

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 9

In the Matter of

GWS, INC., A SUBSIDIARY OF  
GOODWILL INDUSTRIES OF  
SOUTHEASTERN WISCONSIN AND  
METROPOLITAN CHICAGO, INC.

Employer

and

Case 9-RC-17309  
(Formerly 30-RC-6116)

SERVICE EMPLOYEES INTERNATIONAL UNION  
LOCAL 73, AFL-CIO-CLC

Petitioner

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein called the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, <sup>1/</sup> the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.

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<sup>1/</sup> The Employer and the Petitioner timely filed briefs which I have carefully considered in reaching my decision. Further, I hereby deny the Employer's "Motion to Strike Portions of Petitioner's Brief" as it lacks merit with regard to assertions of gross and intentional misrepresentations by the Petitioner and concludes that the Employer's Motion constitutes a reply brief. No leave to file a reply brief pursuant to the Board's Rules and Regulations, Section 102.67 was requested or granted.

3. The labor organization involved claims to represent certain employees of the Employer.

4. 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.

5. The Employer, a corporation, provides food services pursuant to a contract awarded under the Javits-Wagner-O'Day Act (JWOD Act) by the United States Navy at the Great Lakes Naval Training Center in Lake County, Illinois. In providing food services for the naval facility, the Employer employs approximately 297 employees in the unit found appropriate. The food service operation at the Great Lakes Naval Training Center, herein referred to as the Great Lakes operation, is the only facility of the Employer involved in this proceeding. The Employer is a successor employer to a previous contractor, Triple P, a non-JWOD Act contractor, that had a contract to run one of the three galleys now operated by the Employer. The Petitioner and Triple P were apparently parties to a collective-bargaining agreement covering Triple P's galley employees. However, the parties stipulated that there is no contract bar to the instant proceeding.

The Petitioner seeks to represent a unit comprised of all full-time and regular part-time food service and production employees employed by the Employer at the Great Lakes Naval Training Center galleys, including cooks, assistant cooks, food service worker/vegetable preparation crew leader, general cleaners (including equipment cleaners and floor care specialists), storeroom employees (including Jack-of-the-Dust (JOD)/shelf stockers and storeroom workers), assistant kitchen managers and record keepers, excluding all other employees, all clerical employees (including payroll technicians and administrative assistant), confidential employees (including payroll technicians and administrative assistant), technical employees and all guards and supervisors as defined in the Act. Contrary to the Petitioner, the Employer maintains that the individuals with disabilities, whom it employs under the auspices of the Javits-Wagner-O'Day Act (JWOD participants) are not employees within the meaning of Section 2(3) of the Act. The Employer also asserts that approximately 13 or 14 assistant kitchen managers (AKMs) must be excluded from the unit as supervisors within the meaning of Section 2(11) of the Act and that its 4 recordkeepers must be excluded from the unit as office clerical employees who lack a community of interest with other employees in the proposed bargaining unit. The Petitioner contends that none of the AKMs possess or exercise any of the statutory indicia of supervisory status set forth in the Act and that the AKMs are properly included in the unit. In addition, the Petitioner maintains that the recordkeepers share a sufficient community of interest with other employees to warrant their inclusion in the unit. Finally, the Petitioner has not indicated whether it is willing to proceed to election in any unit different from the one it has petitioned to represent.

The Employer was awarded the Great Lakes food service contract in about January 1998 based on a bid submitted pursuant to the JWOD Act. Under the JWOD Act government contracts are allocated to various nonprofit organizations through noncompetitive bidding. To qualify for a JWOD Act contract, the contractor must perform 75 percent of the direct labor hours using qualified participants. A qualified participant is an individual who is blind as defined for purposes of the JWOD Act or otherwise severely handicapped. For purposes of the

JWOD Act a “severely handicapped person” means, “a person . . . who has a severe physical or mental impairment (a residual, limiting condition resulting from an injury, disease, or congenital defect) which so limits the person's functional capabilities (mobility, communication, self-care, self-direction, work tolerance or work skills) that the individual is unable to engage in normal competitive employment over an extended period of time.” As a result of short lead-time to commence operations and the large number of personnel needed to perform its contractual commitments, the Employer was given until April 2000 to meet the JWOD Act's requirement that participants perform 75 percent of the direct labor hours.

The record discloses that the Employer made a profit of approximately \$500,000 in its first year of operations at Great Lakes. The Employer attempts to build a 6 to 7 percent profit margin into such contracts. In this regard, the Employer projects an annual profit of roughly \$637,000 on the Great Lakes contract, which provides for approximately \$9.8 million in revenues per annum. The Employer utilizes revenues generated under its Great Lakes contract to subsidize various programs operated under the auspices of its parent corporation, Goodwill Industries of Southeast Wisconsin and Metropolitan Chicago, Inc.

Great Lakes is located on the shore of Lake Michigan and is currently the only Navy recruit training facility in operation. It is also a major training center for other Navy personnel and officers. The Employer provides food services to the recruits and personnel at the training center via Great Lakes' three galleys, numbered 535, 928 and 1128. If the Employer fails to timely prepare and serve meals to the Navy's specifications, including utilization of its recipes, the Employer could lose the contract.

Galley 535 is located in the section of the Great Lakes facility where nonrecruit personnel and officers attend training. Galleys 928 and 1128 are located in the Recruit Training Command section of Great Lakes and service Navy recruits. Galley 535 is approximately 1½ miles from Galley 928 and about ¼ miles separate Galley 535 from Galley 1128; about 1½ miles separate Galley 928 from Galley 1128. There are approximately six serving lines in Galley 535 and each line can serve approximately 200 to 225 at a time. Galleys 928 and 1128 have eight serving lines capable of serving 225 to 250 people at a time. Sculleries or dishwashing areas separate each line. In each of the galleys the lines form a near circle with the kitchen located at the center of the circle. Galley 535 contains approximately 20 steam kettles, 10 on each side of the galley, between 30 and 70 gallons in size. Much of the cooking takes place in the steam kettles and the remainder takes place in Galley 535's three ovens. Galleys 928 and 1128 contain similar cooking equipment, but both are larger than Galley 535.

The work that occurs in the galleys is divided into “front-of-the-house” and “back-of-the-house” operations. The front-of-the-house operations include serving food, maintaining the beverage bars and the dining area and scullery work. The back-of-the-house operations include the kitchen, vegetable preparation and the cleaning of pots and pans. The Employer's contract for the performance of services includes the front and the back-of-the-house operations for Galley 535 and back-of-the house operations only for Galleys 928 and 1128. The front-of-the-house operations in Galleys 928 and 1128 are staffed by recruits. The Employer also provides cashiers, VIP service for high-ranking Navy officers and civilian cabinet officers, and performs warehousing functions in Galley 928. The Employer also performs cleaning and waxing of vinyl

floors in Galleys 928 and 1128. The Employer prepares and/or serves between 28,000 and 60,000 meals a day, reaching the high point in about mid-summer when the largest numbers of recruits are at Great Lakes. Indeed, the record discloses that Galley 928 is the largest food service facility in the United States military. Galley 1128 serves as an overflow galley and has traditionally been open only about 6 months each year beginning in late spring when large numbers of new recruits normally arrive at the base.

Jackie Hallberg is the Employer's executive director. Reporting directly to Hallberg are Dwight Ferguson, the director of food service operations for the Employer at Great Lakes, and Barb Kroupa, manager for work force development. Reporting directly to Ferguson are Chris Mann, assistant director/executive chef; Rich Wilkins, assistant director of administration; Rick Olsher, assistant director of operations; and Romeo Nacua, quality assurance manager. Reporting directly to Mann is Ted Kozlowski, galley manager for Galley 535, and Robert Miller, galley manager for Galleys 928 and 1128, while two kitchen manager positions report to Kozlowski and three kitchen manager positions report to Miller. Reporting directly to Wilkins, who is in charge of warehousing functions, are Jeff Guthman, stores manager, and Debra Gilmore, administrative assistant. Galley 535 Stores Supervisor David Deadwiler and the Galley 928/1128 Stores Supervisor Frank Figueroa report directly to Guthman. Reporting directly to Olsher is Galley Operations Support Manager Fannye Tyson-Essex, who, in turn, is the immediate supervisor of the four food service worker supervisors. The Training/QA Assistant Mike Mann is responsible to Nacua and the four employment support specialists report to Kroupa.

It appears that the galley managers and kitchen managers primarily work day shifts from about 7 a.m. until 4 or 5 p.m., as needed.<sup>2/</sup> Kitchen managers and those above them in the Employer's hierarchy perform "duty watch" in the galleys 7 days a week. In this connection, these uncontested supervisors/managers rotate overseeing the operation of the galleys on Saturdays and Sundays for approximately 12 and 16 hours each day. Additionally, these managers have pagers and may be contacted in their off hours. In addition to the galley and kitchen managers, the Employer's back-of-the-house operations include 10 AKMs, 5 of whom are employed in Galley 535 with the other 5 assigned to Galleys 928 and 1128.<sup>3/</sup> As of May 1999, the remainder of the back-of-the-house employees consisted of approximately 32 cooks and 3 cook assistant/helpers employed in Galley 535 and 34 cooks and 14 cook assistant/helpers employed in Galleys 928 and 1128. The galleys operate on a three shift around the clock schedule with some employees being scheduled to work a split or swing shift. The first shift in Galley 535 is from 4 a.m. to 12 p.m., the second is from 11:30 a.m. to 8 p.m. and the third is from 8 p.m. to 4 a.m. In Galleys 928 and 1128 the shifts run from 12 midnight to 8 a.m. for the first shift, from 6 a.m. to 2 p.m. for the second shift, and from 12 noon to 8 p.m. for the third shift with some employees working a split shift from 4 a.m. to 7:30 a.m. and from 10 a.m. to 2 p.m. The swing shift is a variable schedule where employees work some combination of day, afternoon, and evening shifts. The AKMs are scheduled to work all three primary shifts and swing shifts. Approximately 90 percent of the JWOD participants are initially employed at

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<sup>2/</sup> It appears from the record that some of the kitchen managers also work evening hours during the week.

<sup>3/</sup> When all three galleys are operating the Employer employs four or five AKMs in each galley.

Galley 535, which enables them to work in an environment only with other coworkers and not with recruits who staff the front-of-the-house operations in the other two galleys.

The Employer hires JWOD participants from a variety of sources. A principal source for such participants is the Employer's vocational rehabilitation referral network and about 50 percent of the participants referred for employment with the Employer are from these agencies. These agencies include the Illinois Office of Rehabilitative Services, the Wisconsin Department of Vocational Services, the Independence Center of Lake County, the North Point Achievement Center, the Special Education District of Lake County, the Urban League of Lake County, and the Veteran's Administration Medical Center. Some JWOD participants have been hired by word of mouth that the Employer was hiring disabled individuals and still others came to the Employer as a result of the Employer advertising for positions in newspapers. In addition, approximately 10 current participants transferred to participant status after initially being hired without any consideration of any existing disabilities. Some of the individuals who transferred to participant status in this manner were adequately performing their jobs without accommodation.

The record discloses that with regard to referral agencies, the Employer indicates to the agencies it utilizes that referred individuals should have, "the ability . . . to perform the essential functions of the job." Additionally, during the interview process a representative of the Employer is charged with explaining the job to the applicant and asking the applicant if he/she, "can perform the essential functions of the job with or without accommodations." In this connection, the record discloses that the Employer has rejected a few disabled applicants because their disabilities were too severe for them to perform the essential functions of the available position and the Employer was unable to accommodate their disabilities. Participants are hired for employment without any restrictions on the length of time they may work for the Employer.

When a participant is hired he/she receives orientation from an "intake coordinator" and an Individual Employment Plan" (IEP) is prepared for each participant. The purpose of the IEP is to establish a benchmark of a participant's current abilities based on their previous work experience. The IEP is also used to identify any restrictions that might prevent a participant from completing tasks. Further, it addresses barriers that participants will have to confront and seek to overcome in order to achieve a successful work experience. Finally, the IEP assists the Employer in identifying support needs that will help participants maintain employment such as childcare, transportation, accommodations for their disabilities and encouragement to regularly take any prescribed medications.

JWOD participants are generally categorized as possessing physical, mental or developmental disabilities. The number of participants with a diagnosis of mental retardation is small and those participants with a diagnosis of severe retardation is even smaller, such that the Employer declined to provide a number for that diagnosis for the purpose of maintaining confidentiality. The record discloses that about 40 percent of the jobs in the galleys require some skills and experience. To fill such skilled positions, the record discloses that the Employer seeks out higher functioning disabled individuals.

The Employer provides JWOD participants with additional training beyond that which is offered to non-participant employees. Participants are sometimes retrained in certain skills when a deficiency or need is demonstrated. The Employer supports participants in training and thereafter with job counselors or coaches, i.e., employment support specialists (ESS). After an initial training period front line supervisors assign participants to positions within their particular classifications and ensure that the jobs are correctly performed. There are four ESS employees, with a fourth being hired during the course of the instant proceeding. The ESS employees work different shifts in an effort to maximize the working hours that a participant can readily access an ESS should the need arise. As part of the initial training for participants, the ESS counselors provide them with training in “soft skills” that lasts between 45 minutes and 2½ hours. “Soft skills” training involves those expectations that an employer would have of employees while they are at work, including attendance, punctuality, communications with coworkers, communications with supervisors, attire and hygiene. Other than the “soft skills” training, which may have broader application, the training that participants receive is generally limited to instructions on how to perform their specific jobs with the Employer.

The job counseling provided by the Employer consists largely of non-intrusive monitoring of a participant's progress on the job. The ESS employees meet with some participants from time to time during working hours to discuss a variety of issues, including a participant's ability to perform his or her job as affected by his or her disability. However, ESS employees do not typically hold regularly scheduled meetings with participants. Moreover, it appears that the meetings that occur between an ESS and a participant are often initiated by the participant. The Employer does not provide participants with housing or transportation to and from the job. Yet, the Employer, through the ESS employees, assists participants in obtaining affordable housing, arranging transportation, and assists them with other personal issues impacting on their jobs such as the resolution of childcare problems and counseling on marital and family issues. ESS employees meet with participants on work time.

The record discloses that the Employer does not have a formalized plan to move participants out of its work force and into “competitive” private employment. For example, it does not have any private sector “partners” to which it can provide qualified participants. Indeed, it appears that only two participants hired by the Employer have gone on to other competitive employment. On the other hand, the Employer provides participants with opportunities for internal promotion through various positions at Great Lakes. Thus, a participant may begin his or her employment as a food service worker and subsequently move into positions such as assistant cook, cook, cleaner and JOD. There have been about 16 participants who have received such promotions.

The Employer's JWOD participants at Great Lakes are commonly supervised and paid on the same wage scale as its nonparticipant employees. Additionally, participants receive the same benefits as nonparticipants. Participants and nonparticipants alike punch a time clock and are offered the opportunity to work overtime. As a group, participants work fewer hours a week than nonparticipants. However, participants still work a substantial number of hours each week. For example, I note that the record reflects that during August 1999 participants constituted approximately 48 percent of the Employer's direct labor work force and they performed approximately 42.6 percent of the direct labor hours worked.

The record discloses that the Employer makes certain accommodations for participants. Thus, the Employer apparently provides participants with scheduling flexibility to enable them to meet childcare needs or to address other “barriers to employment” that are not directly related to a disability. The Employer also attempts to accommodate participants’ disability or disabilities by assigning them to a job, where possible, that addresses restrictions imposed by their disability or disabilities, including a reduced work schedule.

The Employer does not apply strict production standards or requirements to participants. However, such standards are not applied to nonparticipant employees. Rather, any productivity requirements are imposed by the nature of the workplace itself. Thus, at peak the Employer is responsible for timely serving up to 60,000 meals a day over four sittings in each of the three galleys: breakfast, lunch, dinner and a late night meal known as mid-rack.<sup>4/</sup> The record discloses that the failure to strictly adhere to the Navy’s timetable for each meal could result in the Employer’s loss of the contract for nonperformance. Accordingly, participants and nonparticipants alike must work efficiently to ensure timely service.

The Employer has a progressive disciplinary procedure that applies to both participants and nonparticipants. This procedure provides for an oral warning, written warning, suspension without pay and discharge. The record discloses that participants, unlike nonparticipants, are often counseled before progressive discipline is imposed. Even so, over 20 participants have been discharged by the Employer; most for no call/no show attendance problems. About five participants have been discharged for negative reasons other than no call/no show, including one participant who was discharged for failing a drug test. The progressive disciplinary procedure is apparently applied more strictly to nonparticipants. However, the record discloses that extenuating circumstances may also be taken into account when determining the appropriate level of discipline for nonparticipants.

#### **ANALYSIS OF EMPLOYEE STATUS:**

It is well settled that the Board will assert jurisdiction over a nonprofit charitable organization. *St. Aloysius Home*, 224 NLRB 1344, 1345 (1976); *Hudelson Baptist Childrens Home*, 276 NLRB 126 (1985); *Goodwill Industries of Denver*, 304 NLRB 764, 765 (1991). However, the Board must also determine whether the individuals employed by such nonprofit charitable entities are employees within the meaning of Section 2(3) of the Act. *Cincinnati Association for the Blind*, 235 NLRB 1448 (1978); *Lighthouse for the Blind of Houston*, 244 NLRB 1144 (1979); *Goodwill Industries of Denver*, supra. In making this determination, the Board examines the relationship between the employer and the employees at issue. As the Board noted in *Goodwill Industries of Denver*, “When the [employment] relationship is guided to a great extent by business considerations and may be characterized as a typically industrial relationship, statutory employee status has been found. When the relationship is primarily rehabilitative and working conditions are not typical of private sector working conditions,

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<sup>4/</sup> This meal is only served in Galley 535 and was also referred to in the transcript as mid-rats - a possible abbreviation for midnight rations.

however, the Board has indicated it will not find statutory employee status.” *Goodwill Industries of Denver*, supra, at 765. See also, *Davis Memorial Goodwill Industries*, 318 NLRB 1044 (1995). In performing a business/rehabilitative analysis, the Board considers whether the disputed individuals are subject to production standards and discipline, the extent to which the employer provides disabled individuals with social services, counseling, and training and whether the employer’s operations contemplate or result in long-term employment for workers with disabilities. *Arkansas Lighthouse for the Blind*, 284 NLRB 1214, 1216-1217 (1987); *Davis Memorial*, supra. The Board also considers whether the employees at issue receive wages similar to those of other employees and whether those wages are tied to productivity or performance. See, *Cincinnati Association for the Blind*, supra; *Lighthouse for the Blind of Houston*, supra; *Arkansas Lighthouse for the Blind*, supra.

Here, I note that a certain level of production is required as a result of the nature of the job itself. Moreover, as the Employer moves toward compliance with the JWOD Act requirement that 75 percent of the direct labor hours be performed by participants, even more of the production requirements of this rather time intensive operation will have to be met by workers with disabilities. In addition, both participants and nonparticipants receive the same wages and benefits. See, *Arkansas Lighthouse for the Blind*, supra; *Davis Memorial*, supra. However, there is no evidence that the Employer's uniform wage scale promotes any rehabilitative purpose.

The record also discloses that participants are subject to the Employer's progressive disciplinary procedure. In most instances, counseling is attempted before discipline is administered to participants, while nonparticipants are not given the same degree of counseling or leniency when discipline is being considered. In addition, the record discloses that the Employer often makes accommodations for participants by adjusting their hours of work, limiting the scope of their duties in some instances and by assisting them with arrangements for childcare, transportation and other issues impacting on employment.

The Board has held that disabled employees are “employees” within the meaning of the Act even though an employer provides additional consideration to their particularized needs and circumstances. See, *Arkansas Lighthouse for the Blind*, supra; *Davis Memorial*, supra; *Huckleberry Youth Programs*, 326 NLRB No. 127, slip op. at 2 (September 30, 1998). In *Arkansas Lighthouse for the Blind*, the Board found only that the evidence with regard to discipline established that the employer used, “some form of discipline to ensure that its clients produce.” Supra at 1216. In *Davis Memorial*, the Board affirmed the regional director’s finding that the disputed individuals were statutory employees even though the disciplinary process for such employees included substantial opportunities for counseling in lieu of or prior to the initiation of discipline. Supra at 1046. Further, in *Huckleberry Youth*, the Board conceded that in matters of employee performance the employer was more flexible with the disputed individuals than it was with those employees who were not in dispute, but noted that the disputed individuals “. . . can be disciplined and fired.” Supra, slip op. at 2. Finally, the Board has specifically held that an employer’s accommodations for disabled individuals “may reflect a business judgment as much as a rehabilitative object” when it is operating subject to the JWOD Act’s contractual requirement that a certain percentage of direct labor hours be performed by disabled participants. *Arkansas Lighthouse for the Blind*, supra at 1217, fn. 25.

With the exception of “soft skills” training, the training that is provided to participants is generally the type of training that is necessary to enable participants to perform their jobs. The training for participants is somewhat different than for nonparticipants in that participants receive more oversight with respect to the process provided by the ESSs and the training period is longer. Additionally, participants may require retraining. The Board has found that the existence of this type of training coupled with the lack of a formal job placement program to be indicative of a typically industrial relationship rather than a rehabilitative one. See, *Lighthouse for the Blind of Houston*, supra, and *Arkansas Lighthouse for the Blind*, supra. Here, participants are responsible for their own housing, transportation and other personal needs. However, the Employer may assist participants in locating basic needs to facilitate their continued employment. Although counseling is provided on an as needed basis for the purpose of enhancing participant’s prospects for long-term competitive employment, the Board has held that providing such ancillary services and counseling do not detract from the essentially industrial nature of the relationship between disputed individuals and their employers. *Davis Memorial*, supra. I also find noteworthy the fact that only two of the Employer’s participants have left the Employer for competitive private employment and that they apparently located those positions without any assistance from the Employer.

Several other factors in the instant case support a conclusion that the employment relationship between the Employer and participants is governed largely by business considerations and is therefore typically industrial in nature. Thus, the record discloses that participants can expect long-term employment with the Employer with an opportunity to advance within the Employer’s operation. Prospects for long-term employment are indicated not only by the existence of a “career ladder” opportunity within the Employer’s operation, but also by the low turnover rate among participants, the Employer’s need to maintain participant work hour levels at a 75 percent rate and the lack of emphasis on graduating participants to private competitive employment. The Board has repeatedly found that a typical private employment relationship is indicated where, as here, disputed individuals have the opportunity for long-term employment. *Cincinnati Association for the Blind*, supra; *Lighthouse for the Blind of Houston*, supra; *Arkansas Lighthouse for the Blind*, supra; *Davis Memorial*, supra. Finally, the participants here share common supervision with nonparticipants, receive the same wages and benefits and generally work similar hours under similar working conditions. See, *Arkansas Lighthouse for the Blind*, supra; *Davis Memorial*, supra.

The record establishes that “normal economic considerations are a significant factor” in the participants’ relationship with the Employer and that such relationship is “typically industrial” rather than rehabilitative in nature. In reaching this conclusion, I particularly note the intensely commercial nature of the Great Lakes enterprise and the degree of productivity such an operation demands, the use of progressive discipline with respect to participants, the similarity between participants and nonparticipants in terms of wages, hours, supervision and other working conditions, the limited social services, counseling and training provided to participants, and participants’ opportunity for long-term employment with the Employer. Under these circumstances, the JWOD Act participants are statutory employees within the meaning of Section 2(3) of the Act.

In reaching my conclusion that participants are statutory employees, I have carefully considered the arguments to the contrary advanced by the Employer at the hearing and in its brief. The cases relied on by the Employer in support of its position are, however, clearly distinguishable on their facts. In *Goodwill Industries of Denver*, supra, the employer operated under a JWOD Act contract to provide janitorial, meat room cleaning and merchandise stocking services for a commissary on a United States Air Force base. These types of services were provided by handicapped clients who were “allowed to work at their own pace and [were] paid on a piece rate basis.” Id. at 764. Additionally, in *Goodwill Industries of Denver*, discipline was imposed “only in extreme cases.” <sup>5/</sup> Id. at 765. Further, at least some of the disputed individuals in that case, those known as client/trainees, were employed in the operation for an average of a mere 6 weeks and the employer transported many of them to and from the jobsite. Id. at 765, fn. 8. Finally, in *Goodwill Industries of Denver*, there was a noted “lack of emphasis on production” and the employer had lost \$100,000 in the relatively small operation over the course of a 4-year period. Id. at 764, 765. These facts stand in stark contrast to the profitable operation engaged in by the Employer, the intrinsically fast-paced commercial nature of the enterprise and the consequent necessary emphasis on productivity. Additionally, the disputed individuals here are not accommodated to the same degree as those in *Goodwill Industries of Denver*, in terms of assistance in getting to and from the job, the pace at which they are permitted to work and the extremely limited circumstances in which they might expect discipline to be imposed.

The Board’s decision in *Goodwill Industries of Tidewater*, 304 NLRB 767 (1991), cited by the Employer, is similar to the instant case in that the disputed individuals there were employed under a JWOD Act contract on a base operated by the United States Navy. However, in that case, the employer operated at a loss, the contract was limited to the performance of janitorial services, the disputed individuals worked at their own pace and were not “subject to production quotas or discipline for insufficient production,” discipline was imposed only in extreme circumstances, and at least some training was administered outside working hours. Id. at 768. More importantly, the disputed individuals in *Goodwill Industries of Tidewater* had half of their training wages paid by a referral agency and the high turnover rate indicated that they did not enjoy long-term employment. Id. at 768, fn. 9, 769.

The Board's decision in *Key Opportunities, Inc.*, 265 NLRB 1371 (1982), relied on by the Employer, also bears marked factual differences from the subject case. In *Key*, the employer provided disabled individuals known as clients with work fulfilling contracts for various services including sorting, painting and lettering, building pallets, packaging liquid chemicals, grinding, and building display boards and shipping supports. Id. at 1373. *Key* consistently lost substantial amounts of money on these contracts. In addition, most of the disabled individuals in *Key*, unlike here, were paid on a piece rate basis and therefore their pay rate was tied to their productivity with some earning as little as “a few cents” an hour. Id. Additionally, many and possibly a majority of *Key's* participants were handicapped to such an extent that they were required to work in a sheltered workshop environment and could not advance into a competitive

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<sup>5/</sup> For example, individuals known as client/trainees were discharged only for "failing to come to work or for eating commissary food" in violation of strict Air Force regulations. Id. at 765.

environment. *Id.* Thus, I note that many of the disabled individuals in *Key* needed repeated daily instruction in the performance of the most simple tasks, were not expected to provide their own transportation to and from work, and their work output was as little as 5 percent that of a nondisabled employee. *Id.* at 1375.

Finally, *Goodwill Industries of Southern California*, 231 NLRB 536 (1977), cited by the Employer, was later overruled by the Board in *Goodwill Industries of Denver*, to the extent that it stood for the proposition that a petition may be dismissed solely because an employer possesses a “worthy rehabilitative purpose.” *Goodwill Industries of Denver*, *supra* at 765, fn. 7. In *Goodwill Industries of Southern California*, the petitioner sought to represent drivers, helpers and mechanics who worked in the employer's transportation department where they were engaged in collecting discarded items donated by the public. Notably, the “clients” in *Goodwill Industries of Southern California* were permitted to work at their own pace. However, the Board still concluded that the clients “may arguably be said to be employees within the meaning of the Act.” *Id.* at 538. The Board nevertheless found, apparently because of the potential adverse impact on the employer's eleemosynary objectives, that it would not effectuate the purposes of the Act to assert jurisdiction over them and dismissed the petition. *Id.* Accordingly, I find *Goodwill Industries of Southern California*, *supra*, not controlling herein in view of the doubtful continuing validity of the analysis undertaken in that case, the Board's conclusion that the disputed individuals were arguably employees within the meaning of the Act, and the fact that the disputed individuals were permitted to work at their own pace without express or implicit production requirements.

Based on the foregoing, the entire record and careful consideration of the arguments of the parties at the hearing and in their briefs, I find that the Employer's JWOD Act participants are employees within the meaning of Section 2(3) of the Act who share a substantial community of interest with the non-participant employees. Accordingly, I shall include the participant employees in the unit.

As I have found that the JWOD Act participants are statutory employees who are properly included in the unit, I turn now to a consideration of the remaining subsidiary issues, i.e., the supervisory status of the AKMs and whether recordkeepers should be excluded from the unit as office clerical employees who lack a community of interest with the other unit employees.

### **THE SUPERVISORY STATUS OF AKMs:**

The record discloses that AKMs spend a substantial percentage of their work time in completing paperwork,<sup>6/</sup> making assignments to cooks, directing their work and training them in the preparation of various menu items. The remainder of their work time, while functioning as AKMs, is spent in the performance of various direct cooking tasks. In addition, AKMs are regularly scheduled to work shifts where they are functioning solely as cooks without any

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<sup>6/</sup> The paperwork handled by the AKMs includes 1090 forms that dictate the menu for a particular day and the number of recruits and other Navy personnel expected to be fed, and 1282 forms that dictate the amount of each food product needed for meal preparation each day.

responsibility for noncooking tasks. There is some conflict in the record as to the percentage of time spent by AKMs in the performance of direct labor duties versus other tasks. One record estimate suggests that AKMs spend as much as 80 percent of their work time in the performance of tasks that do not involve cooking or food preparation. In this connection, the record discloses that AKMs may spend as much as 2½ hours of each 8-hour shift at desks in the galleys from which they observe galley operations and perform paperwork. In contrast, there is at least some indication in the record that AKMs may spend significantly more than 20 percent of their overall work time in the performance of direct cooking tasks. Thus, one AKM testified that at least 3 out of every 5 of his workdays involves a significant amount of cooking. Further, AKMs are regularly scheduled to work as cooks and during such shifts they are engaged primarily in the performance of direct cooking tasks.

AKMs are responsible for seeing that meals are prepared to Navy specifications in a timely manner and that the necessary inventory and supply paperwork is completed. Although they are not specifically required to report early, AKMs may arrive about 15 minutes prior to the start of their respective shifts for the purpose of reading the log from the prior shift and setting the cooking assignments for the cooks as dictated by the menu for that shift and day. AKMs assign the more difficult cooking tasks to the more experienced cooks based on their observation of the respective abilities of the cooks over a period of time. The work assignments made by the AKMs are not reviewed. Once the basic assignment is made the cooks follow recipe cards that provide step-by-step instructions to bring each task to completion. The cooks are responsible for converting the recipes to the quantity needed for each menu item and the AKMs review these conversions to ensure that the recipe is correct. The recipe conversions are established by the Navy. In addition to direct cooking tasks, AKMs may assign cooks to take temperatures of food, check hot boxes and ensure that the cooking kettles are cleaned at end of the shift. The Employer considers the cooks in its Great Lakes operation to be skilled employees.

Work schedules are made out 2 weeks in advance by the kitchen managers. The Employer typically schedules six to seven cooks to work in each galley on each shift. Additionally, two to six food service workers are employed in back-of-the-house positions on the first and second shifts. In addition, a single food service worker cleans pots and pans on the third shift in Galley 535. AKMs are responsible for overseeing the work of the cooks, cooks assistants or helpers, and the vegetable preparation employees. However, it appears that their direct responsibilities for assignment and direction are limited to the cooks and that the kitchen managers directly assign and direct the other back-of-the-house employees. Each employee's schedule includes one ½-hour and one 15-minute unpaid break. However, AKMs may alter an employee's break time to accommodate food preparation and food service needs. Additionally, AKMs may grant brief breaks on the clock to cooks and other back-of-the-house employees at times when the galley is not busy.

Requests for vacation time generally are passed through the AKMs to the kitchen managers. The kitchen manager and an AKM will sometimes discuss whether they have a sufficient number of employees scheduled to permit an employee to take requested vacation time. A galley manager and kitchen manager then coordinate vacation requests for scheduling purposes. Kitchen managers are generally responsible to ensure coverage in the event of employee call-ins or illnesses.

When an employee calls off work shortly before a shift and there is no kitchen manager or front-of-the-house supervisor available an AKM may arrange for a substitute. It is not clear from the record how often an AKM might request a substitute cook when there is no one higher in the Employer's hierarchy to address the issue. A substitute may be obtained either from another galley,<sup>7/</sup> by calling off-duty cooks, or by requesting a cook to work overtime. However, the Employer does not mandate overtime and any requests to work overtime may be refused without penalty. Further, it is not clear from the record how often AKMs request employees to work overtime. For example, one AKM testified that he had never been involved in assigning the overtime which had been worked in his area. Employees who are unable to reach anyone for a call-off directly will leave a message on an answering machine that is located in the kitchen office. A list of employee telephone numbers is maintained in the same office for call-in purposes. There does not appear to be any call-in method with regard to cooks except that those called in are known to be available and to be good cooks.

The record testimony is conflicting as to whether AKMs may send employees home early during a shift if there is insufficient work and whether they may call employees in to work on their own if they believe they are needed. For example, an AKM testified that he had no authority to send employees home on a shift based on his belief they were not needed and that he had not done so. There is also record testimony indicating that AKMs direct employees to a kitchen manager when a request for early release from a shift is made and that additional cooks are called in to work only after consultation between an AKM and a kitchen manager. However, there is some record evidence that, at least, some AKMs have sent employees home early when they did not have enough work and that such AKMs have the authority to call additional employees in to work if they are needed. No examples were provided and the witness who provided this evidence later testified that he was unaware as to whether AKMs actually took such actions.

The record reflects that AKMs do not play a role in the hiring process and that they are not involved in layoffs,<sup>8/</sup> recalls or as decisionmakers in the Employer's grievance procedure. Further, AKMs have no authority to discharge employees. However, AKMs have some involvement in the administration of the Employer's progressive disciplinary procedure. In this regard, it is clear that AKMs may orally warn or counsel employees. However, oral warnings, when they are reduced to writing, are not utilized for purposes of assessing progressive discipline. In determining whether to merely issue an oral warning to an employee or whether to recommend that an employee receive a formal warning, the AKMs are guided by the Employer's written progressive disciplinary policy. The Employer's disciplinary policy contains an extensive list of items, the breach of which warrants formal discipline.

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<sup>7/</sup> The record indicates that requests to transfer cooks between galleys are handled by kitchen managers and relayed down to the AKMs to send or receive a cook. This practice became more common during the course of this proceeding when the Employer was temporarily shorthanded.

<sup>8/</sup> A claim that they would make recommendations for layoffs is speculative, as there have been no layoffs. Moreover, there is no evidence that such recommendations, if made, would be followed.

AKMs are also involved in the issuance of written oral and written warnings. The participation of AKMs at these levels of the progressive disciplinary procedure is circumscribed by the fact that kitchen managers participate in the issuance of such discipline by independently investigating the basis for such warnings and by being present with an AKM when the disciplinary action is given to the employee. A former kitchen manager, Dave O'Hara, testified that he informed the AKMs working under him that they were to bring any disciplinary issues to him for review. Although Assistant Director/Executive Chef Chris Mann asserted that AKMs may issue written warnings without first consulting with a kitchen manager or other undisputed supervisor/manager, he was unable to provide any example of such an occurrence. Indeed, his superior, Director of Food Service Operations Ferguson, testified that the decision to issue any type of formal discipline in the back-of-the-house would in most instances be made by a kitchen manager or by a kitchen manager and AKM in conjunction with other managers, including human resources personnel.<sup>9/</sup> Notably, the warnings introduced into the record have a space for the signature of a "supervisor" and a "witness" and in each instance one of the two individuals signing the documents in these spaces is above the AKM in the Employer's hierarchy.<sup>10/</sup>

In the absence of a kitchen manager or higher authority, an AKM may send an employee home in extreme situations but this apparently rarely occurs. Thus, the record discloses that on a single occasion an AKM sent two employees home pending an investigation as a result of a nighttime physical altercation in the workplace. The matter was then turned over to human resources, which conducted an independent investigation. Generally, AKMs report incidents to kitchen managers that may warrant suspension or discharge. The kitchen manager or other undisputed supervisor/manager then independently reviews the facts prior to the making of a disciplinary determination. In this connection, I note that when there is no kitchen manager in the galley and something has gone wrong, the AKMs are to page a kitchen manager to advise the manager of the situation.

It is unclear from the record the length of time that AKMs have had any involvement in the disciplinary procedure. For example, one AKM testified that he had only learned from the Employer while this proceeding was in progress that he was authorized to be involved in the disciplinary procedure. To the extent that AKMs recommend disciplinary action the record reflects that such recommendations are sometimes rejected by an ESS when a JWOD participant is involved.

AKMs have quite recently played a limited role in recommending promotions. Thus, the record discloses that on two occasions, while this matter was pending, AKMs recommended that assistant cooks who had worked on their shifts for a period of several weeks be promoted to cooks. Such recommendations were followed. Less specific record testimony indicates that AKMs have made oral recommendations for promotions on several other occasions but such recommendations were not always followed. AKMs have also been involved in evaluating

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<sup>9/</sup> In fact, Ferguson testified on that occasion that AKMs are to report to their kitchen managers "everything that happens in their shift."

<sup>10/</sup> In one instance an assistant galley manager signed a series of warnings as a "witness." However, the record discloses that she made her own investigation of the facts underlying the discipline.

employees because of their familiarity with the employees from working with them. Their involvement in evaluations has been sporadic, as has the Employer's utilization of an evaluation process. In participating in the evaluation of employees, AKMs have not recommended any kind of wage increase.

AKMs punch a time clock and are paid on an hourly basis at a rate of \$13.01 an hour. They do not keep time records for other employees on their shift and do not have access to their personnel records. The hourly rate for AKMs compares with an hourly rate of \$11.40 an hour for cooks. JOD employees, who are in the unit, are paid an hourly rate between that of the cooks and the AKMs. The AKMs receive the same benefits as other employees in the unit and are covered by the same employee handbook. In contrast, kitchen managers are salaried and are paid between \$30,000 and \$35,000 a year and galley managers earn a salary of between \$40,000 and \$50,000 a year. Additionally, the kitchen managers and other high-ranking managers and supervisors, unlike AKMs and other unit employees, are covered by a different handbook and have the option of electing health insurance coverage. Salaried employees are also eligible for dental insurance, long-term disability insurance and may participate in a retirement plan. AKMs wear a chef's jacket that is distinctive from that worn by cooks, whereas kitchen managers and others above them in the Employer's hierarchy wear casual business attire and baseball style caps. AKMs and other unit employees are all required to wear paper caps. Kitchen managers work out of separate offices off the galley floor whereas, as noted above, the AKMs utilize desks located on the floors of the respective galleys. Finally, kitchen managers are frequently on the galley floor during the course of a shift.

AKMs may initiate an emergency break out (EBO) if they become aware that the Employer is running short of food for a particular meal. If an EBO appears necessary, the AKM will choose a substitute item from a list maintained for that purpose. The AKM will then consult with a kitchen manager regarding the item to be substituted and the kitchen manager will determine whether the item to be substituted is cost effective. The AKMs do not possess the cost information. An EBO change must be approved by a galley manager or Navy representative. Additionally, AKMs may approve the doubling of servings if it appears during the course of a meal that there will be substantial leftovers.

AKMs receive training not available to other unit employees. Thus, they attended sexual harassment and supervisory training that was conducted at Great Lakes in October 1998, as well as supervisory training that was conducted in Milwaukee during the calendar year 1998. Unit employees receive the sexual harassment component of the Great Lakes training, but do not receive training in how to be a supervisor, including the administration of progressive discipline. Finally, the AKMs received sanitation training in 1999 that unit employees did not receive. The AKMs themselves provide on-the-job training to back-of-the-house employees. However, more experienced cooks also provide such training.

The Employer conducts back-of-the-house management meetings on Wednesday of each week. The AKMs do not attend these meetings during which staffing levels are discussed. More recently, the Employer began conducting meetings attended by the AKMs, kitchen managers and galley managers each Monday morning. The AKMs in Galley 535 began participating in these meetings in about late July 1999, during the pendency of this proceeding. Problems that arise on

the different shifts are discussed and an accountability coordinator brings any problems with the required paperwork to the attention of those in attendance.

### **ANALYSIS OF THE SUPERVISORY STATUS OF AKMs:**

Section 2(11) of the Act defines a supervisor as a person:

. . . 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 recommend such action, if in connection with the foregoing, the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment. . . .

It must be noted, however, that in enacting Section 2(11) of the Act, Congress emphasized its intention that only supervisory personnel vested with “genuine management prerogatives” should be considered supervisors, and not “straw bosses, leadmen, set-up men and other minor supervisory employees.” *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985). Although the possession of any one of the indicia specified in Section 2(11) of the Act is sufficient to confer supervisory status, such authority must be exercised with independent judgment and not in a routine manner. *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981). Moreover, the exercise of “supervisory authority” in merely a routine, clerical, perfunctory or sporadic manner does not confer supervisory status. *Feralloy West Corp. and Pohng Steel America*, 277 NLRB 1083, 1084 (1985); *Chicago Metallic Corp.*, supra; *Advanced Mining Group*, 260 NLRB 486, 507 (1982). It is also well established that the burden of proving that an individual is a supervisor rests on the party asserting supervisory status. See, *Beverly Enterprises-Ohio d/b/a Northcrest Nursing Home*, 313 NLRB 491 (1993); *Ohio Masonic Home*, 295 NLRB 390, 393 (1989). “Accordingly, whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established at least on the basis of those indicia.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

The Employer here has not met its burden in establishing that the AKMs are supervisors within the meaning of Section 2(11) of the Act. To the contrary, the record evidence affirmatively discloses that the AKMs do not possess any indicia of supervisory authority within the meaning of Section 2(11) of the Act. The AKMs do not have the authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward, discipline, or responsibly direct the work of employees or adjust their grievances, in a manner requiring the exercise of independent judgment.

The Employer contends that the AKMs are statutory supervisors based primarily on their involvement in assigning and directing the work of cooks and assistant cooks on a daily basis and their involvement in disciplining employees. Additionally, the Employer relies on “secondary indicia” of supervisory status such as the fact that AKMs wear different uniforms and have access to desks with telephones, the fact that AKMs have received supervisory training

and attend some management meetings and the fact that the Navy considers AKMs to be “watch captains.” I disagree with the Employer’s position vis-à-vis the supervisory status of its AKMs, and I specifically discount the limited, circumscribed, and routine nature of the AKMs’ responsibilities with respect to their employees.

With regard to the role of AKMs in assigning and directing work, I note that they assign distinct cooking tasks by rotating employees through different reoccurring tasks and by assigning more difficult cooking chores to the cooks whom they know to possess superior cooking skills based on their familiarity with those skills. The AKMs’ direction of the bulk of the tasks performed by cooks and assistant cooks is limited to overseeing the timely preparation of the foodstuffs for each meal as dictated by the Navy menu. Once a menu assignment is made, the cooks merely follow step-by-step recipe cards and make quantity conversions established by the Navy. Thus, AKMs need only ensure that the cooks are correctly preparing each item based on these established parameters. It appears that most if not all of the menu items are repeatedly prepared by the cooks and assistant cooks. Accordingly, with regard to cooking tasks, there is no discretion involved in the AKMs direction of work.

The noncooking tasks that AKMs may assign to cooks are quite routine and also require little or no direction. Thus, cooks may be assigned tasks such as taking temperatures to ensure that menu items are being prepared within the established temperature range for proper and safe cooking and they may be assigned to clean kettles at the end of a shift so that they are ready for use by cooks on the following shift. Finally, I note that the cooks are skilled workers, to varying degrees, and would appear to be capable of preparing an array of food items without oversight particularly given the strictures placed on meal preparation by the Navy. Indeed, the limited assignment and direction of work that AKMs give to cooks and assistant cooks is routine in nature and does not require the exercise of independent judgment. See, *Somerset Welding & Steel*, 291 NLRB 913, 914 (1988).

With regard to the AKMs’ participation in the Employer’s disciplinary process, the record discloses that the role of the AKM is actually a reportorial function. Thus, AKMs report factual events that may constitute breaches of the Employer’s written rules of conduct and a meeting is then conducted between the purportedly offending employee, the AKM involved, and a kitchen manager. If a JWOD participant is involved, an ESS counselor may intervene to have the proposed disciplinary action amended or eliminated. In generalized testimony, witnesses for the Employer assert that the review of disciplinary action initiated or recommended by AKMs is in many instances subject only to procedural and not substantive review by kitchen managers and other undisputed supervisory personnel. However, other testimony suggests that undisputed supervisors make factual inquiries into written oral and written warnings and thus engage in substantive review of those warnings. Moreover, it strains credulity to conclude that the pervasive participation at the lower levels of the progressive disciplinary procedure by undisputed supervisory personnel is limited almost exclusively to questions of procedure. Indeed, the record is nearly bereft of specific examples of the context and the outcome of these disciplinary meetings. Accordingly, I conclude that the AKMs do not issue warnings to employees that automatically lead to further discipline without independent review of such warnings by undisputed supervisory personnel and that there is insufficient evidence, particularly in view of the large number of JWOD participants involved, that they make effective

recommendations with regard to disciplinary action. Under well settled Board law, employees are not supervisors where the warnings they issue “either individually or in the aggregate, do not lead to personnel action; or, if they do, such action is not taken without independent investigation or review by others.” See, *RAHCO, Inc.*, 265 NLRB 247, fn. 22, (1982); cited with approval in *Northcrest Nursing Home*, 313 NLRB 491, 497, fn. 30 (1993).

With regard to those occasions when an AKM may arrange for a substitute to fill in for an absent employee, it is clear that AKMs cannot mandate that a cook or assistant cook work overtime or come in early to work. It is well settled that the solicitation of employees to work an unscheduled shift or to work overtime without the authority to compel employees to report is insufficient to confer supervisory status. See, *Northcrest*, supra at 505; *Providence Hospital*, 320 NLRB 717 (1996); *St. Francis Medical Center-West*, 323 NLRB 1046 (1997). Moreover, the evidence is in conflict with regard to the authority of AKMs to effectuate temporary work assignments or to deviate from the established schedule. Thus, I do not find that the supervisory status of AKMs has been established on the basis of their involvement in such matters. See, *Phelps*, supra at 490.

The limited involvement of AKMs in the promotion and evaluation of employees does not confer supervisory status. Thus, it is well settled that where a putative supervisor's participation in employee evaluations does not directly impact the employee's conditions of employment and where such evaluations are reviewed by admitted supervisory personnel, the completion of such forms does not confer supervisory status. *Hauser Hard-Chrome of Kentucky, Inc.*, 326 NLRB No. 36 (1998); *Hillhaven Rehabilitation Center*, 325 NLRB No. 9 (1998). Additionally, where recommendations for promotions are sporadic and are not followed in some instances they do not constitute effective recommendation and supervisory status is not thereby established.

The Employer points to several secondary indicia of supervisory authority in support of its contention that the AKMs are supervisors. Thus, the Employer cites their higher hourly rate of pay,<sup>11/</sup> the fact that they have received “supervisory” training that other employees have not received, and the fact that they attend some management meetings.<sup>12/</sup> Inasmuch as the AKMs do not possess, let alone exercise with independent judgment, any of the various supervisory indicia set forth in the Act, the so-called secondary indicia of supervisory status relied on by the Employer, even when viewed in the light most favorable to its position, do not imbue the AKMs with supervisory status. In this regard, the Board has long held that absent any primary indicia of supervisory status, such secondary indicia have no legal significance. *Billows Electric Supply of Northfield, Inc.*, 311 NLRB 878, fn. 2 (1993); *Juniper Industries, Inc.*, 311 NLRB 109, 110

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<sup>11/</sup> In this connection, I note that the cooks are paid approximately 88 percent of the hourly rate received by the AKMs and that the JODs receive an hourly rate in between that received by the AKMs and that received by the cooks. Although the AKMs receive the highest rate of pay of any of the employees in the unit, their hourly rate is not dramatically higher than a large number of other unit employees.

<sup>12/</sup> The Employer also asserts that the Navy considers AKMs to be “watch captains.” The significance of this assertion is not made clear at hearing or in the Employer's brief. However, I am not aware of any Board cases which stand for the proposition that an individual may be deemed a statutory supervisor merely because he or she is viewed as such by a third party.

(1993); *McClatchy Newspapers*, 307 NLRB 773 (1992). I also find noteworthy the fact that there are currently nine supervisors for approximately 93 employees, including the AKMs, in the back-of-the-house operation. If the 10 to 14 AKMs were found to be supervisors, there would be approximately 20 supervisors for 83 employees, a highly unrealistic ratio of supervisors to employees which militates against finding the AKMs to be statutory supervisors. *Plastics Industrial Products*, 139 NLRB 1066 (1962).

The Board cases relied on by the Employer in support of its proposition that AKMs are statutory supervisors are clearly distinguishable on their facts from the subject case. In *Custom Bronze & Aluminum Corp.*, 197 NLRB 397 (1972), cited by the Employer, the Board concluded that a leadman who had filed a decertification petition was, in fact, a supervisor within the meaning of the Act. In reaching this conclusion, the Board relied in particular on the fact that the leadman “. . . alone [was] responsible for the work of the shop employees and the daily production of the shop.” *Id.* at 398. In this connection, the Board noted that the supervisors to whom the leadman reported rarely entered the work area and absent a finding that the leadman was a supervisor the shop would be without supervisory authority each workday. *Id.* at 397, 398. Further, the leadman in *Custom Bronze* was involved in the hiring process and was responsible for keeping track of employees’ time. In contrast, during most working hours the kitchen managers in the instant matter are engaged in direct oversight of meal production and are frequently on the galley floor. Additionally, galley managers and other undisputed supervisors are regularly on the galley floor or in the immediate vicinity. Moreover, AKMs may readily contact kitchen managers by pager during their off hours should anything unusual arise during a shift. The AKMs are not involved in the hiring process and do not keep track of employee time. In sum, setting aside the apparent differences in the nature of the work to be assigned and directed, it is clear that the AKMs are merely a link in the production chain and do not possess the type of authority and independent judgment possessed by the leadman in *Custom Bronze*, who was solely responsible for the production of the shop. *Id.*

The shift leaders found to be supervisors by the Board in *Liquid Transporters, Inc.*, 250 NLRB 1421, 1425 (1980), also possessed and exercised supervisory indicia distinguishable from the responsibilities performed by AKMs. Thus, unlike the AKMs, the shift leaders in *Liquid Transporters* use independent discretion in assigning employees to “various functions,” they send employees home early on their own and they mandate employees to work overtime to replace absent employees. In contrast, the AKMs primarily assign one type of function - cooking - and they cannot mandate employees to work overtime. There is conflicting testimony in regard to their independent authority to send employees home early.

The Employer’s reliance on *Elliot River Tours, Inc.*, 246 NLRB 935 (1979), is also misplaced. Thus, one of the two disputed supervisors in *Elliot* actually hired employees and testified that he had the authority to fire employees but he had apparently never done so. *Id.* at 942. The other disputed supervisor in *Elliot* operated the employer’s white water school and had wide latitude in selecting the guides who made up the staff. *Id.* at 942-943. It is difficult to contrast the AKMs’ lack of authority in hiring and assigning employees with that possessed by the disputed individuals in *Elliot* because the authority possessed and exercised by those individuals is so much greater than that of the AKMs such as to make *Elliot* completely inapposite to this case.

The Board's decision in *Rose Metal Products*, 289 NLRB 1153 (1988), cited by the Employer, does not advance its position. Unlike the AKMs, the disputed supervisor in *Rose Metal* effectively recommended that employees be discharged. *Id.* The Board also concluded that the disputed supervisor in *Rose Metal* utilized independent judgment in making work assignments. *Id.* Although not explicated in the Board's decision, such assignments presumably involved a wide variety of tasks in connection with differing metal fabrication applications. Thus, such assignments stand in stark contrast to the tightly circumscribed cooking of menu items with step-by-step preparation instructions.

Finally, the Employer cites the Board's decisions in *Formco, Inc.*, 245 NLRB 127 (1979), and *Detroit College of Business*, 296 NLRB 318 (1989), for the respective propositions that the authority of an individual to discipline employees or to effectively recommend discipline, without more, imbues that individual with supervisory status under the Act. However, *Formco*, supra at 129, actually deals with the effective recommendation of discipline rather than independent disciplinary action and *Detroit College of Business*, supra at 319-320, involves disputed individuals with hiring authority and the authority to effectively recommend discharge, retention, or transfer of employees through evaluation of those employees. It is not even contended that the AKMs in the subject case possess or exercise the type of authority exercised by disputed individuals in *Formco* and *Detroit College of Business*. Accordingly, I find those decisions inapposite to a disposition of the supervisory issue in the subject case.

Based on the foregoing, the entire record and having carefully considered the arguments of the parties at the hearing and in their briefs, I find that AKMs are "leadmen" who do not exercise independent judgment, but are merely responsible for completing certain paperwork and for assigning routine tasks, many of which are repetitive, pursuant to an established menu and an established employee work schedule. In performing their duties, the AKMs spend a substantial percentage of their work time engaged in hands-on production related tasks, including cooking, checking the temperatures of food and ensuring that galley equipment is functioning properly and that it is clean. Their limited role in making routine assignments to employees and their various reportorial functions are commensurate with the status of leadmen rather than statutory supervisors. Accordingly, I find that the AKMs are not supervisors within the meaning of Section 2(11) of the Act and I shall include them in the unit.

## **RECORDKEEPERS:**

Contrary to the Employer, the Petitioner seeks to include four recordkeepers, one of whom is a lead recordkeeper in the unit. <sup>13/</sup> The recordkeepers report to the stores manager and also interact with naval officers who have oversight responsibilities for the operation of the galleys. The recordkeepers are primarily responsible for keeping track of inventory records, processing food orders for the galleys, and generally maintaining the financial status of the galleys. This involves preparation of the forms used by the galleys (forms 1092 and 1282). These forms are completed in the galleys and they provide an accounting of food costs and stores consumed. The recordkeepers then utilize the completed forms (1092) to prepare the necessary records used for the financial management of the galleys by the Employer's managers. The other forms (1282) are sent to Naval Supply Systems Command, which reflect the financial viability of the galleys. This entire process is performed on computers utilizing food service management software with password protected files. The recordkeepers receive training on the use of this software as well as other on-the-job training. The recordkeepers do not produce or serve food.

The recordkeepers work at a building at Great Lakes referred to as Building 3200. It is located between  $\frac{3}{4}$  of a mile and  $1\frac{3}{4}$  mile from the three galleys. The recordkeepers typically work from 7 a.m. to 3 p.m., Monday through Friday, and, with the exception of the lead recordkeeper, spend approximately  $7\frac{1}{2}$  hours of each workday in Building 3200. The remaining  $\frac{1}{2}$  hour of each shift is spent in the galleys picking up the paperwork for which they are responsible, or in route to or from the galleys. The lead recordkeeper spends about half of her work time in Building 3200 and nearly half of her work time in the galleys. While in the galleys, the lead recordkeeper balances and inputs inventory data from hard cards kept for each food item. When the recordkeepers are in the galleys their primary contact is with the stores supervisor from whom they primarily receive their paperwork. They also have regular telephonic contact with the stores supervisor. In the occasional absence of the stores supervisor the recordkeepers receive their paperwork from the JODs. They may also occasionally consult with JODs when there is a problem with a receipt for supplies. <sup>14/</sup>

The two most recent hires into recordkeeper positions had previously worked for the Employer as cashiers. The Employer prefers that recordkeepers possess a minimum of 1 year of college course work in accounting or bookkeeping and requires that they possess good math skills, bookkeeping and accounting skills and some knowledge of computer operations and data entry.

The stores manager, the immediate supervisor of the recordkeepers, has a desk in Building 3200. Employees in the unit do not report directly to the stores manager. Rather, JOD and shelf stocker employees report directly to the stores supervisor who, in turn, is responsible to the stores manager. Recordkeepers are paid approximately \$10.55 an hour and the lead recordkeeper is paid approximately \$11.55 an hour. The recordkeepers eat at the galleys on

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<sup>13/</sup> The lead recordkeeper coordinates the input of data by the other three recordkeepers and ensures that financial data is correctly maintained. There is no contention that the lead recordkeeper is a statutory supervisor.

<sup>14/</sup> The principal duty of the JODs is to physically move food from the receiving areas for the purpose of issuing the foods to the galleys for storage.

occasion. When they do so they eat in the areas of the galleys that service Navy officers and the Employer's managers and not in the areas utilized by unit employees. The lead recordkeeper utilizes desks in two of the galleys that are shared with JODs, the stores supervisor, and AKMs. A desk in the third galley is utilized solely by the lead recordkeeper.

The Board generally excludes office clerical employees from overall production and maintenance units. *Hygeia Coca-Cola Bottling Co.*, 192 NLRB 1127, 1129 (1971); *Westinghouse Electric Corp.*, 118 NLRB 1043 (1957). However, plant clerical employees are customarily included in such units. *Raytee Co.*, 228 NLRB 646 (1977); *Armour and Co.*, 119 NLRB 623 (1957). In this connection, the Board has long held that the distinction between office and plant clericals is rooted in community-of-interest concepts. *Minneapolis-Moline Co.*, 85 NLRB 597, 598 (1949). Clericals whose principal functions and duties relate to an employer's general office operations and are performed within the office itself are deemed office clericals who do not have a close community of interest with production or warehouse employees, even if such clericals spend as much as 25 percent of their time in the production area and have daily contact with production personnel. *Container Research Corp.*, 188 NLRB 586, 587 (1971). *Mitchellace, Inc.*, 314 NLRB 536, 537 (1994); *Cook Composites & Polymers Co.*, 313 NLRB 1108 (1994). Thus, the Board has held that data entry operators who perform mainly clerical duties and have distinct work sites, separate supervision, and only incidental contact with production employees, are office clericals rather than plant clericals. *Mitchellace*, supra; *Cook Composites*, supra; see also *Jakel Motors, Inc.*, 288 NLRB 730, 742 (1988). However, the Board has included clerical employees in warehouse units when the duties they perform are integral to the functioning of warehouse operations. See, *Fleming Foods, Inc.*, 313 NLRB 948, 949 (1994); *John N. Hanson Co.*, 293 NLRB 63, 64-65 (1989); *S & S Parts Distributors Warehouse*, 277 NLRB 1293 (1985).

In the case *sub judice*, the recordkeepers have a separate work situs, work under separate immediate supervision from unit employees and perform duties quite different from those performed by employees in the unit. Additionally, they interact only occasionally with a small number of unit employees. In this connection, with the exception of the lead recordkeeper, they are physically in the galleys for only a brief period of time each work day. The recordkeepers are responsible for keeping track of inventory (stored food product), ordering supplies and generating documents detailing the financial viability of the galleys based on the number of meals served, the costs of those meals in terms of supplies consumed and the cost to replenish and/or augment those supplies. Clearly these duties play a significant role in the meal production process. It has not been established that the duties performed by the recordkeepers are so integral to be part of the production process to mandate the inclusion of the recordkeepers in the unit.

The cases cited by the Employer do not require a different conclusion. *Hamilton Halter Co.*, 270 NLRB 331 (1984), cited by the Petitioner, is easily distinguishable. The duties performed by the disputed employees in *Hamilton Halter* included maintaining inventory and ordering supplies. *Id.* Yet, unlike the subject recordkeepers, the disputed individuals in *Hamilton Halter* loaded and unloaded trucks and were otherwise directly involved in the production process. *Id.* at 331-332. Moreover, their "primary responsibility" involved

processing customer orders and typing them onto invoice slips, “a process closely associated with production.” Id. at 331.

Based on the foregoing, the entire record and having carefully considered the arguments of the parties at the hearing and in their briefs, I find that the recordkeepers, including the lead recordkeeper, are primarily office clerical employees who do not share such a community of interest with the other employees sought by the Petitioner to require their inclusion in the unit. *Mitchellace, Inc.*, supra; *Virginia Manufacturing Co., Inc.*, 311 NLRB 992 (1993); *Nuturn Corporation*, 235 NLRB 1139, 1140 (1978). Accordingly, I shall exclude the recordkeepers, including the lead recordkeeper, from the unit.

### **SUPERVISION:**

In accord with the record evidence, I shall exclude Jackie Hallberg, executive director; Dwight Ferguson, the director of food service operations; Barb Kroupa, manager for work force development; Chris Mann, assistant director/executive chef; Rich Wilkins, assistant director of administration; Rick Olsher, assistant director of operations; Romeo Nacua, quality assurance manager; Ted Kozlowski, galley manager for Galley 535; Robert Miller, galley manager for Galleys 928 and 1128; Dave O'Hara, Ed Pauig, Charlene Amos and Antron Dorrogh, kitchen managers; Jeff Guthman, stores manager; David Deadwiler, Galley 535 stores supervisor; Frank Figueroa, Galley 928/1128 stores supervisor; and Fannye Tyson-Essex, galley operations support manager from the unit as supervisors within the meaning of Section 2(11) of the Act.

### **CONCLUSION AS TO APPROPRIATE UNIT:**

Based on the foregoing, the record as a whole and having carefully considered the arguments of the parties at the hearing and in their briefs, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining:

**All full-time and regular part-time food service and production employees including cooks, assistant cooks, food service worker/vegetable preparation crew leader, general cleaners (including equipment cleaners, and floor care specialists), storeroom employees (including Jack of the Dust/shelf stockers and storeroom workers), assistant kitchen managers, and recordkeepers, employed by the Employer at the Great Lakes Naval Training Center galleys, excluding all office clerical employees (including recordkeepers, payroll technicians and administrative assistant), confidential employees (including payroll technicians and administrative assistant), technical employees, all other employees, and all guards and supervisors as defined in the Act.**

Accordingly, I shall direct an election among the employees in such unit.

## DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by **Service Employees International Union Local 73, AFL-CIO-CLC**.

## LIST OF ELIGIBLE VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters using full names, not initials, and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB No. 359 (1994). Accordingly, it is hereby directed that within 7 days of the date of this decision **2** copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the Regional Director of Region 30 who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in Region 30, National Labor Relations Board, 310 West Wisconsin Avenue, Suite 700, Milwaukee, Wisconsin 53203-2211, on or before **February 3, 2000**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

## RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the

Executive Secretary, 1099 - 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by **February 10, 2000**.

Dated at Cincinnati, Ohio this 27<sup>th</sup> day of January 2000.

*/s/ Richard L. Ahearn*

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