

**The Republican Company, Employer-Petitioner and
Springfield Newspaper Employees Association,
Inc., Petitioner.** Case 01–UC–000838

August 7, 2014

DECISION ON REVIEW AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND HIROZAWA

The Employer-Petitioner (the Employer) publishes a newspaper, *The Republican*, in Springfield, Massachusetts. For many years, the Employer and the Union (Springfield Newspaper Employees Association, Inc.) have been parties to a collective-bargaining agreement that covers full-time employees in the editorial, advertising, circulation, maintenance, business, press-stereo, and composing departments. On February 1, 2007, the Regional Director for Region 1 issued a Decision, Clarification of Bargaining Unit, and Order in this unit clarification proceeding, in which the Employer sought to exclude 22 positions from the bargaining unit on the ground that they were supervisory, managerial, or confidential. The Regional Director excluded three positions from the unit as supervisory, but dismissed the petition insofar as it sought to exclude the remaining positions.

The Employer and the Union each filed a request for review. On July 20, 2007, the Board granted the Employer's request for review of the Regional Director's finding that Editorial Page Editor Steve Smith is not a managerial employee and the Regional Director's findings that Assistant Classified Manager Cecile Youmans and Electrical Manager Paul Robitaille are not statutory supervisors. On the supervisory issues, the Board granted review solely with respect to whether Youmans' role in hiring, and Robitaille's role in hiring and discipline, demonstrate supervisory status.

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

We have carefully considered the entire record in this case, including the briefs on review, and have decided to affirm the Regional Director's findings that Assistant Classified Manager Cecile Youmans and Electrical Manager Paul Robitaille are not statutory supervisors.¹ Contrary to the Regional Director, however, we find that Editorial Page Editor Smith should be excluded from the unit as a managerial employee.

¹ For the reasons stated below in fn. 4, Member Miscimarra would find that Robitaille is a statutory supervisor.

I. FACTS

A. *Editorial Page Editor*

The editorial department employs various editors and reporters who write and edit the news stories reported in the newspaper. The department is headed by Executive Editor Wayne Phaneuf, who reports to the publisher, Larry McDermott. Steve Smith, the editorial page editor since October 1999, also reports directly to McDermott. Two other editorial page editors report to Smith. Smith is generally responsible for the content of the editorial pages, which include unsigned editorials that express the opinion of the newspaper, "op-ed" columns, letters to the editor, and editorial cartoons.

Editorials: The newspaper runs three editorials a day, 7 days a week. Smith meets daily with the other two editorial editors to discuss topics for the following day's editorials. Whoever "pitches" the idea writes the editorial. Smith has the authority to veto a topic at this stage if he determines that it is "not worthy of an editorial." Publisher McDermott also occasionally sends editorial ideas to Smith.²

In his testimony, McDermott agreed with Smith that the newspaper has "institutional" positions on important topics. Smith testified that some institutional positions predate McDermott's time as publisher, and that he (Smith) knows most of those positions. Even when Smith or the other editorial page editors personally disagree with them, their editorials must express the newspaper's views. McDermott has the final say in reconsidering the institutional opinions.³ With respect to noninstitutional issues, Smith determines the paper's published stance, only occasionally consulting with McDermott. In doing so, he is guided by the "general philosophy" of the newspaper and by McDermott's views, which he knows well.

Smith sends McDermott a daily email notifying him of the proposed editorial topics and stances for the following day. However, McDermott rarely responds. Occasionally, McDermott directs Smith to make certain points; a few times a year, he rejects Smith's proposed editorials.

² Sometimes, Smith disagrees with the topics proposed by McDermott and he has persuaded McDermott not to run editorials. For example, McDermott once suggested an editorial on a tent city of homeless people occupying public property in the downtown area, but Smith disagreed and the editorial was not run.

³ For example, McDermott recently changed the newspaper's stance on casino gambling notwithstanding Smith's view that the newspaper should stick with its prior position.

Political endorsements: The paper publishes endorsements of political candidates. McDermott decides who the paper will endorse in major political races, with input from Smith. In local elections, McDermott may defer to Smith, particularly if McDermott is not familiar with the candidates.

Editorial columns and cartoons: The editorial page runs columns and editorial cartoons submitted both by syndicates and by individuals. The Employer pays 4 to 6 syndicates representing 15 to 20 columnists and several cartoonists to deliver a certain number of columns or cartoons per week. The newspaper usually publishes four columns and two political cartoons a day. Smith selects from among the submissions, only occasionally consulting McDermott, and makes an effort to offer a range of political opinion. At one point, McDermott told Smith that there were too many liberal columnists and that the newspaper needed a better balance. After Smith showed McDermott all of the conservative columns that the paper had published in the prior month, McDermott rescinded his directive.

Each week, the newspaper runs six to eight cartoons about State and local issues drawn by a staff artist. Smith shows the sketches to McDermott, who exercises final authority over their selection, sometimes rejecting all of the sketches.

“Viewpoint” column and letters to the editor: The editorial page includes a daily “Viewpoint” column, in which writers express their opinions on local matters. Most “Viewpoint” columns are submitted, unsolicited, by members of the community. Smith decides, without input from McDermott, which columns to publish.

The editorial page also publishes 30 to 40 letters to the editor on a daily basis. One of the other editorial editors decides which letters to publish and shows them to Smith, who approves them. McDermott does not review Smith’s choices, although Smith occasionally asks for McDermott’s opinion before publishing letters on sensitive topics.

B. Assistant Classified Manager

Cecile Youmans has the title of assistant classified manager in the classified department. She reports to Classified Manager Maureen Thorpe, who, in turn, reports to Advertising Director Joel Morse. Youmans works with the staff of 17 advertising “takers,” who accept unsolicited classified ads over the telephone, and 8 or 9 full-time “inside advertising solicitors,” who solicit potential advertisers.

Advertising Director Morse, the sole witness to testify regarding Youmans’ role in hiring, acknowledged having no firsthand knowledge of the procedure used to hire the most recent employee in the classified department. Ac-

ording to Morse, the human resources department recruits the candidates and conducts initial interviews. Thereafter, Morse testified, Thorpe and Youmans interview candidates, but he did not “think” that Thorpe’s interviews were “thorough.” (Tr. 894.) Morse testified that he “would say” that Youmans is the primary decision maker “who recommends” hiring, but he also testified that the human resources director simply consults with Youmans, who advises her whether “she feels” that applicants are qualified. (Tr. 894.) Morse “believes” that Youmans made recommendations to human resources because Youmans did not make any recommendations to him (Tr. 895), and Morse claimed that he met candidates only after hiring. (Tr. 930.) But Morse also testified that “once they decide” on a candidate, he talks to the candidate, and that he usually follows Youmans’ recommendation. (Tr. 896.)

C. Electrical Manager

1. Hiring

Paul Robitaille is the Employer’s “electrical manager.” The electrical department maintains the HVAC, compressed air, and electrical systems at the Employer’s building. An assistant electrical manager and two electricians report to Robitaille. Robitaille reports to Production Director James Foley, who is not an electrician.

The Employer’s human resources department screens and refers applicants to the electrical department. Foley testified that Robitaille assists him in interviewing each candidate. In 1997, and then again in 2002, Foley and Robitaille interviewed five candidates together. The Employer hired two employees in 1997, and one in 2002. According to Foley, he informed Robitaille that Robitaille was present at interviews because Foley “valued his judgment in assessing the candidates . . . because of his background and experience” (Tr. 205), and specifically “value[d] his judgment in determining whether or not the candidate[s] had the electrical qualifications.” (Tr. 207.) Foley also testified that, after the candidates’ interviews, he met with Robitaille to discuss their qualifications, and that he had agreed with Robitaille’s recommendation to hire certain candidates and reject others. According to Foley, he placed a great deal of importance on Robitaille’s recommendations.

Human Resources Director Judith Fraser testified that she interviewed all candidates referred by human resources. Regarding the 2002 hire, she recalled having a discussion with Foley and Robitaille in Foley’s office, in which Robitaille made recommendations regarding the candidates. She testified that Robitaille’s recommendations were followed because “he had the technical expertise that [Foley] and I didn’t.” (Tr. 1537.) However, the

only recommendation Fraser recalls Robitaille making was when he rejected one candidate because of his handshake.

2. Discipline

According to Production Manager Foley, Robitaille has the authority to informally counsel employees and to issue verbal warnings to employees without consulting him. Foley testified that if there is a second occurrence on an issue, Robitaille “would” recommend a written warning, and “consult[]” with him before issuing one. (Tr. 210–211.) Foley further testified that, if the same employee had subsequent problems, Robitaille would recommend a suspension or termination.

The record contains two examples of disciplinary incidents involving Robitaille. In 2002, he issued a verbal warning to employee Jack Spear for entering an inappropriate comment about a coworker in the maintenance log. In 2004, when Foley was away on vacation, Robitaille orally reprimanded Spear for engaging in the same conduct and documented this incident in a handwritten note that he gave to Spear. The note did not state that it was a written warning. In it, Robitaille stated that after reading a note that Spear had written to another employee in the maintenance log, he confronted Spear and reminded him that if he had problems with what someone was doing, he was to bring it to Robitaille and not put it in the log. Robitaille also wrote that he told Spear, “if this persists I will have to take disciplinary action.” (Emp. Exh. 15.) There is no evidence that a copy of the note was placed in Spear’s personnel file or that Robitaille even mentioned the note to a supervisor or manager.

II. THE REGIONAL DIRECTOR’S FINDINGS

Finding that it is Publisher McDermott, rather than Editorial Page Editor Smith, who has ultimate authority to approve the paper’s published stance, the Regional Director declined to exclude Smith from the bargaining unit as a managerial employee. The Regional Director also found that Assistant Classified Manager Youmans was not a supervisor. He found that she does not effectively recommend hiring, because Classified Manager Thorpe, to whom Youmans reports, also interviews each candidate and therefore has independent knowledge of the candidate’s qualifications and suitability. Similarly, the Regional Director found that Electrical Manager Robitaille’s participation in the interview process does not rise to the level of effectively recommending hiring, because Production Director Foley, to whom Robitaille reports, interviews all candidates. The Regional Director also found that Robitaille’s authority to issue verbal warnings is too minor to establish supervisory status, and that authority to recommend more serious discipline does

not establish supervisory status absent some evidence that his recommendations are followed without independent investigation. The Regional Director discounted Robitaille’s issuance of a single written warning as an isolated incident that occurred only because Production Director Foley was on vacation.

III. THE PARTIES’ CONTENTIONS

A. Employer

The Employer contends that Smith is a managerial employee by virtue of his role in proposing and writing editorials and political endorsements, and his authority to select which syndicated columns, political cartoons, “*Viewpoint*” columns, and letters to the editor will be published. In asserting that Youmans and Robitaille effectively recommend the hiring of employees, the Employer primarily contends that the Regional Director’s decision is contrary to cases where the Board has found supervisory status despite the involvement of upper management in hiring decisions. In asserting that Robitaille has authority to effectively recommend discipline, the Employer contends that the production department has a progressive disciplinary system, and that verbal warnings issued by Robitaille serve as the basis for subsequent discipline. The Employer also asserts that Robitaille can effectively recommend a suspension or termination under its progressive disciplinary system.

B. Union

Regarding Smith, the Union asserts that the record supports the Regional Director’s finding that decisions involving the content of the editorial page ultimately rest with Publisher McDermott. Regarding Youmans’ role in hiring, the Union asserts that Advertising Director Morse’s testimony regarding Youmans’ role was vague, and that, even if credited, it fails to establish that she effectively recommended hiring. The Union contends that Robitaille’s role in hiring does not confer supervisory status because it is limited to assessing a candidate’s technical expertise. Finally, the Union contends that Robitaille does not effectively recommend discipline because he does not have permission to issue written warnings and because the Employer does not have a progressive disciplinary policy.

IV. ANALYSIS

A. Managerial Status

1. Legal principles

Managerial employees are defined as those who formulate and effectuate high-level employer policies or “who have discretion in the performance of their jobs independent of their employer’s established policy.” *General Dynamics Corp.*, 213 NLRB 851, 857 (1974);

see generally *NLRB v. Yeshiva University*, 444 U.S. 672, 682 (1980). Although the Board has no firm criteria for determining managerial status, an employee will not ordinarily be excluded as managerial unless he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy. *Allstate Insurance Co.*, 332 NLRB 759, 762 (2000). The party seeking to exclude an individual as managerial bears the burden of proof. *LeMoyne-Owen College*, 345 NLRB 1123, 1128 (2005); *Waste Management de Puerto Rico*, 339 NLRB 262, 279 (2003).

2. Application

We find that Smith is a managerial employee in light of his role in formulating, determining, and effectuating the newspaper's editorial policies and he is thus outside the coverage of the Act. As discussed above, the Regional Director declined to exclude Smith from the bargaining unit as a managerial employee because he found that McDermott had ultimate authority to approve the Employer's editorial views and policies. We find that this conclusion cannot be reconciled with the Supreme Court's holdings in *Yeshiva* that final authority is not required to show managerial status, and that "the relevant consideration is effective recommendation or control." 444 U.S. at 684 fn. 17.

As discussed above, Smith is responsible for the contents of the editorial page, which includes unsigned editorials that express the opinion of the newspaper. He selects the editorial topics for the next day's paper and either assigns an editorial to one of two editorial writers who report to him or writes it himself. Smith has the authority to veto a topic at this stage. Late in the afternoon, Smith emails Publisher McDermott the topics of the planned editorials. Generally, McDermott does not respond. On rare occasions, McDermott will ask that certain points be made. Less often still, McDermott will reject a proposed editorial: according to Smith, out of over 1000 editorials published each year, McDermott rejects only 2 or 3. The actual editorial copy is provided to McDermott "at the end of the day," but there is no indication that McDermott has changed an editorial at this point in the process.

Hence, at the very least, Smith effectively recommends editorial topics and positions to McDermott, who approves those recommendations on all but rare occasions. Cf. *Mountaineer Park, Inc.*, 343 NLRB 1473, 1474-1475 (2004) (individuals effectively recommended discipline where they initiated disciplinary process and submitted proposed writeups to their superior, who routinely approved them without independent investigation if they were "justifiable"). The fact that McDermott "holds a rarely exercised veto" does not diminish Smith's effec-

tive power in formulating and implementing the newspaper's journalistic policies. *Yeshiva*, 444 U.S. at 684 fn. 17.

We agree with the Employer, moreover, that the cases cited by the Regional Director in support of his finding that Smith is not a managerial employee are distinguishable. In *Suburban Newspaper Publications, Inc.*, 226 NLRB 154, 156-157 (1976), and *Bulletin Co.*, 226 NLRB 345, 356-358 (1976), the putative managers had less authority, and were subject to far greater oversight, than Smith. In *Suburban Newspaper*, the editorials, particularly those containing political endorsements, were "often" discussed with the executive editor before being written, and the executive editor occasionally changed them before publication without consulting with the editors. In *Bulletin Co.*, the Board found that editorial writers were not managerial where the editorial page editor, a stipulated supervisor, directed and oversaw preparation of editorials on a daily basis, including generating most topics, clearing topics with the publisher, editing the editorial copy, and returning an approved copy before printing. In contrast to these cases, Smith is responsible for the content of the entire editorial page, including selecting editorial topics and positions, and he usually does so without any affirmative approval from McDermott. Although McDermott can veto Smith's decisions, he has rarely done so. Thus, in practical terms, Smith's authority to determine the topic and content of editorials far exceeds that of the putative managers in *Suburban Newspapers* and *Bulletin*.

Finally, we reject the notion that Smith's discretion is so circumscribed by existing policy that his selection of editorial topics and positions does not rise to the level of true managerial authority. The record reveals that Smith regularly writes and directs editorials on topics that reside outside of the paper's institutional positions. Smith testified that in determining what the paper's published stance should be on new issues, he is guided by the paper's "general philosophy." However, applying a "general philosophy" to determine the paper's published stance involves the exercise of sufficient independent discretion, in our view, to confer managerial status. Thus, while the existence of detailed policies may constrain an individual's discretion below the threshold necessary to show managerial status, managerials may include those who "exercise discretion *within* . . . established employer policy." *Yeshiva*, 444 U.S. at 683 (emphasis added).

B. Supervisory Status

1. Legal principles

Section 2(11) of the Act defines a “supervisor” as an individual who has the authority, inter alia, to hire, discipline, or effectively recommend such action, so long as the individual uses independent judgment in doing so. The authority to effectively recommend “generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed.” *Children’s Farm Home*, 324 NLRB 61, 61 (1997). The burden to prove supervisory authority rests with the party asserting it. See *Oakwood Healthcare, Inc.*, 348 NLRB 686, 694 (2006) (citing *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711–712 (2001)). The party seeking to prove supervisory status must establish it by a preponderance of the evidence. *Id.* “Purely conclusionary evidence” does not satisfy that burden. *Lynwood Manor*, 350 NLRB 489, 490 (2007). Supervisory status is not proven where the record evidence “is in conflict or otherwise inconclusive.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

Absent additional evidence, an individual does not effectively recommend hiring where acknowledged supervisors also interview the candidates. See *J. C. Penney Corp.*, 347 NLRB 127, 128–129 (2006) (training supervisor did not effectively recommend hiring where all applicants “recommended” by the training supervisor were subsequently interviewed by other managers, who were the only individuals vested with hiring authority); *Ryder Truck Rental, Inc.*, 326 NLRB 1386, 1387 fn. 9, 1388 (1998) (technicians-in-charge who interviewed candidates and offered “opinions or recommendations” that were given “significant” weight did not have authority to effectively recommend hiring where a higher-level official also participated in the interview and hiring process); *Waverly-Cedar Falls Health Care*, 297 NLRB 390, 392 (1989) (LPNs did not effectively recommend hiring where no contention or finding that the director of nursing relied solely on the LPNs’ recommendations without further inquiries), *enfd.* 933 F.2d 626 (8th Cir. 1991).

To confer supervisory status based on authority to discipline, the exercise of disciplinary authority must lead to personnel action without independent investigation by upper management. 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 . . .”); *Beverly Health & Rehabilitation Services, Inc.*, 335 NLRB 635, 669 (2001), *enfd.* in pertinent part 317 F.3d 316 (D.C.

Cir. 2003). Warnings that simply bring the employer’s attention to substandard performance without recommendations for future discipline serve a limited reporting function, and do not establish that the disputed individual is exercising disciplinary authority. See *Williamette Industries*, 336 NLRB 743, 744 (2001). Similarly, authority to issue verbal reprimands is, without more, too minor a disciplinary function to constitute supervisory authority. See *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1139 (1999); *Ohio Masonic Home*, 295 NLRB 390, 394 (1989).

2. Application

a. Assistant Classified Manager Cecile Youmans

We find, in agreement with the Regional Director, that the evidence submitted by the Employer does not satisfy its burden of proving that Assistant Classified Manager Youmans hires or effectively recommends the hiring of employees. Rather, as the Regional Director found, Classified Manager Thorpe’s direct participation in the hiring process supports a conclusion that Youmans did not effectively recommend hiring. See *J. C. Penney*, 347 NLRB at 128–129; *Ryder Truck Rental*, 326 NLRB at 1387 fn. 9, 1388; *Waverly-Cedar Falls Health Care*, 297 NLRB at 392.

The Employer relies on Advertising Director Morse’s testimony to establish Youmans’ hiring authority, but Morse’s testimony was vague and contradictory, and we deem it unhelpful. But even if we accept it at face value, the record evidence regarding Youmans’ role in hiring is slim. Neither Youmans nor Thorpe, her immediate supervisor, testified at the hearing. And Morse, the only witness called by the Employer regarding Youmans, admitted having no firsthand knowledge of the procedure used to hire the most recent employee in the department, and he was unable to offer any specific examples of Youmans’ role in earlier hiring. Morse’s testimony also failed to establish the absence of independent investigation by higher authority than Youmans. Rather, Morse simply expressed his understanding, couched in general terms, that Manager Thorpe did not “thorough[ly]” interview candidates. (Tr. 894.) As Morse did not attend those interviews and described them only in conclusory terms, we decline to find on the basis of his testimony that Thorpe’s role was so limited that Youmans effectively recommended hiring. See *Alternate Concepts, Inc.*, 358 NLRB No. 38, slip op. at 4–8 (2012) (employer failed to present specific evidence showing that crew dispatchers and line controllers were statutory supervisors); *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006) (employer failed to meet its burden of establish-

ing supervisory authority where testimony was “utterly lacking in specificity”).

b. Electrical Manager Paul Robitaille

(1) Hiring

We agree with the Regional Director that the Employer failed to meet its burden of demonstrating that Electrical Manager Robitaille effectively recommends hiring. In particular, we agree that Production Director Foley’s and Human Resources Director Fraser’s direct participation in the hiring process supports a conclusion that Robitaille did not effectively recommend hiring. See *J. C. Penney*, 347 NLRB at 128–129; *Ryder Truck Rental*, 326 NLRB at 1387 fn. 9, 1388; *Waverly-Cedar Falls Health Care*, 297 NLRB at 392.⁴

⁴ Member Miscimarra dissents from the majority’s finding that Electrical Manager Paul Robitaille is a statutory employee. An individual is a 2(11) supervisor if, among other things, he or she has the authority to effectively recommend hiring and uses independent judgment in doing so. *Fred Meyer Alaska, Inc.*, 334 NLRB 646, 649 (2001). Sec. 2(11) requires only possession of authority to carry out an enumerated supervisory function, not its actual exercise. *Sheraton Universal Hotel*, 350 NLRB 1114, 1118 (2007).

Robitaille is the electrical manager in the electrical department. An assistant electrical manager and two electricians report to him, and he reports to Production Director Foley. Robitaille interviewed each of the three electrical department candidates hired during his tenure, his recommendations were always followed, and Foley testified that Robitaille’s recommendation “was the most important part of hiring.” Foley told Robitaille that “the reason he [Robitaille] was there was because I valued his judgment in assessing the candidates for the electrical position because of his background and experience, and that I would use his recommendation for the hiring.” Likewise, Human Resources Director Fraser testified that Robitaille “definitely made recommendations and I remember he rejected one of the candidates because of the guy’s handshake,” and that his recommendations were followed. This testimony cannot be reconciled with the majority’s view that Robitaille only assessed technical skills. See *Sheraton Universal Hotel*, above (front-desk supervisor effectively recommended hiring where he interviewed candidates, his hiring recommendations were “very, very key,” and if he recommended that a candidate not be hired that “would be fatal,” even though a superior also personally interviewed the applicant as “part of the process”); *Detroit College of Business*, 296 NLRB 318 (1989) (department coordinators had authority to effectively recommend hiring where they participated in all interviews of part-time instructor candidates and offered a recommendation at the conclusion of the interview on whether the candidate should be hired, where final decision to hire was a “joint decision” and no instructor had ever been hired without the consent of a department coordinator, whose recommendations were followed in all but 2 of 12 hirings).

Member Miscimarra believes Robitaille’s supervisory status is not undermined by the participation of two other statutory supervisors—Production Director Foley and Human Resources Director Fraser—in the hiring process. The Board reached a different conclusion in *Sheraton*, above, and *Detroit College of Business*, above, where the participation of admitted supervisors in the hiring process did not detract from the supervisory status of the disputed individuals. Indeed, in *Detroit College of Business*, department coordinators effectively recommended hiring of instructors when they participated in interviews with an associate dean, hiring decisions were made jointly, and no instructor had

The evidence establishes that, at most, Robitaille’s role in hiring was limited to assessing the technical skills of prospective candidates. It is undisputed that Robitaille had technical experience that Fraser and Foley did not. Not surprisingly, Foley “value[d]” Robitaille’s “judgment” in determining whether or not candidates had the requisite electrical qualifications. (Tr. 207.) But providing assessments of that nature does not amount to effectively recommending hiring, and thus does not indicate supervisory status. See *Aardvark Post*, 331 NLRB 320, 320–321 (2000) (editor was not a supervisor where his function was to let superior know if applicants were technically qualified, while superior determined if they would “fit into” the employer’s operation); *The Door*, 297 NLRB 601, 601–602 (1990) (employee lacked authority to effectively recommend hiring where his role in the hiring process was limited to screening resumes, making recommendations with respect to technical qualifications, and participating, along with higher-level officials, in applicant interviews). See also *Kenosha News Publishing Co.*, 264 NLRB 270, 271 (1982) (policy of not hiring over subeditors’ objections did not confer supervisory status on subeditors, where editor and subeditor together mutually selected candidate from group, both interviewed candidate, and editor invited subeditor to express an opinion).⁵

Contrary to the Employer and our dissenting colleague, this case is distinguishable from *Detroit College of Business*, 296 NLRB 318. There, the Board found that department coordinators effectively recommended hiring where they participated in joint interviews with higher-level officials and jointly made hiring recommendations, and where no one was hired without the consent of the coordinator. Here, the evidence fails to establish that Robitaille has veto power over hires, and any recommendation appears limited to confirming technical ability.⁶

ever been hired without the consent of a coordinator. Member Miscimarra believes that holding cannot be meaningfully distinguished from the facts presented here.

⁵ The evidence does not establish that Robitaille has veto power with respect to hiring electricians. Foley initially asserted that Robitaille had veto power if he did not want to hire an applicant. Union counsel objected that the testimony was speculative because Foley did not assert that Robitaille had ever vetoed an applicant, and the Employer withdrew the question.

⁶ Robitaille’s limited role of confirming a candidate’s technical ability also distinguishes this case from *Sheraton Universal Hotel*, 350 NLRB at 1115, 1118, where the Board found that the putative supervisor effectively recommends hiring.

Our dissenting colleague contends that the record establishes that Robitaille made actual hiring recommendations and did not merely pass on the technical ability of candidates. However, the only specific recommendation Fraser or Foley could recall that was *not* based on an

(2) Discipline

We find, in agreement with the Regional Director, that the Employer has failed to carry its burden of proving that Robitaille disciplines employees, or effectively recommends their discipline, within the meaning of Section 2(11) of the Act. The Employer adduced evidence of two instances in which Robitaille assertedly became involved in the disciplinary process. In both instances, however, Robitaille's involvement was too minor to establish disciplinary authority.

In the first incident, Robitaille issued a verbal warning to employee Jack Spear for entering an inappropriate comment in the Employer's maintenance log. But there is no evidence that this warning had any effect on Spear's job status or tenure. See *Hausner Hard-Chrome of KY., Inc.*, 326 NLRB 426, 427 (1998) (reprimand not disciplinary absent evidence that "job affecting discipline (such as a suspension)" resulted). Accordingly, the warning was merely a verbal reprimand, and verbal reprimands without consequences do not bespeak supervisory status. See *Ohio Masonic Home*, 295 NLRB 390, 394 (1989) (finding that "[t]he mere authority to issue verbal reprimands . . . is too minor a disciplinary function to constitute supervisory authority"); accord: *Washington Nursing Home, Inc.*, 321 NLRB 366, 371 (1996); *Passavant Health Centers*, 284 NLRB 887, 889 (1987).

In the second incident, when Robitaille's own supervisor was away on vacation, he orally reprimanded Spear for repeating his misconduct in regard to the maintenance log, and he gave Spear a handwritten note describing the misconduct and warning that Robitaille would have to take unspecified "disciplinary action" if the misconduct persisted. As with the earlier verbal warning, there is no evidence that Robitaille's oral reprimand and handwritten note had any effect on Spear's job status or tenure.

Moreover, there is no evidence that Robitaille recommended any discipline at that time. Notably, there is no evidence that a copy of Robitaille's note or mention of it was placed in Spear's personnel file. Although Robitaille's note referred to the possibility of discipline for a future infraction, it made no recommendation of discipline based on the incident at hand.⁷ In these circumstances, we find that Robitaille's note was at most a re-

port of misconduct, and not actual discipline or recommendation of discipline. As such, the note is plainly insufficient to establish that Robitaille possesses the statutory authority to discipline or effectively recommend discipline. See *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002) (collecting Board and court cases holding that "[r]eporting on incidents of employee misconduct is not supervisory if the reports do not always lead to discipline, and do not contain disciplinary recommendations"); see also *Ohio Masonic Home*, 295 NLRB at 394 (finding that "the mere factual reporting of oral reprimands and the issuing of written warnings that do not automatically affect job status or tenure do not constitute supervisory authority").

The Employer nonetheless claims that Robitaille's seemingly minor warnings on the two occasions above necessarily take on a disciplinary aspect when considered in the context of the Employer's purported progressive disciplinary system. We find this claim unpersuasive. 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. See *Oak Park Nursing Care Center*, 351 NLRB 27, 30 (2007) (finding employee counseling forms disciplinary, where each form corresponded to a step in the employer's progressive disciplinary process and "routinely result[ed] in actual discipline" including suspension and termination); *Ohio Masonic Home*, 295 NLRB at 393-394 (finding warnings not disciplinary, where employer had failed to establish that it had a "defined progressive disciplinary scheme" under which the warnings would "automatically affect job status or tenure"). The Employer, however, bears the burden of proving the existence of such a system, and the role that warnings play within the system. The Employer here has failed to produce the requisite evidence.

Although several of the Employer's witnesses, including Foley, testified that the Employer has a progressive disciplinary system, the Employer offered no documentary evidence setting forth the components of this asserted system, let alone of its existence. Consequently, the evidence fails to show how verbal reprimands and warnings of the kind issued by Robitaille may relate to later, actual discipline, much less that they automatically or routinely result in it, as required for 2(11) supervisory status.⁸ See *Ken-Crest Services*, 335 NLRB 777, 777-

applicant's technical ability was Robitaille's negative evaluation of one candidate's handshake.

⁷ This case is accordingly distinguishable from cases like *Mountain Park, Inc.*, 343 NLRB 1473 (2004), and *Progressive Transportation Services*, 340 NLRB 1044 (2003), in which putative supervisors made disciplinary recommendations. Cf. *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 309 (6th Cir. 2012) (affirming Board finding that individuals lacked statutory authority to effectively recommend discipline where "the record d[id] not contain even one written disciplinary recommendation" from them).

⁸ Other testimonial evidence underscores the absence of any progressive disciplinary system or of any fixed relationship between warnings and more serious discipline. Employee William Zajac testified that the Employer has suspended employees without any prior warning; Single Copy/Alternate Delivery Manager Celeste DuPont and Assistant Circulation Director Richard McGrath testified that the Employer has issued

778 (2001) (finding verbal warnings not disciplinary, notwithstanding purported progressive disciplinary system, because an employee could receive numerous counselings and verbal warnings without further discipline); *Concourse Village, Inc.*, 276 NLRB 12, 13 (1985) (finding written warnings disciplinary, where progressive disciplinary policy expressly provided that receipt of three written warnings would result in termination); see also *Ten Broeck Commons*, 320 NLRB 806, 809 (1996) (finding warnings not disciplinary, where there was no showing of “predetermined discipline based solely on the receipt of a certain, set number of warnings”).

In any event, even assuming that Robitaille’s two warnings to employee Spear were disciplinary by virtue of the Employer’s purported progressive disciplinary system, the exercise of supervisory authority on two isolated occasions, including one when Robitaille’s supervisor was on vacation, does not transform an employee into a statutory supervisor. See *Shaw, Inc.*, 350 NLRB 354, 357 & fn. 21 (2007) (foreman’s participation in decision to suspend two employees insufficient to establish super-

visory status); *Franklin Home Health Agency*, 337 NLRB at 829 (sporadic exercise of supervisory authority does not confer supervisory status); *Chevron U.S.A.*, 309 NLRB 59, 61 (1992) (noting that “isolated and infrequent incidents of supervision do not elevate a rank-and-file employee to a supervisory level” and citing cases).

V. CONCLUSION

We find, for the reasons set forth by the Regional Director and as discussed above, that the Employer has not satisfied its burden to establish that Youmans effectively hires, or that Robitaille effectively hires or disciplines. Accordingly, we affirm the Regional Director’s finding that Youmans and Robitaille are not supervisors within the meaning of Section 2(11) of the Act. We reverse, for the reasons set forth above, the Regional Director’s finding that Smith is not a managerial employee.

ORDER

The Regional Director’s Decision is affirmed in part and reversed in part, and the collective-bargaining unit is clarified to exclude the lead editorial page editor.

multiple verbal warnings to employees without any escalation of discipline.