In its continuing efforts to rewrite federal labor law to benefit unions, the National Labor Relations Board (NLRB) has again narrowed the definition of “supervisor” under Section 2(11) of the National Labor Relations Act (NLRA). In *G4S Government Solutions Inc.*, 363 NLRB No. 113 (February 10, 2016), the Board concluded that nuclear power plant security lieutenants were not supervisors under the NLRA. Because supervisors are specifically excluded from the definition of “employee” under the Act, supervisors may not organize and have a duty of loyalty to their employers. In light of unions’ efforts to expand bargaining units, the NLRB has continued to find that individuals are not supervisors under the NLRA, even where they appear to meet the historical statutory criteria.

**The Statutory Framework and the NLRB’s Decision**

Under well-established NLRB precedent, an individual is a supervisor under the NLRA if he or she exercises or effectively recommends one or more of the indicia set forth in Section 2(11) of the NLRA. In *G4S*, the NLRB rejected the employer’s evidence of supervisory status, which focused on the criteria of responsible direction, assignment, and discipline.

In *G4S’s* chain of command, there are 330 lower-level protective force personnel reporting to 46 lieutenants, who in turn report to 5 captains, 1 chief, and 4 majors. *G4S’s* lieutenants command teams of security officers in responding to and repelling attacks on the nuclear power plant. Lieutenants regularly lead teams under their command in training exercises to prepare for any armed attacks on the plant and command the truck convoy when nuclear material is transported within the site. During nights, weekends, holidays, and any other times when nonessential personnel are away from the site, lieutenants are the highest ranking officers at the site.

With regard to discipline, the NLRB found that the lieutenants did not discipline employees because there was no evidence that the employer relied on lower-level discipline to impose a higher level of progressive discipline, nor did the employer consistently apply a progressive discipline policy. Similarly, the NLRB found that the lieutenants did not effectively recommend discipline because the labor relations department reviewed all discipline before it was issued.

The NLRB rejected a lieutenant’s testimony that he used his personal discretion to not evacuate a building as evidence of responsible direction because the lieutenant made this decision only after talking to a chief (a statutory supervisor). The NLRB also found that it was unclear whether the decision not to evacuate was “more than one obvious choice.”
The NLRB further found that the lieutenants did not assign employees, as there was no evidence that the lieutenants' approving or readjusting of post rotation schedules involved more than routine assignment. In a similar vein, the NLRB found that although lieutenants temporarily reassigned employees outside of their normal assignments, there was no evidence that the lieutenants considered anything other than an employee's skill and knowledge in their determinations. The NLRB then concluded that the procedures for permanent reassignment of employees and granting overtime were set forth in the collective bargaining agreement and thus did not require independent discretion.

The Dissent

In a well-reasoned dissent, Board Member Philip A. Miscimarra pointed out what employers everywhere are realizing: "[T]he Board has tended to evaluate each Section 2(1) factor in isolation, and then construe each factor so narrowly as to compel a conclusion that nobody is a supervisor." Member Miscimarra further noted that if the lieutenants are not supervisors, the only persons who would be responsible for the roughly 330 individuals during a terrorist attack on a nuclear power plant would be four majors, one chief, and five captains. The dissent then chastised the majority's failure to recognize that only one indicium of supervisory authority is required for an individual to meet the definition of a supervisor under the NLRA. Member Miscimarra noted that he found the command authority exercised by lieutenants in tactical situations and during training exercises demonstrated responsible direction qualifying them as supervisors under the NLRA.

Key Employer Takeaways

In light of unions' efforts to expand bargaining units, the NLRB has taken a closer look at the definition of "supervisor" under the NLRA and has continued to find that individuals are not supervisors even where they appear to meet the historical statutory criteria. The decision in G45 is just another cautionary tale demonstrating that employers will be expected to provide an abundance of evidence in support of any supervisory claims and may be required to establish that the individuals in question actually exercise (not just possess the authority to exercise) two or more indicia of supervisory status. The NLRB has continued to restrict the number of individuals that will fall within the definition of a "supervisor" under the NLRA, paving the way for greater union organizing. Employers should ensure that the employees it considers supervisors in fact exercise independent authority in supervising and directing employees to ensure that the NLRB will find that these individuals have supervisory status and prohibit the supervisors from being included in a bargaining unit.