

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12**

**SEA WORLD OF FLORIDA LLC
d/b/a DISCOVERY COVE**

Employer

and

Case 12-RC-362952

**INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 30, AFL-CIO**

Petitioner

DECISION AND DIRECTION OF ELECTION

Sea World of Florida LLC d/b/a Discovery Cove (the Employer) operates entertainment, amusement, and theme park attractions in Orlando, Florida, including the Discovery Cove and Aquatica attractions. On April 1, 2025, International Union of Operating Engineers, Local 30, AFL-CIO (the Petitioner) filed a petition under Section 9(c) of the National Labor Relations Act (the Act) seeking to represent a unit of all full-time and regular part-time maintenance divers, senior divers, dive technicians, and lead divers employed by the Employer at its facility in Orlando, Florida. An organization chart the Employer prepared for the hearing and the Employer's Statement of Position show that the Employer refers to 4 of the maintenance divers as senior divers and categorizes 6 maintenance divers as associate divers and sometimes refers to the dive technician as a gear technician.

The parties stipulated that all full-time and regular part-time associate divers, senior divers, dive safety officers, and dive technicians should be included in any unit found appropriate, and that all other employees, office clerical employees, professional employees, managerial employees, guards, and supervisors as defined by the Act should be excluded from any unit found appropriate.

The only substantive issue in dispute is whether 2 dive supervisors, who were formerly called lead divers, are supervisors within the meaning of Section 2(11) of the Act as the Employer contends, or nonsupervisory employees who should be included in the unit as eligible voters as the Petitioner contends. The record shows that the Employer changed the title "lead diver" to the title "dive supervisor," also referred to by the Employer as "supervisor, water quality (dive shop)." There was no change of duties when the Employer changed the job title, and there is no evidence showing when the job title was changed. I shall refer to these employees as dive supervisors.

On April 10, 2025, a hearing officer of the Board held a hearing in this matter during which the parties were given the opportunity to present their positions and supporting evidence.

At the time of the hearing the petitioned-for unit included 2 dive supervisors, 6 associate divers, 4 senior divers, 1 dive safety officer, and 1 dive technician, for a total of 14 employees, including the 2 disputed dive supervisors. Thereafter, the parties submitted post-hearing briefs. I have carefully considered the record evidence and the parties' briefs.

At the hearing, the Employer moved that the case should be held in abeyance or dismissed because the Board lacks a quorum and argues that as the Regional Director I have no authority to certify the outcome of an election until such time as the Board has a quorum. The Employer also argues that the removal protections for Board members and administrative law judges are unconstitutional. The Petitioner opposed the Employer's motion to stay or dismiss the case based 29 CFR Sections 102.178 and 102.182. The hearing officer referred the Employer's motion to me for a ruling. For the reasons set forth in below in the Analysis section of the Decision, I deny the Employer's motion.

I further find, based on the facts and analysis below, that there is insufficient evidence to establish that the dive supervisors are supervisors within the meaning of Section 2(11) of the Act. Accordingly, I find that the dive supervisors should be included in the unit and are eligible to vote, and I am directing an election including them in the unit.

I. Facts

A. Overview of the Employer's operations

Employees in the petitioned-for unit perform most of their work at Discovery Cove, and they also perform work at Aquatica, a nearby theme park operated by the Employer that is approximately a one-mile drive from Discovery Cove. Discovery Cove has areas designated as lagoons, reef, and river/oasis with various sea animals, including dolphins, otters, and fish. The work performed at Aquatica by the Discovery Cove dive team includes the maintenance of the Commerson's dolphin pool. Discovery Cove is generally open to the public from about 7:00 a.m. to 5:00 p.m.

Buck Lyman is the Employer's Vice President of Zoological Operations for Discovery Cove and Aquatica. He has worked for the Employer for a total of 20 years, and after a break in his employment he returned to the Employer in his current position almost 2 years before the hearing. Lyman's normal work hours are approximately the same hours that Discovery Cove is open to the public. Approximately 300 employees come under the general supervision of Lyman, including 4 managers and approximately 18 employees designated as supervisors. David Gray, Manager of Water Quality at the Discovery Cove and Aquatica, is one of the managers who report directly to Lyman. Gray regularly works from 6:00 a.m. until 2:30 or 3:00 p.m.¹

¹ Lyman testified that Gray sometimes trains divers at night.

B. Duties and functions of dive supervisors and other employees in the petitioned-for unit.

Dive supervisor Charles Melo has been in that position since about 9 months before the hearing. Melo reports to Manager Gray and Vice President Lyman. Samantha Milford was a maintenance diver until April 10, 2025, the day of the hearing. Milford was interviewed for a vacant dive supervisor position on April 3. She was selected for the job and was scheduled to start on April 10. The record shows that like dive supervisor Melo, newly promoted dive supervisor Milford will report to Gray and Lyman.

The dive safety officer regularly works during the daytime and reports directly to Manager Gray. He adjusts his schedule as needed to train divers. It appears that he adjusts his schedule to work at night when training the maintenance divers. The dive safety officer also trains other divers, including divers on the zoological teams. He trains new divers on the Employer's dive standards. The dive safety officer has no supervisory responsibility.

Like the dive safety officer, the dive technician, also known as the gear technician, regularly works during the daytime and reports directly to Manager Gray. He sometimes works at night if there are problems with dive gear. His job is to maintain all of the scuba gear and equipment for a program called SeaVenture. Vice President Lyman testified that the dive technician "is a technical diver as well as a mechanic."

The 10 maintenance divers (including senior divers and associate divers) report to the dive supervisors. The dive supervisors and maintenance divers work at night, after Discovery Cove is closed to the public. According to Lyman, the dive supervisors start work at 6:00 p.m. and the rest of the dive maintenance team starts work at 6:30 p.m. The dive supervisors work 10-hour shifts and the associate and senior divers (collectively, the divers) on the dive maintenance team work 10-hour or 8-hour shifts.² There is frequent overtime for the dive supervisors and divers. The divers clean the exhibits, diving to perform various tasks in the pools and lagoons and also cleaning surrounding areas. Tasks include dredging, scrubbing, pressure washing, vacuuming, cleaning skimmers and "sumps," and netting rivers. The maintenance divers also use forklifts for certain tasks, such as moving artificial coral reef heads for cleaning.³ They use various tools in the water and must be careful to remove all tools to avoid injury to the animals.⁴ At times, the divers must stop work because the weather is unsafe.

The divers' work is overseen by the dive supervisors. The dive supervisors develop a maintenance schedule based on the available staff and the exhibit needs and may change that schedule. However, Vice President Lyman and Manager Gray may dictate and change maintenance priorities. For example, Lyman requested that the otter exhibit be cleaned weekly,

² Thus, there is no regular overlap between the work hours of Vice President of Zoological Operations Lyman or Manager of Water Quality Gray and the work hours of the maintenance dive team.

³ On March 27, 2025, dive supervisor Melo made an email request to schedule forklift training for 3 divers at the start of their night shifts, copying Vice President Lyman and Manager Gray. Lyman testified that Melo chose the trainees, but there is no evidence about his basis for making that choice and the record does not show whether the divers who were not chosen had already received forklift training.

⁴ The record does not identify or suggest the tools used by divers other than forklifts, vacuums, and pressure washing equipment.

and dive supervisor Melo and the supervisor of the otter exhibit determined the day of the week that otter exhibit maintenance should be performed.⁵

The dive supervisors send Vice President Lyman and supervisors and managers in the zoological departments nightly email reports of scheduled maintenance work that has been performed by the dive team and any scheduled maintenance work that the dive team did not perform because of insufficient time and/or understaffing. The reports include the number of divers assigned and the hours of work it took for each maintenance task to be completed. The reports may also note damage to equipment, request the purchase of new equipment, and/or state the number of employees who call out of work.

Vice President Lyman and Manager Gray acknowledged that sometimes the dive supervisors dive in the water and perform the same work as the divers. The record does not reflect the percentage of the dive supervisors' time they spend performing the same work as the divers.

The job description for the dive supervisor job, titled "Supervisor, Water Quality (Dive Shop)," accurately summarizes the duties and requirements for the job. It states that the position's duties include overseeing and being able to perform all tasks of the department, being a main resource for technical information, implementing and executing company directives day-to-day, ordering materials needed for the department, maintaining and providing oversight for environmental and safety regulations, maintaining and approving daily timesheets and weekly schedules, training new hires, assisting and maintaining communications with other departments, and performing other duties as assigned. The requirements including at least 5 years of experience as a working diver in an aquatic life support facility or other water treatment facility, at least 2 years of experience in water quality or a similar maintenance shop, strong knowledge of fluid hydraulics and advanced water treatment processes, scuba certification, passing a dive physical examination, ability to complete CPR training and certification, excellent written and verbal communication skills, ability to swim and work in and around water, ability to stand for long periods and lift, push/pull 80 pounds, and bend, reach, twist, and turn with complete flexibility.

Vice President Lyman and Manager Gray interviewed diver Milford for the dive supervisor position on April 3. Lyman testified that he looks for a dive supervisor who will lead the team by keeping it together, work well with others in resolving disputes, be organized, schedule the team, and communicate with him and other managers and supervisors in the Employer's zoo departments. He added that he looks for someone who "leads in disciplines and schedules."

⁵ As an example of the dive supervisors' scheduling function, the Employer entered in evidence an email chain showing that on Monday, April 7, 2025, supervisor of animal training Riley Brooks requested that dive supervisor Melo have the dive team vacuum dolphin pool 1 and scrub dolphin pool 2 that night, and Melo responded that the dive team could not do that work because they had been told to clean the otter exhibit weekly and that was being done on Mondays. In response to Brooks' further inquiry, Melo informed Brooks of the dive team's weekly schedule, including "diving dolphin" on Fridays.

There are no job descriptions in evidence for the positions of senior diver, associate diver, dive technician, or dive safety officer.

C. Hiring

Vice President Lyman testified that dive supervisors have participated with their manager in the interviews of candidates for hire of divers. During the interviews the interviewers ask questions printed on the Employer's "Individual Contributor Structured Interview Guide" provided by the Employer. There are scenarios presented in the first several questions and then a section on technical expertise. The interviewers may take notes. Each interviewer rates the candidates from 1 to 9 on each section of the interview form, and adds the scores together, and recommends whether or not to continue the hiring process. The interviewers then discuss whether or not they are in favor of a candidate and a decision is made. If there is a hiring recommendation the manager sends it to the Employer's Human Resources recruiter, apparently to act on the decision. When asked what happens if a dive supervisor recommends against continuing the hiring process, Lyman testified that he thinks that it generally sways the outcome of the decision. However, there is no evidence that Vice President Lyman has observed the participation of dive supervisors in the hiring process.

Manager Gray testified that on one or two occasions only supervisors interviewed a candidate for hire. In response to a leading question as to whether that occurred "in the last three, five years," Gray replied affirmatively. When asked why that happened, he testified, "I couldn't be there that day, so they just continued without me." Gray did not recall whether the candidate or candidates who were only interviewed by supervisors were hired, but testified, "whatever decision they made I went with." The Employer presented no documentation of such interviews. Manager Gray recalled one instance that occurred about a month and a half before the hearing when he was the only interviewer of a diver.

The Employer introduced in evidence the "Individual Contributor Structured Interview Guide of two candidates for diver positions who were interviewed by Manager Gray and dive supervisor Melo on April 3, 2025, a week before the hearing. These documents appear to be the ones completed by Melo, who wrote some cryptic notes, scored the candidates, and checked the "continue" box for both of them. The forms for the interview of those candidates prepared by Gray were not introduced in evidence, despite Gray's testimony that each interviewer fills out a copy of the form. In addition, the record does not reflect whether either candidate who was interviewed by Gray and Melo on April 3 was hired. Neither of the candidates' names appears on the lists of employees subsequently submitted by the Employer on April 9 with its Statement of Position, or on the organization chart prepared by the Employer for the hearing. There is no evidence that Manager Gray followed dive supervisor Melo's recommendation that the two candidates should continue to be considered for hire.

D. Promotion

Manager Gray testified that dive supervisor Melo sent him an email on March 21, 2025, recommending diver Samantha Milford for promotion to dive supervisor. However, Melo's email does not contain a recommendation to promote Milford. It merely states that Milford had

applied for the dive supervisor position, that it was above Melo's pay grade to push her application forward, and asked Gray to review her application. When asked whether Melo had otherwise endorsed Milford for the job, Gray testified that he had mentioned it once or twice before but did not specify what was said by Melo that constituted an endorsement of Milford. After Melo's March 21 email, on April 3, Vice President Lyman and Manager Gray interviewed Milford for the dive supervisor position. Melo did not participate in the interview process. Either Lyman or Gray (apparently Lyman) wrote detailed notes about Milford's responses to questions on the interview form, showing that the interview was not a mere formality.

In the same email Melo asked Gray to revisit promoting two associate divers to senior divers to give Melo help with team leadership and training. The record does not reflect any criteria for promotion to senior diver. Gray testified that after the email he decided to promote the two associate divers to senior divers and they were promoted and received pay increases. According to Gray, he relies solely on the recommendations of the supervisors in that situation. On cross-examination, when asked whether Melo had raised this issue of promoting the associate divers to senior divers before the March 21 email, Gray testified, "I don't recall, but he might have mentioned it. It looks like he might have." Gray further testified that he is the person who decides whether to grant such promotions. On re-direct examination, Gray testified that there was a time about a year earlier when dive supervisors did not think any divers were ready for promotion to open senior diver positions. Gray was then asked whether that could be what Melo was referencing about revisiting the issue, and he speculated, "It could very well be what he's (Melo's) talking about, yes."⁶

E. Assignment of work

The dive supervisors prepare a maintenance schedule. Vice President Lyman testified that "the divers, the supervisor" determine which tasks are completed on a given shift. Manager Gray testified that the dive supervisor may decide which diver performs which task and that according to the dive supervisors some divers are better at certain tasks than they are at other tasks, and he is sure that dive supervisors consider that when deciding what tasks to assign to a diver. It is evident from the nightly dive reports that the entire dive team performs apparently routine cleaning tasks on a rotating and repeating weekly schedule. The evidence does not establish that any of these cleaning tasks, such as vacuuming, scrubbing, and power washing, require special skills aside from the ability to be a diver, which is required of the entire dive team, or that certain divers only perform some of these tasks. In addition, there is no evidence about any criteria dive supervisors consider when deciding to assign work.

⁶ As noted above, there is evidence that Melo had only been a dive supervisor for about 9 months at the time of the hearing, so he would not have been in the dive supervisor position a year earlier when, according to Gray, some dive supervisor or supervisors, who Gray did not name, told Gray that no associate divers were ready for promotion to senior diver. Gray's testimony leaves open the possibility that Melo's March 21 email was his second request to promote the 2 divers to senior diver positions, and that the Employer may have denied or failed to act on an earlier promotion recommendation by Melo.

Vice President Lyman and Manager Gray each have assigned specific work to the dive team that alters the routine maintenance schedule from time to time, and the dive supervisors then adjust the schedule accordingly, as occurred when Vice President Lyman required weekly otter exhibit maintenance.

Vice President Lyman determines whether to authorize overtime work, and how much overtime work to authorize, depending on his consideration of factors such as budget, attendance and labor needs. There is testimony that the dive supervisors decide who works overtime, but there is no evidence about how the dive supervisors offer overtime work, whether there are any criteria, or it is simply offered to all divers in view of the dive team's apparent chronic short-staffing and the lack of evidence of differences among divers based on their skills.

On March 8, 2025, dive supervisor Melo emailed supervisors in the Employer's zoo departments for the purpose of soliciting divers from the zoo departments to work overtime helping the short-staffed dive team perform cleaning work during certain blocks of time. He copied Vice President Lyman on the email and asked Lyman to correct him if he was wrong. Lyman directed the dive supervisors Howell and Melo to plan where the overtime work was needed, noting that certain filters and a grate that needed cleaning. He also suggested the option of planning for a zoo operations crew to vacuum an area when the dive team could not get to that work. Dive supervisor Howell replied that he needed to know how many zoo employees would help and whether they were capable of diving before they could determine a schedule. According to Vice President Lyman once the overtime is authorized, the dive supervisors determine who works overtime and how much, which depends in part on how much overtime the employees from other departments are willing to work. There is no evidence that overtime work is mandatory. The record does not reflect the extent of overtime work performed by zoo team employees.

F. Discharge, suspension, and discipline

The Employer presented testimony from Vice President of Zoological Operations Lyman about dive supervisors' involvement in the discharge of a diver. Lyman testified that there was a report at 6:00 a.m. one day that the wet suits used by the Employer's zoological team that works with the animals during the day were found soaking wet on the ground in the men's wet suit room, rather than on hangers as usual. In addition, the wet suits smelled of urine. The Employer then had its security personnel investigate the matter. At 12:45 a.m. on February 26, 2025, Manager Gray sent an email to dive supervisors Melo and Brett Howell, who was still working for the Employer at the time, with a copy to Lyman, informing the dive supervisors that someone vandalized the wet suit room last night, and anyone working could be the culprit, and requesting that they keep their ears open to find out about it. Lyman met with Melo that evening when he reported to work. Lyman instructed Melo to ask the dive team what had happened regarding the wet suits during the dive team's previous shift. Melo asked Lyman for tips on how to approach the situation. Lyman told Melo to get a statement from any employee who admitted to causing the wet suits to be left soaking wet on the floor. Melo then reported to Lyman that he obtained a statement from an employee who admitted the misconduct. Lyman told Melo that he (Lyman) had already discussed the matter with the Employer's Human Resources department, and that they had told Lyman that if somebody admitted the misconduct that person should be

suspended. Lyman told Melo to take the diver's keys and identification and escort him to security and let the employee know that a Human Resources representative would contact him. At 8:56 p.m. that night, Melo emailed Manager Gray and dive supervisor Howell, and copied Vice President Lyman, confirming that he had obtained a written statement from a diver who admitted the misconduct and that he had talked with Lyman and Human Resources and the employee had been suspended and escorted off the property.

On March 1, 2025, Melo sent an email to Lyman stating that he heard rumors that a dolphin trainer found out who was responsible for the wet suit room incident and that a picture of that individual was being passed around, and that he did not want the incident to cause more division between the zoological team and the maintenance dive team. In the email he asked Lyman to let him know if he could help. After reviewing the evidence, the Employer discharged the diver. After Vice President Lyman recounted all of the above events without asserting that Melo had made any recommendation of action to be taken against the diver who was discharged, in response to Employer counsel's question as to whether Melo recommended any such actions, Lyman testified that Melo did recommend that the diver "could be terminated for this."⁷

Vice President Lyman further testified that dive supervisors may be involved in discipline for attendance policy violations or discipline regarding disputes between dive team members, including verbal counseling. The Employer's attendance policy is based on a point system. The policy was not introduced in evidence. There are no examples of such discipline or counseling by a dive supervisor in the record, Lyman's testimony about verbal counseling is based on what Melo told him, but he provided no examples or detail. Lyman testified that Melo has not issued any written discipline. He further testified that former dive supervisor Brett Howell signed disciplinary notices before Lyman returned to the Employer two years before the hearing. Lyman acknowledged that he would only be speculating about any particular instance of Howell issuing discipline and that he has no knowledge that Howell issued disciplines independently. There are no disciplinary notices signed by dive supervisors in the record.

Manager Gray testified that dive supervisor Howell talked to divers if they had attendance issues. He did not testify about what Howell said or identify any particular conversation Howell had with a diver about attendance issues. Vice President Lyman testified that verbal counseling is not documented or noted in employees' personnel files.

G. Other indicia of supervisory status

There is no evidence that dive supervisors are involved in the transfer, lay off, or recall of employees, and insufficient evidence that they have any authority to reward employees or adjust employee grievances, or that they responsibly direct employees.

⁷ Lyman's testimony only establishes that Melo suggested the possibility that the employee's misconduct could lead to discharge, rather than establishing that Melo recommended discharge of the employee. Lyman testified that Melo did not make a written recommendation of discharge. There is no suspension or discharge notice, note, memorandum or other document in evidence that supports the contention that Melo recommended that the employee be discharged.

Although Manager Gray testified that he was sure dive supervisors handle grievances or concerns raised by divers, he did not know of any particular example when that occurred, and there is no evidence that dive supervisors were informed that they have such authority. In response to a leading question, Gray testified that dive supervisors have the authority to resolve an employee's scheduling request. There is no evidence of an example when that occurred.

There is evidence that the Employer has an evaluation system and that an evaluation might influence pay raises. However, Vice President Lyman testified that there have been no evaluations of the divers during the past year, and Manager Gray testified that there have been no evaluations of the divers for the last 2 years, and no merit wage increases granted for the last 5 to 8 years.

Manager Gray testified that dive supervisors are accountable for the performance of work, but he was not asked whether dive supervisors are accountable for the performance of the other employees. Vice President Lyman testified that if another diver was specifically at fault for something, the dive supervisor would be accountable only if it was their responsibility to make sure the exhibit did not have tools left over, but the individual that "did it" (i.e. left the tool in an exhibit) would be more directly accountable. Thus, the dive supervisor would be held accountable only for his own failure to inspect the work to make sure no tools were left in the work area. This evidence does not show that dive supervisors are held accountable for the performance of other employees.

H. Secondary indicia

Dive supervisors earn \$25.00 per hour, senior divers earn \$19.50 per hour, and associate divers earn \$17.50 per hour. There is no evidence in the record about the compensation of the dive safety officer or the dive technician, or about any distinction between the benefits of dive supervisors and the benefits of other employees in the petitioned-for unit.

Dive supervisors have no authority to grant sick leave because that is handled by the Employer's Human Resources department and a third party. Dive supervisors may grant employee requests for vacation days off pursuant to the Employer's vacation policy.

Dive supervisors may decide what needs to be purchased and place the order themselves or ask their manager to do that. Purchases are ultimately approved by Vice President Lyman.

II. ANALYSIS

A. The Employer's motion to hold the case in abeyance or dismiss it is denied.

President Donald J. Trump removed Board Member Gwynne A. Wilcox from her position on January 27, 2025, leaving Chairman Marvin E. Kaplan and Member David A. Prouty as the only two members of the Board. On March 6, the District Court for the District of Columbia held that the removal of Member Wilcox violated the removal protections for Board members set forth in Section 3(a) of the Act and enjoined the removal of Member Wilcox in *Wilcox v. Trump*, Case 1:25-cv-00334-BAH. On March 28, a panel of the United States Court of

Appeals for the D.C. Circuit granted an emergency motion to stay the District Court's order, once again leaving the Board without a quorum. On April 7, the D.C. Circuit granted motions for en banc reconsideration of the matter, vacated the March 28 order granting a stay pending appeal, and denied the government's motions for a stay pending appeal, thus renewing the District Court's reinstatement of Member Wilcox. Most recently, on April 9, 2025, Chief Justice John G. Roberts, Jr. of the United States Supreme Court stayed the District Court's order "pending further order of the undersigned or of the Court." *Trump v. Wilcox*, --- S.Ct. ---, 2025 WL 1063917 (Mem). In summary, during the time since the petition herein was filed on April 1, the Board only had a quorum on April 7 and April 8.

Section 3(b) of the Act authorizes the Board to delegate its powers in representation cases under Section 9 of the Act to regional directors, including its powers to determine appropriate units for collective bargaining, determine whether a question concerning representation exists, direct an election, take a secret ballot, and certify the results thereof, subject to review by the Board if a request for review is filed. The Board delegated that authority to regional directors effective on May 15, 1961, and has never withdrawn it. 26 FR 3885, 3889, 3911 (May 4, 1961).

In addition, the Board's Rules and Regulations at "Subpart X – Special Procedures When the Board Lacks a Quorum" include the following relevant provisions:

- 29 CFR Section 102.178 (76 FR 77700, December 14, 2011) states, "The policy of the National Labor Relations Board is that during any period when the Board lacks a quorum normal Agency operations should continue to the greatest extent permitted by law."
- 29 CFR Section 102.182 (82 FR 11786, February 24, 2017) provides that when the Board lacks a quorum "to the extent practicable, all representation cases may continue to be processed and the appropriate certification should be issued by the Regional Director notwithstanding the pendency of a request for review, subject to revision or revocation by the Board pursuant to a request for review filed in accordance with this subpart."

The Board has rejected the arguments raised in the Employer's motion. Regarding the lack of a Board quorum, see *Brentwood Assisted Living Community*, 355 NLRB No. 149, slip op. at 1, fn.2 (2010), *enfd.* 675 F.3d 999 (6th Cir. 2012) (finding that the Regional Director properly processed a representation case pursuant to the authority delegated to him notwithstanding the fact that the Board lacked a quorum); see also, *UC Health v. NLRB*, 803 F.3d 669 (DC Cir. 2015); *NLRB v. Bluefield Hospital Co., LLC*, 821 F.3d 534 (4th Cir. 2016); *Overstreet v. El Paso Disposal LP*, 625 F.3d 844, 853 (5th Cir. 2010); *Osthus v. Whitesell Corp.*, 639 F.3d 841, 844 (8th Cir. 2011); *Frankl v. HTH Corp.*, 650 F.3d 1334, 1354 (9th Cir. 2011). In *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010), the Supreme Court found that the Board's loss of a 3-member quorum did not cast doubt on Board delegations of authority to nongroup members, such as the regional directors or the general counsel, that preceded the loss of a Board quorum, and the Court did not address that question. 560 U.S. at 684, fn. 4.

Regarding the asserted unconstitutionality of the removal protections for Board members and ALJs, neither the Board nor any ALJ has been involved in this case to date, and there is no claim or evidence that the Employer's interests have been harmed by the removal protections,

nor have the Board or courts found the removal protections unconstitutional. See *Commonwealth Flats Dev. Corp.*, 373 NLRB No. 142, slip op. at 1, n.1 (2024) (cited cases omitted); *SJT Holdings, Inc.*, 372 NLRB No. 82, slip op. at 1-2, n.4 (2023) (cited cases omitted). See also, *YAPP USA Auto. Sys., Inc. v. NLRB*, --- F. Supp. 3d ----, No. 24-12173, 2024 WL 4119058, at *9-10 (E.D. Mich. Sept. 9, 2024) (applying causal-harm standard to reject constitutional challenge to removal protections enjoyed by Board members and administrative law judges), *injunction pending appeal denied*, No. 24-1754, 2024 WL 4489598 (6th Cir. Oct. 13, 2024), *emergency application for writ of injunction denied*, No. 24A348, 2024 WL 4508993 (U.S. Oct. 15, 2024) (Kavanaugh, J., in chambers).

The Employer argues that the Supreme Court's opinion in *Loper Bright Enterprises v. Raimondo*, 603 US 369 (2024), overruling the doctrine of court deference to statutory interpretations by administrative agencies in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), requires the conclusion that regional directors do not have delegated authority to certify election results whenever there is not a quorum of Board members. However, the Employer's argument fails to recognize the possibility that an independent statutory interpretation of this issue by the courts may result in agreement with the Board that the Act permits it to authorize regional directors to exercise Board delegations of authority to process representation cases and to certify election results that were granted before the Board's loss of its quorum. In any event, *Loper Bright* involves a standard of review that is only to be applied by the courts and it does not affect my analysis.

Based on the above-cited Rules and Regulations of the Board and case authority, the Employer's request to hold this case in abeyance or dismiss it is denied.

B. There is insufficient evidence to establish that dive supervisors are supervisors within the meaning of Section 2(11) of the Act.

For the reasons set forth below, I find that the Employer has failed to establish that dive supervisors are statutory supervisors under Section 2(11) of the Act. Rather, the record shows that dive supervisors are working lead persons.

1. Board law regarding supervisory status

The Act expressly excludes supervisors from its protection. Section 2(11) of the Act defines a supervisor as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly 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.

Accordingly, the three requirements to establish supervisory status are that the putative supervisor possesses one or more of the above supervisory functions; the putative supervisor

uses independent, rather than routine or clerical, judgment in exercising that authority; and the putative supervisor holds that authority in the interest of the Employer. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 712-713 (2001) (citing *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-574 (1994)).

Supervisory status may be shown if the alleged supervisor has the authority either to perform a supervisory function or to effectively recommend the same. The statutory definition of a supervisor is read in the disjunctive. Possession of any one of the enumerated powers, if accompanied by independent judgment and exercised in the interest of the employer, is sufficient to confer supervisory status. *Kentucky River*, 532 U.S. at 713. The general authority to “effectively recommend” means that “the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed.” *Veolia*, 363 NLRB at 908 (quoting *Children’s Farm Home*, 324 NLRB 61, 61 (1997)).

“Independent judgment” occurs when the individual exercising the authority acts or effectively recommends the action free of the control of others, having formed an opinion about which action, among multiple possibilities, to take by discerning and comparing data. *G4S Regulated Security Solutions*, 362 NLRB 1072, 1073 (2015) (quoting *Oakwood Healthcare*, 348 NLRB 686, 692-93 (2006)). The Board has held that judgment “is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” *Oakwood Healthcare*, 348 NLRB at 693. Being “in charge” of other employees does not establish supervisory authority unless the putative supervisor’s actions involve independent judgment. *Dean & DeLuca New York, Inc.*, 338 NLRB at 1047.

If authority is used only sporadically, the putative supervisor will not be deemed a statutory supervisor. *Coral Harbor Rehabilitation and Nursing Center*, 366 NLRB No. 75, slip op. at 17 (2018). The supervisor has to at least act or effectively recommend such action “without control of others and form an opinion or evaluation by discerning and comparing data.” *Oakwood Healthcare, Inc.*, 348 NLRB 686, 692-693 (2006). Judgment is not independent when the putative supervisor follows detailed instructions (e.g., policies, rules, collective-bargaining agreement requirements). *Id.* at 693. To be independent, “the judgment must involve a degree of discretion that rises above the ‘routine or clerical.’” *Id.* at 693 (citing *J.C. Brock Corp.*, 314 NLRB 157, 158 (1994)) (quoting *Bowne of Houston*, 280 NLRB 1222, 1223 (1986)), finding that “the exercise of some ‘supervisory authority’ in a routine, clerical, perfunctory, or sporadic manner does not confer supervisory status”). If a choice is obvious, the judgment is not independent. *Oakwood*, supra, at 693. The Board has an obligation not to construe the statutory language too broadly because the individual found to be a supervisor is denied the employee rights that are protected under the Act. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006); *Oakwood*, supra, at 687.

The Board may look at secondary indicia, including other factors suggesting that the alleged supervisor possesses a status separate and apart from rank-and-file employees. However, secondary indicia will not establish supervisory status absent some showing of at least one supervisory authority among those expressly listed in Section 2(11) of the Act. *J.C. Brock Corp.*, 314 NLRB 157, 159 (1994).

The party asserting supervisory status has the burden of proving supervisory authority and must establish it by a preponderance of the evidence. *Kentucky River*, 532 U.S. at 711; *Oakwood*, supra, at 687. The lack of evidence is construed against the party asserting supervisory status. *Dean & DeLuca New York, Inc.*, 338 NLRB 1046, 1047-1048 (2003); *Veolia Transportation Services, Inc.*, 363 NLRB 902, 908 (2016). In addition, purely general and conclusory evidence is insufficient to establish supervisory status. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006); Mere inferences, generalities, or conclusionary statements, without detailed, specific evidence of independent judgment, are insufficient to establish supervisory authority. *G4S Regulated Security Solutions*, 362 NLRB 1072, 1072 (2015). *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006); *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006); *Volair Contractors, Inc.*, 341 NLRB 673, 675 (2004). Similarly, supervisory status is not demonstrated when the evidence is in conflict or inconclusive. *The Arc of South Norfolk*, 368 NLRB No. 32, slip op. at 3 (2019) (quoting *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989)).

2. There is insufficient evidence to show that dive supervisors have authority to hire or effectively recommend the hire of employees.

With respect to hiring, the Board has held that an individual does not effectively recommend hiring where acknowledged supervisors also interview the candidates. *See, e.g., J.C. Penney Corp.*, 347 NLRB 127, 128-29 (2006) (training supervisor did not effectively recommend hiring where other managers vested with hiring authority subsequently interviewed all applicants “recommended” by training supervisor); *Ryder Truck Rental, Inc.*, 326 NLRB 1386, 1387 n.9, 1388 (1998) (technicians-in-charge interviewed candidates and offered “opinions or recommendations” that were given “significant” weight but did not have authority to effectively recommend hiring where higher-level official also participated in the interview and hiring process).

Manager Gray’s vague testimony, which is unsupported by documentary evidence, about one or two instances 3 to 5 years ago when he followed the recommendation of unnamed dive supervisors to hire unnamed divers without interviewing the candidates himself is insufficient to establish that dive supervisors exercise independent judgment by effectively recommending hiring decisions. In addition, assuming for the sake of argument that Manager Gray’s vague recollection is based on facts and the instances 3 to 5 years ago were effective recommendations to hire, this was not consistent with the Employer’s regular practice, and at most it is sporadic evidence of the exercise of supervisory authority that is insufficient to establish supervisory status. *Coral Harbor Rehabilitation and Nursing Center*, 366 NLRB No. 75, slip op. at 17.

Neither of the current dive supervisors was employed by the Employer 3 to 5 years ago. Moreover, it appears that Manager Gray did not follow dive supervisor Melo’s recent recommendations to continue the hiring process for the two candidates interviewed by Gray and Melo, demonstrating that Melo lacks the authority to effectively recommend the hire of employees.

The Employer’s assertion that exiting employees often provide letters of resignation to the dive supervisors because the dive supervisors are responsible for finding a replacement is

unsupported by evidence. There is one instance in the record of dive supervisor Melo reporting to Manager Gray and Vice President Lyman by email that a diver gave two-week notice of her resignation. There is no evidence that dive supervisors are involved in recruiting diver candidates.

3. There is insufficient evidence to establish that dive supervisors have authority to effectively recommend promotions.

As detailed above, there is insufficient evidence to show that dive supervisor Melo recommended diver Milford for the dive supervisor job. Rather, he said that was above his pay grade and he merely reported Milford's application for the position to Gray. Thereafter, Vice President Lyman and Gray independently interviewed Milford and promoted her. Although Gray asserts that he relied on Melo's recommendation to promote 2 divers to senior diver status, the evidence appears to show that Melo had made this recommendation to Gray previously and Gray had not acted on it, causing Melo to ask him to revisit the matter. Gray's testimony about the reason Melo asked him to revisit the matter was completely speculative and self-serving. His claim that he always follows the dive supervisors' recommendations is conclusionary and general. I find that there is insufficient evidence to show that dive supervisors effectively recommend promotions.

4. There is insufficient evidence to establish that dive supervisors exercise independent judgment regarding the assignment of work.

Although the dive supervisors prepare a maintenance schedule and assign divers to work in particular areas, these assignments appear to require various forms of routine cleaning work, and it appears that the assignment decisions are clerical in nature and do not require the exercise of independent judgment. There is no evidence about particular skills or other criteria dive supervisors consider in assigning work to particular employees, and there is no evidence that any diver is incapable of performing all of the required work. The dive reports in evidence show that groups of 4 to 7 divers are frequently assigned to a single project at the same time, and no distinction between divers is discernable from the dive reports or other evidence.

Manager Gray testified that the dive supervisor may decide which diver performs which task and that according to the dive supervisors some divers are better at certain tasks than they are at other tasks was conclusory and general. His testimony that dive supervisors consider a particular diver's skills when assigning them to a task was wholly speculative. The nightly dive reports show that the entire dive team performs routine cleaning tasks on a repeating weekly schedule. The evidence shows that Vice President Lyman and Manager Gray decide whether the regular maintenance schedule should be revised based on particular needs, as Vice President Lyman did by directing weekly cleaning of the otter exhibit.

Contrary to the Employer's argument, there is insufficient evidence to establish that dive supervisors assign work to divers using independent judgment that involves "a degree of discretion that rises above the routine or clerical." *Oakwood*, 348 NLRB at 693.

There is testimony that dive supervisors may choose which divers will be assigned overtime work, but there is no evidence that dive supervisors offer overtime work selectively rather than to all divers equally, or that divers' skills differ in any manner requiring dive supervisors to exercise independent judgment to overtime work or other work. *Pacific Coast M.S. Industries Co.*, 355 NLRB 1422, 1423-1424 (2010). In addition, there is no evidence that overtime work is mandatory or that dive supervisors have authority to mandate that divers work overtime.

In summary, there is insufficient evidence to show that dive supervisors use independent judgment with respect to the assignment of work.

5. There is insufficient evidence to establish that dive supervisors have authority to discipline, suspend, or discharge divers or to effectively recommend any of those actions.

The Board has found that following detailed orders or regulations issued by the employer will not confer supervisory status because that does not constitute the exercise of independent judgment within the meaning of Section 2(11) of the Act. *See Wackenhut Corp.*, 345 NLRB 850, 854 (2005). Vice President Lyman and the Employer's Human Resources department initiated the investigation of the wet suit incident and dictated all of dive supervisor Melo's actions with respect to the suspension and discharge of the diver who admitted responsibility, as described above in detail. Melo merely reported what he learned based on following the directions of his superiors, and there is insufficient evidence to show that he effectively recommended the suspension or discharge of the employee.

The record is also devoid of evidence that dive supervisors exercise independent judgment with respect to the issuance of other forms of discipline, such as warning notices and verbal counseling.

6. There is insufficient evidence to establish that dive supervisors possess other supervisory authority.

As stated above, there is no evidence that dive supervisors are involved in the transfer, lay off, or recall of employees, and insufficient evidence that they have any authority to reward employees or adjust employee grievances, or that they responsibly direct employees.

Regarding the reward of employees, although the Employer has an evaluation system, it has not been applied to the dive team for at least 2 years. Even if dive supervisors had previously evaluated divers, there is no evidence of a link between evaluations and pay increases because the Employer has not granted merit pay increases for the past 5 to 8 years. Thus, the Board has held that "when an evaluation does not, by itself, affect the wages or job status of the employee being evaluated, the individual performing such an evaluation will not be found to be a statutory supervisor." *Willamette Industries*, 336 NLRB 743 (2001) (quoting *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 (1999); *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989) (no evidence LPNs participation in annual review process resulted in any

personnel action); cf. *Bayou Manor Health Center*, 311 NLRB 955 (1993) (LPNs held statutory supervisors because they completed evaluations that directly led to merit increases).

Regarding the adjustment of grievances, although Manager Gray was “sure” dive supervisors handle grievances or concerns raised by divers, he did not cite a single example, and his testimony was speculative and conclusionary. The fact that dive supervisors schedule vacation days at the request of divers appears to be routine in nature and based on the Employer’s vacation policy, and there is no evidence that such scheduling has involved the adjustment of a grievance.

The Employer did not establish that dive supervisors responsibly direct the work of other employees because there is no evidence that they face adverse consequences if a diver’s work performance is subpar. *Community Education Centers, Inc.*, 360 NLRB 85, 85 (2014). As noted above, Manager Gray’s testimony does not connect the accountability of dive supervisors to the work of other employees, and Vice President Lyman made it clear that the dive supervisor is only responsible for his or her own work.

The dive supervisors’ function of keeping time records and receiving calls from divers regarding attendance is a routine and clerical task. See *Pacific Coast M.S. Industries*, 355 NLRB at 1430.

Although secondary indicia of supervisory status may be considered, the Employer has failed to meet its burden of proving that dive supervisors exercise any of the statutory indicia of supervisory status, and I find no significance in the scant evidence of secondary factors that may be considered.

In summary, for the above reasons I find that there is insufficient evidence to establish that dive supervisors are supervisors within the meaning of Section 2(11) of the Act and further find that they are employees within the meaning of Section 2(3) of the Act and are eligible to vote in the election.

IV. CONCLUSIONS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The rulings of the Hearing Officer at the hearing are free from prejudicial error and are hereby affirmed.
2. The parties stipulated, and I find that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.⁸

⁸ The parties stipulated that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and is subject to the jurisdiction of the Board based on the following commerce facts: The Employer, Sea World of Florida, LLC d/b/a Discovery Cove, is engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act, and is subject to the jurisdiction of the National Labor Relations Board. The Employer is a Florida limited liability company with a place of business located at 6000 Discover Cove Way,

3. As described above, I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. The parties stipulated, and I find that there is no collective-bargaining agreement covering any of the employees in the unit sought in the petition herein and there is no contract bar to this proceeding.

5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

6. I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time associate divers, senior divers, dive supervisors (supervisors, water safety), dive safety officers, and dive technicians (gear technicians) employed by the Employer at its Discovery Cove and Aquatica parks, Orlando, Florida; excluding all other employees, office clerical employees, professional employees, managerial employees, guards, and supervisors as defined by the Act.

V. DIRECTION OF ELECTION

A. Election Details

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for the purposes of collective bargaining by International Union of Operating Engineers, Local 30, AFL-CIO.

A manual election will be conducted on May 6, 2025, from 6:00 p.m. to 7:00 p.m. at the Employer's premises, Human Resources Training Room, 6283 Sea Harbor Drive, Orlando, Florida.

The ballots will be counted immediately following the close of the poll by the Board Agent. The ballots and Notice of Election shall be printed in English.

Orlando, Florida, where it is engaged in the business of providing family entertainment, amusement and theme park attractions at its resort complex in Orlando, Florida. During the past twelve months, in the course of its business, the Employer derived gross revenues in excess of \$500,000 and purchased and received at its Orlando, Florida facilities goods valued in excess of \$50,000 directly from points located outside the State of Florida.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending April 23, 2025, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. In a mail ballot election, employees are eligible to vote if they are in the unit on both the payroll period ending date and on the date they mail in their ballots to the Board's designated office.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

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

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **May 1, 2025**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.⁹**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

⁹ The Petitioner agreed to waive 9 days of the 10-day period that it is entitled to have the voter list.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision and Direction of Election in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

VI. RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement

explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: April 29, 2025.



David Cohen, Regional Director
National Labor Relations Board, Region 12
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