

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

MARS HOME FOR YOUTH

Employer

and

Case 6-RC-12692

PENNSYLVANIA SOCIAL SERVICES UNION
LOCAL 668 a/w SERVICE EMPLOYEES
INTERNATIONAL UNION a/w CTW¹

Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Employer, Mars Home for Youth, provides residential, educational and community-based services for at-risk youth ages 11 to 18 at its facility in Mars, Pennsylvania. The Petitioner, Pennsylvania Social Services Union Local 668 a/w Service Employees International Union a/w CTW, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit, as amended at the hearing, of all full-time and regular part-time residential advisors and assistant residential program managers employed at the Employer's Mars, Pennsylvania, facility; excluding office clerical employees, therapists, teachers and guards, other professional employees and supervisors as defined in the Act, and all other employees. A hearing officer of the Board held a hearing and the parties filed timely briefs with me.

The parties are in disagreement as to the supervisory status of the Assistant Residential Program Managers (ARPMS). There are five ARPMS at issue herein. The Employer, contrary to the Petitioner, asserts that the ARPMS must be excluded from any unit found appropriate herein as they are statutory supervisors.

¹ The name of the Petitioner appears as amended at the hearing.

The Petitioner has indicated a willingness to proceed to an election in any unit found appropriate. The unit sought by the Petitioner has approximately 65 – 70 employees.

I have considered the evidence and arguments presented by the parties on the issues. As discussed below, I have concluded that based on the record, the burden of establishing that the ARPMs are supervisors within the meaning of the Act has not been met by the Employer. Therefore, this position should be included in the unit herein. To provide a context for my discussion of the issues, I will first provide an overview of the Employer's operations. Then, I will present in detail the facts and reasoning that supports my conclusions on the issues.

I. THE EMPLOYER'S OPERATION

The Employer provides community-based services and residential services to at-risk juveniles. The community-based program provides therapeutic services to children and families in various counties within the Commonwealth. The residential services are open 24 hours a day, seven days a week, 365 days a year and provide group home and therapeutic services to children who come to the organization via Child and Youth Services, juvenile probation and/or parental referral. The residential clients typically come to the Employer with a host of behavioral issues, including aggressive and violent tendencies, self-harm, substance abuse and sexual aggression. The Employer's overarching goal is to provide treatment and closely supervise daily living activities that will enable children to return to a home environment.

The Employer's residential services are based at a 20-acre campus in Mars, Pennsylvania. The campus is comprised of six residential facilities and Longmore Academy, an alternative educational school generally serving children ages 11 to 18. Among the residential facilities is a Diversion and Acute Stabilization Program (DAS) unit, Sloan House, that specializes in 28-day diversion and acute stabilization programming. In the remaining units, the duration of the stay depends on the treatment progress.

Sloan is a coed unit that contains the DAS Program and houses up to 15 residents.² Sloan is staffed by 18 full-time equivalent (FTE) Residential Advisors (RAs). In addition, there is one Residential Program Manager (RPM)³ and one Assistant Residential Program Manager (ARPM). Susan Flannigan is the RPM and John Scott is the APRM.⁴

In addition to Sloan, there are five other residential units: Eichenauer, Collins, Ryman, Wardle and Gilfillan.⁵ Eichenauer is an all-female, non-RTF⁶ unit, meaning that the clients assigned to that unit do not require as much treatment relative to an RTF unit. Eichenauer houses a maximum of ten residents and is staffed with twelve FTE RAs. In addition to the RAs, Eichenauer also is staffed with one RPM and one ARPM. Sherrie Tellez is the ARPM at Eichenauer.⁷

Collins is an all-female predominantly RTF unit housing ten residents. As with Eichenauer, Collins is staffed by twelve FTE RAs along with one RPM and one ARPM. The RPM at Collins is Jerry Hepp and the ARPM is Kim Minto.

Like Collins, Ryman is an all-female residential mostly RTF unit. Ryman typically houses between 10 to 12 clients and is staffed with twelve FTE RAs along with one RPM and

² Attached to Sloan is the main building which houses the health services office as well as the administrative offices including finance and human resources.

³ The parties stipulated that RPMs are statutory supervisors within the meaning of Section 2(11) of the Act based on their authority to hire and fire, evaluate and discipline employees.

⁴ Flannigan has been the RPM for approximately eight months; Scott has been the ARPM for approximately seven months.

⁵ Each of the residential units is comprised of residential bedrooms, a main living area, a community area, an area with a table and chairs, along with a staff office and manager office.

⁶ "RTF" stands for Residential Treatment Facility, and it serves as shorthand for clients requiring more significant treatment. Specifically, RTF clients require more therapeutic care. In contrast, non-RTF residents have not received an RTF classification by the County, and they receive group therapy, but they do not see a psychiatrist in the way that the client who is subject to RTF treatment does.

⁷ Tellez has been in that position for a matter of weeks. Prior to Tellez, Michele Harrington was the ARPM at Eichenauer.

one ARPM. Scott was the acting RPM for Ryman at the inception of the hearing in this matter,⁸ but Shawn Dechellis had been hired as the new RPM for Ryman effective October 12, 2009.

Donna Kihn is the ARPM on Ryman.⁹

Wardle is an all-male unit housing up to twelve residents. Like the other units, Wardle is staffed with twelve FTE RAs, along with one RPM and one ARPM. The RPM on Wardle is Kristin Burgess and the ARPM is Ed Weber.¹⁰

Gilfillan is another all-male unit housing up to twelve residents. Consistent with the other units, Gilfillan is staffed with twelve FTE RAs, along with one RPM and one ARPM. The RPM is Tyrone Steals and the ARPM is Chad Householder.

As noted, the total number of RAs employed by the Employer is 60 – 65. RAs, ARPMs and RPMs generally are assigned to a particular unit on a somewhat permanent basis. Nevertheless, staff can move (or be moved) between units to cover staffing vacancies. Pennsylvania Department of Public Welfare (DPW) regulations require a minimum staffing ratio of one staff member to eight children. The ratio applies to all “waking hours;” i.e., the 7:00 a.m. to 3:00 p.m. and 3:00 p.m. to 11:00 p.m. shifts. The Employer’s goal is, whenever possible, to exceed the DPW minimum staffing ratio by maintaining a ratio of one staff member to three children. Therefore, in terms of staffing, one to three is the goal, but one to eight is the requirement.

Generally speaking, the Employer runs three shifts for ARPMs and RAs: 7:00 a.m. to 3:00 p.m., 3:00 p.m. to 11:00 p.m. and 11:00 p.m. to 7:00 a.m., although the precise start/stop times vary somewhat. Normally, there is an RPM and/or an ARPM on each unit during the 7:00-3:00 and 3:00-11:00 shifts. However, the overwhelming majority of those shifts are staffed by an RPM or an ARPM – not both. In fact, overlaps typically are limited to one or two shifts per

⁸ Scott’s regular assignment is ARPM of Sloan. Prior to Scott, Gary Warman was the RPM for a few months.

⁹ Kihn has been the ARPM at Ryman for a few months and previously served as the RPM.

¹⁰ Burgess and Weber have been in their positions for in excess of one year.

week so that the RPMs and ARPMs can coordinate administrative functioning of the units. In addition, most RPMs do not work past 7:00 p.m. and, as a result, ARPMs typically are the highest level staff on campus during the weekdays between 7:00 p.m. and 11:00 p.m., and on weekends 7:00 a.m. to 11:00 p.m.¹¹

The Employer is under the overall supervision of Executive Director Martin Harris. Reporting to Harris is the Director of Human Resources Liz Hays¹² and the Director of Residential and Clinical Services.

The Director of Residential and Clinical Services oversees the residential program. Skye Lehocky (Lehocky) is the Acting Director of Residential and Clinical Services.¹³ However, the organization is recruiting to fill the position on a permanent basis. Lehocky normally is the Assistant Director of Residential Services. Reporting to the Assistant Director of Residential Services are the RPMs, the Admissions Coordinator and the EAS Program Manager. Reporting to the Residential Program Managers are the ARPMs and the RAs.

At the hearing, the parties stipulated that ARPM Scott is a supervisor within the meaning of the Act on the ground that he effectively recommended the hire of an employee. The Petitioner contends that Scott's position is "Assistant Program Manager" and not an ARPM. It appears that this argument is based on Scott's 2009 performance evaluation on which his job title is listed as "Assistant Program Manager." At one time in the recent past, the ARPM position was referred to as the Assistant Program Manager by the Employer.

¹¹ In contrast to the day and evening shifts, RPMs and ARPMs do not work the night shift (11:00 p.m. to 7:00 a.m.). Consequently, RAs report to the on-call RPM during the 11:00 – 7:00 shift. Someone is on call 24 hours a day, seven days a week.

¹² Hays has served as the Director of Human Resources for a little less than two years. In that capacity, Hays is responsible for Human Resource issues throughout the organization, including recruitment, benefit administration and policy and procedure development.

¹³ Lehocky has been the Acting Director for just under one month. John Eliyas previously was the Director of Residential and Clinical Services, but he no longer is employed by the Employer. There is no dispute that Hays, Lehocky and other management representatives are supervisors within the meaning of the Act.

After the stipulation was entered into, no further record testimony or evidence was taken with respect to Scott's job duties and responsibilities. The Employer takes the position that Scott's job responsibilities are no different from those of the other ARPMS. Accordingly, the Employer, contrary to the Petitioner, asserts that Scott's stipulated supervisory authority is relevant and must be considered in determining the supervisory status of the remaining ARPMS. This issue will be addressed *infra*.

The Employer maintains distinct job descriptions for RAs, ARPMS and RPMs. The Assistant Residential Program Manager job description applies to all ARPM positions, including Scott. The Employer normally hires ARPMS from within the organization and the positions typically are posted along with the job description.¹⁴ The fourth bullet point in the ARPM job description provides: "Assist the RPM in providing appropriate levels of supervision to child care staff to ensure completion of job responsibilities." The seventh bullet point in the ARPM job description reads: "Provides input to the RPMs in the completion of staff performance evaluations and monthly staff scheduling when needed." Likewise, the job description provides that ARPMS "assume the duties of an RPM as assigned by the Director of Residential Services, and, as necessary, assumes all other resident advisor responsibilities."

The Employee Policy Manual covers all employees at the Employer. The Employee Policy Manual includes work rules and disciplinary procedures. The Employer conducts performance evaluations for new hires after 90 days, and annually thereafter. The Employer overhauled its pay system in January 2008, and there have not been any wage increases since that time. However, staff were notified during a meeting in April 2008, that future pay increases will be tied to the performance evaluations conducted since January 2008. To date, due to the State funding situation, the Agency has not been able to issue pay increases. However, the

¹⁴ The record does not set forth the precise qualifications the Employer relies upon in filling the RA, ARPM and RPM positions. It appears that some of the RAs and/or ARPMS and RPMs are college graduates or have attended college. It does not appear that any specific skill tests or certifications are necessary for the RA, ARPM or RPM positions.

Employer has budgeted a three percent increase for the next fiscal year; and the increase will be merit-based, not a cost-of-living adjustment.

The ARPMS, unlike RPMS, are hourly paid and eligible for overtime. ARPMS and RAs work weekends and holidays, while, generally, the RPMS do not. ARPMS and RAs are counted toward the direct care staff-to-resident ratios, while RPMS are not. Unlike the RPMS, ARPMS do not attend management meetings.

As noted above, the Employer provides services continuously each day, 365 days per year. There is an on-duty manager for every 7:00-3:00 and 3:00-11:00 shift.¹⁵ Consequently, there are two on-duty manager shifts per day and 14 shifts per week. Only RPMS and ARPMS¹⁶ serve as on-duty managers. RAs never serve as on-duty managers. Each ARPM serves as the on-duty manager an average of one to two shifts per week.¹⁷ Each of the units is involved in scheduling the on-duty shifts¹⁸ and RPM Burgess coordinates the process by maintaining the overall schedule.¹⁹

The on-duty manager is responsible for all residential matters campus-wide during the shift. In that regard, the on-duty manager's responsibilities include responding to call-offs, arranging for transports, managing crises, coordinating communications and completing various reporting requirements. In addition, the on-duty manager is responsible for the security of the campus. The on-duty managers prepare on-duty reports, which are filed electronically and

¹⁵ The on-call system is in place during the 11:00-7:00 shift.

¹⁶ ARPMS are responsible for acting as a manager on their unit, but when they are on-duty, they are responsible for managing on a campus-wide basis. The duties of an RPM and an ARPM serving as on-duty supervisor appear to be the same.

¹⁷ Tellez, who is new, had not yet assumed on-duty responsibilities as of the hearing.

¹⁸ Sloan does not participate in the on-duty program. Sloan is excluded because the acuity of the clients in that 28-day program requires the staff to remain focused on that unit rather than on campus-wide responsibilities.

¹⁹ Most RPMS and ARPMS have a "normal" schedule with respect to on-duty, but it does vary based on particular circumstances.

generally due by the end of the shift. These reports are distributed to the on-duty report team, which is comprised of Directors, RPMs, ARPMs, therapists and the principal at the school, along with the Chief Executive Officer. The reports discuss call offs, incidents, transports, vehicle use and shift summaries for all of the units, including Sloan. The on-duty managers also communicate other pertinent information by email messages to the on-duty report team. By the on-duty reports and emails, the members of the on-duty report team are constantly updated on the operations of all of the units. On-duty managers also are responsible for their job responsibilities of their units.

The Employer takes the position that ARPM job responsibilities as an on-duty manager must factor into a determination as to whether ARPMs possess supervisory authority. The job responsibilities of the ARPMs when assigned as on-duty managers will be discussed in detail *infra*. in regard to the discussion with respect to their authority to responsibly direct the RAs and to assign work to the RAs.

II. THE SUPERVISORY STATUS OF ARPMs

Supervisors are specifically excluded from the Act's definition of "employee" by Section 2(11) of the Act which 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 in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The supervisory authorities are listed in the disjunctive, meaning that an individual may qualify as a supervisor based on any of the twelve listed types of authority. However, Section 2(11) also contains the conjunctive requirement that the power be exercised with "independent judgment," meaning that the judgment must be free from control of another authority and the exercise of judgment must involve a degree of discretion rising above "routine or clerical."

In Oakwood Healthcare, Inc., 348 NLRB 686 (2006), the Board revisited the issue of supervisory status in light of the Supreme Court's holding in NLRB v. Kentucky River Community Care, 532 U.S. 706 (2001) and set forth therein and in two companion cases, Golden Crest Health Care Center, 348 NLRB 727 (2006) and Croft Metals, Inc., 348 NLRB 717 (2006) a more precise analytical framework pursuant to which supervisory issues, particularly with respect to the Section 2(11) supervisory functions of responsible direction and assignment, are to be decided (herein Oakwood Healthcare, et al). In these decisions, the Board emphasized that "[T]he burden of proving supervisory status rests on the party asserting that such status exists." Oakwood Healthcare, *supra* at 694, quoting Dean & Deluca of New York, Inc., 338 NLRB 1046, 1047 (2003). The party seeking to prove supervisory status must establish it by a preponderance of the evidence. *Id.* Further, with respect to the type of evidence presented, the Board emphasized that purely conclusory evidence is not sufficient to establish either the possession of a Section 2(11) function and/or whether that such function is carried with independent judgment. *Id.* at 693. For example, merely conclusory testimony that staffing needs are based on an assessment of "patient acuity" is insufficient to establish independent judgment. Lynwood Manor, 350 NLRB No. 44, slip op. at 2 (2007). Since Oakwood, the Board has repeatedly found that evidence presented was insufficient to sustain the party seeking to prove supervisory status burden of proof on the supervisory issue litigated where the evidence lacked sufficient specificity and was devoid of any examples or details or circumstances showing that the putative supervisor(s) possessed 2(11) authority and/or that its exercise required independent judgment rising to the requisite level of being more than routine or clerical in nature. E.g., Avante at Wilson, 348 NLRB 1056, 1057 (2007); Lynwood Manor; *supra*; Loyalhanna Health Care Associates, 352 NLRB No. 105, slip op. at 2 (2008); Barstow Community Hospital, 352 NLRB No. 125, slip op. at 2 (2008).

A similar analytical approach to the Oakwood Healthcare, *et al.* framework with respect to the Section 2(11) discipline function indicia has been set forth by the Board in several cases decided subsequent to Oakwood Healthcare, the most recent of which is Oak Park NursingCare Center, 351

NLRB 27 (2007). In that case, the Board articulated the type of evidence and the specificity of evidence required to establish Section 2(11) status in regard to this function. As more fully set forth herein, the term “discipline” can have a number of varied connotations. It is only authority to “discipline” that meets the standards set forth in Oak Park that establish supervisory status.

The facts set forth by the Board with respect to the analytical framework discussed above in Oakwood Healthcare et al. and Oak Park Nursing Center, vests putative supervisors with genuine management prerogatives and distinguishes these individuals from those who have greater job responsibilities than lower paid subordinates, including responsibilities to assign, direct and oversee the work of the subordinate employees, through the use of independent judgment, but yet have not been delegated to them the requisite authority which confers upon them supervisory status; i.e., the authority to responsibly direct, the authority to require when assigning work, and/or the authority to take action which initiates the disciplinary process.

As noted above, the Employer, contrary to the Petitioner, contends that the five ARPMs at issue are statutory supervisors based upon their authority to assign work to and responsibly direct the RAs, to discipline and effectively recommend discipline, suspension and discharge of the RAs, and to effectively recommend the hire of RAs. There is no evidence that the ARPMs at issue have the authority to hire, transfer, discharge, suspend, lay off, recall, promote, reward, adjust grievances or to effectively recommend such action with the exception, in the Employer’s opinion, of hire, suspension and discharge. I will examine whether there is sufficient evidence that the ARPMs’ duties and job responsibilities involve supervisory assignment and/or responsible direction of employees and/or the authority to discipline and effectively recommend the hire, discipline, suspension and discharge of RAs.

A. Authority to Responsibly Direct

1. Preliminary Statement

As noted, the Employer argues that ARPMs have the authority to responsibly direct employees for the purposes of establishing supervisory authority under Section 2(11) of the Act.

For the reasons set forth below, I find that the Employer has not sustained its burden of proof that the ARPMs possess supervisory authority with respect to this Section 2(11) function.

In Oakwood Healthcare, *supra* the Board stated that an individual has authority “responsibly to direct employees” when that individual decides “what job should be undertaken next and who shall do it. . . provided that both the direction is ‘responsible’. . . and carried out with independent judgment,” *Id* at 691. Direction is “responsible” only if the person directing and performing the oversight of the employee is “accountable for the performance of the tasks by the other, such that some adverse consequence may befall the one providing the oversight of the tasks performed by the employee are not performed properly.” *Id* at 691-692. In order to meet the burden of showing that direction by the ARPMs is “responsible,” the party seeking to prove supervisory status must present evidence of “actual accountability.” Golden Crest Healthcare, *supra* at 731; Alstyle Apparel, 351 NLRB 1287 (2008); Barstow Community Hospital, *supra*. Moreover, the level of accountability necessary to show that direction is “responsible” is not established unless it is “shown that the employer delegated to the putative supervisor the authority. . . to take corrective action if necessary.” Oakwood Healthcare, *supra*. The purpose of this “accountability” requisite is to create a clear distinction between those employees who are directing in the interests of management (and therefore acting as supervisors) and those whose interest in directing other employees “is simply the completion of a certain task.” *Id*. The standard is not met unless the putative supervisor “will have, if and to the extent necessary, an adversarial relationship with those he is directing.” *Id*.

As can be seen from the above, the term “responsibly directs” is limited in scope particularly when contrasted with the term “to assign,” which, as set forth *infra*, is construed by the Board as designating an employee to a place and/or time, or giving employees significant overall duties. Directing an employee to perform discrete tasks within such overall assignments,

as in giving *ad hoc* instructions, is encompassed by the term responsibly to direct. Oakwood Healthcare, *supra* at 689-690.²⁰

2. The Section 2(11) Function

In the instant case, I note the young adults that come to the Employer arrive with a variety of behavioral issues, including tendencies to be aggressive, to use illegal substances, and to do harm to themselves. Accordingly, it is clear that there are potentially severe consequences if the residents are not properly supervised and all staff—RAs, ARPMs and RPMs alike are responsible for ensuring that residents do not hurt themselves, one another, the staff, or damage property during their shifts.

A review of the record indicates that ARPMs direct the RA staff to perform discrete tasks in two broad areas: tasks which are regularly performed on a daily basis and direction given by ARPMs to the RAs in a crisis situation.²¹

²⁰ For example, a charge nurse's redirecting an LPN to immediately give a sedative to a particular patient, or a person on a shift/floor who has employees under him and instructing those employees as to the job which should be undertaken next and who should do it. Oakwood Healthcare, *supra* at 689-693.

²¹ As noted previously, ARPMs act as the on-duty manager on a regular basis. The Employer avers that during these times, ARPMs responsibly direct employees. The evidence in this record does not support this contention for there is insufficient evidence that ARPMs give *ad hoc* instructions to RAs to perform discrete tasks when acting as the on-duty manager. The record does reflect that one job responsibility of the on-duty manager is to receive reports of crisis situations and to follow up with the staff to make sure that a situation is resolved and that all appropriate paperwork, including serious incident reports (SIRs) are completed. A SIR is completed whenever there is physical escort or restraint, hospitalization, intimate sexual contact between the residents, runaways or serious property damage. The on-duty manager is responsible for a debriefing following the incident wherein either orally or in comments included in the SIR, the on-duty manager advises the staff if they have done something incorrectly. ARPM Kihn provided an example of this type of counseling wherein she advised the staff that if any future incidents arose with respect to the resident in question "escalating (becoming aggressive in behavior)," the resident responded well to humor, and that such an approach should be used to attempt to "de-escalate" the resident. But this type of direction set forth in the SIRs is after-the-fact counseling and mentoring, an action I find is not encompassed within the Section 2(11) function at issue.

Contrary to the contention of the Employer, the Board holds that an employee's service as the highest-ranking employee on duty is a secondary indicia of supervisory status that, by itself, is insufficient to demonstrate supervisory status. E.g., Loyalhanna Care Center, *supra* at slip op at 3 and cases cited therein. So, too, job descriptions alone do not show supervisory status. *Id* at 2. Rather, it is the putative supervisor's actual duties and authorities that are controlling. *Id*.

RAs daily tasks are largely dictated by treatment plans or routines which include school time, study time, therapy groups, recreation times, and meal times. Each residence basically has the same type or similar routine. ARPMs have input and have made adjustments to these routines.²² The purpose of these routines is to provide a very structured program for the residents so that, in the words of ARPM Kihn, “there is something scheduled pretty much each hour of the day” for the residents. In addition to the treatment plans or routines for the residents, the Employer also utilizes a procedure described as shift plans for the staff which encompasses the tasks the staff needs to perform during that shift; e.g., completion of reports, administering medication, cleaning rooms, laundry and so on. Each shift has a shift leader who is the first person to arrive for work. In the event the ARPM and shift leader are not the same person, the ARPM outranks the RA. The shift leader, in conjunction with other staff on that shift, prepares the shift plan, which, *inter alia*, assigns each staff member to particular tasks.

The record contains very few examples of the ARPMs giving *ad hoc* instructions to RAs to perform discrete tasks with respect to those tasks encompassed by either resident routines or treatment plans or shift plans. One example, however, was given by ARPM Householder, who testified that he provided instructions to the RAs to make sure a certain resident changed his clothes because of a hygiene problem. Another example involved ARPM Weber. Weber wrote a note in the unit’s communication log instructing the night shift “to organize and combine the old and new controlled meds.” When this was not done, Weber sent an e-mail to RPM Burgess

²² For example, ARPM Telez implemented a new routine that eliminated morning chores to give residents more time to get ready for school. Consequently, residents now eat as a group in the morning. Telez also, *inter alia*, implemented a system for shutdowns for poor school behavior which previously did not exist at her residence subsequent to her discussions with the staff about the matter and her contacting other units to see what procedures, if any, they had in place. ARPM Minto suggested that educational groups be added to her residence—a female residence—similar to those held at the male units.

However, ARPMs’ job responsibilities involving adjustments to a unit’s daily routine is not evidence of responsible direction because such adjustments are not *ad hoc* instructions to employees to perform discrete tasks. Similarly, the record contains extensive evidence demonstrating that the ARPMs are responsible, in conjunction with RPMs, to train new RAs on how to conduct their daily routines, including such practices as medication administration. Again, though, training new employees is not giving employees *ad hoc* instructions to perform discrete tasks.

recommending that the RAs needed to be written up for failing to follow his instructions. There is no evidence that any “discipline” or corrective action was imposed.²³

With respect to crisis situations, there is both testimonial and documentary evidence (SIRs) that crisis incidents involving residents occur on a regular basis. One would assume that at these times, the ARPMs give *ad hoc* instructions to RAs on a regular basis. But again, the record is deficient in that it does not contain very many specific examples of the type of *ad hoc* instructions given. What the record does contain is general testimony that during these times, ARPMs pull RAs off their assigned daily tasks to respond to the crisis situation. Thus, there is general testimony that if a particular resident is becoming physically or sexually aggressive or if a resident is exhibiting suicidal tendencies, an ARPM may direct a particular RA to act “one on one” with the resident if, in the ARPM’s opinion, the RA has previously demonstrated that he or she has rapport with the resident or has a particular skill in dealing with the type of crisis behavior exhibited in order to attempt to “de-escalate” the resident as expeditiously as possible. When this is done, the remaining available staff are instructed to assume the completion of those daily work tasks engaged in or scheduled to be engaged in by the RA who is attempting to “de-escalate” the resident. A specific example contained in the record involved ARMP Minto who, when a resident was “escalating,” instructed two fairly new RAs to physically escort the resident from a common area to an area in the unit where the resident would be better able to calm down. When the RAs failed to follow Minto’s instructions, Minto requested assistance from other units.²⁴ A further example of *ad hoc* instruction given in a crisis situation is that if a resident is having a behavioral problem, the ARPM, like the RPMs, may implement a shutdown of the residence and then direct other staff to take the remaining

²³ Contrary to the contention of the Employer, I find that instructions to RAs set forth in a unit’s communication logs by ARPM Minto advising employees to complete required paperwork not be *ad hoc* instruction since preparing paperwork is an overall task assigned to the RAs to perform. One report required to be completed, at least in part, by the RAs is a monthly report which documents all aspects of a resident’s progress, including school performance and behavior in the unit. These reports go to case workers, probation officers and parents.

²⁴ As set forth in more detail *infra*, on the section discussing the ARPMs’ authority to discipline, the two RAs at issue were subsequently issued written warnings. The decision to issue these warnings was made by RPM Hepp after Minto advised him of the incident.

residents outside to diffuse the situation. Finally, ARPM Kihn testified, without much elaboration, that she has “removed” staff members who were causing a resident to “escalate.” Kihn also provided a further example wherein she directed a male employee who was working in her unit to sit outside the room of a large female resident because that resident was becoming physically aggressive. In this regard, Kihn testified that she did not believe that female staff RAs on duty would have been physically able to restrain the resident if the need arose.

In summary, based upon the above and the record as a whole, I find that the Employer has presented sufficient evidence to establish that ARPMs have the authority to give *ad hoc* instructions to employees to perform discrete tasks.

As set forth previously, an integral component of the Board’s “responsibly to direct” analytical framework is that the party seeking to establish supervisory status must present a preponderance of evidence demonstrating that the putative supervisors have the authority to oversee and take corrective action with respect to the discrete tasks given to the subordinate employees by them. In this regard, although I have found no case wherein the Board has per se distinguished “corrective action” from Section 2(11) authority to discipline or effectively recommend discipline, the authority to take corrective action in conjunction with directing work presumably means something less than Section 2(11) disciplinary function, because such authority would be enough, in itself, to establish supervisory status under Section 2(11).²⁵

Corrective action, in my opinion, is a quality assurance activity whose goal is to help the subordinate employees improve their performance. Thus, corrective action, in my opinion, encompasses such actions as informal or formal counseling,²⁶ verbal warnings, written

²⁵ See Croft Metals, *supra* at 722, fn. 13, wherein the Board implies that corrective action could encompass verbal warnings or taking non-compliant employees to higher management.

²⁶ The Employer has in place a procedure known as a “Record of Supervision,” a teaching tool which is a documented counseling session conducted by an RPM with an ARPM or RA, or by a ARPM with an RA, wherein subordinate staff are debriefed following an incident and advised how areas of identified job performance could be, should be, or must be improved. Some Records of Supervision are prepared on a periodic basis. A Record of Supervision is not discipline under the Employer’s policies.

warnings, the imposition of more severe disciplinary actions, or merely reporting an incident to one's superior for action, if deemed necessary.

The record is replete with evidence of ARPMs taking corrective action. Much of this evidence is detailed *infra*, in the discussion on the authority of ARPMs to discipline or recommend discipline within the meaning of Section 2(11). All ARPMs in their testimony²⁷ acknowledged that part of their job responsibilities requires them to make sure the RAs in their units are following proper routine and adhering to the Employer's rules, procedures and policies with respect to such matters, and to talk with RAs to make necessary corrections. Notwithstanding the above, the difficult issue now presented is whether there is sufficient evidence in this record demonstrating that ARPMs take corrective action with respect to their *ad hoc* instructions to perform discrete tasks, as opposed to evidence demonstrating that ARPMs take corrective action necessary to enforce the Employer's rules and procedures.²⁸ On balance, although the question is a difficult one, I find that the Employer has met its burden on this issue. Specifically, I find that the incident involving ARPM Minto discussed above, as well as an incident wherein ARPM Minto learned that an RA, Kara McLaughlin, had taken a resident to a hospital contrary to her instructions and advised her superiors of the matter²⁹ demonstrate that ARPMs possess the authority to take corrective action within the meaning of the Section 2(11) function "responsibly to direct."³⁰

²⁷ All five ARPMs at issue testified at the hearing.

²⁸ In my judgment, evidence of corrective action of this latter type does not evidence Section 2(11) authority to responsibly direct employees.

²⁹ This incident is described in more detail *infra* with respect to ARPMs' authority to discipline RAs. Ultimately, with respect to this incident, RPM Sue Flanigan, issued a Record of Supervision to McLaughlin.

³⁰ There is also fairly extensive evidence in the record of the ARPMs exhorting RAs to complete their tasks, including completion of required paperwork, or else face the prospect of being "disciplined." It appears that ARPMs' responsibilities to insure that RAs carry out their overall work tasks is considered by the Board to be direction of employees. See Croft Metals, Inc., *supra* at 719. Accordingly, this is admittedly evidence of the ARPMs' authority to take "corrective action."

Having demonstrated that ARPMs have the authority to direct, oversee and correct the work of ARPMs within the meaning of the Board's analytical framework set forth in Oakmont Healthcare, et al., the issue now presented for determination is whether the Employer has met its burden of proof in demonstrating the ARPMs' actual accountability; i.e., it must be shown that the ARPMs face a prospect of material adverse consequences if RAs fail to perform specific tasks as instructed to do so by them. E.g., Bartstow Community Hospital, supra at slip op. 2, citing Golden Crest Healthcare, supra at 731. The Employer has failed in its burden of proof in this regard.³¹

The concept of actual accountability within the principles set forth in Oakwood Healthcare, et al. is factually precise and specific in nature. Evidence of material adverse consequences for failure of subordinate employees to perform specified tests as instructed is not demonstrated by, for example, warnings issued to putative supervisors because of deficiencies in the manner they themselves perform discrete tasks and/or because their failure to discipline or take corrective action against subordinate employees because of the latter's violations of an employer's policies or rules.³²

³¹ Because the Employer did not demonstrate that the ARPMs responsibly direct employees, I need not determine whether they exercise "independent judgment" in this regard. See Golden Crest Healthcare, supra at 732, fn 14. Moreover, to prove "independent judgment" the evidence on this issue must be of sufficient specificity to establish the requisite degree of discretion exercised with respect to both the concept of "independent" (not subject to the control of others) and the concept of "judgment" (the mental or intellectual process of forming an opinion or evaluation by discerning and comparing." Oakwood Healthcare, supra at 693. However, even if the action of the putative supervisor is not controlled by detailed instructions, the judgment is not independent if it is made in a routine, clerical or perfunctory manner. For example, if there is only one obvious and self-evident choice, then the judgment is routine in nature.

³² Thus, I conclude, contrary to the contention of the Employer, that the fact that ARPM Householder was counseled about his judgment in directing an inexperienced RA to take a resident to an emergency room who, while at the hospital, allegedly made "rude" remarks to the hospital staff, not to be evidence of "actual accountability." In this regard, the Employer failed to adduce that Householder suffered any material adverse consequences from this "counseling," or that such "counseling" will be referenced in future disciplinary action. Similarly, although Householder received a record of supervision which criticized his failure to adjust staff to allow him to be present in a crisis situation, there is no evidence that this record of supervision will have an effect on Householder's terms and conditions of employment. Finally, the fact that Householder received a written warning for displaying inappropriate conduct toward residents, this warning criticized his (Householder's) actions and not the failure of subordinate staff to perform specific unit tasks as directed. ARPM Weber was also "counseled" for allowing a staff member "to wander." Again, this counseling did not involve the failure of subordinate employees to perform specific unit tasks as instructed.

In support of its contention that ARPMS are held accountable for their direction of others, the Employer relies heavily on their performance evaluations and the fact that these performance evaluations will be used as a basis for future pay increases. To date, performance evaluations have not impacted an ARPMS' terms and conditions of employment. More importantly, the Employer's contention in this regard is without merit for the following reasons.

The performance evaluation form at issue consists of a four-page document setting forth 17 performance factors with the ARPM rated on a scale of 1 – 4, with four being the highest rating with respect to each factor. None of the performance factors specifically encompass the concept of the manner in which the ARPMS "direct" employees.³³ The ARPM is then given an overall evaluation average. At the bottom of the last page is a section entitled "Opportunities for Improvement." On one of the evaluations in evidence, the rater (RPM) commented that the ARPM needs to "improve in confrontation and that the ARPM needs to improve on following up with staff that are not performing duties assigned to them, including disciplinary action discussed with the program manager."³⁴ No management representative who testified clarified whether, in fact, RPMs are expected to evaluate ARPMS on their performance in directing the work of others. No management representative who testified offered any explanation of the factors to be considered by RPMs if in fact the ARPMS are evaluated on their performance in directing the work of others with respect to the "interpersonal relationships" or any other performance factor. No management representative who testified

³³ The performance factors include productivity, job knowledge, reliability, attendance, independence, creativity, initiative, adherence to policy, interpersonal relationships, judgment, commitment to non-violence, commitment to emotional intelligence, social learning, democracy, open communication, social responsibility and commitment to growth and change. A rating of "2" is a satisfactory rating.

³⁴ On another evaluation, unlike other evaluations of other ARPMS, there is a comment in the performance factor "interpersonal relationships" that the ARPM "needs to work on following through with disciplinary actions when the tasks she assigns are not completed." The ARPM received a rating of "2" for this performance factor. The overall rating was 3.18. On another evaluation, with respect to the same performance factor, the rater commented that the ARPM "struggles with the fact that he is above residential staff." The ARPM received a "2" for this performance factor and an overall rating of 2.82.

offered an explanation of what overall rating would result in a denial or reduction of future wage increases or whether a negative rating with regard to the “interpersonal relationships” or any other performance factor alone would result in a denial or reduction of a wage increase. In these circumstances, I find that the Employer has not established that performance evaluations might have an adverse impact on the ARPMs’ terms and conditions of employment and thus are insufficient to establish accountability. Golden Crest Healthcare, *supra* at 731; Barstow Community Hospital, *supra* at slip op. 2. Accordingly, the Employer has not shown that ARPMs possess the authority to responsibly direct employees.

B. Authority to Assign

1. Preliminary Statement

As previously indicated, the Employer asserts that ARPMs possess the Section 2(11) authority to assign. For the reasons set forth herein, I find that the Employer has not met its burden in establishing that ARPMs possess this authority.

In Oakwood Healthcare, Inc., *supra*, the Board, as noted, construed the term “assign” as designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or an overtime period) or giving an employee significant overall duties (such as an RN charge nurse designating an LPN to regularly administer medications to a patient or a group of patients). In the health care industry, for example, the term “assign,” according to the Board, encompasses the putative supervisor’s responsibility to assign nurses and aides to particular patients. In a hospital setting, for example, “assign” would encompass the action of a charge nurse in instructing a nurse to monitor those patients with orthopedic concerns. Oakwood Healthcare, at 689. In Golden Crest, *supra*, the Board emphatically reaffirmed the principle that a party seeking to establish supervisory authority, at least with respect to the authority to assign work, “must show through the interdiction of specific rather than pure conclusionary evidence that the putative supervisor possesses the authority to require a certain action be taken. In this regard, the Board made it clear that a

putative supervisor's action in requesting (rather than ordering) an employee to work overtime or seeking an employee to voluntarily come to work early to fill an open position is not a mandate (e.g., nurse utilizing a list of on-call employees that are contacted in reverse order of seniority when a volunteer is needed to come to work). The element of possessing the authority to "require" encompasses the principle that there must be affirmative evidence that adverse consequences would befall an employee who chose not to follow a putative supervisor's assignment. Absent such evidence, the Board will not find that a putative supervisor exercises authority to assign. Golden Crest Healthcare, *supra* at 729-730.³⁵

In addition to the above, the party seeking to establish supervisory status must affirmatively demonstrate that in assigning employees, the putative supervisors exercise independent judgment. Specifically, the party seeking to establish supervisory status must present evidence of sufficient specificity on this issue. For example, in the health care setting, which is similar to the setting involved herein, if an individual weighs the individualized conditions and needs of a patient against the skills or special training of the available nursing staff, the resulting assignment involves the exercise of independent judgment. Oakwood Healthcare, *supra* at 693.³⁶ However, evidence on this issue must be sufficiently specific with examples or details of circumstances showing that the putative supervisors weighed and/or balanced the aforementioned factors in making decisions.

³⁵ This element of "require" is probably what vests the putative supervisor with genuine management prerogative with respect to the authority to assign. In my opinion the authority to require is more limited in scope than authority to take corrective action with respect to the Section 2(11) function to responsibly direct because the term "require" encompasses the principle that adverse consequences will befall an employee who chooses not to follow a putative supervisor's "assignment." So, too, the term "require" is not, as it is used in connection with the Section 2(11) authority to assign, in my opinion, synonymous with the Section 2(11) term, "discipline."

³⁶ The Board in Oakwood Healthcare, also held that the mere existence of guidelines and policies is not necessarily incompatible with the exercise of independent judgment if there is room for discretionary choices and if the degree of discretion exercised rises to the requisite level. *Id.*

An excellent illustration of the application of the foregoing principles is the Board's decision in Barstow Community Hospital, *supra*. In that case, the issue presented was whether relief clinical coordinators possessed the Section 2(11) authority to assign, specifically with respect to scheduling staff by determining the number of nurses needed and where they should be assigned. With respect to the independent judgment factor, there was testimony from a registered nurse who filled in as a relief clinical coordinator that, in deciding whether to "float" (temporarily transfer) or call someone in, she would take into account the patients' acuity and the level of experience of the available nurses. In addition, the employer's medical/surgical manager testified that in deciding whom to call in or float, the relief clinical coordinator had to consider the patients' needs and experience level of staff members who could be reassigned from one area to another or called in to work to meet those needs. The Board found such evidence to be insufficient to sustain the employer's burden of proof that the relief clinical coordinators exercised independent judgment in assigning nursing staff since it was devoid of examples or details showing that a relief clinical coordinator, in assigning nursing staff, actually "weigh[ed] the individualized condition and needs of the patient against the skills or special training of available nursing personnel." *Id* at slip op. 2.³⁷

With the aforementioned principles in mind, I shall now examine the various job tasks undertaken by the ARPMs upon which the Employer relies for its assertion that ARPMs possess Section 2(11) authority to assign.

2. Scheduling

The record reveals that RPMs have been delegated the authority by the Employer to prepare work schedules for their respective units to ensure appropriate staffing ratios in

³⁷ In determining whether ARPMs exercise the requisite degree of independent judgment in assigning RAs, it must be kept in mind that an ARPM's discretion in this area may be restricted or limited by the low number of RAs on duty per shift in each unit—only one to three RAs. Accordingly, this consideration buttresses the conclusion that it was incumbent upon the Employer to have provided specific evidence replete with examples, details and circumstances to demonstrate that the ARPMs have the actual authority to assign within the meaning of Section 2(11).

accordance with the DPW guidelines and the Employer's policies. In four of the five units, the RPM has delegated this task to the unit ARPM.³⁸

No RA staff are promised or guaranteed a regular shift. Rather, all staff are expected to work whatever shift may be required and, therefore, RAs submit shift requests for each schedule. RAs also direct requests for days off, vacation days and holidays to the ARPMS or RPM who draft the schedules. The extent to which these requests are accommodated vary depending on the staffing needs of each particular unit. It is also clear from the testimony of management representatives, RPMs and ARPMS that when drafting schedules, the ARPMS consider factors such as the experience and abilities of the staff, seniority and, in the case of one ARPM, employee performance, when conflicts in requests arise and cannot be resolved informally.³⁹ However, the record also shows that consideration of those factors may vary from unit to unit at any particular time due to the composition of the staff.⁴⁰ For example, some ARPMS may decide to run "short" to accommodate requests if the unit can withstand the scheduled time off. Some ARPMS also have a practice of contacting other units in order to ascertain whether those units have extra staff to fill "holes" on the schedule.⁴¹

³⁸ Weber does not prepare work schedules. Unit schedules are prepared on a weekly basis.

³⁹ Certain staff members have a "preferred" schedule, which means a fixed schedule; i.e., they have the same days off or they work certain shifts. Although the record indicates that an RA must approach the ARPM or RPM to obtain a fixed schedule, the record is unclear as to the exact authority the ARPM possesses in making a decision on this matter. In addition, there is some evidence in the record that ARPMS approve employee shift changes and change the work schedule accordingly. This is done, for example, when the RA is experiencing a family emergency. One option utilized by the ARPMS in seeking volunteers to fill an open slot because of a shift change is to accommodate the volunteer's request to trade one of their shifts in exchange for picking up the shift the ARPM needs to fill. I find that the ARPM's actions in this regard in approving shift changes is nothing more than ministerial in nature.

⁴⁰ For example, when ARPM Tellez began making the schedule, she implemented a "4/3" system in which employees work four days and have three days off and that each RA has at least one weekend off per month.

⁴¹ A similar process is undertaken when a vacation request is made. Vacation requests of three or more days are documented on a form and can be "approved" by either the ARPM or RPM. One-day vacation requests go directly to the ARPM (excluding Weber's unit). There is no evidence that vacation request approval is anything more than routine or clerical in nature.

Although the record establishes that with respect to the four units where ARPMS schedule, that ARPMS fairly regularly deny RA schedule preference requests when there is a conflict which cannot be otherwise resolved. However, there was no testimony presented providing examples and/or details of the circumstances.⁴²

Based upon the above and the record as a whole, I find, for the reasons set forth below, that the Employer has not shown that the ARPMS' job responsibilities with respect to preparing RA work schedules establishes that the ARPMS possess Section 2(11) authority to assign. First, it is unclear whether the Employer delegated to the ARPMS the authority to assign within the meaning of Section 2(11) of the Act with respect to their job responsibilities in preparing work schedules. In this regard, all ARPMS do not have this job responsibility and those who do were given this task not by the Employer but by the RPM for the unit to which the ARPM is assigned. Second, clear and precise testimony and evidence was not provided by the Employer showing that ARPMS have the authority to require RAs to adhere to their scheduling decisions or else risk the possibility that adverse consequences will befall an RA who chooses not to follow the ARPM's "assignment." Golden Crest Healthcare, supra at 729-730.⁴³ Clarification of

⁴² ARPM Minto identified three instances wherein she denied requests that she was not able to accommodate. She provided no details about her decision making process at those times. Similarly, ARPM Kihn testified that she was unable to fill the schedule based on volunteers approximately five times. Like Minto, Kihn provided no details concerning those instances.

⁴³ There is testimony demonstrating the ARPMS expect RAs to follow their decisions in this matter, and that, as one RA testified, ARPMS' decisions are followed because it would be insubordination if they refuse. I find this speculative testimony to be inconclusive on the issue of whether the ARPMS can require RAs to accede to their work schedule decisions. I am not unmindful of the fact that it could be argued that it should be inferred that ARPMS have the authority to require, as evidenced by incidents contained in the record that the ARPMS have alerted their superiors with respect to other matters which in the ARPMS' opinion constituted "insubordination" for refusal to follow instructions, and that, in some of these instances, discipline was imposed. Specifically, these incidents are discussed *infra* with respect to the discussion on authority to discipline (e.g., the Kara McLaughlin incident, the Lopricola incident, and the incident discipline involving ARPM Minto directing two new RAs and the refusal "to physically restrain an escalating" resident). However, as set forth herein, I have found that ARPMS do not have the authority to discipline or effectively recommend discipline. In addition, I am not of the opinion that these incidents are affirmative evidence of the authority to require as encompassed by the term "to assign." In this regard, I note, as set forth *infra*, ARPM Weber "recommended," for instance, that two employees be discipline for failing to follow his instructions regarding medication. His recommendation was not adopted by his superiors. Thus, without specific evidence to the contrary, I cannot conclude that an employee will

the ARPMS' authority to require was needed to be presented particularly in light of the record evidence which suggests that work schedules have at least some oversight by the unit RPM and by RPM Burgess before implementation.⁴⁴ Third, and most importantly, the evidence presented is insufficient in establishing that ARPMS exercise independent judgment in preparing the work schedules and denying, when the occasion arises, an RA request for a particular schedule because of conflicts. As set forth above, no examples giving details and circumstances concerning the ARPMS' decision making in this area was presented, contrary to the teaching of the Board in Oakwood Healthcare and its progeny.⁴⁵

3. Filling Vacancies Due to Call Offs

One of the functions of the "on-duty" manager for which the RPMs and ARPMS function on a rotating basis is to ensure that all units are adequately staffed, particularly when there are vacancies due to call offs.

The on-duty manager is notified when an employee calls off and arranges coverage for that person's shift if necessary. All the ARPMS gave substantially the same testimony in describing the procedure they follow under these circumstances: First, if the call off leaves the unit with fewer staff than the Employer's desired ratio but more than the state-required ratio, the on-duty manager asks the remaining staff (RAs) whether they need assistance. If so, the on-duty manager checks the direct care schedule to see whether any unit has staff in excess of the Employer's ratios. If so, the on-duty manager requests that that unit send one of its staff members to the unit where staff is needed. This practice is called "pulling." Generally,

necessarily suffer adverse consequences if that employee refuses to accept an assignment made by an ARPM.

⁴⁴ In this regard, there is evidence demonstrating that at least one RPM, Steals, occasionally makes suggestions to ARPM Householder about staffing when he, Steals, reviews the work schedule. Householder may, or may not, follow Steal's suggestions.

⁴⁵ Extensive and somewhat unnecessary evidence was presented at the hearing concerning the ARPMS' authority to "approve" or verify the accuracy of RA timecards, which evidence, according to the Employer, the ARPMS' authority to "assign." The Board has consistently held, however, that authority to verify employees' timecards is routine and clerical and does not indicate supervisory authority. Golden Crest Health Care Center, *supra* at 730, footnote 10.

according to the testimony of the ARPMs, the on-duty manager allows the unit staff to make a decision on their own as to which staff member to send. Sometimes, the on-duty manager specifically asks for a male or female staff member; for example, because Eichenauer is a girls' unit, a female staff member must always be present at night. If no staff members are available on campus to cover a shift, the on-duty manager calls employees who aren't working that day seeking a volunteer to cover the shift. At this point, whether he has found a volunteer or not, the ARPM must obtain management approval for any overtime that might be entailed.⁴⁶ If there is no volunteer to fill the vacant position, the on-duty manager instructs a staff member to stay after his or her regularly scheduled shift. This process is referred to in the record as "sticking."⁴⁷ A particular staff member often gets stuck by process of elimination. It appears to be a practice that a staff member who has already worked a double shift cannot be "stuck." If more than one staff member is eligible to be stuck, it is "common practice" to stick the less senior person. Sometimes a staff member that has been "stuck" becomes "unstuck" if another staff member volunteers to cover the shift.

Despite extensive evidence in the record concerning the above-described procedure utilized in filling vacancies when there is a call off, the record does not contain specific examples of situations where an ARPM has instructed an RA to report to work or instructed an RA to "stay over." In addition, no management representative who testified was examined as to whether ARPMs affirmatively have the authority to require, without approval from their superiors, RAs to

⁴⁶ Some requests for overtime authorization by ARPMs are denied. Kihn recalled a situation within the prior two months when she had arranged for someone to fill a call off shift on overtime, but Lehocky denied the overtime because an RPM was on campus and available to assist in direct care if needed. In certain situations, overtime is not pre-approved if, according to Lehocky, it is not possible to submit it in advance. This generally occurs on the night shift because a late call off, according to Lehocky, would cause a unit to fall below ratio. Accordingly, the RPM or ARPM on duty has the authority to authorize overtime. However, such authorization is not evidence of supervisory status since the exercise of the requisite degree of independent decision making does not exist.

⁴⁷ Householder calls the unit where the call off occurred and tells the staff that someone needs to stay to cover the shift. According to Householder, "It's like common practice that the RAs already know." In Weber's words, "[t]hat's just an accepted part of everybody's job essentially that on occasion that will happen."

stay past the end of their shift or come into work from home to fill vacancies caused by call offs. Likewise, these witnesses were not examined on whether adverse consequences would befall an RA who chose not to follow an ARPMS' instructions in this regard.

Based upon the above and the record as a whole, I find that the Employer has not established that ARPMS exercise supervisory authority filling vacancies caused by call offs because the Employer has not affirmatively established that ARPMS possess the authority to require RAs to accede to the ARPMS' instructions within the meaning of Section 2(11). Golden Crest Healthcare Center, *supra* at 729-730. Moreover, the Employer has not demonstrated that ARPMS exercise the requisite degree of discretion in filling vacant positions with non-volunteer RAs. Apart from the fact that this record lacks the specificity of evidence required by the Board to show that ARPMS exercise independent judgment in this area, the record reflects that decisions made are often, if not always, dictated by pre-established practice (the least senior RA is the individual selected in the context of gender requirements) or the Employer's policy (a staff member is not permitted to work more than 16 consecutive hours).⁴⁸

4. Transports

The record reveals that on-duty managers arrange some transports for residents to medical and other appointments and have the responsibility to determine how to manage the resulting vacancy. It appears that the first priority of the ARPMS, as well as RPMs, in assigning RAs to transports is to pair residents with staff members from their units whom they are familiar, taking into account an RAs gender,⁴⁹ experience in doing transports, and, at times, the

⁴⁸ It is clear that when an on-duty manager instructs an RA from another unit to fill a vacancy, he/she may be doing so without taking into consideration the skill level of the RA directed to cover an opening since the on-duty RPM may not have extensive knowledge of the staff on units to which they are not regularly assigned. It is also noted that the Employer argues that ARPMS sometimes make decisions to "run a unit short" (less than a full complement of staff) as evidencing ARPMS' possession of Section 2(11) authority. In my judgment, however, decisions to "run a unit short" is not encompassed by the term "to assign" and therefore not applicable in considering whether ARPMS possess this Section 2(11) function.

⁴⁹ It appears that on-duty managers, at times, deviate from the same gender preference when assigning transports.

relationship between residents and staff, if known. Volunteers are normally requested to conduct transports, and it is the practice of at least several ARPMs to leave it with RAs to figure out who among them will actually conduct the transport if there are no special circumstances such as gender restriction or questions about an RA's experience level. On-duty managers also take into account reasons given by an RA for not conducting a transport. Although there is testimony that ARPMs have, on occasion, "directed" an RA to transport residents, there is very little evidence that ARPMs have the authority to require RAs to perform this job task. In this regard, there is no evidence that an RA ever refused to conduct a transport when instructed to do so. ARPM Householder testified that it has "been rumored" that an RA could be "written up" for insubordination for refusing a directive to transport. No management representative, however, who testified confirmed that a "writeup" could occur and there is no other evidence that adverse consequences would befall an RA who so refused. Thus, the Employer has not established that the ARPMs possess the authority to require RAs to conduct transports.

5. Assignments Within The Residence

There is no contention by the Employer that ARPMs exercise Section 2(11) authority to assign with respect to the daily work tasks undertaken by the RAs. As set forth previously, RAs' daily tasks are largely dictated by the resident treatment routine for the unit as implemented each day by the unit shift plan, which often is prepared by an RA in conjunction with discussions with the remaining staff working on a particular shift.

Due to resident crisis situations which arise during the course of a shift, the RPM or ARPM on duty at the unit may have to adjust the shift plan to equalize the workload whenever an RPM, ARPM or RA is assigned to act "one on one" with a resident to "de-escalate" the resident.⁵⁰ As set forth previously, in my judgment, directing an RA to act "one on one" with a resident is encompassed within the Section 2(11) function to responsibly direct, rather than the Section 2(11) function to assign. In any event, the record contains no examples of an RA

⁵⁰ RPMs and ARPMs assign this task to themselves.

refusing to act “one on one,” and the Employer has not provided sufficient evidence establishing that adverse consequences would befall an RA who refused to either accept a shift on his/her daily work tasks⁵¹ or to act as a one on one. Accordingly, the Employer has not met its burden in this regard. Golden Crest Health Care Center, *supra* at 729-730.

C. Discipline, Effective Recommendation of Discipline Suspension and Discharge

1. Preliminary Statement

As noted, the Employer argues that ARPMs have the authority to discipline and/or effectively recommend discipline, suspension and discharge for purposes of establishing supervisory authority under Section 2(11). For the reasons set forth below, I find that the Employer has not sustained its burden of proof that the ARPMs possess supervisory authority with respect to these Section 2(11) functions.

It is well established that under Section 2(11) of the Act, individuals are supervisors if they have the authority, in the interest of the employer, to discipline other employees or to effectively recommend such action, including suspension and/or discharge, if, in connection with the foregoing, the exercise of such authority is not a merely routine or clerical nature but requires the use of independent judgment. E.g., Oak Park Nursing Care Center, *supra* at 28, citing Oakwood Healthcare, *supra*, and Arlington Masonary Supply, 339 NLRB 817, 818 (2003).

A key component of whether authority to discipline or effectively recommend discipline confers Section 2(11) status is whether the discipline impacts job status or job tenure. *Id.* Certainly, the mere issuance of verbal or written warnings does not, standing alone, have the requisite job impact even if the discipline was imposed with the exercise of independent judgment. Accordingly, Oak Park sets the evidentiary standards which must be met if a putative supervisor is to be found to possess Section 2(11) authority to discipline by the issuance, or effectively recommending the issuance, of verbal and/or written warnings. The burden of

⁵¹ Clearly, a shift of assignment of a RA’s daily work tasks because a staff is directed to act “one on one” with an “escalating” resident does not involve the exercise of independent judgment since work is adjusted to equalize the workload.

proving that such an individual is a supervisor rests on the party asserting such status. *Id.* Further, an individual possesses Section 2(11) authority to discipline where the ability to issue warnings or counseling forms lay a foundation, under an employer's progressive discipline system, for future discipline against an employee. *Id.* citing Promedica Health Systems, 343 NLRB 1351 (2004).

Specifically, in Oak Park, there was affirmative evidence that the employer's progressive disciplinary policy, which was initiated by LPNs filling out employee counseling forms, laid the foundation for more severe discipline, either the termination or suspension of employees, since those counseling forms were referenced in subsequent discipline. Further, the Board noted in Oak Park that the putative supervisors had the discretion whether to document employee infractions on the counseling forms because the putative supervisors alone, without independent investigation, determined whether the conduct at issue warranted a verbal warning or written documentation. Thus, the Board concluded that the putative supervisors were vested with the authority to exercise independent judgment in deciding to initiate the progressive disciplinary process against an employee.

It is important to note that in Oak Park the Board distinguished the factual situation presented therein from a scenario where there was no evidence to establish that written disciplinary write-ups, even if retained in the employee's personnel file, constituted a prerequisite to discipline or routinely resulted in discipline. See, e.g., Children's Farm Home, 324 NLRB 61 (1997); Vencor Hospital – Los Angeles, 328 NLRB 1136 (1999).

In summary, a putative supervisor's preparation of written counseling forms, write-ups or reports does not establish Section 2(11) authority, even if such documentation is part of a progressive disciplinary process, in the absence of evidence that 1) the putative supervisor has the discretion to decide whether to document the infractions (independent judgement); 2) the document is an "integral part of the [e]mployer's progressive disciplinary system in that they are used to document each phase of the disciplinary process and routinely result in actual

discipline” (imposition of discipline); and 3) the documentation is accepted by higher management without independent investigation. Oak Park Nursing Care Center, *supra* at 30.

With respect to the instant case, it is first important to note that the ARPMs’ job description does not set forth that the ARPMs have the authority to discipline or effectively recommend the discipline, suspension or discharge of subordinate employees. Second, it is important to note that the Employer’s policy manual includes work rules and a progressive disciplinary system. In relevant part, the policy manual provides: “Apart from serious offenses that warrant separate consideration,⁵² disciplinary warnings are administered on a progressive basis and may include verbal warnings, written warnings, suspension and/or termination of employment. . .proposed disciplinary warnings are cumulative, but the nature of the warning and related disciplinary measure largely depend on the nature of the offense and the number of times an offense or varied offenses occur. . .[b]oth parties must sign and date the written documentation of the warning (whether verbal or written warning is being presented) and the original documentation must be submitted to the Director of Human Resources for inclusion in the employee’s file (emphasis added). Finally, as noted, the record clearly establishes that the Employer has a procedure in place described as “Record of Supervision” which are written documents not considered by the Employer to be disciplinary actions, but which constitute “counselings” undertaken by the ARPMs to improve employee performance or to provide feedback to the RAs when deficiencies in performance are encountered.⁵³

⁵² The policy manual lists approximately a dozen examples of flagrant or serious disregard of policy, professional conduct, or the well-being of others for which progressive discipline may be set aside in consideration of suspension or termination of employment including, *inter alia*, repeated occurrences of any documented performance offenses, theft, possession of illegal drugs, reporting to work under the influence of alcohol or illegal drugs; fighting with, intimidating or threatening others; possession of a weapon; unreported absence from work.

⁵³ As noted previously “Record of Supervision,” in all likelihood, falls within the meaning of the term corrective action set forth in Oakwood Healthcare with respect to the Section 2(11) responsibly direct function.

In light of the foregoing principles and discussion, I shall now consider the Employer's contention that ARPMS possess the Section 2(11) authority to discipline and/or effectively recommend discipline, suspension and discharge of subordinate employees.

2. Instructions to the ARPMS

In support of this supervisory contention, the Employer initially notes that ARPMS have been repeatedly instructed by higher management and their respective supervisors, the RPMs, of the need to "discipline" RAs when appropriate. These "instructions" have been done orally and in writing through the utilization of ARPM "supervisions (documents which are similar in scope to those prepared for the RAs)" and by comments set forth in ARPM evaluations. For example, RPM Hepp issued a "supervision" to ARPM Minto wherein he commented, "Kim [Minto] and I spoke about her responsibilities as an assistant manager. Kim had to recently give 'written warnings' to staff for violations of policies and written rules.⁵⁴ Kim has improved in this area, but still needs to improve on confrontation of staff when those times call for it. . . and to write people up if they continue to fail to complete paperwork, but Minto has not done so." and that "Minto still needs to work on backing up her verbal warnings to staff when necessary." Similar comments were made by Hepp in Minto's most-recent performance evaluation, wherein Hepp, in the Opportunities for Improvement Section of the evaluation, reminded her that her failure to follow through with "discipline" would render her ineffective as an assistant supervisor.⁵⁵

The record reveals that ARPM Weber has had similar comments placed in his evaluation by his supervisor. In this regard, Weber testified he has not "written up anyone because he has not faced a situation where he thought it necessary." Weber, in his testimony, did not verify

⁵⁴ These written warnings will be discussed in detail *infra*.

⁵⁵ As noted, Assistant Supervisor was the job title previously given to the ARPM job classification. Since this evaluation, Minto issued a written warning to an RA for "insubordination." The details of this written warning will be discussed *infra*.

whether his usage of the term “written up anybody” refers to a non-disciplinary “Record of Supervision” or a more formal written warning.⁵⁶

Based upon the above, I cannot conclude that these conclusionary comments set forth in ARPM “supervision” documents and evaluations alone evidence Section 2(11) authority to discipline or effectively recommend discipline in view of the principles set forth in Oakwood Healthcare and its progeny that general conclusionary evidence does not establish the possession of supervisory authority.

3. Incidents Allegedly Evidencing the Exercise of Section 2(11) Authority

ARPMs Householder and Weber testified that they have not issued any employee written warning reports, and the record contains no examples of discipline issued by them. However, the Employer avers that the record is replete with examples of ARPMs Kihn, Tellez and Minto either disciplining or effectively recommending discipline, suspension or discharge within the meaning of Section 2(11).

a. Kihn

The record reveals two instances of ARPM Kihn issuing RAs “verbal warnings” -- one for “swearing” at a resident in the middle of a restraint; and the other for reports that an RA was sleeping on the job. In each instance, Kihn testified that she told the RA in question that the conduct was unacceptable and, if repeated, could possibly lead to a written warning or discipline. Kihn, in her testimony, in response to a question asked by Employer’s counsel, characterized these warnings as a “teaching or coaching tool.” More significantly, the Employer failed to produce any evidence that these verbal warnings were documented in writing, submitted to the Director of Human Resources, or placed in the employee’s personnel file in accordance with the above-described Employer’s progressive discipline policy. Moreover, there is no claim by the Employer that these undocumented verbal warnings could and/or would be

⁵⁶ The record also reveals that Minto has, on several occasions, written in the residence log book cautioning employees that they will be disciplined/discharged if they fail to complete their assignments, including requisite documentation. Next to several of Minto’s comments, Hepp noted that he was in agreement with Minto’s admonitions to the RAs.

utilized to document the initial phase of the Employer's disciplinary policy. As a result, the Employer's reliance on these verbal warnings fails to establish that ARPMs possess Section 2(11) authority to discipline pursuant to the analytical framework enunciated by the Board in Oak Park Nursing Care Center, *supra*.

The Employer also contends that Kihn, in July 2009, effectively recommended that an employee be terminated and that this incident evinces ARPMs' supervisory status. More specifically, an RA, Shannon Lopicolo, was hired by the Employer to work at the Ryman Residence even though she did not possess a valid driver's license—one of the Employer's job requirements. Assistant Director of Residential Services Skye Lehocky, who was then acting as the interim program manager at the Ryman Residence, met with Lopicolo and informed her that she was, under no circumstances, to drive the Employer's vehicles to transport residents. Lehocky advised ARPM Kihn and all other staff of her instructions to Lopicolo in this regard. Kihn also advised Lopicolo not to transport residents by car. Nevertheless, Lopicolo subsequently, despite directives not to do so, transported residents to medical appointments. When Kihn learned of this, she reported the incident to her RPM and expressed her opinion that "there needed to be some disciplinary action involved." Kihn also reported the matter to Lehocky, who was then acting in her capacity as the assistant director of residential services. Lehocky testified that when Kihn informed her of the incident, she asked Kihn the action that should be taken; to which, according to Lehocky, Kihn responded, "I think we need to let her go."⁵⁷ Lehocky and John Eliyas, then-director of residential services, set up a time to talk with Lopicolo, apparently by telephone. In this regard, the record is not clear whether any decision to discipline or terminate Lopicolo had been made as of that time. Nevertheless, the record does reflect that Lopicolo did not talk with management and that thereafter Lopicolo was terminated.

⁵⁷ Kihn, who was called as a witness by the Employer, did not testify about her conversation with Lehocky. According to Lehocky, Kihn, when asked by Lehocky about Lopicolo's overall job performance, responded that she "is not doing well."

Subsequently, Lehocky met with Lopicolo to give her the final paycheck and to receive her keys and badge. According to a memorandum prepared by Lehocky about the meeting, Lopicolo acknowledged that she was wrong in transporting the residents, but that she had been instructed to do so by on-duty manager Minto. Lehocky testified that she questioned Minto about Lopicolo's assertion, and that Minto denied that she gave Lopicolo any such directive.

Based upon the above, I cannot conclude that the Lopicolo incident evinces the ARPMs' authority to effectively recommend the termination of employees within the meaning of Section 2(11) of the Act. First, even accepting Lehocky's testimony, which was not corroborated by Kihn, that Kihn recommended that Lopicolo be terminated for Lopicolo's action in disregarding the Employer's directive not to conduct transports, such recommendation does not establish that Kihn's recommendation involved the level of independent judgment contemplated by Section 2(11). In this regard, Kihn had been instructed by the Employer that Lopicolo was not to drive while on duty. On reporting the Lopicolo incident to her supervisors, Kihn was merely following, in the broad sense, directives given her by management. Clearly, Kihn did not have the discretion not to report the incident to her RPM and/or higher management. Further, it is problematic, based on the state of this record, that Kihn "effectively" recommended Lopicolo's termination. After Kihn's report was received by Lehocky, both she and Elias set up a time to talk by telephone with Lopicolo about the matter in order to investigate the matter further. There is no evidence to suggest that a termination decision had, as yet, been made. Only after Lopicolo "missed" management's telephone call does the record suggest a termination decision was made. The record does not reveal what considerations were undertaken by management in this regard. Consequently, I find that the Employer has failed to sustain its burden of proof by a preponderance of the evidence that Kihn effectively recommended the termination of Lopicolo within the meaning of Section 2(11) of the Act. Oak Park Nursing Care Center, *supra*.

b. Tellez

The record reveals that a new RA was terminated in late September or early October 2009, after Tellez and three others accused him of sexual harassment. After the second complaint by a female staff member, Tellez reported the allegations to RPM Jordan. Tellez did not investigate the complaints on her own. Jordan decided to do a “supervision” with the employee as a “mentoring tool.” Subsequently, that employee made a remark to Tellez that she considered sexually offensive. Tellez reported the incident to Jordan, who referred her to Lehocky. Tellez met with Lehocky, advised her of the various staff complaints and inquired whether “we could recommend [the male employee] being moved to another unit.” Lehocky advised Human Resource Director Liz Hays about the matter. Hays then instructed Lehocky to obtain statements from the female employees. Tellez was not involved in any discussions wherein the Employer decided to terminate the male employee, nor did Tellez make any recommendations in this regard.

Clearly, the record establishes that Tellez’ actions with respect to the sexual harassment allegations do not constitute effective recommendation of discipline. First, management officials made an independent investigation before reaching its termination decision. Second, Tellez made a recommendation to transfer the RA, a recommendation that was not followed by her superiors. Accordingly, the record is clear that the Employer has failed to sustain its burden of proof that the sexual harassment incident evinces Section 2(11) authority by the ARPMs to effectively recommend discipline and/or discharge.

b. Weber

The record reveals that ARPM Weber recommended disciplinary action against two employees for failing to follow his instructions regarding medications. The recommendation was made to RPM Burgess. There is no evidence, and the Employer does not claim, that any disciplinary action was taken as recommended. Clearly, the fact that Weber’s recommendations were not acted on suggests that Weber and other ARPMs do not have the authority to effectively recommend discipline.

c. Minto

The Employer cites four formal written warnings issued by ARPM Minto to support its contention that ARPMs have the Section 2(11) authority to discipline subordinate employees. Two written warnings involved an incident during which a resident began exhibiting aggressive behavior and “started upturning everything in the unit.” Minto directed two new, relatively inexperienced RAs to restrain the resident because she did not want to do so since she was pregnant. When the RAs failed to adhere to her request, Minto called “a code” for assistance, and the on-duty RPM, Warman, came and was able to “de-escalate” the resident. Another RPM, Jordan, also responded to the call for assistance, and advised Minto to “counsel” the two RAs about situations requiring hands-on contact. Minto spoke to one of the RAs and Jordan spoke to the other. When Minto discussed the incident the next day with her supervisor, RPM Hepp, she was instructed by Hepp for her and Jordan to issue the RAs written warnings. The text of the written warnings was prepared by RPMs Jordan and Hepp. Minto signed the written warnings and submitted them to Hepp. There is no evidence that when discussing the matter with Hepp, Minto made any recommendation as to whether the RAs should be disciplined.

The record further reveals that, with respect to the two other written warnings, Minto, after being counseled by RPM Hepp regarding her need to be less reluctant to “discipline” employees when the need arose, issued the two written warnings at issue to RAs for failing to complete monthly paperwork. Minto discussed both warning reports with Hepp before writing them. Hepp reviewed them and supplemented the text of one. These two warning reports also cautioned the employees that “continued violation will result in further disciplinary actions.” The record is silent as to whether any subsequent discipline was issued to any of the aforementioned RAs.

During the hearing, no management representative was directly questioned with respect to any of the aforementioned written warnings or as to whether the Employer intended to rely on them in determining, if necessary, the level of discipline to be imposed if the RAs at issue were involved in future infractions. Thus, it is unclear as to how the written warnings at issue

impacted or will impact the RAs' job status or tenure.⁵⁸ It can certainly be argued that the writeups here are an integral part of the Employer's disciplinary system and will be used, if necessary, for the imposition of future disciplinary actions which do impact job status. However, this supposition, I find, is speculative. There is no evidence in this record that written warnings issued by ARPMs have been referenced in subsequent disciplinary notices resulting in the next level of discipline in accordance with the Employer's progressive disciplinary system. Cf., Progressive Transportation Services, 340 NLRB 1044 (2003), where the Board suggested that evidence of actual impact on job status is not always necessary for a finding of supervisory status if there is evidence of at least some history of written warnings issued by putative supervisors being referenced in future discipline.

Moreover, apart from the above, it is difficult to conclude that Minto exercised the requisite degree of independent judgment in issuing the written warnings at issue to warrant a finding of Section 2(11) supervisory status. In issuing the written warnings to the RAs who failed to submit paperwork on time, Minto did so pursuant to Hepp's standing instructions and only after discussions with Hepp. The Employer did not adduce evidence that Minto could have exercised her discretion not to pursue the matters further and/or to merely issue the RAs "records of supervisions." Similarly, with respect to the written warnings issued to the RAs for failing to restrain the "escalated" resident, Minto and Jordon prepared the documents, with the assistance of another RPM, only after being instructed by Hepp to "write them up." Clearly, such a directive eliminated any discretion Minto could have exercised in this situation. Further, as noted, there is an absence of evidence that Minto ever made any recommendation to impose discipline.

Accordingly, I find that based upon the above, the Employer has not sustained its burden of proof in establishing, by a preponderance of the evidence, that the actions engaged in by Minto in issuing the aforementioned written warnings to RAs establishes Section 2(11) status.

⁵⁸ Since these employee warnings were offered into evidence at the hearing, it is assumed that, pursuant to the Employer's Policy Manual, each were placed in the employee personnel file after issuance.

Finally, with regard to Minto, the record reveals that Minto informed her superiors that an RA, Kara McLaughlin, had failed to follow a nurse's instructions relayed to her through Minto not to take a resident to the hospital. RPM Flanigan issued a "record of supervision" to McLaughlin. No discipline was imposed, and there is no evidence that Minto made any recommendation in this matter. Clearly, this incident does not evince ARPMS' alleged authority to discipline or effectively recommend discipline.

D. Authority to Effectively Recommend Hire

The Employer contends that ARPMS have the authority to effectively recommend the hire of employees. For the reasons set forth below, I find that the Employer has not met its burden in this regard.

In support of its contention, the Employer emphasizes that at the hearing the Petitioner entered into a stipulation that ARPM Scott was a supervisor within the meaning of the Act because he effectively recommended the hire of an employee. As a result of the stipulation, no further evidence was taken with respect to the job responsibilities and authority of Scott. The record does not disclose the circumstances or details of Scott's "effective recommendation" that the Employer hire an RA.

The Employer asserts, contrary to the Petitioner, that this stipulation alone warrants the conclusion that all ARPMS possess this authority since there is virtually no evidence in the record to distinguish Scott's job responsibilities from those of the remaining five ARPMS at issue. I cannot agree with the Employer's argument in this regard. More specifically, Director of Residential Clinical Services Lehocky testified that ARPMS can "recommend people for hire" because they "can sit in on an interview and be part of the process. . .giving them a say in the decision on that hire." Others who participate in the interview process, notably the RPM, have input which is considered before a hiring decision is made. Lehocky's testimony⁵⁹ clearly

⁵⁹ The record reveals that in the Spring of 2009, when ARPM Kihn was "probably" an RPM, Kihn sat in on two or three interviews with Lehocky, which Lehocky had arranged, and that according to Lehocky, they "hired the applicants together."

establishes that while ARPMs may participate in the interview process, any recommendation they may make is not “effective recommendation” since it is not relied upon exclusively by the Employer in hiring decisions. The input of all participants in the interview process is considered. Accordingly, in the absence of evidence that the five ARPMs at issue effectively recommend the hire of RAs, I find that the stipulation entered into with respect to Scott is not controlling, and that the Employer has failed to meet its burden in this regard.

Accordingly, I find that the Employer has not met its burden of establishing that ARPMs have the authority to assign or responsibly direct or discipline or effectively recommend hire, discipline, suspension or discharge using independent judgment.

III. FINDINGS AND CONCLUSIONS

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

1. The hearing officer’s rulings made at the hearing are free from prejudicial error and are 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 in this matter.
3. The Petitioner 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 following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time residential advisors and assistant residential program managers employed by the Employer at its Mars, Pennsylvania, facility; excluding office clerical employees, therapists, teachers and guards, other professional employees and supervisors as defined in the Act and all other employees.

IV. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Pennsylvania Social Services Union Local 668 a/w Service Employees International Union a/w CTW. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

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

B. Employer to Submit List of Eligible Voters

To ensure 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 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).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **December 10, 2009**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website, www.nlr.gov,⁶⁰ by mail, or by facsimile transmission at 412-395-5986. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two (2)** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are

⁶⁰ To file the eligibility list electronically, go to www.nlr.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu, and follow the detailed instructions.

filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

V. 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, DC 20570-0001. This request must be received by the Board in Washington by **December 17, 2009**. The request may be filed electronically through E-Gov on the Agency's website, www.nlr.gov,⁶¹ but may not be filed by facsimile.

DATED: December 3, 2009

/s/Robert W. Chester
Robert W. Chester, Regional Director

NATIONAL LABOR RELATIONS BOARD
Region Six
William S. Moorhead Federal Building
1000 Liberty Avenue, Room 904
Pittsburgh, PA 15222

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⁶¹ To file the request for review electronically, go to www.nlr.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu and follow the detailed instructions. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Agency's website, www.nlr.gov.