UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

STARWOOD HOTELS & RESORTS
WORLDWIDE, INC., d/b/a SHERATON
UNIVERSAL HOTEL

and Case 21-CA-36429

UNITE HERE LOCAL 11

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Los Angeles, California.

DECISION

I. Statement of the Case

Lana H. Parke, Administrative Law Judge. This matter was tried in Los Angeles, California on September 28 and 29, 2005[1] upon an Order Consolidating Cases, Consolidated Amended Complaint and Notice of Hearing (the Complaint) issued July 29, 2005 by the Regional Director of Region 21 of the National Labor Relations Board (the Board) based upon charges filed by UNITE HERE, Local 11, AFL-CIO (the Union.)[2] The Complaint alleges Starwood Hotels & Resorts Worldwide, Inc., d/b/a Sheraton Universal Hotel (Respondent) violated Sections 8(a)(1) and (3) of the National Labor Relations Act (the Act). Respondent essentially denied all allegations of unlawful conduct.[3]

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[1] All dates herein are 2004 unless otherwise noted.

[2] During the course of the hearing, pursuant to a nonboard settlement between the Charging Party and Respondent, the Charging Party requested withdrawal of charge 21-CA-36776, on which charge the General Counsel had based complaint paragraphs 1(d), 5(b), 5(c), 6, and relevant portions of 7, all of which relate to employee Miguel Aguilar. The General Counsel thereafter moved to dismiss the named complaint allegations. I granted the General Counsel's motion and remanded those matters to the Regional Director for appropriate action. In light of the General Counsel's motion, it is unnecessary for me to rule on Respondent's motion to dismiss paragraph 6 of the Complaint.

[3] Respondent's unopposed post hearing motion to correct the transcript is granted. The motion and corrections are received as Administrative Law Judge exhibit 1.

II. Issues

1. Whether Kevin Grace was, at relevant times, a supervisor of Respondent within the meaning of Section 2(11) of the Act.
2. Whether Respondent violated Sections 8(a)(3) and (1) of the Act on June 25, 2004 by discharging Kevin Grace.
3. If so, whether Mr. Grace should be afforded the remedies of back pay and reinstatement.

III. Jurisdiction

At all relevant times, Respondent, a Maryland corporation, with a place of business at 333 Universal Terrace Parkway, Universal City, California has been engaged in the operation of a hotel providing food and lodging (the hotel). During a representative 12-month period ending December 29, Respondent derived gross revenues in excess of $500,000 and purchased and received at its Universal City, California facility goods valued in excess of $50,000, directly from points outside the State of California. Respondent admits, and I find, it has at all relevant times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In July, Hotel Employees and Restaurant Employees Union, Local 11, AFL-CIO (HERE, Local 11) merged with Union of Needletrades, Industrial, and Textile Employees, AFL-CIO, to form the Union. The Union is a labor organization within the meaning of Section 2(5) of the Act.[4]

IV. Findings of Facts

A. The Discharge of Kevin Grace

At all times relevant hereto until the July merger that resulted in the formation of the Union, one of the merging entities, HERE, Local 11, represented various of Respondent's employees in collective bargaining, including employees in Respondent's front office department (front office). The front office responsibilities included guest registration (handled by guest service agents or GSAs), luggage assistance, concierge, switchboard, and service promise agents (SSPs).[5] The front office provided guest services 24-hours a day and was staffed with 30-40 employees working three shifts: shift one, 7:00 a.m. to 3:00 p.m., shift two, 3:00 p.m. to 11:00 p.m., and shift three, 11:00 p.m. to 7:00 a.m. During the relevant period, Tony Fernandez (Mr. Fernandez) served as Respondent's Director of Rooms and Anton Akopian (Mr. Akopian) served as Respondent's Front Office Manager.[6] Under their supervision, Respondent employed three supervisors at its front desk: Froilan Casanas (Mr. Casanas), on

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[4] Where not otherwise explained, findings of fact herein are based on party admissions, stipulations, and uncontroverted testimony.

[5] Service promise employees resolved guest complaints (so-called guest occurrences or challenges) in keeping with Respondent's mission statement that if a guest were not satisfied, neither was Respondent. GSA and SSP employees were interchangeable. Additionally, during the "night owl" or graveyard hours, night auditors performed closing audits of the Hotel's accounts and prepared accounting reports for the controller.

[6] Mr. Fernandez served as Respondent's front office manager from about 2000 until about 2003 when he was promoted to the position of Director of Rooms, where he continued to oversee the front office operations. Mr. Fernandez left Respondent's employment in December 2004.

shift one, Kevin Grace (Mr. Grace) on shift two, and Philippe Bakhoum (Mr. Bakhoum), replaced by Kevin Finister (Mr. Finister) in June, alternating with Mr. Grace on shift two. Shift three had no assigned supervisor.

During the relevant period, Respondent followed a "Manager on Duty" (MOD) system, in which someone was designated to be responsible for the well being of the entire Hotel and its operation at all times. The front office supervisor on duty served as the MOD with an additional MOD assigned to assist on weekends.[7] Mr. Fernandez was available by telephone, even on his days off, in case "anyone" needed him but was rarely contacted during his off hours, as the front desk supervisors "handled the situation…[were] very responsible…[knew] the policies and procedures…took initiative…[and] did proper follow through…[Mr. Fernandez] learned of events upon his return [to the Hotel]…"

Respondent employed Mr. Grace as a front desk supervisor from October 2003 until his date of discharge, June 25. In May, Mr. Grace contacted union representatives for the purpose of seeking union representation for the front desk supervisor positions. In June, Mr. Grace and Mr. Casanas signed union membership/authorization cards. It is unnecessary to detail the unsuccessful November attempts made by a union steward/employee delegation to present the authorization cards to management. Counsel for the General Counsel asserts that the conduct of Mathew T. Wakefield (Mr. Wakefield) during one of the attempts demonstrates animus toward Mr. Grace's union activities. However, Respondent's animus is immaterial; Respondent concedes it fired Mr. Grace on June 25 because he wore a union button.

On June 25, Mr. Grace wore a one-inch diameter button bearing the legend "Local 11, Hotel Employees & Restaurant Employees Union. Los Angeles" (the union pin) on his right lapel while on duty at the front desk. During Mr. Grace's shift, Mr. Fernandez summoned Mr. Grace to his office, and told him that it was inappropriate for him to wear the union button as he was part of Respondent's management team. When Mr. Grace declined to remove the button, Mr. Fernandez accused him of insubordination and terminated him.

B. The Duties and Authority of Kevin Grace

Three witnesses testified concerning the duties of the front desk supervisors: Mr. Grace, Mr. Casanas, and Mr. Fernandez. After carefully considering the testimony of all three witnesses, I have determined that the testimony of Mr. Fernandez, where it conflicts with that of the other two witnesses, should be credited. Mr. Fernandez testified consistently, forthrightly, and with clear recall. I note that, at the time of his testimony, he was employed at the Long Beach Hilton hotel, which has no business ties to Respondent; Mr. Fernandez may be regarded as an unbiased witness.

In his position as front desk supervisor, Mr. Grace was in charge of the front office area, making sure the GSAs fulfilled their responsibilities. In doing so, Mr. Grace utilized detailed checklist instructions prepared by upper management, entitled "Front Desk PM Daily Checklist Instructions," which specified the steps required to accomplish such tasks as checking new management memos, making sure employees understood the contents, and monitoring guest arrivals and non-arrivals, departures, room moves, room discrepancies, and various matters associated with room billings and payments. Mr. Grace spent 70 percent of his work day

[7] The additional weekend MOD could be a Hotel manager from any of the Hotel departments.

following the checklist and assisting GSAs with checking in guests. Mr. Grace also handled such guest complaints as the GSAs were unable to resolve. In placating dissatisfied guests, Mr. Grace had authority to offer them jelly beans, points toward a complimentary stay, late checkout, or bill reductions. If guest injuries, safety or cleanliness concerns, or room-furnishings malfunctions occurred, Mr. Grace could direct security, maintenance, or housekeeping to address the problems. Mr. Grace also directed employees to cover for or assist other employees as needed. For example, Mr. Grace might direct an employee to attend the bell desk in the momentary absence of the bell person or assign an employee to assist on the switchboard. When front office employees had interpersonal conflicts that affected the work, Mr. Grace discussed the problems with them and thereafter communicated the discussion to management personnel with whom subsequent resolution rested.

The front desk supervisors were encouraged to attract new business, which entailed, in part, determining the appropriate room rate the GSAs could charge walk-in customers. On a busy night with high occupancy levels, Mr. Grace had discretion to decline to rent a room at a discounted rate. Conversely, on a "dead" night, he could extend the lowest rate available to walk-in customers. While Mr. Grace did not have to obtain management approval before determining the room rate for a particular night, he reported the rates to management because Respondent wanted "to stay in communication with all the different shifts and managers." Although no specific evidence shows that Respondent had established occupancy/room rate policies for Mr. Grace to follow, Mr. Fernandez' testimony supports an inference that such guidelines existed. Regarding Mr. Grace's authority to set room rates, Mr. Fernandez testified: "Mr. Grace might…say…go ahead and take the lowest rate available or…give that discount, or…the employee rate is closed but…extend it to those folks…"[8]

To "help develop…and cross-train" the Front Office Supervisors, Mr. Fernandez had them work on different skill sets, such as scheduling and payroll, so that all of them would have an opportunity to gain some experience in those areas. As did other front office supervisors, Mr. Grace prepared front office schedules based on Hotel occupancy projections and prescribed staffing levels. In doing so, he took into account employee seniority established by the collective-bargaining agreement[9] and vacation and special leave requests.[10] Mr. Fernandez considered that Mr. Grace effectively "move[d] staffing about and made adjustments, gave people time off as required and also added people on when necessary," balancing appropriate staffing with the Hotel budget. According to Mr. Fernandez:

> [T]he union seniority list…makes the process a little bit more difficult because of the fact that you have to specify which individuals can work, at what particular times. But, however being a hotel, you have a different flow of business going about. You have to be able to massage those staffing hours and guidelines and you, also, have to…talk to the staff about it, whether or not it would be all right,

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[8] In absence of evidence to the contrary, it is reasonable to assume that Mr. Grace did not determine what discounts could be applied to room rates, or what the lowest rate or the employee rate was.

[9] For scheduling purposes, Mr. Akopian provided the front office supervisors with a list of employees with approved and pending leave requests and those entitled to preferential shifts based on seniority.

[10] It is not clear what role the front office supervisors played in dealing with special leave requests. Mr. Fernandez testified, "…sometimes we have to move people with special requests around" but did specify under whose discretion those decisions fell.

> for them to work certain days but you still have to…follow strict guidelines, as well as trying to balance what is actually going to be required, for a particular day or week…Everyone understands…that all schedules are based on occupancy.

Front desk employees were required to submit written requests for days off ("Time Away" requests) or for specific work days to a front desk manager or supervisor; during the relevant period, Mr. Grace signed a number of such request forms on the line designated "Manager Approval." With regard to the written "Time Away" requests, Mr. Fernandez testified as follows:

> A (by Mr. Fernandez) [Request for Time Away forms] are requests for time off, for –- if somebody wanted to take vacation time or some special requests. So, these would be filled out and then, whichever Front Office Supervisor was in charge of scheduling, at that time period, would approve or hopefully, move the dates about or disapprove it.
> ….
> Q Whose decision would it be, to approve then the time off?
> A That would be the schedule maker or the Front Office Supervisor. If the Front Office Manager was also doing it, then it would be his approval but whoever is actually in charge of the schedule would be in charge of saying yes or no.
> Q Then, what would be the thought process that would go into whether or not one of these would be approved, by a Manager or Supervisor?
> A It really –- it is based, on our occupancy. We want our -– our Associates to have the time off, especially if they have not had one, to get some rest or getting their special requests, for an event that they have. However, we have to abide, by our scheduling based on business levels. So, if it cannot be done, then, again, we try to work with the staff, as best as we –- could -– but if it cannot be approved, it will not be approved. Now, they have a -– they can elevate it. They can say, you know, can I talk to, you know, the Front Office Manager? Can I talk to Tony but, otherwise, [the front office supervisors] have the authority to say yes or no, on these vacation requests.

Mr. Grace also signed on the "Manager's Signature" line of various payroll/timeclock adjustment forms. Mr. Grace called unscheduled employees into work, utilizing the union seniority list, released employees early, and authorized overtime as needed.[11] The record does not contain specific information as to what procedures or system Mr. Grace may have followed in handling staffing needs. Mr. Fernandez testified as follows:

> Q (by Mr. Wakefield): Did you ever have situations, in which you had too many employees working, at one time?
> A (by Mr. Fernandez): Too many, yes, I have.

[11] I cannot accept Mr. Grace's testimony that he never prepared a schedule, or approved or denied time off, changed schedules, or authorized overtime. In addition to the credibility determination detailed above, the time-off request forms themselves, which show no indication that another level of approval was required, do not support Mr. Grace's testimony. Moreover, Mr. Grace's assertion that employees extended their shifts into overtime as an incidental consequence of press of business without his prior approval is too implausible to accept.

Q Would Mr. Grace have had the authority, to send someone home, if there were too many employees working?
A Yeah. He had to because, again, he is responsible for our manpower hours, for that time period. So, if, let us say, the count dropped or a group changed their plans or they all came in earlier, he is required to -– first, he will do it diplomatically: Who wants to go home first? Then, if he does not get enough -– enough volunteers, he goes by seniority or he goes by who came in last or first and then, he starts sending people home.
Q Then, how about if there are not enough employees working? Let us say, somebody did not show up for work. Does he have the authority, to decide who to call in?
A He could, if he thought it was necessary, to bring in additional staffing. He would have to probably think about whether or not with the staff that he has, whether to extend somebody that is already working there, maybe, extend them overtime, instead of having to call somebody, on their day off, or, maybe, it is a situation where he, himself, probably could just, you know, fill in, for the time period. But, if it is a situation, in which we are really busy, something of that nature, then he is going to have to call in help of else the night will go haywire or the shift will go haywire.
Q Does he have to get any authority, before he made any of those decisions?
A No.
Q Did he have the authority, to approve time off, for someone?
A Yes and say, if he was -- looking at this -– at the schedule, again, one of the things that they would do is, they would go through their file of special requests and vacations and based on that, they will be able to say, okay, this is good. We can do this or not or he can –- In most situations, he can approach the staff member and say, you know -- stating a case of, we are really busy, at this time. We need everybody, you know, all hands on deck. However, can we move it up a weekend or is there something we can work with, in that manner? So, he would approve or disapprove, in that –- in that way.
Q Now, he would approve or disapprove someone's time off, did he have to go, to you, or any other Manager, to get their okay?
A No. He would just –- he would just say, you know, yes, we can do this or no and this is the reason why.

Mr. Grace reminded employees of their break times, which were set by law and by union contract, and covered for their absences if necessary. Mr. Grace could use petty cash to purchase food from nonhotel eateries for quick employee consumption when press of business prevented front office employees from taking scheduled breaks,[12] to reward employees for extraordinary effort, or to celebrate a special occasion.

[12] On occasion, front office supervisors told employees they could not have their lunch breaks because the Hotel was too busy. In those situations, the front office supervisors ordered food for employees to eat in the front office, instructing the employees to "[e]at and work. You know, go back, have a few bites of pizza, sip your soda, and then, if the bell rings, go back out." Mr. Fernandez acknowledged there were times when increased business prevented front office employees from taking their breaks at the proper times, but there is no evidence as to who devised the eat-and-work system or what would happen if an employee wanted to take a scheduled break instead of eating and working.

For disciplinary notification to employees, Respondent utilized a form entitled "Corrective Action Notice." Respondent's printed Corrective Action Notice lists various categories of employee misconduct with adjacent checkboxes, and, under the designation, "Type of Action:" (also with adjacent checkboxes) sets forth the following disciplinary measures: Verbal,[13] Written, Final Written, Suspension, and Separation. A section labeled "Reason:" provides space for written explanation. The front desk supervisors had no authority to effectuate any of the discipline noted on the Corrective Action Notice. Those disciplinary measures were the province of Mr. Fernandez and, on occasion, the director of Human Resources. The front desk supervisors, including Mr. Grace, had responsibility to "coach and counsel" employees regarding mistakes and failure to follow training procedures (herein called coach and counsel).[14] As noted by Mr. Fernandez, Respondent "put a lot of faith in [its] coach and counsel methodology," seeing employee mistakes as an opportunity for front office supervisors to take staff aside and coach them in proper procedures. The supervisors could also explain to employees the disciplinary steps that might follow continued infractions and could recommend more drastic discipline to upper management. The supervisors were to document all such coach and counsel interactions, copies of which documentation were placed in employee personnel files for use as "a reference" if another, similar infraction occurred. The disciplinary step following a coach and counsel was termed a "verbal documentation" (i.e., a documented oral warning), in which a supervisor of Respondent told the target employee, "I am officially speaking to you and we have spoken in the past before."[15]

Mr. Grace documented what occurred in coach and counsels by emails to Mr. Akopian and Mr. Fernandez.[16] The following instances of employee misconduct resulting in coach and counsel occurred during Mr. Grace's tenure:

1. On January 20, Mr. Grace told front desk employee, Keshana Miller, of the importance of working in full uniform, which she assured him she would do in future.

2. On January 31, Mr. Grace investigated a guest complaint about front desk employee, Tony Chacon (Mr. Chacon), informed Mr. Chacon that he would "not [accept] guests [telling him] that one of [his] staff was rude or abrupt." Mr. Grace also told Mr. Chacon, essentially, that he needed to work on being friendly, accommodating, and helpful and that it was "the last time a guest should [tell Mr. Grace] that [Mr. Chacon] was not helpful, [or was] rude or abrupt."

3. On February 23, Mr. Grace held another coach and counsel with Mr. Chacon regarding his attitude with a guest on the telephone. Two hours later, another incident occurred between Mr. Chacon and a guest. Mr. Grace investigated the matter, told Mr. Chacon his behavior had been reprehensible and that he should be prepared to give

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[13] Since the progressive disciplinary steps enumerated in the Corrective Action Notice commences with "Verbal" action followed by "Written" action, presumably the "Verbal" action refers to a documented oral warning, as does "Verbal" documentation" later mentioned by Mr. Fernandez.

[14] Mr. Casanas described the coach and counseling duty as "giv[ing the] staff a reminder."

[15] According to Mr. Fernandez, the coach and counsel documentation served to show that verbal documentation was not the first time the problem had been raised with the employee.

[16] Mr. Casanas testified that he documented coach and counsels on a "Progressive Disciplinary Form" that was given to "us" by Human Resources. No such document was received into evidence or referred to by any other witness.

a statement to Mr. Akopian, Mr. Fernandez, and possibly human resources. Mr. Grace informed Mr. Akopian and Mr. Fernandez of the incident in an email dated February 23, stating that he had gotten "a version from [GSAs, Leslie and Mohammed] who told me that Tony should be sent home. I told them that it is near 11 pm and he will be leaving shortly."[17] The February 23 email contains no disciplinary recommendation.

4. On June 13, Mr. Finister and Mr. Grace together told front desk employee, Wanda Earl, to be more careful about assigning the correct room numbers to guests. Mr. Finister thereafter described the counseling in an email to Mr. Fernandez.

At some point after Mr. Grace's February 23 coach and counsel described above, Mr. Grace recommended to Mr. Fernandez that discipline for Mr. Chacon be elevated as much as possible. Mr. Akopian and Mr. Fernandez issued Mr. Chacon a Corrective Action Notice on February 24, for "[v]iolation of hotel rules and regulations" and causing "fear and concern of co-workers…" The action box marked was "Written." Although the written explanation in the "Reason" section, generally tracks the information Mr. Grace provided in his February 23 email, there are additional details and quotations that suggest Mr. Fernandez and/or Mr. Akopian conducted additional investigation. For example, the Corrective Action Notice gives the following information that is not contained in the email: "[Your conduct] was described by the guest to be 'aggressive, rude, and alarming';"…according to the guest, [he] felt that Mohammed [another GSA] was appropriately meeting his needs;" "[Y]ou took it upon yourself…to 'take over' Mohammed's interaction with the guest."

As for employee discipline administered beyond the "coach and counsel" sessions described above, Mr. Fernandez testified as follows:

> Q (by Mr. Wakefield) All right. What about going to the next step in discipline? What would happen, after a coach and counsel?
> A (by Mr. Fernandez) Then, we would go, into verbal, verbal –- I believe it is verbal documentation and then, we would go into written and then, termination, I believe, and then, for that Company that is –-
> Q When you say, verbal, is it a documented verbal?
> A Yes. It would be an actual Form like this, in which we take the employee and say, I am officially speaking to you and we have spoken, in the past before. That is why those coach and counseling documentations were –- were important because this is not the primary –- or this is not the first time we spoke with this individual about it. So, it would generally be the first major step or the second, I guess, major step, into the disciplinary process.
> Q Who would normally take those higher steps, in the progressive discipline process?
> A The higher the disciplinary process went, the more involved I wanted to be in it. So, when it came to written and, obviously, suspensions, based on investigations, even -– even then, the Director of Human Resources would have to be involved. I placed myself, in that process, because I have to put a sense of importance, on that particular Step because going down that path leads to more grievous, you know, disciplinary actions.

[17] Mr. Fernandez testified that Mr. Grace had the authority to send an employee home when there was "some type" of misconduct or "in [the] particular case" of Mr. Chacon to refrain from doing so.

Q So, I take it, from –- from that, [Mr. Grace] did not have the authority, to fire an employee?
A Oh, no. No –- no.
Q And he did not have the authority, to do a written warning, on his own?
A No. I would -– I would like to be involved in that.

As a front office supervisor, Mr. Grace participated in Respondent's front office employee hiring process.[18] The procedure Respondent followed in hiring front office employees and Mr. Grace's role therein was described by Mr. Fernandez:

Q (by Mr. Wakefield) Did Mr. Grace have any role, in the hiring process?
A (by Mr. Fernandez) Yes, he did.
Q What was his role, in the hiring process?
A He -– he interviewed and, also, look over applications and resumes.
Q Did he have the authority to make hiring decisions?
A Solely, no. He could make recommendations, as he went through the interview process with us and speaking to the applicants and going over their resume. Based on their background or their performance, in the interview, he can strongly suggest and –- and we would hire, based on that.[19]
Q Did he, in fact, interview or screen applicants?
A Yes, he did.
Q How is it you know that?
A Because I required it. It is what we did together, as a management team. We would interview all the candidates, whether it is -– we did it, as an informal group, or based on schedules that we had or based on the candidate's schedule. They would make their own arrangement to –- to speak and interview that candidate.
Q If Mr. Grace said to you, I do not like this particular candidate, would that have had any effect, upon your decision?
A Yeah. That would have been fatal. I mean, we would not -– we would not have proceeded with a candidate that does not have the support of their eventual Manager.
Q If Mr. Grace had said to you, I think this person should be hired, would you have relied solely, upon that recommendation to hire?
A Yes. I mean, I would certainly interview because that is part of the process that we do but that recommendation is very, very key.

Mr. Fernandez could not specifically recall any employee whom Mr. Grace interviewed. After reviewing Respondent's employment records, he testified as follows:

A April, Wanda, Tony.
Q What about those three?

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[18] Mr. Grace denied ever interviewing any employment applicant. Not only do I accept Mr. Fernandez' testimony for the reasons set forth above, but I also note that Mr. Casanas testified that he and other supervisors interviewed applicants and that management asked for his opinion of the candidate, which tends to corroborate Mr. Fernandez' testimony that front desk supervisors participated in the hiring process.

[19] Mr. Fernandez did not specify who "we" and "us" were, but it is reasonable to infer that the pronouns refer to himself and other upper management officials.

A Those are probably people that he helped with the hiring process because those are three least senior, newest people on board. I remember April. She is a very nice girl. I think he had helped us with her.
Q When you said, help, what do you mean by that?
A Help interview her, gave an approval, based on his conversations with her, based on her resume, at the time, and then, gave a recommendation of, yeah,… she is going to be great or no, we should not hire her.
Q In the case of April, what was his recommendation?
A Yes. Let us hire her. She is a wonderful girl, wonderful worker, good background.

V. Discussion

There is no dispute that Respondent discharged Mr. Grace for wearing a union button, and Respondent has neither demonstrated nor argued that “special circumstances” vitiate its employees’ right under Section 7 of the Act to wear and display union insignia while at work. Absent "special circumstances," the promulgation or enforcement of a rule prohibiting the wearing of such insignia violates Section 8(a)(1) of the Act and discharge of an employee for doing so violates Section 8(a)(3) of the Act. *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 801-803 (1945); *The Smithfield Packing Company, Inc*., 344 NLRB No. 1, fn. 20 (2004).[20]

Respondent defends its discharge of Mr. Grace on the ground that the Act did not protect him in wearing a union button because he was, at the time, a supervisor within the meaning of Section 2(11) of the Act. Respondent carries the burden of proving supervisory status. *Kentucky River Community Care, Inc.,* 121 S. Ct. 1861, 1866-1867 (2001); *Dean & Deluca New York, Inc.,* 338 NLRB 1046, 1047 (2003) (“The party asserting [supervisory] status must establish it by a preponderance of the evidence [citations omitted]”). Thus, Respondent must establish that Mr. Grace had the authority to exercise at least one of the powers enumerated in Section 2(11) of the Act and that the use of that authority involved a degree of discretion that rises to the level of "supervisory independent judgment." *Dean & Deluca New York, Inc.*, supra, at 1247, citing *Elmhurst Extended Care Facilities,* 329 NLRB 535, 536 fn. 8 (1999). The Board construes any lack of specific evidence to support a finding of supervisory status against the party asserting supervisory status and conclusionary evidence is insufficient to establish supervisory status. *Armstrong Machine Company, Inc.,* 343 NLRB No. 122, fn. 4 (2004) and cases cited therein; *Dean & Deluca New York, Inc.*, supra, at 1247.[21]

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 to direct them, or to adjust their grievances, or effectively to recommend such action, if the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. "The possession of even one of those attributes is enough to convey supervisory status, provided the

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[20] The burden of establishing the existence of special circumstances rests with the employer. *Pathmark Stores,* 342 NLRB No. 31, slip op. 2 (2004). The special circumstances exception is narrow and “a rule that curtails an employee’s right to wear union insignia at work is presumptively invalid.” *E&L Transport Co.,* 331 NLRB 640, fn. 3 (2000).

[21] Also, it does not matter that Respondent may have believed, in good faith, that Mr. Grace was a supervisor within the meaning of the Act rather than a statutory employee. See *General Security Services Corp.,* 326 NLRB 312, 313 (1998).

authority is exercised with independent judgment, not in a merely routine or clerical manner." *Arlington Electric, Inc.,* 332 NLRB 74 (2000), quoting *Union Square Theatre Management,* 326 NLRB 70, 71 (1998). The authority effectively to recommend "generally means that the recommended action is taken with no independent investigation by superiors, not simply that the recommendation is ultimately followed," *ITT Lighting Fixtures,* 265 NLRB 1480, 1481 (1982). Mr. Grace had no authority to hire, transfer, suspend, lay off, recall, promote, discharge, or discipline employees, but he did possess limited authority in other of the 2(11) indicia. The crucial question in deciding whether his authority rose to the level of supervisory status is whether he exercised his authority with independent judgment and not in a merely routine or clerical manner. "The statutory term 'independent judgment' is ambiguous with respect to the *degree* of discretion required for supervisory status...It falls clearly within the Board's discretion to determine, within reason, what scope of discretion qualifies."[22] The Board is careful not to give too broad an interpretation to the statutory term "independent judgment" because assigning supervisory status results in the exclusion of the individual from the protections of the Act. *Tree-Free Fiber Co.,* 328 NLRB 389 (1999); *McGraw-Hill Broadcasting Co., Inc.,* 329 NLRB 454, 459 (1999).

Respondent's assertion of Mr. Grace's supervisory status rests primarily on his possession of the following manifestations of authority:

1. Overseeing the front office department during his 3 to 11 p.m. shift.
2. Preparing front office schedules.
3. Approving time off and accepting absence notification.
4. Calling unscheduled employees into work and releasing employees from work.
5. Assigning break time and overtime.
6. Purchasing food for employee consumption.
7. Coaching and counseling employees.
8. Participating in employee applicant interviews and making hiring recommendations.
9. Rewarding employees.
10. Regularly serving as MOD.

As for Mr. Grace overseeing the front office department during his shift, the fact that he was in charge of that department or even, as MOD, of a more extensive venue, does not establish that he exercised supervisory authority. Respondent must show that Mr. Grace's oversight required independent judgment. *Dean & Deluca New York, Inc.,* supra at fn. 13. The evidence demonstrates that Respondent's front office employees knew what their work assignments entailed and did not require more than limited oversight. Mr. Grace spent 70% of his time performing work similar to that done by others at the front desk, but was also responsible for ensuring that specific tasks were performed and that the front office department functions were covered. To meet the former responsibility, Mr. Grace followed an itemized checklist prepared by management; to meet the latter responsibility, Mr. Grace could assign employees to fill in for unmanned or undermanned departmental positions.[23] While Mr. Grace exercised a degree of discretion in making such temporary work assignments or in shifting employees around within their department to get the work done, there is no evidence that Mr. Grace did more than take into account production needs, employee availability, and employee capability in making work assignments. There is no evidence Mr. Grace

[22] NLRB v. Kentucky River Community Care, supra, 1867-1868.

[23] Two examples involved Mr. Grace assigning employees to cover the bell desk briefly and to assist on the switchboard.

independently devised work plans or did other than follow the task routines prescribed by Respondent. Mr. Grace's direction of employees in their performance of routine work does not demonstrate independent judgment. *Armstrong Machine Company, Inc.,* supra; *Central Plumbing Specialties, Inc.,* 337 NLRB 973 (2002); See also *Hexacomb Corp.,* 313 NLRB 983, 984 (1994). Further, Mr. Grace's discussion of interpersonal employee conflicts with employees cannot demonstrate authority to resolve employee grievances or problems where he reported the discussion to a higher management level and left resolution of the matter there.

In connection with overseeing the front office department, the front office supervisors also handled guest complaints and directed security or maintenance employees to address reported problems. While Respondent conferred significant responsibility on the supervisors to care for guest needs and resolve guest complaints, there is no evidence that their handling of guest or maintenance problems involved the exercise of independent judgment in directing employees. While the supervisors could and did ask maintenance engineers to look at a reported maintenance problem or request security staff to check out a security concern, there is no evidence the supervisors in any way told those employees how to perform their duties or how to resolve the maintenance or security problems. Consequently, the referral of a guest problem to the maintenance or security department constituted a routine response to predictable, recurring guest comfort issues. There is no evidence Mr. Grace's problem-solving authority in this regard affected employees' terms and conditions of employment. *Armstrong Machine Company, Inc.,* supra. Handling customer service issues does not, without more, confer supervisory authority. See *Los Angeles Water and Power Employees' Association,* 340 NLRB No. 146, slip op. 3 (2003).

Respondent also permitted the front office supervisors to set the room rates the GSAs could extend to walk-in customers, depending on occupancy levels. However, there is no evidence the front office supervisors determined the range of room rates or occupancy/room rate ratios. The front office supervisors' discretional selection of room rates within the parameters of established guidelines is insufficient to show an exercise of independent judgment, which in any event, would not impact employee terms and conditions.

The front office supervisors prepared employee schedules for the front office.[24] They did so by reviewing the Hotel's current and projected occupancy rates and by following established staffing levels. There is no evidence the front office supervisors had any responsibility for setting the occupancy projections or staffing levels. In scheduling employees the supervisors had to, in Mr. Fernandez' words, "massage [the] staffing hours and guidelines," but they also had to follow "strict guidelines, as well as trying to balance what is actually going to be required, for a particular day or week." Scheduling of employees does not necessarily establish supervisory authority. *Dean & Deluca New York, Inc.,* supra at fn. 15, citing *Jordan Marsh Stores Corp.,* 317 NLRB 460, 467 (1995) (individual who directed, assigned, and made up the work schedules of employees was found not to be statutory supervisor). Here, the evidence is likewise insufficient to show that Mr. Grace exercised independent judgment in preparing employee schedules rather than simply applying guidelines established by Respondent's budgetary policies and its collective-bargaining agreement or otherwise exercised any of the statutory attributes of supervisory authority in scheduling employees.

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[24] Mr. Fernandez' testimony that he had the front office supervisors work on scheduling and payroll to help "develop…and cross-train" them with the object of their gaining some experience in those areas does not clearly demonstrate that the front office supervisors were fully responsible for scheduling, but I have assumed they were for purposes of this analysis.

Mr. Grace approved or denied employee requests for time off. With regard to such requests, Respondent's policy was to accommodate employees' time-off requests whenever possible. However, staff scheduling was ultimately based on the Hotel's occupancy levels, which dictated whether Mr. Grace could grant the requested leave. If he denied time off, the employee could "elevate" the request to a higher management level: the Front Office Manager or Mr. Fernandez. There is no evidence as to what action upper management customarily took when a disappointed employee appealed Mr. Grace's leave denial. As there is no evidence Mr. Grace had input into Respondent's staffing/occupancy ratios pursuant to which employees' time-off requests were evaluated and as employees could appeal Mr. Grace's denial of time off, the evidence does not establish that Mr. Grace's approval of time off involved the exercise of independent judgment.

Mr. Grace also accepted nonattendance notifications from employees, approved overtime, monitored break times, called unscheduled employees into work, and released employees from work as staffing needs dictated. The evidence regarding his authority in these areas is essentially conclusionary. The evidence lacks details of the existence or nonexistence of underlying instructions, or procedures, or criteria, which would aid in determining whether Mr. Grace exercised independent judgment or merely followed plans and policies established by some else. The evidence also lacks examples of specific instances of implementation, which would give a clearer picture of Mr. Grace's authority in these matters. Conclusionary evidence that an individual possesses employee oversight authority, does not, without more specificity, establish that that individual as a statutory supervisor. See, for example: *NLRB v. Hilliard Development Corp.,* 187 F.3d 133, 146 (1st Cir. 1999)("determination of order of lunch and other breaks is essentially clerical"); *Los Angeles Water and Power Employees' Association,* supra at slip op. 4 (assertion of authority to grant or deny time off fails in absence of specific instances of exercise of authority); *Fleming Cos.,* 330 NLRB 277 (1999) (merely accepting notification that employees will not report to work does not show authority to grant or deny time off); *Sherwood Corp.,* 321 NLRB 477, 478 (1996) (authority to call employee in to work is not supervisory where individual cannot require attendance); *Millard Refrigerated Services, Inc.,* 326 NLRB 1437, 1438 (1998) (decision to send employees home based on observation that there is no other work to be done does not involve the use of independent judgment); *Dean & Deluca New York, Inc.,* supra at fn. 15, citing *Jordan Marsh Stores Corp*., supra (individual's direction and scheduling of employees does not necessarily establish that the individual is a statutory supervisor). Any lack of specific evidence to support a finding of supervisory status is construed against the party asserting supervisory status*. Armstrong Machine Company, Inc.*, supra at fn. 4; *Dean & Deluca New York, Inc.,* supra at 1048. The Board has said that "general, conclusionary evidence, without specific evidence [that an employee] in fact exercises independent judgment…, does not establish supervisory authority. *Tree-Free Fiber Co.,* supra at 393. In the absence of evidence that Mr. Grace's authority in these areas involved independent judgment, I cannot find it conferred supervisory status on him. See *Billows Electric Supply of Northfield, Inc.,* 311 NLRB 878 (1993).

As for employee discipline, Respondent asserts in its post-hearing brief that Mr. Grace issued documented verbal warnings (also called verbal documentations) to employees, which warnings constituted the initial step of Respondent's progressive disciplinary system. I cannot accept Respondent's assertion. Respondent presented no documentary evidence of any such warnings issued by any front office supervisor. It is reasonable to assume that since coach and counsel memorializations were kept in employee files, *a fortiori,* documented verbal warnings would likewise be placed there; Respondent's failure to produce any documented verbal warnings issued by a front office supervisor supports an inference that none exists. Moreover,

although Mr. Fernandez did not specify which supervisory employee could issue a verbal documentation or "Verbal" action as it is noted on Respondent's Corrective Action Notice, there is nothing in his testimony to suggest that the front office supervisors were authorized to issue such discipline. The evidence shows only that the front office supervisors had responsibility to coach and counsel front office employees when they made mistakes, violated work rules, or committed procedural infractions. I find, therefore, that in dealing with employee misconduct, Mr. Grace was not authorized to do more than coach and counsel employees.

The question, of course, is whether the front office supervisors' authority to coach and counsel front office employees fits within any of the enumerated criteria of Section 2(11), the most germane of which is the authority to discipline other employees or effectively to recommend such action. Generally, the Board has considered authority to issue general counselings and verbal warnings to employees to be insufficient to demonstrate authority to discipline employees as required by Section 2(11). *Ken-Crest Services,* 335 NLRB 777, 778 and fn. 10 (2001). Here, Respondent required its front office supervisors to address work rule violations with offending employees and to notify management they had done so. Respondent did not authorize the front office supervisors to take any further disciplinary steps. After the front office supervisors memorialized any coach and counsel incidents in communications to Mr. Fernandez and Mr. Akopian, upper management determined what, if any, follow-up discipline should be imposed. Although any coach and counsel documentation was placed in employee files, coach and counsel did not, standing alone, constitute discipline or affect any employee's job status but operated as a "reference" in succeeding disciplinary action.

The fact that coach and counsels were reference points in succeeding discipline does not answer the question of whether coach and counsels served a catalyzing function in Respondent's overall disciplinary process. Respondent argues that the evidence herein regarding front office supervisors' involvement in employee discipline parallels the facts in *Wilshire at Lakewood*, 343 NLRB No. 80 (2005) where the Board found a registered nurse (RN) who served as a "weekend supervisor" possessed supervisory authority within the meaning of Section 2(11) of the Act.[25] In *Wilshire*, the RN, in pertinent part, checked and corrected employees in their tasks and, at her discretion, documented employee residential care infractions on a disciplinary form, thereby initiating review by managerial officials to determine whether further disciplinary action was warranted. On at least two occasions, the RN orally reported infractions—e.g. intoxication, breaktime abuse, and failure to answer patient calls—resulting in a management decision to send the employees home, which decision the RN communicated to the offending employees.

The Board found that the RN had authority to issue, at her discretion, disciplinary writeups of employee infractions, which, placed in employees' personnel files, "constituted the first step in the process for possible discipline." Although the writeups did not necessarily lead to further disciplinary action in every instance, the Board emphasized that they played a "significant role in the disciplinary process," and were initiated by the RN's "independent determination that the committed infraction [was] egregious enough to warrant the writeup."[26]

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[25] In *Wilshire at Lakewood*, 343 NLRB No. 23 (2004), the Board had reached a contrary conclusion regarding the RN's supervisory status. Following the Employer's petition for review of the Board's Order to the Eighth Circuit, the Board, sua sponte, reconsidered its decision and reversed its prior finding that the RN was not a statutory supervisor within the meaning of Section 2(11) of the Act.

[26] *Wilshire,* supra at slip op. 1-2 and fn. 5.

The Board declined to "say that the authority to decide whether to report an infraction makes a person a supervisor. Rather, [the Board said] that a person who is responsible for deciding whether to report an infraction, which report will initiate a disciplinary process, has supervisory authority."[27]

The parallel between the facts in the instant case and those of *Wilshire* are, even without Respondent's cogent argument, apparent. However, a significant element present in *Wilshire* is missing herein: there is no evidence that the front office supervisors' coach and counsel responsibilities initiated Respondent's disciplinary process. Mr. Fernandez described the coach and counsel process as an opportunity for front office supervisors to instruct staff in proper procedures and explain to them the disciplinary steps that might follow failure to so conform their conduct. Documentation of a coach and counsel, which was placed in employee files, served only as a reference if another similar infraction occurred, as evidenced by Mr. Fernandez' testimony and by the fact that the preprinted information on Respondent's Corrective Action Notice says nothing about coach and counsels. As for Respondent's argument that coach and counsels initiate Respondent's disciplinary process, of the four coach and counsels in which Mr. Grace was involved, only the egregious incident concerning Mr. Chacon resulted in any disciplinary follow-up; there is no evidence the others even generated any managerial consideration of discipline. Moreover, Mr. Grace made no recommendation of discipline in any coach and counsel documentation, which tends to undercut Respondent's argument that the coach and counsel documentation was intended to initiate the disciplinary process. I recognize there is a fine line between discretional authority to report employee misconduct that will initiate a formal disciplinary process and the misconduct reportorial function that a leadperson might possess without incurring supervisory status. See *Los Angeles Water and Power Employees' Association,* supra at slip op. 5 (individual's report of misconduct does not constitute effective recommendation of discipline where management undertakes its own investigation and decides what, if any, discipline to impose); *Ryder Truck Rental, Inc.,* 326 NLRB 1386 (1998) (authority to issue verbal or written warnings that do not affect employee status or to recommend discipline do not evidence disciplinary authority); *Millard Refrigerated Services, Inc.,* supra at 1438 (1998) (employees did not effectively recommend discipline when they submitted disciplinary forms to the plant superintendent who approved them only after conducting an independent investigation; the employees exercised nothing more than a reportorial function that was typical of a "leadman" position). Here, although the evidence is not entirely clear, it appears that coach and counsel documentations are routinely placed in employee files without significant managerial review, do not constitute recommendation of disciplinary action, do not give rise to disciplinary action, are not utilized unless repetition of misconduct occurs, and even then become part of the disciplinary process only as a reference for managerial action, including investigation.[28] After consideration of all the evidence relating to Mr. Grace's coach and counsel responsibility, I must conclude that his authority to report employee misconduct remains just that and does not cross over into supervisory territory.[29]

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[27] *Wilshire,* supra at fn. 8.

[28] The discipline meted to Mr. Chacon is an example of how Respondent's system worked. The February 23 coach and counsel was the second given to Mr. Chacon in as many months. After Mr. Chacon's second coach and counsel, Mr. Fernandez and Mr. Akopian dealt with his discipline and, although Mr. Grace recommended Mr. Chacon's discipline be elevated as much as possible, he was disciplined only at "written," the second of five disciplinary levels.

[29] In its post-hearing brief, Respondent refers to the coach and counsels as "discipline" and to their documentation as "documented verbal warnings" or "disciplinary write-ups." There is

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Respondent argues that Mr. Grace's emails to his supervisors regarding Mr. Chacon's misconduct evidence an independent authority to discipline employees. It is true that, as noted in his January 31st email to Mr. Fernandez and Mr. Akopian, Mr. Grace reported he had informed Mr. Chacon that he would "not [accept] guests [telling him] that one of [his] staff was rude or abrupt," that [Mr. Chacon] needed to work on being friendly, accommodating, and helpful, and that it was "the last time a guest should [tell Mr. Grace] that [Mr. Chacon] was not helpful, [or was] rude or abrupt." While Mr. Grace clearly cautioned Mr. Chacon that future infractions could result in discipline, the evidence fails to show that Mr. Grace could, himself, instigate any such discipline; rather, the supervisory authority implied by Mr. Grace's admonition appears to have been self-conferred. Self-proclaimed authority does not confer statutory authority. See *Billows Electric Supply of Northfield, Inc,* supra.

It is also true that Mr. Grace's February 23rd email to Mr. Fernandez and Mr. Akopian implies that he independently decided that evening not to send Mr. Chacon home after his contretemps with a guest.[30] Further, Mr. Fernandez testified that Mr. Grace had the authority to send an employee home when there was "some type" of misconduct or, "in [the] particular case" of Mr. Chacon, to refrain from doing so. The authority to send employees home for engaging in misconduct is typically considered evidence of supervisory authority. *Bredero Shaw, A Division Of Shawcor Ltd.*, 345 NLRB No. 48, slip op. 2 (2005). However, an exception exists to that rule. If the authority to send refractory employees home is limited to instances of egregious misconduct, the Board does not consider the authority meets statutory supervisory indicia. *Bredero Shaw, A Division Of Shawcor Ltd.*, supra, citing *Vencor Hospital-Los Angeles,* 328 NLRB 1136, 1139 (1999) and *Washington Nursing Home,* 321 NLRB 366 fn. 4 (1996). Here, the evidence is insufficient to determine whether Mr. Grace's authority to send misbehaving employees home fits within the typical supervisory authority rule or within the exception to the rule. I cannot examine past instances of Mr. Grace's exercise of such authority because no evidence shows he ever sent any employee home for misconduct. I cannot rely on Mr. Fernandez' testimony to resolve the question because his testimony does not explicate the extent of Mr. Grace's authority. While I accept Mr. Fernandez' assertions that Mr. Grace could send an employee home for "some type" of misconduct or could refrain from doing so in Mr. Chacon's "particular case," his testimony does not clarify whether or not the determination to send an employee home would turn on the egregiousness of the misconduct. Since the Board construes any lack of specific evidence to support a finding of supervisory status against the party asserting supervisory status,[31] I cannot find that Mr. Grace's authority to send recalcitrant employees home establishes his supervisory status.

Regarding Mr. Grace's participation in the hiring of front office employees, the evidence is not clear as to what Respondent's hiring process entails. No evidence was adduced as to who initially reviewed applications and determined which applicants would be interviewed, although Mr. Fernandez testified that Mr. Grace "looked over" applications and resumes.[32]

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nothing in the record to support or justify such characterizations, which carry connotations of formal disciplinary actions, and I reject both the characterizations and the connotations.

[30] Mr. Grace informed Mr. Fernandez and Mr. Akopian that Leslie and Mohammed's opinion was that Mr. Chacon should be sent home, but Mr. Grace told them Mr. Chacon would leave shortly (apparently when his shift ended).

[31] Armstrong Machine Company, Inc., supra fn. 4; Dean & Deluca New York, Inc., supra, at 1247.

[32] Reviewing applications and resumes would not, in any event, constitute effective

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There is no evidence that the front office supervisors were significantly involved at any stage of hiring prior to the interview. Mr. Grace's role in the interview process, as described by Mr. Fernandez, was that "he could make recommendations, as he went through the interview process with us…[and could] strongly suggest and we would hire based on that." Although Mr. Fernandez said that front-office-supervisor disapproval would be fatal to an applicant's employment chances, no evidence was presented of any applicant to whose employment a front office supervisor objected or of any applicant to whose employment Mr. Grace's favorable opinion was pivotal. Mr. Fernandez named employees "April, Wanda, [and] Tony" as applicants whose "hiring process" Mr. Grace "probably…helped with." Mr. Fernandez specifically remembered April as a very nice girl whose hiring he thought Mr. Grace had assisted with by helping to interview her, giving his opinion of her as "a wonderful girl, wonderful worker, good background," and by saying, "Let us hire her."[33]

Given the above evidence, it does not appear that Mr. Grace independently conducted any part of the hiring process. At every stage, Mr. Grace's involvement was in conjunction with upper management officials. See *Ryder Truck Rental, Inc.,* supra at fn. 9 ("Where supervisors…participate in the interview process, it cannot be said that employees whose status is at issue have authority to effectively recommend hiring within the meaning of Sec. 2(11).") Further, no evidence supports a finding that the front office supervisors' evaluative role went beyond voicing approval of an applicant management was considering for hire. The Board does not consider "compatibility recommendations" sufficient "to support a finding of hiring authority within the meaning of Section 2(11) [citations omitted]." *Tree-Free Fiber Co.,* 328 NLRB 389, 391 (1999).[34]

Respondent argues that Mr. Grace could reward employees as contemplated in 2(11) of the Act, citing his discretional purchase of food for employee consumption, creation of employee incentives, and preparation of a bulletin board with employee pictures to "increase employee morale." The only one of these actions to affect employment terms is the monetary incentive program. But it does not appear from Mr. Fernandez' testimony that the front office supervisors did more than oversee that program: "…we have [an incentive program] there, which…the supervisors would take turns in looking after—which, if you sold a certain room and you were able to up-sell it, you would be given a small percentage of that revenue and then, they would track that and we would place on the boards …for people to see." There is no evidence the front office supervisors set the incentive revenue percentage or awarded the incentive money discretionally. Their mere oversight of the program is a clerical function at most. Respondent also contends that Mr. Grace could reward employees by granting time off, either for vacation or personal leave. Although Mr. Grace approved time off, as discussed above, there is no

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recommendations for hire. *Wake Electric Membership Corp.,* 338 NLRB 298 (2002).

[33] However, in later testimony, Mr. Fernandez admitted he was "not positive" Mr. Grace had interviewed April, Wanda, or Tony Chacon.

[34] *Detroit College of Business,* 296 NLRB 318 (1989) and *Venture Industries,* 327 NLRB 918 (1999), cited by Respondent, are distinguishable. In *Detroit,* the employer provided clear and specific evidence that hiring was a joint decision between coordinators, whose status was at issue, and the associate dean and that no instructor has ever been hired without coordinator consent. In *Venture*, it appears that the line and department supervisors, whose status was at issue, independently interviewed existing employees for in-plant job postings, and then made a selection recommendation to the department manager. Moreover, the line and department supervisors could issue oral or written reprimands to employees. In both cases, unlike the instant matter, the evidence as to the target individuals' authority is clear and specific.

evidence he could do so as a reward to employees.

It is true that the front office supervisors, including Mr. Grace, served as the Hotel's MOD at certain periods and that the MOD was the focal point for problem reporting and resolution. However, although MOD assignment unquestionably demonstrated that Respondent regularly entrusted valuable assets and important responsibilities to Mr. Grace's care, the mere fact that Mr. Grace functioned as the MOD does not establish that he exercised supervisory authority during those occasions. *Dean & Decluca New York, Inc.,* supra, fn 13; While serving as MODs, the front office supervisors were expected to follow Hotel policies and procedures, could contact Mr. Fernandez as needed, and informed him of events upon his return to the Hotel. There is no evidence that the front office supervisors exercised independent judgment during their MOD stints rather than adhering to established policies and procedures with follow-up reporting to Mr. Fernandez. Such does not show statutory supervisory authority. See *Training School at Vineland*, 332 NLRB 1412 (2000) (service as the highest ranking employee on site does not establish supervisory without evidence of Section 2(11) indicia).

Respondent also contends that Mr. Grace's supervisory status is established by the following evidence: (1) Mr. Grace was included in managerial meetings that focused on employee issues and performance; (2) Respondent required Mr. Grace to sign Respondent's "Code of Business Conduct" and "Policy Against Insider Trading" forms aimed at "avoiding abuses of power;" (3) front office employees treated Mr. Grace as a supervisor, notifying him if unable to show up for work, coming to him with "concern[s]," and directing serious customer complaints to him; (4) Respondent held Mr. Grace out to employees and customers as a supervisor and so indicated his status by his name tag; (5) Respondent paid Mr. Grace a higher wage than other front office employees; (6) Mr. Grace posted notices that front office employees were required to review regarding upcoming hotel events; and (7) Mr. Grace had access to and made entries in the MOD log, thereby notifying senior management as to issues arising during his shift. While these factors may constitute so-called secondary indicia of supervisory status, the Board has held consistently that secondary indicia are not dispositive of a supervisory issue without evidence of at least one primary indicator of supervisory status. *See, e.g., Central Plumbing Specialties, Inc.,* supra; *Billows Elec. Supply of Northfield, Inc.,* supra at fn. 2 (1993); *Juniper Indus., Inc.,* 311 NLRB 109, 110 (1993). [35] Here, Respondent has not demonstrated that Mr. Grace possessed any primary statutory indicator of supervisory status.

In sum, I find Respondent has not met its burden of showing that Mr. Grace was a supervisor at any relevant time hereto. I find Mr. Grace was a statutory employee entitled to the Act's protections on June 25 when Mr. Fernandez fired him for wearing a union button. Accordingly, Respondent's termination of Mr. Grace violated Section 8(a)(3) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Sections 8(a)(3) and (1) of the Act by discharging Kevin Grace

[35] *McClatchy Newspapers,*307 NLRB 773, 779 (1992) (secondary criteria such as attendance at management meetings "do not establish supervisory status by themselves"); *Central Plumbing Specialties, Inc.,* supra at 975 (secondary criterion of higher pay does not establish supervisory status.)

because of his protected activities.

4. The unfair labor practices set forth above affect commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including offering reinstatement to Mr. Grace and making him whole for whole for any loss of earnings and other benefits he suffered through Respondent's unlawful conduct to be computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Respondent, citing *Precoat Metals,* 341 NLRB No. 143 (2004), argues that Mr. Grace is not entitled to reinstatement and backpay essentially because he gave false testimony herein. In *Precoat,* the Board found an alleged discriminatee had "forfeited his entitlement to reinstatement and backpay" because he gave false testimony in his pretrial affidavit and at the hearing. In reaching its conclusion, the Board distinguished between a situation in which an alleged discriminatee's testimony is discredited and one in which the witness has "deliberately lied." The Board asserted that it was not denying the alleged discriminatee customary remedies because he was discredited but because he deliberately lied. In the instant matter, I have discredited the testimony of Mr. Grace where it conflicts with that of Mr. Fernandez. I have not made, and do not make, any finding that Mr. Grace has deliberately lied. Accordingly, I decline to deny the Board's normal remedies to Mr. Grace. As for Respondent's assertion that Mr. Grace is presently disabled, determination of that question and its ramifications for reinstatement and backpay are left to the compliance stage of these proceedings.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[36]

ORDER

Respondent, Starwood Hotels & Resorts Worldwide, Inc., d/b/a Sheraton Universal Hotel, its officers, agents, successors, and assigns, shall

1. Cease and desist from discharging any employee on the basis of his/her protected activities.
2. Take the following affirmative action necessary to effectuate the policies of the Act:
   (a) Within 14 days from the date of this Order, insofar as it has not already done so, offer Kevin Grace full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.
   (b) Make Kevin Grace whole for any loss of earnings and other benefits suffered

[36] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

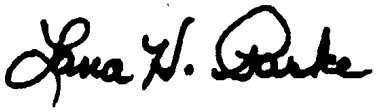
as a result of the unlawful discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Kevin Grace and within three days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(d) Within 14 days after service by the Region, post at its office in Universal City, California, copies of the attached notice marked "Appendix."[37] Copies of the notice, on forms provided by the Regional Director for Region 21 after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by 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, Respondent has gone out of business or closed the operations involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since June 25, 2004.

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

Dated, Washington, D.C. December 2, 2005



Lana H. Parke
Administrative Law Judge

[37] If this Order is enforced by a Judgment of the 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."

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 do anything that interferes with these rights. More particularly,
WE WILL NOT discharge any employee because of his/her protected activities.

WE WILL insofar as we have not already done so, offer Kevin Grace full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and **WE WILL** make Kevin Grace whole for any loss of earnings and other benefits suffered as a result of our unlawful discrimination against him.
WE WILL remove from our files any reference to our unlawful discharge of Kevin Grace and thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

Respondent, Starwood Hotels & Resorts Worldwide,
Inc., d/b/a Sheraton Universal Hotel,
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

888 South Figueroa Street, 9th Floor
Los Angeles, California 90017-5449
Hours: 8:30 a.m. to 5 p.m.
213-894-5200.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 213-894-5229.