and management, and the *Briggs Indiana* doctrine should not be wielded as a means to enable labor’s feigned ignorance of the Act and deceitful or intentionally misleading negotiating tactics. *See Vance v. Ball State Univ.*, 570 U.S. 421, 434 fn 7 (2013) (The Act’s “unique purpose . . . is to preserve the balance of power between labor and management.”).

2. The Regional Director should not have barred evidence or testimony relating to the terms of Parties’ CBA because such evidence would have clarified relevant provisions dispositive in this matter.

In the hearing over Union’s present petition, the Region barred Foodland from presenting testimony or other evidence relating to the interpretation and negotiation of Parties’ operative

CBA. This decision departs from precedent concerning the parol evidence rule. The Board has explained the parol evidence rule as follows: “Where the parties to a contract express their agreement in an integrated writing, intending it to embody the full and final expression of their bargain, any other expression, usually oral, made prior to or contemporaneous with the writing, is inadmissible *to vary* the terms of the writing.” *Kal Kan Foods*, 288 NLRB 590, 593 (1988). Foodland, however, did not intend to vary the terms of its CBA with Union. Foodland instead sought to provide testimony clarifying those provisions, specifically the provision containing Union’s promise to recognize Managers as supervisors under the Act. As asserted above, this provision is not “mere exclusionary language” and constituted Union’s promise to refrain from representing Managers or accepting them into membership. *See supra* Section III.A.1. This provision is therefore dispositive of the entire present dispute, and the Regional Director improperly prejudiced Foodland by not permitting it to present evidence clarifying this critical provision. *See W. J. Holloway & Son*, 307 NLRB 487, 487 fn. 1 (1992) (explaining extrinsic evidence may be used to “explain or clarify” but not to “invalidate and nullify” parties’ written agreement).

B. The Decision departed from Board precedent in deciding Managers are not supervisors despite Foodland’s preponderance of the evidence showing Managers perform statutory supervisory functions.

Foodland’s request for review should be granted because the Decision departed from or misapplied the Board’s preponderance of the evidence standard. On its face, the Decision used the preponderance of the evidence standard to justify its decision Managers are not supervisors. In so doing, however, the Decision ignored corroborating evidence from Union and disregarded credible testimony in support of Foodland’s position Managers are supervisors under the Act.

An employer must only establish supervisory status by a mere preponderance of the evidence. *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003) (citing *Bethany Med. Ctr.*,

328 NLRB 1094, 1103 (1999); *Volt Info. Sciences*, 274 NLRB 308, 330 (1985).). The “burden of showing something by a ‘preponderance of the evidence’ . . . simply requires the trier of fact ‘to believe that the existence of a fact is more probable than its nonexistence.’” *Concrete Pipe and Products of Cal., Inc. v. Construction Laborers Pension Tr. For S. Cal.*, 508 U.S. 602, 622 (1993). **Evidence need not be conclusive, absolute, or clear to meet a preponderance of the evidence.** *See, e.g., Allentown Mack Sales and Serv., Inc. v. NLRB*, 522 U.S. 359, 375–76 (1998) (calling the Board’s implementation of preponderance of the evidence standard “nonsense” and finding the Board erroneously applied the applicable preponderance of the evidence standard by instead seeking from party evidence that was “clear, cogent, and convincing”); *see also Schneiderman v. U.S.*, 320 U.S. 118, 125 (1943) (“To set aside such a grant the evidence must be ‘clear, unequivocal, and convincing’-‘it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt.’”).

Foodland presented evidence Managers possess and exercise actual supervisory authority and are therefore properly excluded from the bargaining unit due to their supervisory status. *See Ky. River Cmty. Care, Inc.*, 532 U.S. at 712–13 (explaining bargaining unit of “employees” does not include statutory supervisors). Section 2(11) of the Act defines “supervisor” as follows:

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

29 U.S.C. § 152(11).

If an individual possesses any **one** of the indicia listed in that Section, and exercises it in a non-routine and non-clerical way, that individual is a supervisor. *Unifirst Corp.*, 335 NLRB 706, 713 (2001). Foodland must therefore only prove by a preponderance of the evidence that

Managers possess just ***one*** of the indicia in Section 2(11), *Allstate Ins. Co.*, 332 NLRB 759, 760 (2000), provided the authority can be exercised in Foodland’s interest with independent judgment and not in a routine matter. *Unifirst Corp.*, 335 NLRB at 713; *Allstate Ins. Co.*, 332 NLRB at 760; *see also Oakwood Healthcare, Inc.*, 348 NLRB at 688 (reflecting principle a worker need only have authority to exercise or effectively recommend the exercise of *one* supervisory “management prerogative”).

Relevantly, the Decision meaningfully failed to consider “[i]t is the *existence* of [statutory supervisory] authority that counts under the statute, and not the frequency of its exercise.” *Beverly Cal. Corp. v. NLRB*, 970 F.2d 1548, 1550 fn. 3 (6th Cir. 1992) (emphasis added); *Maine Yankee Atomic Power Co. v. NLRB*, 624 F.2d 347, 360 (1st Cir. 1980); *see also Beverly Enters.-Mass., Inc.*, 165 F.3d 960, 961 (D.C. Cir. 1999) (“The exercise of supervisory authority is not always necessary to establish that authority is possessed.”). The evidence must therefore only show *existence* of an individual’s supervisory authority through tangible examples, not necessarily its being exercised. *See Oil Workers v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971) (“[W]hat the statute requires is evidence of actual supervisory authority visibly demonstrated by tangible examples to establish the *existence* of such authority.” (emphasis added)).

The evidence presented here for the Board’s review includes tangible examples and reasonably indicates Foodland’s Managers **possess** the statutory authorities to exercise or effectively recommend, and actually exercised or effectively recommended, ***more than one*** supervisory function described in Section 2(11) of the Act.

1. Managers are supervisors because they possess the authority and exercised the authority to assign and responsibly direct employees.

The Decision failed to consider Managers’ authority to assign and responsibly direct employees, instead skipping this step in its analysis in favor of concluding any such exercise of

this authority was not exercised with independent judgment. Decision at 12–13. As supported by the reasons that follow, however, Managers assign and responsibly direct employees, *and* do so using independent judgment in Foodland’s interest, *see infra* Section III.B.6.

Foodland’s job descriptions for its Managers specifically state their authority and responsibility to “effectively direct and supervise the activities of all [Deli/Bakery] Department personnel to achieve the sales and profit goals established for the department.” Er. Exhs. 1–2. The duty to “assign” work is alone sufficient to exclude an employee from the unit for supervisory status if that duty involves the “designation of **significant overall** duties” rather than mere “ad hoc instruction that the employee perform **discrete** tasks.” *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006). Managers may therefore be excluded as statutory supervisors insofar as they have “men under them” and decide what job those employees shall undertake next or who shall do it. *Id.* at 1298. Also, “for direction to be ‘responsible,’ the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly.” *Oakwood Healthcare, Inc.*, 348 NLRB at 692.

Testimony provided here recognizes Managers as the “keepers of their departments.” Tr. 64:10–13, 20–24. Managers’ major responsibilities include assigning and prioritizing work to their employees, *e.g.*, Tr. 65:13–18, supporting their status as statutory supervisors. *See Am. River Transp. Co.*, 347 NLRB 925, 927 (2006) (authority to assign employees and order performance of certain tasks required a finding of supervisory status). Managers also assign employees to various work stations within the department, Tr. 120:18–24, and are held accountable for ensuring employees perform the work assigned to them. *See* Tr. 71:15–17 (Q:

Okay. Do you hold them accountable for the employees in their department. A: Oh, yes.”); 121:13–17. As part of holding Managers accountable for their employees, Foodland’s Store Directors evaluate Managers based on the amount of production produced by department employees, the level and quality of teamwork fostered by Managers among department employees, and the degree of training, coaching, and correction provided by Managers. Er. Exhs. 8 and 9 (2021 Performance Ratings and Performance Feedback Forms Completed by Store Director for Deli Manager Kaya Bailey, dated Oct. 8, 2021); Tr. 162:9–13 (Store Director describing Er. Exh. 8 and stating “work pace is on how much they actually - - their involvement on the department, yeah, like production, and all aspects in that area.”).

The Decision erroneously misconstrued this evidence as Managers not responsibly directing employees. In making this conclusion, the Regional Director disregarded Employer’s presentation of *tangible* documentary evidence Managers are evaluated based on ability to manage employees and achieve company objectives through the responsible assignment of department clerks. Managers’ abilities to manage employees and employees’ performance is therefore a critical element of whether a Manager can receive a positive, satisfactory, or negative performance evaluation, demonstrating fact Foodland imposes adverse action against Managers if they do not effectively direct department employees. *See* Tr. 152:20–25 (A: . . . But pretty much, if they run their department smooth, then it would be met expectation or exceed expectation.); *see E Source Cos., LLC*, Case 27-CA-202883, 2018 WL 2683887 (June 4, 2018) (citing *Parkview Hosp., Inc.* 343 NLRB 76 (2004); *Bell Halter, Inc.*, 276 NLRB 1208 (2001)) (“The Board has held that a less favorable evaluation can constitute an adverse action.”).

Since Managers’ responsibility for directing employees, or their failure to direct employees, can result in adverse employment actions, like a negative evaluation, the Region

should have found Managers not only direct employees, but *responsibly* direct employees as supervisors under the Act. See *Oakwood Healthcare, Inc.*, 348 NLRB at 692; *E Source Cos., LLC*, 2018 WL 2683887 (2018) (citing *Parkview Hosp., Inc.* 343 NLRB 76 (2004); *Bell Halter, Inc.*, 276 NLRB 1208 (2001)) (stating less favorable evaluation can constitute adverse action). In concluding differently, the Decision departed from Board precedent in *Oakwood*, which defined “responsibly directing” employees as meaning an employer imposes against a putative supervisor “a prospect of adverse consequences for the putative supervisor” arising from their direction of other employees. *Oakwood Healthcare, Inc.*, 348 NLRB at 692.

2. Managers are supervisors because they independently determine department employees’ work schedules and assignments.

Other duties evidencing supervisory authority include: *preparing posted work schedules, appointing employees to various departments, shifts, or overtime periods, and assigning overall duties beyond the occasional or sporadic rotation of different tasks*. *Croft Metals*, 348 NLRB at 718–21. Another important consideration is whether the employee has authority to *require* an employee to perform work assignments. See *Golden Crest Healthcare Ctr.*, 348 NLRB 727, 729–30 (2006).

Here, Managers have the authority to independently schedule department employees’ work schedules, adjust those work schedules, and to order and approve overtime according to department needs. Tr. 67:11–16; 178:25–179:1. These reasons strongly support Managers’ classification as supervisors under the Act. See *Croft Metals*, 348 NLRB at 718–721; *see also* *USF Reddaway, Inc.*, 349 NLRB 329 (2007) (lead persons who made changes in job assignments based on the employer's needs were supervisors).

In one case, the Board held five team leaders had the authority to create and adjust work schedules and that “such authority constitute[d] the authority to assign.” *Modesto Radiology*

Imaging, Inc., 361 NLRB 888, 889 (2014). The *Modesto* team leaders did not exercise independent judgment in creating and adjusting work schedules, though, so the Board held they were not supervisors. Unlike in *Modesto*, however, Foodland’s Managers here do not use stringent rotational schedules to assign and schedule work. Managers instead exercise independent judgment because they independently create work schedules, approve overtime, prioritize work, and assign employees more than mere discrete tasks depending on Managers’ own assessment of individual employees’ strength and efficiency of skills, all of which the Board acknowledged in *Modesto* supports finding of supervisory status. *See id.* (citing *Oakwood Healthcare*, 348 NLRB at 689 (assignment refers 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 em-ployee”).

The Decision here even recognized Managers’ independent judgment in assigning employees based on their strength and skills, Decision at 7, but it improperly found this did not constitute supervisory status, *id.* at 13 (inconsistently describing Managers’ assignment of workers as “largely formulaic”). In contrast to the distinguished facts and the Board’s ultimate decision in *Modesto*, the Board should hold here that Managers’ exercise of independent judgment in assigning work and adjusting work schedules warrants a finding of their statutory supervisory status.

3. Managers are supervisors because they have authority to recommend disciplinary action without further investigation.

The Decision also erroneously concluded Managers do not possess authority to effectively recommend discipline. The “principle of effective recommendation ‘generally means that the recommended action is taken without independent investigation by superiors.’” *Volvo Grp. North Am., LLC*, 370 NLRB No. 52 (2020) (stating General Counsel’s explanation of

recommended actions); *Veolia Transp. Servs., Inc.*, 363 NLRB 902, 908 (2016).

In the Decision, the Regional Director erroneously found Managers merely report deficiencies to Store Directors for Store Directors' separate independent decision. Decision at 12. Rather, Managers do more than report rule infractions or inspect and report on employee work. Compare *Riverboat Servs. of Indiana, Inc.*, 345 NLRB 1286 (2005); *Brown & Root*, 314 NLRB 19, 21 n. 6 (1994). Managers report violations and deficiencies to Store Directors for input of Managers' recommended imposition of discipline in Foodland's electronic discipline system.

Testimony further explained Store Directors act upon Managers' discipline recommendations and do not separately decide whether such GIGs should be input or not. Foodland's Store Directors explained *no further independent investigation* is conducted when a Manager recommends an employee be issued a GIG. Managers are therefore doing more than simply reporting poor performance or bad behavior. Compare *Allied Aviation Serv. Co. of N.J. v. NLRB*, 854 F.3d 55, 65 (D.C. Cir. 2017) ("Having a role as witnesses, or reporters of fact, within a disciplinary process is legally insufficient to establish the effective exercise of disciplinary authority."); Tr. 69:1–3, 7; 92:14–17; 110:8–13.

In so much as the Regional Director may have discredited Store Directors' testimony, Store Directors are the only employees who would definitively know whether independent investigation is conducted before acting upon a Manager's recommendation of discipline. Managers, like those who testified for Union, would not have possession or awareness of this information as it would be Store Directors conducting any required follow-up investigations. Testimony also showed Foodland's Human Resource Department *always* processed a GIG recommended by Managers and input by Store Directors, so Managers' recommendations to impose discipline are followed without investigation even at higher levels of Foodland's

corporate structure. *See Sheraton Universal Hotel*, 350 NLRB 1114, 1116 (2007) (“Contrary to the judge’s speculation, nothing in the record suggests that upper management conducted an independent investigation before deciding to impose discipline. . . .”); Tr. 36:2–13; 87:17–19; 187:24–188:1.

The authority granted Managers and the degree to which those recommendations are followed is therefore easily distinguished from cases where the Board found no supervisory status because recommendations for disciplinary action in those cases were only sometimes followed. *See, e.g., Volvo Grp. North Am., LLC*, 370 NLRB No. 52 (2020) (deciding evidence of only one incident where supervisor followed team member’s recommendation for disciplinary action was insufficient to demonstrate team member was statutory supervisor).

In addition, the Decision acknowledged Foodland’s “well-defined” and “uniformly followed” progressive discipline system but completely ignored evidence that Managers have and actually do initiate Foodland’s progressive disciplinary process by deciding whether to recommend and/or actually issue verbal and/or written warnings. “A warning may qualify as disciplinary within the meaning of Section 2(11) if it “automatically” or “routinely” leads to job-affecting discipline, by operation of a defined progressive disciplinary system.” *Veolia Transp. Servs., Inc.*, 363 NLRB at 909; *see also Ohio Masonic Home*, 295 NLRB 390, 393-394 (1989) (finding warnings not disciplinary, where employer failed to establish that it had a “defined progressive disciplinary scheme” under which the warnings would “automatically affect job status or tenure”).

By effectively recommending and issuing verbal or written warnings, Managers have authority to independently decide whether no level of discipline or some level of discipline will be issued and the progressive discipline system started or continued. This amounts to more than

mere “paper power.” *Compare Oil Workers v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971) (finding employer notices of job responsibilities was naked designation of “paper power”). Further, the Decision treated Managers’ verbal warnings as mere “oral coaching” not constitutive of supervisory authority. The Board, however, already established verbal warnings in the context of a defined progressive disciplinary system constitutes discipline. *Veolia Transp. Servs., Inc.*, 363 NLRB at 909 (citing cases).

Regardless, Managers do more than provide “oral coaching.” In making its decision on this point, the Regional Director cited to *Los Angeles Water and Power Employees’ Assn*, 340 NLRB 1232, 1234 (2003) (“*LA Water*”). In *LA Water*, the facts are clearly distinguished from those presented on the record here. In that case, employer challenged the ballot of a lead clerical employee. The Board held the employee was not a supervisor, in part, because she did not effectively recommend discipline. The Board considered the following: employee could not “issue the type of verbal warning that could be documented in an employee’s personnel file;” the employee’s verbal warnings were never considered when employer decided whether to discipline employees or not; and the employer conducted its own investigation before deciding whether discipline should be imposed. All of the facts in *LA Water* are contradicted by the evidence presented. Here, Managers can actually *issue* disciplinary actions to clerks. Their verbal warnings are reported to Store Directors for documentation at the store- or company- levels. More importantly, Managers can independently decide to issue verbal warnings. Store Directors do not conduct their own investigation before acting on Managers’ recommendations to input verbal warnings or input written warnings into the company discipline system. The Decision’s reliance on *LA Water* in deeming Managers’ role here as merely providing “oral coaching” is therefore inappropriate and misconstrued or disregarded the evidence presented.

Further, Managers do not “simply bring substandard performance to the employer's

attention without recommendations for future discipline.” *Veolia Transp. Servs., Inc.*, 363 NLRB at 908 (2016). Testimony here indicated verbal and written warnings recommended by Managers are saved at both the store- and company- levels for consideration in future discipline decisions involving the same employee and conduct.

Foodland presented specific examples of Managers’ independent judgment and authority to issue or effectively recommend discipline. In one, a Store Director described Foodland’s actions after an employee failed to complete breadmaking tasks. Tr. 182:11–23. Even the Decision specifically acknowledged another example where Manager informed Store Director she had issued a verbal warning and Store Director approved documentation of the verbal warning based on just the Manager’s recommendation. Decision at 6; Er. Exhs. 5–6; *see also* Tr. 35:11–12; 35:17–36:1; 48:11–14; 68:6–10; 69:1–7, 12–23; 70:6–14. The Decision, however, apparently assigns little to no weight to these examples of a Manager independently deciding and/or effectively recommending to discipline an employee without further investigation.

The Region also received documentary evidence signed by a Manager showing Managers document and issue employees GIGs, proving Managers are involved in Foodland’s progressive discipline process and actually take part issuing GIGs. The Decision presumably discredited Managers’ role in the disciplinary system because only Store Directors have access to Foodland’s electronic disciplinary system. This conclusion, however, disregards testimony describing Managers have access to Store Directors’ computers and would be permitted to input GIGs if needed. Any question whether Managers *actually* would input GIGs does not depend on whether Managers possess the authority to issue GIGs but rather on whether necessity requires them to, i.e., whether Store Directors or Assistant Store Directors would more readily be able to input them into the company system located in Store Directors’ offices.

Last, the Decision failed to consider corroborating testimony from Union’s witness

confirming Managers' authority to effectively recommend or impose discipline. Union's witness, a Manager, admitted Foodland provided her training on its disciplinary process. Tr. 214:8–15; 244:5–7. The Regional Director should have considered this as evidence proving Managers' possession of authority to issue and/or effectively recommend discipline in Foodland's interest. See Tr. 244:5–7 (Q: Okay. You said you were trained on how the GIG system works right? A: Yes.); 260:21–24 (Q: Okay. And you said that you were trained on how the GIG system works; can you tell us about that training? A They only train me, just like -- **they told us when to give the write-ups.**). Union witness admitted Foodland trained her on its disciplinary process, corroborating Foodland's grant of authority to Managers to impose or recommend discipline. Fact this particular Manager had no occasion to, or made no decision to, issue or recommend discipline – as Foodland trained her to – does not discount the probative value this aspect of her testimony has for Foodland's assertion that such authority is part of each Manager's position.

As a matter of policy, Managers' ability to recommend disciplinary action for bargaining unit employees under their supervision – or to effectively ensure no discipline is recommended – bars them from membership in the bargaining unit. See *Mountaineer Park, Inc.*, 343 NLRB 1473, 1475 (2004) (deciding assistant supervisors were statutory supervisors because they wrote recommendations for disciplinary actions and those recommendations were routinely approved so long as they were justifiable without separate investigation); *Progressive Transp. Servs.*, 340 NLRB 1044 (2003) (finding deck lead supervisor possessed sufficient supervisory authority because it reported disciplinary problems and recommended disciplinary action that was approved by director without independent investigation).

In addition, whether an individual is a supervisor includes considering his/her relationship to management. See *Phillips v. Kennedy*, 542 F.2d 52, 55 (8th Cir. 1976). Foodland's reliance on

Managers to exercise independent judgment deciding when to initiate or continue its “well-defined” and “uniformly followed” progressive discipline puts Foodland at odds with labor and in a compromised position should Managers be deemed eligible for membership in the union. Such a result is not intended by the Act because part of the Board’s purpose is “[t]o ensure that employees who exercise discretionary authority on behalf of the employer will not divide their loyalty between employer and union.” *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 687–88 (1980); *see also NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 573 (1994) (describing Congressional intent to exclude supervisors in order to address the “imbalance between labor and management”).

4. Managers are supervisors because they have authority to effectively recommend hiring and retention decisions.

The Decision described Foodland’s process for screening job applicants but did not consider testimony job applications from job referrals are screened by Managers and then recommended (or not recommended) to Store Director for interview and hire. Managers also actively interviewed job applicants and provided hiring recommendations to Store Directors. Tr. 112:9–10; 125:11–23; 129:11–20; 147:13–19. Store Directors rely on their recommendations to hire or reject a job applicant. Tr. 61:20–22; 78:21–79:3; Tr. 88:2–7; 112:19–20; 115:17–20; 147:10–12. Managers, then, effectively recommend whether job applicants will be hired or not. Tr. 61:14–15, 18–19; 88:2–7; 112:11–18 (Q: . . . what happens after the interview? A: So after the interview they actually give the recommendation. Q: And how do you respond to the recommendation? A: **Normally, if they recommend the applicant to be hired, then we hire them.**). Considering this, Managers should not be considered eligible for bargaining unit membership because they are supervisors under the Act. *See Berger Transfer & Storage*, 253 NLRB 5, 10 (1980) (finding supervisory status *even where employee’s recommendation to hire a*

candidate was followed by interviews with company officials but recommendations against hiring were ultimately taken as final); *HS Lordships*, 274 NLRB 1167, 1171 (1985) (finding for supervisor where employer never hired anyone bar manager recommended not to hire); *see also* Tr. 112:19–20 (Q: Okay. **And if they don’t recommend to hire? A: Then I wouldn’t hire the employee – applicant . . .**).

Managers also train department employees then evaluate their performance when recommending whether the employee should be retained beyond probation. Where putative supervisors’ evaluation of an employee during probation determines whether the employee will pass probation or not, supervisory status should be found. *See Allied Aviation Serv. Co. of N.J. v. NLRB*, 854 F.3d 55, 66 (D.C. Cir. 2017) (finding Training Supervisors were statutory supervisors because they “possess, at least, the authority to recommend that probationary employees be retained for employment; that these recommendations are routinely followed without independent investigation by others and that such recommendations require the use of independent judgment.”).

The Regional Director incorrectly decided Managers do not effectively recommend retention decisions – despite their evaluation of probationary employees and Store Directors’ reliance on Managers’ recommendations – solely because no evidence showed a probationary employee had been terminated for not passing probation. Authority under Section 2(11), however, includes authority to recommend retention as much as it does discharge. *See id.*

As in *Allied Aviation*, the Board should find Foodland’s Managers are supervisors because they train, evaluate, and ultimately recommend whether a probationary employee should pass probation or not. Tr. 62:1–20; 113:17–114:5 (A: If she recommends to pass this employee to probation, then we will pass on its probation.). Managers must also coach and correct these

employees as they monitor improvement, Tr. 89:4–13, demonstrating independent judgment in the assessment and correction of new employees’ performance. *See Oakwood Healthcare*, 348 NLRB at 692 (explaining independent judgment as independently developing an opinion without the control of others). Last, Store Directors do not override Managers’ recommendations to pass or fail a probationary employee, so those recommendations are followed based solely on Managers’ assessments. *See* Tr. 114:4–9 (A: **If she recommends to pass this employee to probation**, then we will pass on its probation . . . **that’s the only information I need** if we’re going to pass the employee.); 115:3–6; 179:24–180:3.

5. Managers are supervisors because they have authority to award employees.

Managers are able to award employees with limited to no oversight. Tr. 70:21–25; 116:16–25; Tr. 178:1–3. The Decision disregarded testimony stating Shaka Bucks awarded by Managers held “no precise value.” Testimony directly indicated, however, these employee awards hold a monetary value of \$1. Tr. 219:1–2. Notably, while Managers may only be issued limited amounts of Shaka Bucks initially, testimony showed Managers can always ask Store Directors for more Shaka Bucks. Tr. 43:7–10., 70:23–25, 71:10–12, 117:7. Importantly, no one else in the deli and bakery departments besides Managers can award employees. Tr. 219:3–5 (Q: Okay. And who gives out shaka bucks? A: **It’s all the department heads or the IS - - the ISC, the green shirts.**). Despite the Decision’s ultimate finding, this distinguishes Foodland’s Managers from cases where the Board found no supervisory status because other employees could recommend employees awards. *See N. Montana Health Ctr.*, 324 NLRB 752, 753 fn. 12 (1997) (acknowledging evidence indicating *any* employee can recommend another employee for awards and that award recommendations from charge nurses were *not* given more weight than recommendations from other employees); *Chevron U.S.A.*, 309 NLRB 59, 64 (1992)

(recognizing company policy encouraging all employees to submit award recommendations and finding no evidence crewmembers received any awards because of a putative supervisor's recommendation or request).

6. Managers exercise independent judgment in Foodland's interest.

Where a purported supervisor performs the supervisory functions enacted in Section 2(11) of the Act, exclusion from the bargaining unit depends on whether Managers' exercise their supervisory authority with independent judgment. 29 U.S.C. § 152(11). The NLRB characterizes the exercise of independent judgment as the ability to "act or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning or comparing data. *Oakwood Healthcare*, 348 NLRB at 692. Put another way, supervisory employees engage in something more than routine or clerical decision-making, using a degree of discretion *beyond the perfunctory exercise of predetermined and narrowly limited authority*. *Id.*

The NLRB has found supervisory status for employees who take into account the **quantity** of work to be assigned, the **relative difficulty** of the various assignments, **and the competence** of the staff available to do the work, and then makes assignments **based upon their evaluations** of those considerations. *Oakwood Healthcare, Inc.*, 348 NLRB at 697.

Here, the Regional Director incorrectly found "managers' assignment of work is in strict accordance with the House Rules, and is largely formulaic." Decision at 13. The Decision contradicted itself on this point because it acknowledged Managers assign tasks at times based on demonstrated individual employee efficiency. Decision at 7. This should have indicated Managers' exercise of independent judgment. *See Modesto Radiology Imaging, Inc.*, 361 NLRB at 890 (2014) (looking for evidence employee weighed subordinates' relative skills and training when making work assignments).

As corroborating evidence of Foodland's position, **one of Union's witnesses**, a Manager,

stated *she* creates department employees' work schedules based on the strength of each employees' skills. Tr. 205:10–12, 17–20 (Q: So you just told us that the schedule's ***created based on position and availability and strength of the workers***. Who's the one who looks at that and decides who will work what hours? A: Me.); 209:12 (A: Strength is her capability to do more production.). The same witness admitted she evaluates employee skills and determines employees' work assignments based on her own assessment of those skills as well. Tr. 247:9–11; 262:22–25 (Q: You - - you said that you ***evaluate the skills of the clerks to determine which duties to assign them***; is that - - is that true? A: Yes.); 263:1–3.

A second Union witness, Santos-Shoaf, also a Manager, admitted she too makes the work schedule for her department *based on her observation* of employees' strengths. Tr. 275:20–22; 276:2–6. Santos-Shoaf even added that no one helps her make the schedule, Tr. 295:5–7, no one trained her how to manage her department, Tr. 293:16–18, and that she developed the entire routine for performing tasks in her department *all on her own*, Tr. 293:19–23. Based on the routine Santos-Shoaf *independently* created, Santos-Shoaf trained and directed all of her department employees to complete the tasks necessary for the department to function. Tr. 292:20–22, 293:2–8, 293:12–23.

Even the Union's witnesses admit to using independent judgment to assign *both* employee assignments *and* schedule employees' work schedules. Their assignments are not random, as in *Phelps Cmty. Med. Ctr.*, 295 NLRB 486, 490 (1989), and are not based on rotation, as in *Modesto Radiology Imaging, Inc.*, 361 NLRB at 889. Instead, as the Decision and Union's witnesses admit, work assignments are based on Managers' awareness of department needs and evaluation of employees' skills and efficiency. Under these admissions, Foodland's Managers

should be treated as supervisors because of their independent judgment when directing employees in their assignments and schedules. *Oakwood Healthcare, Inc.*, 348 NLRB at 697.

7. Managers perform supervisory functions in Foodland's interests as required of supervisors under Section 2(11) of the Act.

In addition, to be supervisors under the Act, Managers must exercise their authority “in the interest of the employer.” *Ky. River Cmty. Care, Inc.*, 532 U.S. at 710–11. Supervisory authority is performed “in the interest of the employer” when “(a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; [and] (c) it is actuated, at least in part, by a purpose to serve the [employer].” *Local 1814, Int’l Longshoreman’s Ass’n. v. NLRB*, 735 F.2d 1384, 1394 (D.C. Cir. 1984). Managers perform the above duties in furtherance of the responsibilities described in their official job descriptions, see Er. Exhs. 1 and 2, to support the operation of Foodland’s deli and bakery departments, during official work time, and at store locations. Managers’ roles, then, as “keepers of their departments” are fulfilled in Foodland’s interests and constitute supervisory functions as defined by Section 2(11). See *Int’l Longshoreman’s Ass’n.*, 735 F.2d at 1394.

C. The Decision found Foodland implemented changes since the 2015 Decision but incorrectly concluded Foodland’s changes did not result in grant of additional supervisory authority to Managers.

A review of the Decision is further warranted because it made contradictory or incorrect findings as to changes Foodland implemented after the 2015 Decision. Despite receiving testimony Foodland made substantial modifications to its organizational structure, the Region erroneously concluded the supervisory authority held by Managers, who now no longer have district-level and company-level department directors to report to, did not substantially change. See Decision at 3. For the foregoing and following reasons, Foodland met by a preponderance of the evidence it granted additional authority to Managers to be more involved with supervisory

functions defined by Section 2(11) of the Act than in 2015.

In 2015, the Board ruled Foodland failed to meet its burden showing its Managers were supervisors under the Act. 2015 Decision at 2. The decision reviewed several supervisory functions that Foodland asserted its Managers possessed authority to perform at the time. *Id.* at 3–14, 16–20. The Board’s findings and decision in 2015, however, relied upon facts substantially different than presented here.

For one, the Board recognized conflicting testimony as to whether Managers could actually award Shaka Bucks in their own discretion. *Id.* at 5–6, 17–18. The testimony provided by both Foodland and Union reflect Managers are *now* authorized to issue Shaka Bucks without prior approval from higher-level management, Tr. 70:21–25; 116:16–25; Tr. 178:1–3; *see* 218:13–25; 219:3–5, even if some Managers do not *actually* issue Shaka Bucks often or at all. Tr. 219:6–12; 237:20–22 (Q: And how often do you hand out shaka bucks? Once a month? About once a month? A: Upon the availability of the shaka bucks).

Next, substantial testimony reflects Foodland’s Managers now have control to dictate and adjust department work schedules for their employees, Tr. 24:24–25:1; 32:24–33:9; 116:2–11; 160:1–4; 171:20–172:2, unlike in 2015 where the Board found Store Directors approved all overtime and retained authority to modify work schedules. 2015 Decision at 7, 19–20. While conflicting testimony was provided on overtime, it was nonetheless clear that Store Directors no longer approve *all* overtime. The testimony showed Managers now all have the authority to approve overtime, Tr. 24:24–25:1, and Managers have *actually* approved overtime on their own. Tr. 115:21–24; 116:2–11; 160:1–4; 172:4–13; 179:2–7. What was more clear, Managers complete department employees’ work schedules on their own now, which was confirmed by testimony from *both* Managers who testified for the Union. Tr. 205:10–12, 17–20; 275:20–22;

276:2–6.

Third, the Board found in 2015 Managers did not have the authority to independently discipline or effectively recommend the discipline of employees. 2015 Decision at 9–14, 18–19. Based on the evidence presented in 2015, Managers’ recommendations for disciplinary action was not shown to be a determining factor when Foodland decides whether to issue discipline or not. Managers also apparently did not receive training on processing GIGs. Since then, however, ample evidence demonstrated otherwise. Store Directors trained Managers on GIGs, which Union’s witness confirmed, indicating at least some awareness by Managers of their authority to discipline or effectively recommend discipline. Tr. 214:8–15; 244:5–7; 260:21–24; *see Chevron U.S.A.*, 309 NLRB at 62 (stating “the evidence must ‘fairly’ show that ‘that the alleged supervisor knew of his authority to exercise’ the supervisory power”). Store Directors also now rely on Managers to notify them of performance deficiencies and conduct issues, not for reportorial purposes but for purposes of recommending whether any disciplinary action should be taken, whether only a verbal warning should be given, whether the verbal warning should be informal (store level) or formal (documented in company system), or whether a GIG should be issued. Tr. 35:11–12, 35:17–36:1; Tr. 68:6–8; 70:6–9; Er. Exh. 5. Store Directors throughout the company can execute GIGs based on Managers’ recommendations without an investigation of their own, and some actually do. Managers have the authority to then issue those GIGs, and some actually do, as evidenced in tangible form by Er. Exhs. 5 and 6. Tr. 69:1–3, 7; 92:14–17; 110:8–13; 177:5–11; 182:11–23.

Again, the Board need only find Managers possess authority to perform **one** of the management prerogatives listed under Section 2(11) in order to decide they are supervisors under the Act. *Oakwood Healthcare, Inc.*, 348 NLRB at 688. The above indicates Managers not only

have greater supervisory authority than in 2015, but they also perform multiple supervisory functions under Section 2(11) in broader scope and degree than in 2015. Foodland's Managers, then, should be deemed supervisors and excluded from the bargaining unit. *See Allstate Ins. Co.*, 332 NLRB at 760 (recognizing "touchstone" of Section 2(11) that statutory supervisors need only possess and not exercise supervisory authority).

D. The Decision failed to consider secondary indicia of supervisory status because it incorrectly found insufficient evidence of supervisory authority.

The Regional Director departed from Board precedent in deciding not to consider secondary indicia of supervisory status. The Decision admitted the Board should evaluate secondary indicia evidencing supervisory status when any single indicium under "Section 2(11) of the Act is not conclusively established." Decision at 14 (citing *Sam's Club*, 349 NLRB 1007, 1014 (2007)). The Decision further recognized "[a]bsent evidence that an individual possesses any of the statutory indicia enumerated in Section 2(11) of the Act," secondary indicia of supervisory status is insufficient to find the individual is a supervisor under the Act. *Id.* (citing *Modesto*, 361 NLRB at 889). Citing from the Board's decision in *Sam's Club*, however, secondary indicia of supervisory status are only insufficient, and therefore should only be ignored, "**when there is no evidence** that an individual possesses any one of the statutory indicia." 349 NLRB 1007, 1014 (2007). Here, even the Decision admitted at least "conflicting" evidence of the statutory indicia and, therefore, should have considered the Board's accepted secondary indicia of supervisory authority. *See id.*

The Regional Director's apparent determination there was "no evidence" or that evidence was "inconclusive" or "absent," directly contradicts the Regional Director's own findings. The Decision did not only admit the presence of "conflicting testimony," some of which would presumably be in Foodland's favor, the Decision also specifically recognized "*substantial*

testimony” showing “bakery and deli managers evaluate the clerks at the end of probationary period.” *Id.* at 8 (emphasis added). The Decision also accepted as “consistent” the testimony from Store Directors that they “rely on the bakery and deli managers’ feedback to determine whether a clerk passes their probationary period.” *Id.* The Regional Director’s classification of evidence as too “inconclusive” or “absent” also ignored the documentary evidence demonstrating Managers’ role in Foodland’s “well-defined” and “uniformly followed” progressive discipline process as well as Foodland’s documented method evaluating Managers based on their supervision and management of their department. *See* Er. Exhs. 5–6, 8–9. Further, the Region should have considered Board precedent stating “a less than favorable evaluation” is an adverse action. *E Source Cos., LLC*, 2018 WL 2683887, at *1 (2018) (citing *Parkview Hosp., Inc.* 343 NLRB 76 (2004); *Bell Halter, Inc.*, 276 NLRB 1208 (2001)). The documented fact Foodland bases its evaluation of Managers on their supervision of department employees, which could result in a “less than favorable evaluation,” is therefore relevant evidence of Managers’ supervisory authority the Decision disregarded. *See* Decision at 7, 12–13.

Secondary indicia of supervisory status includes “an individual’s job title or designation and authority to grant [t]ime off,” and “higher compensation and the perceptions of others as to the individuals’ authority.” *Sam’s Club*, 349 NLRB at 1014 (corrections to original) (citations omitted). Here, Managers’ job descriptions include the distinction as “Department Manager” and describes Managers’ specific responsibility to supervise department employees. Er. Exhs. 1–2. Managers’ pay is also set higher than the bargaining unit employees they supervise. Tr. 36:20–23, 37:10–14; 37:19–38:3; 38:9–17. Additionally, testimony showed Managers’ authority to grant time off, even overtime. Tr. 102:11–13; 178:18–179:7. Together, these constitute *multiple* secondary indicia of supervisory authority the Regional did not appropriately consider before

improperly rejecting Foodland's documented and supported position Managers *are* supervisors under the Act and therefore should not be included in Union's existing Foodland bargaining unit.

IV. **CONCLUSION**

For the foregoing reasons, Employer respectfully requests the Board grant its request by reviewing the Regional Director's Decision and ordering either: (1) Managers are statutory supervisors under the Act and excluded from union representation; (2) Managers do not share a community of interest with Union's existing Foodland bargaining unit; or (3) Union contractually agreed not to represent Foodland's Managers and is therefore precluded from such representation regardless of the upcoming *Armour-Globe* election's results.

DATED: Honolulu, Hawai'i, February 11, 2023.

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20, SUBREGION 37

FOODLAND SUPER MARKET LIMITED,

Employer,

v.

UNITED FOOD & COMMERCIAL
WORKERS UNION, LOCAL 480,

Petitioner.

CASE NO. 20-RC-308657

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date, a copy of the foregoing documents were filed electronically with the National Labor Relations Board Office of the Executive Secretary and copies served upon the persons below by email, addressed as follows.

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