G4S Regulated Security Solutions, a Division of G4S Secure Solutions (USA) Inc. f/k/a The Wackenhut Corporation *and* Thomas Frazier *and* Cecil Mack. Cases 12–CA–026644 and 12–CA–026811

June 25, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On September 28, 2012, the Board issued a Decision and Order Remanding in this proceeding, which is reported at 358 NLRB 1701. On April 30, 2013, the Board issued a Supplemental Decision and Order, which is reported at 359 NLRB 947. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit.

At the time of the Decision and Order Remanding and the Supplemental Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. On June 27, 2014, the Board set aside the Decision and Order Remanding and the Supplemental Decision and Order. On August 18, 2014, the court of appeals remanded this case for further proceedings.

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

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, we have considered de novo the judge's decision, supplemental decision, and the record in light of the exceptions and briefs. We have also considered the now-vacated Decision and Order Remanding and the Supplemental Decision and Order, and we agree with the rationale set forth therein. Accordingly, we affirm the judge's rulings, findings, and conclusions and adopt the judge's recommended Order to the extent and for the reasons stated in the Decision and Order Remanding reported at 358 NLRB 1701 and the Supplemental Decision and Order reported at 359 NLRB 947, which we incorporate by reference. The judge's recommended Order, as further modified here, is set forth in full below.[1]

The Respondent suspended and discharged Charging Parties Thomas Frazier and Cecil Mack, both lieutenants in its security force at Florida Power & Light's Turkey Point, Florida nuclear power plant. In agreement with the Respondent, our dissenting colleague argues that the suspensions and discharges were lawful because, in his view, Lieutenants Frazier and Mack are statutory supervisors based on their possession of authority to discipline security officers and their use of independent judgment in exercising that authority. To so conclude, our colleague relies on the testimony of Project Manager Michael Mareth and disciplinary notices issued by lieutenants other than Frazier and Mack. For the reasons that follow, we find this evidence insufficient to demonstrate that Frazier and Mack are statutory supervisors.[2] Rather, they are statutory employees who were suspended and discharged in violation of Section 8(a)(1) of the Act for engaging in protected, concerted activity.[3]

Because the Respondent bears the burden of proving statutory supervisory status, the Board must hold against the Respondent any lack of evidence on an element necessary to establish that status. See, e.g., *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1048 (2003). The Respondent has not proven supervisory status where the record evidence is inconclusive or otherwise in conflict. See, e.g., *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Likewise, mere inferences or conclusory statements, without detailed, specific evidence, are insufficient to establish supervisory authority. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006); *Lynwood Manor*, 350 NLRB 489, 490 (2007); see also *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006).

[1] We shall modify the judge's recommended remedy and Order in accordance with our recent decision in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014). We shall substitute a new notice in accordance with *Durham School Services*, 360 NLRB 694 (2014). In finding the 8(a)(1) suspension violation for the reasons stated in the Supplemental Decision and Order reported at 359 NLRB 947, we do not rely on *Fort Dearborn Co*., 359 NLRB 199 (2012). Instead we rely on *Beverly California Corp*., 326 NLRB 153, 154 (1998), enfd. in relevant part 227 F.3d 817 (7th Cir. 2000). In finding that the discharge of Cecil Mack violated Sec. 8(a)(1), we rely on *Evenflow Transportation, Inc*., 361 NLRB 1482 (2014), incorporating by reference 358 NLRB 695 (2012), cited in the Supplemental Decision and Order. We do not rely on *Belgrove Post Acute Care Center*, 359 NLRB No. 77 (2013), cited in the Supplemental Decision and Order. In finding that the lieutenants are not statutory supervisors, we do not rely on *Alternate Concepts, Inc*., 358 NLRB 292 (2012), cited in the Decision and Order Remanding. Rather, we rely on the other cases cited in the Decision and Order Remanding and on the cases cited and discussed below.

[2] Because we find Mareth's testimony and the disciplinary notices insufficient to establish the supervisory status of the lieutenants, we need not and do not rely on any portion of Frazier's testimony, much of which the judge discredited. See also fn. 2 of the underlying Decision and Order Remanding. Thus, the dissent is incorrect in asserting that the "picture [we] paint of lieutenants' supervisory authority reflects Frazier's discredited account rather than Mareth's credited testimony."

[3] We address here only the arguments raised by the dissent. With respect to the other issues presented in this case, our findings are based on the rationale set forth in the Decision and Order Remanding and the Supplemental Decision and Order, as stated above.

Similarly, job descriptions, job titles, and similar "paper authority," without more, do not demonstrate supervisory authority. *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 2 (2014); *Golden Crest*, 348 NLRB at 731. And like other statutory indicia of supervisory status, the authority to discipline other employees is not determinative unless it is exercised using independent judgment. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 693 (2006).

Contrary to our dissenting colleague, Mareth's testimony is insufficient to carry the Respondent's burden. As the most senior manager in charge of security at the facility, Mareth is several levels removed from the lieutenants in the Respondent's hierarchy, and there is no record evidence that he ever served as a lieutenant. Perhaps not surprisingly, Mareth's testimony consists chiefly of conclusory responses to leading questions by counsel.[4] He did not describe what procedures, protocols, criteria, or other factors, if any, govern lieutenants' disciplinary actions. See, e.g., *Lynwood Manor*, 350 NLRB at 490. In fact, Mareth did not testify to a single specific instance in which a lieutenant had exercised discretion or independent judgment regarding discipline. See, e.g., *Avante at Wilson*, supra, 348 NLRB at 1057 (rejecting claim of supervisory status absent evidence of specific examples). As the D.C. Circuit stated in *Oil Chemical & Atomic Workers v. NLRB*,[5] "what the statute requires is evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority." Mareth's generalized testimony is plainly insufficient to satisfy this requirement. See also *Golden Crest Healthcare Center*, supra at 731; *Lynwood Manor*, supra at 490.

The eight disciplinary notices admitted into evidence, none of which were issued by Frazier or Mack, are also insufficient under this standard to establish that Frazier and Mack are statutory supervisors. Even assuming that the notices evidence authority to discipline, they do not show that lieutenants exercised independent judgment when issuing them. To exercise independent judgment, "an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data," provided that the act involves using a degree of discretion rising above the "merely routine or clerical." *Oakwood Healthcare*, 348 NLRB at 692–693. Judgment is not independent if it is "dictated or controlled by detailed instructions" such as those "set forth in company policies or rules . . . ." Id. at 693. Here, the disciplinary notices show that whatever authority to discipline the lieutenants may exercise, it is both routine and significantly limited by detailed instructions in the Respondent's attendance and progressive discipline policies.

All eight disciplinary notices cite specific provisions of the attendance and progressive discipline policies, and those policies mandated the level of discipline that the notices imposed. Seven of the eight notices involve attendance infractions. The Respondent's attendance policy contains 15 detailed pages of directives regarding absences and the appropriate discipline for specified numbers of absences. The attendance policy operates in tandem with a progressive discipline policy, which consists of 11 pages of defined offenses and specifies 3 escalating levels of discipline consisting of warnings, suspensions, and termination to be imposed for the offenses. Contrary to the dissent, the eight notices do not cover a "range of offenses." As stated above, all but one notice involve attendance infractions—security officers either being late or not reporting to work or training.[6] Further, these are routine matters that do not involve the exercise of discretion: the security officer either was or was not absent or late for work or training. Little or no independent judgment is needed to make that determination.

The Respondent offered no evidence to the contrary. Indeed, the Respondent failed to call any of the lieutenants who signed the disciplinary notices to testify that they exercised independent judgment in issuing them or to describe the role the lieutenants played in their issuance to the security officers. For example, there is no indication whether lieutenants exercised discretion in deciding to issue discipline at a certain level and then prepared and signed the disciplinary notices based on

[4] For example:

Q. Do lieutenants have any role in disciplining security officers?

A. Yes, they do.

Q. Do lieutenants have any—exercise any discretion in issuing discipline under this policy?

A. Yeah, they have the ability to do that, yes.

[5] 445 F.2d 237, 243 (D.C. Cir. 1971), cert. denied 404 U.S. 1039 (1972).

[6] The other notice involved a security officer who damaged a security vehicle and was issued a Level II written warning. There is no support for our colleague's assertion that this discipline "reflect[ed] the issuing lieutenant's discretionary decision to treat the incident as a Level II violation" rather than a Level 1 discharge offense. The incident reported in the disciplinary notice—a lift arm at a security gate that hit a parked security vehicle— did not describe conduct or vehicle damage indicative of a Level I discharge offense, which lieutenants could not impose in any event. Rather, the notice specifically stated that the damage caused by the security guard mandated a Level II written warning and, consistent with this requirement, the notice further advised that additional Level II discipline in the form of a written warning and suspension would follow if the same conduct occurred within 12 months. It is apparent, therefore, that Level II was the only level of discipline that the issuing lieutenant considered, or could have considered, for the vehicle damage caused by the security officer, as it is undisputed that lieutenants cannot impose Level 1 discharges.

that decision, or whether they signed and delivered already-prepared notices at the behest of higher-ranking supervisors. There is some evidence in the record that suggests the latter possibility. One of Frazier's performance evaluations instructed him to consult the progressive discipline policy and to get a captain's review before issuing discipline. Finally, the Respondent's claim that lieutenants have discretion to decide whether to issue or withhold discipline is based solely on Mareth's purely conclusory testimony; there is no testimonial or documentary evidence from any of the lieutenants indicating that they exercised such discretion.[7]

As indicated above, the Board has consistently held that to prove supervisory status by a preponderance of the evidence, a party must present detailed, specific evidence and cannot rely on conclusory testimony or evidence that is inconclusive or otherwise in conflict. See *Golden Crest Healthcare Center*, supra; *Lynwood Manor*, supra; *Avante at Wilson*, supra. Our colleague contends, however, that we have done "violence" to the preponderance of the evidence standard by applying a different "undefined higher-level threshold of proof" in finding that the lieutenants are not 2(11) supervisors. We respectfully disagree. Our decision here is the same as that reached by a unanimous Board panel 10 years ago in *Wackenhut Corp.*, 345 NLRB 850 (2005), involving the same Respondent and the same issue of whether the lieutenants were supervisors. In finding that they were not, the Board cited the same reasons on which we rely today in finding an evidentiary absence of independent judgment in exercising disciplinary authority—disciplinary forms that were signed by lieutenants simply referenced "specific, enumerated regulations . . . [that] mandated the type of discipline to be issued in each particular instance" and the failure by the Respondent "to call as witnesses any of the lieutenants who signed the forms." Id. at 854.

Although we agree with our colleague that "much has changed since the record in [*Wackenhut I*] was created in 2004," we find that it is not in a way that supports his position. The record evidence in that case, also insufficient to establish supervisory status, was considerably more substantial than the evidence submitted here. It consisted of 25 disciplinary forms and 3 "Daily Fire Watch Rove Field Check" forms signed by lieutenants. All of those forms documented offenses and deficiencies by security officers within the preceding 12 months. Here, by contrast, all except one of the eight disciplinary notices were at least 2 years old.[8] Id. at 866–867. [9]

In sum, based on a careful review of the record, and applying well-established precedent, we find that the Respondent has not met its burden of proving that Frazier and Mack are statutory supervisors. To find otherwise, in the absence of evidence that either of them ever disciplined a security officer in their 7 years as lieutenants, and based on the limited, conclusory, and stale evidence submitted by the Respondent, would–borrowing the dissent's terminology–constitute a "violent" departure from precedent.

ORDER

The National Labor Relations Board orders that the Respondent, G4S Regulated Security Solutions, a Division of G4S Secure Solutions (USA) Inc., f/k/a The Wackenhut Corporation, Miami-Dade County, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or suspending employees because they engage in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[7] Contrary to our colleague, the disciplinary notices, which are all typewritten, show only that they were signed, not prepared, by lieutenants. Our colleague asserts, however, that the Respondent was "not required to exclude speculative possibilities" that the notices were not prepared by lieutenants. We disagree. In *Sheraton Universal Hotel*, 350 NLRB 1114, 1116 (2007), which our colleague cites, the Board found that a hotel's front desk supervisor exercised 2(11) authority in recommending discipline, reversing the judge's contrary finding based on his "speculation" that upper management independently investigated the recommendations. See also, *Entergy Mississippi, Inc.*, 357 NLRB 2150, 2156 (2011) (rejecting as "speculative" manager McCorkle's testimony that dispatchers were supervisors).

[8] Contrary to the dissent, there is no indication in *Wackenhut* that the failure by the Respondent to submit its attendance and progressive disciplinary policies in evidence was a factor in the Board's finding that the lieutenants did not exercise independent judgment

[9] Our dissenting colleague points to a "Supervisory Requirements" form signed by Frazier and Mack indicating that they had authority to use progressive discipline. But this is "paper authority" of supervisory status and, as stated above, the Board has consistently found that the mere grant of "paper authority," without more, does not establish that an individual is a supervisor. *Lucky Cab Co.*, 360 NLRB 271, 272; *Golden Crest*, supra, 348 NLRB at 731. As discussed, there is no "more" here, as the record is devoid of evidence that the lieutenants, in actual practice, exercise independent judgment in disciplining guards.

Further, our dissenting colleague's reliance on *Oak Park Nursing Care Center*, 351 NLRB 27, 28–29 (2007), is misplaced. In that case, the individuals found to be supervisors testified that they alone decided whether the misconduct at issue warranted a verbal warning or written documentation. The record here does not establish that the lieutenants exercise similar discretion.

Our colleague also argues that, based on our decision, none of the Respondent's managers could exercise the authority to discipline. We are deciding only this case, however, and doing so based on the record the parties themselves created.

(a) Within 14 days from the date of this Order, offer Thomas Frazier and Cecil Mack full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Thomas Frazier and Cecil Mack whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision as modified in this decision.

(c) Compensate Thomas Frazier and Cecil Mack for any adverse tax consequences of receiving their backpay in one lump sum, and file reports with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each of them.

(d) Within 14 days from the date of this Order, remove from its files any reference to the discharges and suspensions, and, within 3 days thereafter, notify the employees in writing that this has been done and that the discharges and suspensions will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to determine the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Miami-Dade County, Florida facility copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 2, 2010.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 12 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER MISCIMARRA, dissenting.

The Respondent provides a military-type security force for Florida Power & Light's Turkey Point nuclear power plant. Charging Parties Thomas Frazier and Cecil Mack were lieutenants in that force, and the Respondent expected them to discipline the security guards under their command. Although Frazier and Mack denied possessing supervisory authority, the judge refused to credit those denials. Contrary to my colleagues, I would affirm the judge's determination that Frazier and Mack possess supervisory authority under Section 2(11) of the Act based on their authority to discipline employees and their authority to exercise independent judgment when imposing discipline. Accordingly, I would dismiss the complaint.[1]

Congress exempted supervisors from the Act based on its judgment that "an employer is entitled to the undivided loyalty of its representatives." *NLRB v. Yeshiva University*, 444 U.S. 672, 682 (1980). The supervisory exemption is an important part of the national labor policy devised by Congress. Id. In my view, the majority's decision reflects an unduly restrictive treatment of the record evidence and an unduly narrow interpretation of our precedents dealing with supervisory status.

The Act exempts as supervisors those who (1) hold authority to engage in one of the 12 supervisory functions listed in Section 2(11); (2) use independent judgment in their exercise of such authority; and (3) hold that authority "in the interest of the employer." See, e.g., *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 710–713 (2001); *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). The burden of establishing supervisory status by a preponderance of the evidence rests on the party asserting it—here, the Respondent. Id. Because discipline is one of the powers enumerated in Section

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] Because the possession of just one 2(11) indicium of supervisory authority establishes statutory supervisory status, I find it unnecessary to reach the other supervisory indicia addressed by the judge: authority to promote, to assign, and responsibly to direct. Additionally, I do not reach the issue of whether, if Frazier and Mack were employees, the Respondent would have acted unlawfully in discharging them.

2(11), possession of authority to discipline, in the interest of the Respondent, with independent judgment is sufficient to make Frazier and Mack statutory supervisors.

I believe the evidence in this case reveals that Frazier and Mack possessed authority to discipline and to use independent judgment in exercising that authority.[2] The Respondent's project manager, Michael Mareth, testified that lieutenants could impose all forms of progressive discipline except termination without advance approval of a captain or other higher-ranking officer. He also explained that lieutenants, on their own, could decide whether to issue discipline or alternatively to let an offense go unpunished or to use the incident as a "coaching" opportunity. Additionally, Mareth testified that where offenses are listed at two different levels of progressive discipline, lieutenants have discretion to impose discipline at either level. Mareth was familiar with the lieutenants' duties, and only two managerial levels (an operations manager and five captains) separated the lieutenants and Mareth. Mareth had been in charge of security at Turkey Point for 3 years and had worked for the Respondent for 28 years. And his testimony on disciplinary authority was *corroborated* by Frazier and Mack themselves. Frazier admitted that, as a lieutenant, he "had the authority to issue oral and written warnings" and "to issue discipline at least at certain levels."[3] Both he and Mack acknowledged that they had signed a "Supervisory Requirements" document confirming that their job duties included imposing "progressive discipline." Frazier also conceded that he could have exercised "independent judgment" in issuing discipline, but he never saw the need to issue discipline. No credited testimony contradicts this evidence. Taken as a whole, it was more than enough to establish Frazier and Mack possessed authority to discipline with independent judgment. See *Oak Park Nursing Care Center*, 351 NLRB 27, 28–29 (2007) (authority to issue employee counseling forms evinces 2(11) supervisory status, where disputed individuals had discretion to decide whether to document infraction).[4]

This testimony was corroborated by eight Employee Disciplinary/Corrective Action Notices recording various forms of discipline issued to five bargaining-unit guards by seven different lieutenants. These disciplinary notices covered a range of offenses—tardiness, absenteeism, failure to report to training on time, and damaging a vehicle—and the sanctions imposed ranged from oral warnings and written reprimands to 1-day suspensions. This discipline was issued pursuant to the Respondent's attendance and progressive discipline policies, which apply to discipline issued by all levels of the Respondent's management. Those policies furnish guidelines for the level of discipline appropriate to various offenses, but they also recognize that a guard may commit an unlisted offense or that following the guidelines may not be warranted in some instances. Indeed, one offense listed at two progressive-discipline levels—"[f]ailure to meet satisfactory job performance or behavior standards *in the opinion of management*" (emphasis added)—explicitly requires independent judgment. As the Board cautioned in *Oakwood Healthcare*, "the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices." 348 NLRB at 693. The progressive discipline policy here expressly does so.[5]

[2] It is undisputed that if Frazier and Mack had authority to discipline, they exercised that authority in the interest of the Respondent.

[3] As noted above, the judge found that Frazier made an effort to minimize his authority as a lieutenant, and he discredited Frazier's testimony "where [it was] contradicted by the testimony of others or called into question by documentation." Accordingly, I have relied on Frazier's admissions that he possessed disciplinary authority, which are consistent with Mareth's testimony. The picture my colleagues paint of lieutenants' supervisory authority reflects Frazier's discredited account rather than Mareth's credited testimony.

[4] The majority rejects Mareth's testimony as conclusory and unspecific. I disagree. As shown above, Mareth's testimony was clear and specific regarding the extent of lieutenants' authority to discipline and the circumstances under which they could exercise independent judgment. It was also corroborated by Frazier and Mack.

[5] The disciplinary notice issued for damaging a vehicle (i.e., causing damage to property) reflects the issuing lieutenant's discretionary decision to treat the incident as a Level II violation—"unsatisfactory job performance in the opinion of management"—although the progressive discipline policy also includes the Level I offense of "[n]egligent or careless acts that cause serious personal injury or property damage." This determination was significant because a Level I offense is grounds for immediate discharge under the Respondent's progressive discipline policy. And although the majority discounts discipline for violations of the attendance policy as routine and nondiscretionary, the disciplinary notice issued to a security officer for reporting late to training cited the progressive discipline policy, not the attendance policy. Further, all of the notices on their face constitute discipline. Two of the notices impose suspensions, and all of them state that further infractions could result in more severe discipline, consistent with the Respondent's policies. Because the lieutenants thus had considerably more than "paper authority" to discipline, *Lucky Cab Co.*, 360 NLRB 271 (2014), cited by the majority, a case where the employer did not even have a progressive disciplinary procedure, is clearly distinguishable.

The majority rejects this evidence, but I believe their reasons do not withstand scrutiny. The majority first contends that the Respondent failed to disprove the possibility that the lieutenants were merely signing documents prepared by higher-ranking supervisors. Yet, the documents indicate on their face that they were prepared and signed by lieutenants. Under the applicable preponderance of the evidence standard, the Respondent was not required to exclude speculative possibilities.[6] The majority next asserts that Frazier was required to get a captain's review before issuing discipline, citing language from one of Frazier's performance evaluations that indicates that *lieutenants* would have prepared the forms. That evaluation states: "Have more involvement with the Security Officers when disciplinary actions need to be issued. Review and use WNS policy 108 [the Respondent's discipline policy] for guidance when issuing any disciplinary actions and have the Captain review the disciplinary [sic] prior to giving it to the Officers." Read in context, this is not an instruction to get a captain's review before issuing discipline, as the majority contends. Rather, it is a criticism of Frazier for being insufficiently involved in the disciplinary process, and a directive to issue discipline as the duties of his position require. Finally, the majority rejects the disciplinary notices because they were prepared by "lieutenants other than Frazier and Mack" and most were "at least 2 years old." Regarding the first point, the disciplinary notices demonstrate that the Respondent's lieutenants possess authority to discipline with independent judgment, and Frazier and Mack are lieutenants. Even if Frazier and Mack refused to exercise the authority they possess, Section 2(11) requires only the possession of authority to carry out an enumerated supervisory function, not its actual exercise. *Sheraton Universal Hotel*, 350 NLRB 1114, 1118 (2007) (finding that front desk supervisor (FDS) possessed authority to make effective recommendations with regard to hiring where manager testified he would not hire an applicant if FDS recommended against it, despite no specific examples of FDS making such recommendations). Regarding the second point, the date of the disciplinary notices does not diminish their probative value absent evidence that the lieutenants' duties have changed in the interim. There is no such evidence here.

[6] Disputing that the Respondent was not required to exclude the speculative possibility that lieutenants merely signed disciplinary notices, my colleagues cite *Sheraton Universal Hotel*, 350 NLRB 1114 (2007), and *Entergy Mississippi, Inc.*, 357 NLRB 2150 (2011). But as their own description of those cases shows, the Board there rejected findings based on speculation. Those cases support my point, which is that the majority similarly relies on speculation here.

The broad reach of the Respondent's disciplinary policies further supports a finding that Frazier and Mack were supervisors. As noted above, the progressive discipline and attendance policies apply to disciplinary decisions by *all* levels of the Respondent's management, from lieutenants on up. If those policies preclude independent judgment, then the Respondent (and many other employers with similar policies) would have *no* statutory supervisors possessed of 2(11) disciplinary authority. My colleagues' response—i.e., that they are "deciding only this case . . . based on the record the parties themselves created"—improperly discounts this issue. It is unreasonable to adopt the rationale embraced by my colleagues, under which *nobody* in the Respondent's management ranks exercises independent judgment in issuing discipline.

Section 10(c) of the Act expressly requires the Board to accept facts that are proven by a "preponderance of the evidence." "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 & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993) (internal quotations omitted). As shown above, the evidence that Frazier and Mack possessed 2(11) authority to discipline with independent judgment clearly meets the preponderance standard. It does violence to this standard, in my opinion, to disregard relevant evidence merely because the majority believes the Respondent should have introduced yet more evidence. Although my colleagues purport to apply the preponderance standard, they actually apply an undefined, higher-level threshold of proof. The Supreme Court has criticized the Board for applying an effective standard different from its announced standard as a breach of its duty to engage in reasoned decisionmaking. *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 372–377 (1998). I believe the majority does that very thing here.

The heightened standard of proof applied by the majority is especially unwarranted in the circumstances of this case. There can be no reasonable doubt that the Respondent expected its lieutenants to discipline security officers. Indeed, the record evidence reveals the Respondent's unsuccessful efforts to get Frazier and Mack to perform that duty. By holding against the Respondent Frazier and Mack's refusal to do so, in defiance of the Respondent's clear and repeated instructions, the majority hamstrings employers faced with supervisors who refuse to supervise.

In *Wackenhut Corp.*, 345 NLRB 850, 855 (2005), the Board found the Respondent did not establish that certain Turkey Point lieutenants possessed authority to discipline. However, much has changed since the record in that case was created in 2004. In 2006, the lieutenants signed the "Supervisory Requirements" document described above, confirming their authority to impose progressive discipline. Additionally, the Board found that the lieutenants at issue in the earlier case were not shown to have exercised independent judgment in issuing discipline in large part because lieutenant-signed discipline documents all cited "specific, enumerated regulations." Although the regulations were not in the record, the Board found that "it is clear from the context of the forms that the regulations mandated the type of discipline to be issued in each particular instance." 345 NLRB at 854. The lieutenant-issued Employee Discipline/Corrective Action Notices here, however, refer to either the progressive discipline policy or absenteeism policy. Those policies *are* in this record and, as discussed above, they are not so detailed as to eliminate discretion. In these respects, among others, independent judgment was established on the record in this case.

Finally, lieutenants are paid more than security guards, receive additional training not given to guards, are included in management meetings that guards do not attend, and perform little actual guard work. The Board has regarded such evidence as persuasive "secondary indicia" of supervisory status. See, e.g., *American River Transportation Co.*, 347 NLRB 925, 927 (2006) (higher pay and better benefits); *Burns Security Services*, 278 NLRB 565, 570 (1986) (sergeants and lieutenants attended monthly management meetings). Additionally, Frazier and Mack were viewed as supervisors.[7] And if the lieutenants were not supervisors, each captain would be responsible for supervising more than 30 security guards—an implausibly large number given the size, complexity and security sensitivity of the Turkey Point site. See, e.g., *Burns Security Services*, supra at 571 (finding lieutenants and sergeants to be statutory supervisors with 2 to 1 guard-to-supervisor ratio at nuclear power plant).

For these reasons, I believe the Respondent has shown by a preponderance of the evidence that Frazier and Mack possessed authority to discipline security guards and to exercise independent judgment in doing so. Accordingly, I respectfully dissent.

[7] As Frazier conceded, the Respondent treated them as supervisors, and Timothy Lambert, who had been the Union's president since May 2009 and a Turkey Point guard for over 10 years, stated that Frazier and Mack "were supervisors." Lambert further testified that a lieutenant would be his "first line of reporting" and "first line of supervision."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or suspend any of you for engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Thomas Frazier and Cecil Mack full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Thomas Frazier and Cecil Mack whole for any loss of earnings and other benefits resulting from their suspension and discharge, less any net interim earnings, plus interest.

WE WILL compensate Thomas Frazier and Cecil Mack for any adverse tax consequences of receiving their backpay in one lump sum, and WE WILL file reports with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each of them.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful discharges and suspensions of Thomas Frazier and Cecil Mack, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges and suspensions will not be used against them in any way.

G4S REGULATED SECURITY SOLUTIONS, A DIVISION OF G4S SECURE SOLUTIONS (USA) INC. F/K/A THE WACKENHUT CORPORATION

The Board's decision can be found at www.nlrb.gov/case/12-CA-026644 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.