

Nos. 11-1250 & 11-1590

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

MARS HOME FOR YOUTH

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

PENNSYLVANIA SOCIAL SERVICES UNION,
LOCAL 668, SERVICE EMPLOYEES INTERNATIONAL UNION

Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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TABLE OF CONTENTS

Headings	Page(s)
Jurisdictional statement.....	1
Statement of related cases and proceedings.....	3
Statement of the issue	4
Statement of the case.....	4
I. The Board’s findings of fact.....	5
A. Background; Mars Home’s operations.....	5
B. The representation proceeding	6
C. The unfair labor practice proceeding.....	8
II. The Board’s conclusions and order.....	8
Summary of argument.....	9
Standard of review	11
Argument.....	12
I. Substantial evidence supports the Board’s finding that Mars Home failed to carry its burden of proving that five of its employees are statutory supervisors excluded from the Act’s protections	12
A. To avoid unnecessarily stripping workers of their organizational rights, the Board, with court approval, distinguishes between personnel who are vested with genuine management prerogatives and employees with nominally supervisory duties	13
B. The Board reasonably found that Mars Home failed to carry its burden of proving that the ARPMs are statutory supervisors.....	17

TABLE OF CONTENTS

Headings – Cont’d	Page(s)
1. Mars Home failed to prove that the ARPMs responsibly direct the RAs	18
a. ARPM householder was not held accountable for his direction of the RAs	20
b. ARPMs Weber and Minto were not been held accountable for their direction of the RAs	23
c. Mars Home failed to show that performance evaluations have any impact on the ARPMs’ terms and conditions of employment.....	24
2. The ARPMs do not use independent judgment in assigning work to the RAs	26
a. The RA’s schedules are dictated by company policies and government regulations and ultimately approved by a manager.....	27
b. When acting as on-duty manager, the ARPMs did not exercise independent judgment in assigning work	30
c. Responding to crises is direction rather than assignment....	34
3. The ARPMs did not discipline or effectively recommend discipline using independent judgment.....	35
a. ARPM Minto did not independently discipline any RA.....	36
b. ARPM Kihn did not effectively recommend the discipline of an RA	39
c. ARPM Tellez did not effectively recommend the discipline of an RA	40
Conclusion	42

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Arlington Masonry Supply, Inc.</i> , 339 NLRB 817 (2003)	28
<i>Boire v. Greyhound Corp.</i> , 376 U.S. 473 (1964).....	3
<i>Beverly Enters.-Mass., Inc. v. NLRB</i> , 165 F.3d 960 (D.C. Cir. 1999)	11,15,16,36,41
<i>Beverly Enters.-Minn., Inc. v. NLRB</i> , 148 F.3d 1042 (8th Cir. 1998)	40
<i>Citizens Publ'g & Printing Co. v. NLRB</i> , 263 F.3d 224 (3d Cir. 2001).....	12
<i>Croft Metals</i> , 348 NLRB 717 (2006)	16
<i>Dynamic Mach. Co. v. NLRB</i> , 552 F.2d 1195 (7th Cir. 1977)	11
<i>Edward St. Daycare Ctr., Inc. v. NLRB</i> , 189 F.3d 40 (1st Cir. 1999).....	15
<i>Fed. Compass & Warehouse Co. v. NLRB</i> , 398 F.2d 631 (6th Cir. 1968)	36
<i>Franklin Home Health Agency</i> , 337 NLRB 826 (2002)	38
<i>Freund Baking Co.</i> , 330 NLRB 17 (1999)	3
<i>Golden Crest Healthcare Ctr.</i> , 348 NLRB 727 (2006)	16,24,26

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>Hosp. Gen. Menonita v. NLRB</i> , 393 F.3d 263 (1st Cir. 2004).....	14,30
<i>Jochims v. NLRB</i> , 480 F.3d 1161 (D.C. Cir. 2007).....	26,36
<i>Lynwood Manor</i> , 350 NLRB 489 (2007)	16
<i>Medina County Publ'ns</i> , 274 NLRB 873 (1985)	3
<i>Metro Transportation</i> 351 NLRB 657 (2007)	37
<i>Mon River Towing, Inc. v. NLRB</i> , 421 F.2d 1 (3d Cir. 1969).....	11
<i>Kentucky River Cmty. Care, Inc. v. NLRB</i> , 532 U.S. 706 (2001).....	13,14,15,16
<i>New York Univ. Med. Ctr. v. NLRB</i> , 156 F.3d 405 (2d Cir. 1998).....	16
<i>NLRB v. Bell Aerospace Co.</i> , 416 U.S. 267 (1974).....	15
<i>NLRB v. Atlantic Paratrans of NYC, Inc.</i> , 300 F. App'x 54, 55-56 (2d Cir. 2008).....	27,35
<i>NLRB v. Dole Fresh Vegetables, Inc.</i> , 334 F.3d 478 (6th Cir. 2003)	37,41
<i>NLRB v. Don's Olney Foods, Inc.</i> , 870 F.2d 1279 (7th Cir. 1989)	19,32

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>NLRB v. Erie Resistor Corp.</i> , 373 U.S. 221, 236 (1963).....	11,12
<i>NLRB v. Health Care & Retirement Corp. of America</i> , 511 U.S. 571 (1994).....	14
<i>NLRB v. Hilliard Dev. Corp.</i> , 187 F.3d 133 (1st Cir. 1999).....	35
<i>NLRB v. Meenan Oil Co., LP</i> , 139 F.3d 311 (2d Cir. 1998).....	28,35
<i>NLRB v. ResCare, Inc.</i> , 705 F.2d 1461 (7th Cir. 1983)	16
<i>NLRB v. W.C. McQuaid, Inc.</i> , 552 F.2d 519 (3d Cir. 1977).....	11
<i>Oakwood Healthcare</i> , 348 NLRB 686 (2006)	13,14,15,17,18,20,26,27,28,33,37
<i>Oil, Chem. & Atomic Workers Int'l Union v. NLRB</i> , 445 F.2d 237 (D.C. Cir. 1971).....	12,15,21
<i>Pan-Oston Co.</i> , 336 NLRB 305 (2001)	16
<i>Passavant Retirement & Health Ctr. v. NLRB</i> , 149 F.3d 243 (3d Cir. 1998).....	11,13,14
<i>Progressive Transp. Servs., Inc.</i> , 340 NLRB 1044 (2003)	38
<i>Pub. Serv. Co. of Colorado v. NLRB</i> , 271 F.3d 1213 (10th Cir. 2001)	14,25

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>Schnurmacher Nursing Home v. NLRB</i> , 214 F.3d 260 (2d Cir. 2000).....	27,35
<i>Sears Roebuck & Co.</i> , 304 NLRB 193 (1991)	29
<i>Superior Bakery Inc. v. NLRB</i> , 893 F.2d 493 (2d Cir. 1990).....	11
<i>Ten Broeck Commons</i> , 320 NLRB 806 (1996)	36,39
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474, 488 (1951).....	11
<i>VIP Health Servs., Inc. v. NLRB</i> , 164 F.3d 644 (D.C. Cir. 1999).....	14,36

Statutes:

Page(s)

National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)

Section 2(3) (29 U.S.C. § 152(3)	13
Section 2(11) (29 U.S.C. § 152(11)	12,14,15,17,39
Section 7 (29 U.S.C § 157)	9
Section 8(a)(1) (29 U.S.C. § 158(a)(1))	4,7,12
Section 8(a)(5) (29 U.S.C. § 158(a)(5))	3,7,12
Section 9(d) (29 U.S.C. § 159(d))	3
Section 9(c) (29 U.S.C. § 159(c))	3
Section 10(a) (29 U.S.C. § 160(a))	2
Section 10(e) (29 U.S.C. § 160(e))	2
Section 10(f) (29 U.S.C. § 160(f))	2

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JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Mars Home for Youth to review a Decision and Order of the National Labor Relations Board issued on

January 18, 2011, and reported at 356 NLRB No. 79. (A. 7-9.)¹ The Board has cross-applied for enforcement of that Order, which is final with respect to both parties under Section 10(e) and (f) of the National Labor Relations Act, as amended.² Pennsylvania Social Services Union, Local 668 has intervened on behalf of the Board.

The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the Act,³ which empowers the Board to prevent unfair labor practices. This Court has jurisdiction over the petition and the cross-application for enforcement pursuant to Section 10(e) and (f) of the Act because the unfair labor practice occurred in Pennsylvania. (A. 7.) Mars Home's petition for review was filed on January 1, 2011. The Board's cross-application was filed on March 8, 2011. Both were timely because the Act places no time limitations on such filings.

The Board's unfair labor practice Order is based in part on findings made in an underlying representation proceeding (Board Case No. 6-RC-12692), in which Mars Home contested the Board's certification of the Union as the employees'

¹ "A." references are to the joint appendix. "S.A." references are to the supplemental appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

² 29 U.S.C. § 160(e) & (f).

³ 29 U.S.C. § 160(a).

exclusive collective-bargaining representative. Pursuant to 9(d) of the Act,⁴ the record in that proceeding is part of the record before this Court.⁵ Section 9(d) authorizes judicial review of the Board's actions in a representation proceeding for the limited purpose of deciding whether to "enforc[e], modify[], or set[] aside in whole or in part the [unfair labor practice] order of the Board" but does not give the Court general authority over the representation proceeding. The Board retains authority under Section 9(c) of the Act⁶ to resume processing the representation case in a manner consistent with the ruling of the Court in the unfair labor practice case.⁷

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not been before the Court previously. Board counsel are not aware of any related case or proceeding that is completed, pending, or about to be presented to this Court, or any other court, or any state or federal agency.

⁴ 29 U.S.C. § 159(d).

⁵ *See Boire v. Greyhound Corp.*, 376 U.S. 473, 476-79 (1964).

⁶ 29 U.S.C. § 159(c).

⁷ *See, e.g., Freund Baking Co.*, 330 NLRB 17, 17 & n.3 (1999); *Medina County Publ'ns*, 274 NLRB 873, 873 (1985).

STATEMENT OF THE ISSUE

The single issue before the Court is whether substantial evidence supports the Board's finding that Mars Home failed to carry its burden of proving that five of its employees are statutory supervisors excluded from the Act's protections. If so, then the Board reasonably found that Mars Home unlawfully refused to bargain with the Union following its victory in the representation election.

STATEMENT OF THE CASE

The Board found that Mars Home violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the certified collective-bargaining representative of the appropriate unit following the representation proceeding described below. (A. 7-9.) Mars Home does not dispute that it refused to bargain with the Union, but it contests the Board's conclusion that five assistant residential program managers (ARPMs) are properly included in the unit. The Board's findings in the representation proceeding and the unfair labor proceeding, as well as the Board's Decision and Order, are summarized below. Other relevant facts will be discussed in the argument.

I. THE BOARD'S FINDINGS OF FACT

A. Background; Mars Home's Operations

Mars Home provides services to at-risk youth at a campus in Mars, Pennsylvania. (A. 10; A. 124-25.) The children live in six residential facilities, referred to as "units." (A. 11-12; A. 126, 128, 130-37.) Each unit houses 10 to 15 residents and is staffed by 1 residential program manager, 1 ARPM, and 12 to 18 residential assistants (RAs). (A. 12-13; A. 126, 128, 130-37.) The ARPMs at issue in this case are Kim Minto, Sherrie Tellez, Chad Householder, Donna Kihn, and Ed Weber. (A. 12-13; A. 132-33, 136-37.)

There are several levels of management at Mars Home. The top official is the executive director. (A. 14; A. 140.) Reporting to the executive director are the director of human resources, Liz Hays, and the director of residential services, a position that was vacant at the time of the hearing but filled in an acting capacity by Skye Lehocky. (A. 14; A. 123.) Reporting to the director of residential services is the assistant director, who supervises the residential program managers, who in turn supervise the ARPMs and RAs. (A. 14; A. 140, S.A. 1.) Everyone except the ARPMs and RAs attend management meetings. (A. 16; S.A. 9-12.)

RAs and ARPMs work three shifts to provide coverage 24 hours a day, 7 days a week. (A. 13; A. 152, 285, 372, 950, S.A. 3, 14, 53.) ARPMs generally work only the first two shifts (i.e., the "waking hours" shifts), while RAs work all

three shifts. (A. 13; A. 210.) ARPMs and RAs are both paid by the hour and eligible for overtime. The residential program managers are paid a salary and work a different schedule. (A. 16; S.A. 6, 20.) They do not work weekends or holidays and rarely work past 7:00 p.m. during the week, though they do take turns being on call during the overnight shifts. (A. 14, 16; A. 176, 352, 373, S.A. 5, 8, 20.) Accordingly, ARPMs are the highest-ranking staff members on campus from 7:00 p.m. to 11:00 p.m. during the week and from 7:00 a.m. to 11:00 p.m. on the weekends, while RAs are the highest-ranking employees on campus every day from 11:00 p.m. to 7:00 a.m.

The RAs' daily tasks are largely dictated by the residents' routines, including school, study time, therapy groups, recreation time, and meals. (A. 22; A. 373-75.) The RAs know what they are required to do, and they generally are responsible for dividing up their duties among themselves. (A. 22; A. 375-76, 379.) The ARPMs are responsible for ensuring the routines are followed in their units. (A. 22, 25; A. 373-74.) They also prepare draft schedules and work as on-duty manager once or twice a week. (A. 16, 30-31; A. 152.)

B. The Representation Proceeding

On September 9, 2009, the Union filed a representation petition seeking certification as the collective-bargaining representative of Mars Home's approximately 65 RAs and ARPMs. (A. 10-11; A. 53-54.) Mars Home argued

that the ARPMs are supervisors and therefore unprotected by the Act and ineligible to participate in the election.

To resolve this dispute, the Regional Director held a representation hearing beginning September 29, 2009. (A. 10.) Mars Home employs six ARPMs. At the hearing, the parties agreed that John Scott, an ARPM who was then acting as residential program manager, had effectively recommended the hire of an employee. The parties stipulated that Scott was a supervisor under the Act; thereafter, only evidence relating to the supervisory status of the five remaining ARPMs was admitted. (A. 14-15; A. 660.)

On December 3, 2009, the Regional Director issued a Decision finding that Mars Home failed to meet its burden of proving that the ARPMs are statutory supervisors. (A. 10-51.) Accordingly, he directed a secret-ballot election in a unit that included the ARPMs. (A. 49.)

On December 17, 2009, Mars Home filed a Request for Review of the Regional Director's Decision, reiterating its claim that the ARPMs are statutory supervisors. (A. 55-85.) The Board (Chairman Liebman and Member Pearce; Member Schaumber, dissenting) denied Mars Home's request for review. (A. 52.) On January 5, 2010, the Board conducted a secret-ballot election among the unit employees, which resulted in a vote of 34 to 31 in favor of union representation. (A. 86.) On August 9, 2010, the Regional Director certified the Union as the

exclusive collective-bargaining representative of the employees in the unit.

(A. 87.) The Union thereafter requested bargaining. Mars Home refused, claiming the certification was not valid due to the inclusion of ARPMs in the unit.

C. The Unfair Labor Practice Proceeding

On October 25, 2010, the Union filed an unfair labor practice charge.

(A. 88.) After an investigation, the Regional Director, on behalf of the Board's General Counsel, issued a complaint alleging that Mars Home's refusal to bargain violated Section 8(a)(5) and (1) of the Act.⁸

(A. 90-93.) Mars Home filed an answer admitting that it refused to recognize or bargain with the Union. (A. 96-

98.) On November 23, 2010, the General Counsel moved for summary judgment.

(A. 101-06.) The Board found that Mars Home had violated the Act as alleged and

ordered it to bargain with the Union. (A. 7-9.) Mars Home opposed, admitting its refusal to bargain but again contesting the validity of the certification based on its

contention that the ARPMs are supervisors. (A. 108-11.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On January 18, 2011, the Board (Chairman Liebman, and Members Pearce and Hayes) issued its Decision and Order in the unfair labor practice case, granting

the General Counsel's motion for summary judgment. (A. 7-9.) The Board found

that "[a]ll representation issues raised by [Mars Home] were or could have been

⁸ 29 U.S.C. § 158(a)(5) & (1).

litigated in the prior representation proceeding.” (A. 7.) The Board also found that Mars Home did “not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor [did] it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding.” (A. 7.) Accordingly, the Board found that Mars Home had violated the Act by refusing to bargain with the Union as the exclusive collective-bargaining representative of the employees. (A. 7.)

The Board’s Order requires Mars Home to cease and desist from the unfair labor practice found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.⁹ (A. 8.) Affirmatively, the Board’s Order requires Mars Home, upon request, to bargain with the Union, and, if an understanding is reached, to embody it in a signed agreement. (A. 8.) The Order also requires Mars Home to post a remedial notice. (A. 8.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board’s finding that the ARPMs are not statutory supervisors. It is settled that to establish supervisory status, the asserting party must provide specific, tangible evidence of supervisory authority. A party cannot rely on conclusory testimony, generalized testimony, or paper authority. As

⁹ 29 U.S.C. § 157.

the Board reasonably found, Mars Home failed to meet its evidentiary burden of proving that the ARPMs exercised independent judgment in responsibly directing, assigning, disciplining, or effectively recommending the discipline of employees.

The Board concluded that Mars Home failed to show that the ARPMs are held accountable for their direction of the RAs and, therefore, failed to prove that they “responsibly” direct within the meaning of the Act. The instances Mars Home points to instead demonstrate that the ARPMs are held accountable for *their own* actions rather than the performance of the RAs they allegedly supervise. Moreover, there is no evidence that the ARPMs face the prospect of adverse consequences if the RAs fail to perform as directed.

Nor did Mars Home prove that the ARPMs assign work to the RAs with independent judgment. Substantial evidence shows that the RAs’ assignments are controlled by governmental regulation, company policy, and an informal system by which RAs volunteer for certain tasks. Upper management must approve some assignments, while the RAs are free to swap other assignments among themselves. It is settled that employees do not assign work with independent judgment in these circumstances. In addition, the evidence does not support Mars Home’s contention that the ARPMs can *require* the RAs to accept the assignments.

Finally, Mars Home failed to prove that the ARPMs discipline or effectively recommend the discipline of RAs using independent judgment. Rather, the

ARPMs' role is generally limited to providing information to their managers who themselves decide whether to impose discipline, and it is indisputable that supervisory discipline is not proven where the putative supervisor is merely a conduit of information. Furthermore, in the few cases where an ARPM did recommend discipline, managers conducted independent investigations before deciding for themselves whether to impose discipline.

STANDARD OF REVIEW

The Board's determination of supervisory status must be upheld as long as it is supported by substantial evidence, and it will not easily be overturned on appeal.¹⁰ Under the substantial evidence standard, the Board's findings of fact are entitled to affirmance if they are reasonable, and a reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*."¹¹

The determination of whether an individual is a supervisor under the Act is an intensely factual inquiry that calls upon "the Board's special function of

¹⁰ See, e.g., *NLRB v. W.C. McQuaid, Inc.*, 552 F.2d 519, 532 (3d Cir. 1977); *Beverly Enters.-Mass. v. NLRB*, 165 F.3d 960, 962 (D.C. Cir. 1999).

¹¹ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); see also *Passavant Retirement & Health Ctr. v. NLRB*, 149 F.3d 243, 246 (3d Cir. 1998) (noting that the Board is "accorded special deference" due to its "special competence in the field of labor relations") (internal quotes omitted).

applying the general provisions of the Act to the complexities of industrial life.”¹²

Accordingly, this Court has noted that “determinations respecting supervisor status are particularly suited to the Board’s expertise.”¹³

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT MARS HOME FAILED TO CARRY ITS BURDEN OF PROVING THAT FIVE OF ITS EMPLOYEES ARE STATUTORY SUPERVISORS EXCLUDED FROM THE ACT’S PROTECTIONS

Section 8(a)(5) of the Act¹⁴ makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of [its] employees,” and an employer that violates Section 8(a)(5) also derivatively violates Section 8(a)(1) of the Act.¹⁵ Mars Home does not contest that it refused to bargain with the Union.

¹² *Dynamic Mach. Co. v. NLRB*, 552 F.2d 1195, 1202 (7th Cir. 1977) (quoting *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963)).

¹³ *W.C. McQuaid, Inc.*, 552 F.2d at 532 (citing *Mon River Towing, Inc. v. NLRB*, 421 F.2d 1, 5 (3d Cir. 1969)); *see also Superior Bakery Inc. v. NLRB*, 893 F.2d 493, 496 (2d Cir. 1990) (“Indeed, because of the Board’s expertise in deciding who is and who is not a supervisor within the meaning of [Section] 2(11) of the Act, the Board’s findings in this area are entitled to special weight.”) (citation omitted); *Oil, Chem. & Atomic Workers Int’l Union v. NLRB*, 445 F.2d 237, 241 (D.C. Cir. 1971) (supervisory determinations “lie squarely within the Board’s ambit of expertise” and are “entitled to great weight”).

¹⁴ 29 U.S.C. § 158(a)(5).

¹⁵ 29 U.S.C. § 158(a)(1) (making it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of [their organizational] rights”); *Citizens Publ’g & Printing Co. v. NLRB*, 263 F.3d 224, 233 (3d Cir. 2001).

Rather, it contends that five of its ARPMs who voted in the election are statutory supervisors who should not have been included in the bargaining unit. Therefore, if the Board reasonably found that Mars Home failed to carry its burden of establishing that the ARPMs are statutory supervisors, then Mars Home's refusal to bargain with the Union violated Section 8(a)(5) and (1) of the Act.¹⁶

A. To Avoid Unnecessarily Stripping Workers of Their Organizational Rights, the Board, With Court Approval, Distinguishes Between Personnel Who Are Vested with Genuine Management Prerogatives and Employees With Nominally Supervisory Duties

To be entitled to the protections of the Act, one must be an "employee" as the Act defines that word. Section 2(3) of the Act,¹⁷ however, excludes from the definition of the term "employee" "any individual employed as a supervisor." In turn, Section 2(11) of the Act¹⁸ defines the term supervisor as follows:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, 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.

In accordance with this definition, the Supreme Court has recognized that individuals are statutory supervisors "if (1) they have the authority to engage in

¹⁶ See *NLRB v. Erie Brush & Mfg. Corp.*, 406 F.3d 795, 800 (7th Cir. 2005).

¹⁷ 29 U.S.C. § 152(3).

¹⁸ 29 U.S.C. § 152(11).

any 1 of the 12 listed supervisory functions, (2) their ‘exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,’ and (3) their authority is held ‘in the interest of the employer.’”¹⁹

As the Supreme Court has explained, “the statutory term ‘independent judgment’ is ambiguous with respect to the degree of discretion required for supervisory status.”²⁰ Therefore, “[i]t falls clearly within the Board’s discretion to determine, within reason, what scope of discretion qualifies” an employee for supervisory status.²¹ The Board has determined that “to exercise ‘independent judgment,’ an individual must at a minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning or

¹⁹ *Kentucky River Cmty. Care, Inc. v. NLRB*, 532 U.S. 706, 712 (2001) (citation omitted); accord *Passavant Retirement & Health Ctr. v. NLRB*, 149 F.3d 243, 247 (3d Cir. 1998); *Oakwood Healthcare*, 348 NLRB 686, 687 (2006).

²⁰ *Kentucky River*, 532 U.S. at 713; accord *Hosp. Gen. Menonita v. NLRB*, 393 F.3d 263, 267 (1st Cir. 2004).

²¹ *Kentucky River*, 532 U.S. at 713; see also *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 579 (1994) (it “is no doubt true” that “the Board needs to be given ample room to apply [terms like ‘independent judgment’] to different categories of employees”); *Passavant Retirement*, 149 F.3d at 247 (same); *VIP Health Servs., Inc. v. NLRB*, 164 F.3d 644, 648 (D.C. Cir. 1999) (same); *Pub. Serv. Co. of Colorado v. NLRB*, 271 F.3d 1213, 1219 (10th Cir. 2001) (same).

comparing data.”²² The judgment must involve “a degree of discretion that rises above the ‘routine or clerical.’”²³

The Board’s interpretation of the term “independent judgment” follows from the general legislative purpose behind Section 2(11) of the Act to distinguish between truly supervisory personnel, who are vested with “‘genuine management prerogatives,’” and employees – such as “‘straw bosses, leadmen, and set-up men, and other minor supervisory employees’” – who enjoy the Act’s protection even though they perform “‘minor supervisory duties.’”²⁴ Accordingly, in implementing that congressional intent, the D.C. Circuit has warned that “the Board must guard against construing supervisory status too broadly to avoid unnecessarily stripping workers of their organizational rights,” which Congress sought to protect.²⁵ Indeed, “[b]ecause of the serious consequences of an erroneous determination of supervisory status, particular caution is warranted

²² *Oakwood Healthcare*, 348 NLRB at 693 (internal quotation marks omitted).

²³ *Id.*

²⁴ *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81 (1974) (quoting Sen. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947)).

²⁵ *Beverly Enters.-Mass., Inc. v. NLRB*, 165 F.3d 960, 962 (D.C. Cir. 1999); *accord Edward Street Daycare Ctr., Inc. v. NLRB*, 189 F.3d 40, 45 (1st Cir. 1999).

before concluding that a worker is a supervisor despite the fact that the purported supervisory authority has not been exercised.”²⁶

It is settled that the burden of demonstrating employees’ Section 2(11) supervisory status rests with the party asserting it.²⁷ That party must establish supervisory status by a preponderance of the evidence, supporting its claim with specific examples based on record evidence.²⁸ Merely conclusory or generalized testimony is insufficient to establish “independent judgment” or any other element necessary for a supervisory finding.²⁹

Moreover, it is settled that job descriptions and other “paper power” are insufficient to prove supervisory status.³⁰ In other words, supervisory authority is

²⁶ *Beverly Enters.-Mass.*, 165 F.3d at 963.

²⁷ *Kentucky River Cmty Care, Inc. v. NLRB*, 532 U.S. 706, 711 (2001); *Oakwood Healthcare*, 348 NLRB 686, 687 (2006).

²⁸ *See Oil, Chem. and Atomic Workers Int’l Union v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971) (“[W]hat the statute requires is evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority.”); *see also Croft Metals*, 348 NLRB 717, 722 (2006) (noting “[t]he sparse evidence put forward by the Employer with respect to the discretion exercised by” putative supervisor).

²⁹ *See, e.g., Beverly Enters.-Mass.*, 165 F.3d at 963; *NLRB v. ResCare, Inc.*, 705 F.2d 1461, 1467 (7th Cir. 1983); *Lynwood Manor*, 350 NLRB 489, 490 (2007); *Golden Crest Healthcare*, 348 NLRB 727, 731 (2006); *see also Pan-Oston Co.*, 336 NLRB 305, 305 (2001) (“An employee’s title alone cannot establish whether that employee is a supervisor.”).

³⁰ *New York Univ. Med. Ctr. v. NLRB*, 156 F.3d 405, 414 (2d Cir. 1998).

not conferred on an employee merely by vesting her with a title. If an employee has not actually exercised supervisory authority, “there must be other affirmative indications of authority. Statements by management purporting to confer authority do not alone suffice.”³¹ The Supreme Court has therefore recognized that “many nominally supervisory functions may be performed without the ‘exercis[e] of such a degree of . . . judgment or discretion . . . as would warrant a finding’ of supervisory status under the Act.”³²

B. The Board Reasonably Found that Mars Home Failed to Carry Its Burden of Proving that the ARPMs Are Statutory Supervisors

The Board reasonably found that Mars Home failed to meet its burden of establishing that APRMs responsibly direct, assign, discipline, or effectively recommend discipline of the RAs using independent judgment. Specifically, the Board found (A. 26) that the ARPMs direct the work of RAs, but they do not do so “responsibly” because Mars Home failed to prove that the ARPMs are held sufficiently accountable for their direction. The Board further found (A. 33, 35, 36, 41-47) that Mars Home failed to prove that ARPMs exercise independent judgment in assigning, disciplining, or effectively recommending the discipline of RAs. As shown below, the Board’s findings are amply supported by record

³¹ *Id.*

³² *Kentucky River*, 532 U.S. at 713 (citation omitted).

evidence, and Mars Home’s claims to the contrary are based on conclusory testimony and generalized assertions, or otherwise meritless.

1. Mars Home Failed to Prove That the ARPMs Responsibly Direct the RAs

As the Board has explained, responsible direction within the meaning of Section 2(11) has three elements: (1) direction, (2) the ability to take corrective action, and (3) accountability.³³ Here, the Board concluded (A. 26) that the ARPMs direct the work of the RAs and have the ability to take corrective action. Therefore, Mars Home only disputes the Board’s finding that the ARPMs are not accountable for the work of the RAs.

In *Oakwood Healthcare*, the Board stated that responsible direction exists when a “person on the shop floor has ‘men under him,’ and . . . that person decides ‘what job shall be undertaken next or who shall do it.’”³⁴ For direction to be “responsible,” the putative supervisor “must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly.”³⁵ The purpose of requiring accountability is to demonstrate that the

³³ *Oakwood Healthcare*, 348 NLRB at 691-92.

³⁴ *Id.* at 691.

³⁵ *Id.* at 692.

putative supervisor's interests are aligned with management.³⁶ This contrasts with an employee who directs the work of other employees but is not held accountable for their performance, "whose interests, in directing other employees, is simply the completion of a certain task."³⁷

Here, the Board reasonably found (A. 26) that Mars Home failed to show that the ARPMs are held accountable for their direction of the RAs. The testimony presented at the hearing overwhelmingly supports this conclusion. All five ARPMs testified at the hearing, and not one of them testified that they have ever been held accountable for their direction of the RAs. For example, ARPM Kihn was asked if she had ever been disciplined "for a resident assistant not doing their job?" She had not. (A. 396.) Two other ARPMs and a residential program manager similarly testified that the ARPMs are not disciplined in any way if the RAs do not perform their jobs properly. (S.A. 28, 30, 51-52.)

Moreover, three ARPMs, two managers, and Acting Director Lehocky were all asked about specific instances in which RAs misbehaved or violated company policy (A. 495, 677-78, 1009-11, 1100, 1115-16, S.A. 16, 18-19, 22-25, 45-46, 48-50, 58, 61), and not one of them testified that an ARPM was ever held accountable for the actions of an RA in such circumstances. For example, when two RAs who

³⁶ *Id.*

³⁷ *Id.*

work in the same unit with ARPM Minto failed to do paperwork as directed, Minto was not disciplined. (A. 1100, S.A. 58.) Given the complete lack of evidence of accountability, the Board reasonably concluded (A. 26) that Mars Home failed to meet its burden of proving the ARPMs are supervisors.³⁸

Despite the overwhelming testimony to the contrary, Mars Home wrongly claims (Br. 15-24) that ARPMs Householder, Weber, and Minto have been held accountable for their direction of the RAs and that the performance evaluations issued to the ARPMs demonstrate accountability. As shown below, the Board reasonably concluded (A. 26-28) that Mars Home failed to show, as it must, that any ARPM has ever been subjected to adverse consequences because an RA did not perform properly.

a. ARPM Householder Was Not Held Accountable for His Direction of the RAs

Mars Home first contends (Br. 15-16) that ARPM Householder was held accountable for the inappropriate behavior of an RA who transported a resident to the hospital. However, as the Board found (A. 26 n.32), it is clear from the testimony of Acting Director Lehocky that Householder was being criticized for *his own actions* (his decision to send a brand new RA on a transport) rather than

³⁸ See *NLRB v. Don's Olney Foods, Inc.*, 870 F.2d 1279, 1284 (7th Cir. 1989) (no supervisory finding where management “never claimed that [putative supervisor] answered for the work of the . . . workers he supposedly directed”).

for his failure to control the performance of the RA. Indeed, Lehocky testified that she “talked with [Householder] about not sending newer staff” on transports “until they have been properly trained.” (A. 883.)

Moreover, the Board reasonably concluded (A. 26 n.32) that Mars Home failed to present any evidence that this incident could have an adverse impact on Householder’s terms and conditions of employment, which is required “to establish accountability for purposes of responsible direction.”³⁹ Although Householder and his manager discussed this incident in their monthly meeting, which (as usual) was documented with a record of supervision (A. 1407), the HR director testified unequivocally that these monthly meetings and records of supervision do not constitute discipline. (A. 24 n. 26; S.A. 4, 13.) And Mars Home failed to present any evidence that this incident had consequences for Householder’s pay, benefits, or promotional opportunities.

Mars Home also points (Br. 17-18) to another discussion Householder had with his manager in June 2009 when the record of supervision indicates they “talked about the importance of [l]eading by example.” (A. 1408.) Mars Home utterly fails to explain why this incident might demonstrate accountability. The document’s vague comments about leadership certainly do not demonstrate that Householder was being held accountable for the actions of the RAs, and the

³⁹ *Oakwood Healthcare*, 348 NLRB at 692.

testimony reveals only that Householder and his manager discussed training opportunities. (A. 836.) As the D.C. Circuit has stated, “what the statute requires is evidence of actual supervisory authority translated into tangible examples demonstrating the existence of such authority.”⁴⁰ The Board reasonably Board found (A. 24 n.26) that Mars Home failed to present any such evidence.

Finally, Mars Home mistakenly claims (Br. 19) that a written warning issued to Householder in November 2008 demonstrates that he was held accountable for the actions of the RAs. The warning states that Householder inappropriately “told the residents whenever they come out of their rooms to bark (like a dog).” (A. 1451.) The manager who issued the warning testified that Householder’s comment was “unprofessional.” (A. 844.) The Board reasonably concluded (A. 26 n.32) from this evidence that Householder was being disciplined *for his own behavior* rather than the actions of the RAs, which does not constitute accountability. And Householder testified that his manager never in any way indicated that he was being disciplined for the behavior of others, further supporting the Board’s determination that he was being disciplined only for his own behavior. (A. 969.) Indeed, the manager who issued the warning was not

⁴⁰ See, e.g., *Oil, Chem. and Atomic Workers Int’l Union v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971).

even sure whether other RAs were present at the time he made the barking comment. (A. 843.)

b. ARPMs Weber and Minto Were Not Held Accountable for Their Direction of the RAs

Mars Home next claims (Br. 19-20, 23-24) that comments made to ARPMs Weber and Minto demonstrate that they were held accountable for the behavior of the RAs. However, these arguments reveal Mars Home’s fundamental misunderstanding about the elements of “responsible direction” and the different ways to prove supervisory status.

Mars Home first points (Br. 19-20, 23) to comments managers made to Weber and Minto about correcting RAs who make mistakes. (A. 1326, 1486.) For example, Weber’s manager told him that he “is a role model to his peers and [needs to] correct them/offer advice when staff need correction/guidance” (A. 1486), and Minto’s manager told her that she needs to “follow up with residents and staff when they are performing well and correct them when they are ‘slacking’” (A. 1326). However, the Board reasonably considered this to instead be evidence that Weber and Minto have the authority to take corrective action rather than evidence of accountability. (A. 25.) As shown, both are necessary elements of responsible direction.⁴¹ And while the record here, as the Board

⁴¹ See *supra* text accompanying note 33.

explained, “is replete with evidence of ARPMs taking corrective action” (A. 25), it is completely lacking in evidence that the ARPMs have been held accountable for the actions of the RAs when they direct them (A. 26).

Mars Home makes a similar mistake when it points (Br. 20) to a manager’s discussion with Weber about an RA who “wandered” away from the residential unit as evidence of accountability. The Board reasonably determined (A. 26 n.32) that Weber was not being counseled for the failure of the RA *to perform as directed*.⁴² Rather, Weber was instructed to tell the RA to remain at his unit (A. 591-92), which is a matter of assignment rather than responsible direction.⁴³ As shown in more detail below on pages 26-35, Weber does not assign work with independent judgment. (A. 31 n.38; A. 538.)

c. Mars Home Failed to Show That Performance Evaluations Have Any Impact on the ARPMs’ Terms and Conditions of Employment

Finally, Mars Home contends (Br. 21-22) that the performance evaluations it issues to the ARPMs demonstrate accountability. However, the Board reasonably concluded (A. 27-28) that Mars Home failed to show that the evaluations could

⁴² *Golden Crest Healthcare Ctr.*, 348 NLRB 727, 730 (2006) (direction is “decid[ing] what job shall be undertaken next or who shall do it”).

⁴³ *Id.* at 738 (assignment is “designating an employee to a place (such as a location, department, or wing)” or “appointing an individual to a time (such as a shift or overtime period)”).

have an adverse impact on the ARPMs' terms and conditions of employment, which is necessary for a finding of accountability. As the Board explained in *Golden Crest Healthcare*, an employer must present "evidence that a supervisor's rating for direction of subordinates [in a performance evaluation] may have . . . an effect on that person's terms and conditions of employment."⁴⁴

Here, the record evidence overwhelmingly supports the Board's conclusion that the performance evaluations have absolutely no impact on the ARPMs' terms and conditions of employment. For instance, HR Director Hays testified that not one employee received or was denied a pay increase based on these evaluations.⁴⁵ (A. 15; A. 218-22, 1147-50.) Nor is there any evidence that an ARPM received a bonus, promotion, or demotion based on her performance evaluation. Although Mars Home claims (Br. 24) that it intends at some point in the future to give merit-based pay increases (A. 15; A. 218-22, 1147-50), such plans are currently "on hold" due to funding problems. (A. 15; A. 218-22, 1147-50.) And even if these speculative plans could be relied on for a supervisory finding,⁴⁶ Director Hays testified that "it's not a situation where if somebody gets a certain rating on their

⁴⁴ *Id.* at 731.

⁴⁵ *See id.* at 731 n.13 (stating the impact on terms and conditions of employment "may be positive – such as, for example, a merit increase, bonus, or promotion – or negative – such as, for example, the denial of one or more of the foregoing").

⁴⁶ *Pub. Serv. Co. v. NLRB*, 405 F.3d 1071, 1080 (10th Cir. 2005) ("We are unwilling to reverse the Board on speculation.").

evaluation, they get a certain raise.” (A. 221.) Accordingly, the Board rightly concluded (A. 27-28) that Mars Home failed to demonstrate that the ARPMs’ performance evaluations had the requisite adverse impact on their terms and conditions of employment.

2. The ARPMs Do Not Use Independent Judgment in Assigning Work to the RAs

Mars Home argues (Br. 26-50) that the ARPMs “assign” employees in several ways: by scheduling RAs to work, by filling vacancies when someone calls in sick, by assigning transports, and by responding to crises. However, the Board reasonably found that Mars Home failed to prove that ARPMs make such assignments with the requisite independent judgment. (A. 28-37.)

In *Oakwood Healthcare, Inc.*, the Board explained that “assign” involves “designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.”⁴⁷ Key to a finding of assignment is the putative supervisor’s “ability to *require* that a certain action be taken.”⁴⁸ And, as with all of the supervisory functions, assignment authority must be exercised with independent judgment, rather than based on routine or

⁴⁷ *Oakwood Healthcare*, 348 NLRB at 689-90.

⁴⁸ *Golden Crest*, 348 NLRB at 729 (emphasis in original).

ministerial considerations, to confer supervisory status that results in exclusion from the Act's protections.⁴⁹ In order to prove that the ARPMs assign with "independent judgment," Mars Home needed to establish that their assignment decisions (1) are free from control by another authority such as company policy and (2) involve a "degree of discretion" that rises above the "routine or clerical."⁵⁰ It failed to do so.

a. The RAs' Schedules Are Dictated by Company Policies and Government Regulations and Ultimately Approved by a Manager

The Board reasonably concluded (A. 30-33) that the evidence Mars Home presented failed to demonstrate that ARPMs use independent judgment in drafting the schedule. Ultimately, the schedules drafted by the ARPMs are just that: drafts. They must be approved by residential program manager Burgess before they are finalized, and RAs are free to swap shifts if they are dissatisfied with their schedules. ARPM Weber is not responsible for scheduling at all (A. 31 n.38; A. 538), and, as shown below, the remaining ARPMs do not decide how many

⁴⁹ *Jochims v. NLRB*, 480 F.3d 1161, 1171 (D.C. Cir. 2007) (stating that once an employee "was instructed by management" to do something, "her execution of those instructions was a routine task that did not involve independent judgment").

⁵⁰ *Oakwood Healthcare*, 348 NLRB at 692-93; accord *Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260, 266 (2d Cir. 2000); *NLRB v. Atlantic Paratrans of NYC, Inc.*, 300 F. App'x 54, 55-56 (2d Cir. 2008).

employees work per shift, they generally accommodate scheduling requests, and they receive assistance from their supervisors in drafting the schedule.

First, government regulations and company policy require the ARPMs to schedule a certain number of staff members per shift (A. 4, 30-31; A. 304), and Mars Home attempts to accommodate all of the RAs' scheduling needs (A. 31 n.39; A. 260, 301, 307). After filling in the fixed schedules that many RAs work (A. 31 n.39; A. 260, 307) and the scheduling requests of other RAs (A. 31; A. 301), the ARPMs merely fill in the schedule to meet Mars Home's required staffing ratio (A. 13, 31; A. 159, 304, 309).⁵¹

Second, unlike the supervisor in *Arlington Masonry Supply, Inc.*,⁵² cited by Mars Home (Br. 41), the ARPMs who draft the schedule often receive assistance from their managers (A. 22; A. 264, 398), and all schedules are ultimately reviewed and approved by Resident Program Manager Burgess. (A. 33; A. 265, S.A. 17, 21.) Indeed, Minto's manager told her to stop distributing copies of her draft schedule prior to Burgess' approval since it always changes. (A. 1081-82,

⁵¹ See *Oakwood Healthcare*, 348 NLRB at 692-93; accord *NLRB v. Meenan Oil Co., LP*, 139 F.3d 311, 321 (2d Cir. 1998) (no independent judgment where "decisionmaking is directed and circumscribed by clearly established Company policy").

⁵² 339 NLRB 817, 817-18 (2003).

1103.) Based on this record evidence, the Board reasonably concluded (A. 33) that the ARPMs do not exercise independent judgment in creating the schedule.⁵³

It is true, as Mars Home notes (Br. 37), that some of the ARPMs testified generally that they take factors such as seniority into consideration when making the schedule. (A. 305, S.A. 41-42.) But it has long been settled that such conclusory testimony lacking in specificity is not sufficient to support supervisory status,⁵⁴ and as the Board reasonably noted (A. 33), Mars Home failed to elicit a *single* specific example to support that general testimony. So even though Mars Home’s questioning of ARPM Kihn about a schedule she drafted (A. 1248) covers dozens of pages of transcript (A. 467-94), not once did she explain why she scheduled (for example) Sean and Burnadette together on the 3:00 p.m. to 11:00 p.m. shift on June 28, or Alvin and Shannon together on the 7:00 p.m. to 3:00 p.m. shift on July 20.

Nor does the evidence support Mars Home’s claim (Br. 31-36) that the ARPMs have the authority to *require* RAs to work a particular schedule. As the

⁵³ *Oakwood Healthcare*, 348 NLRB at 692-93; *accord Meenan Oil Co.*, 139 F.3d at 321 (no independent judgment where “decisionmaking is directed and circumscribed by clearly established Company policy”).

⁵⁴ *See, e.g., NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1467 (7th Cir. 1983) (stating “general assertions” of an administrator insufficient to show that LPN has supervisory authority); *Sears Roebuck & Co.*, 304 NLRB 193, 193 (1991) (“[C]onclusionary statements made by witnesses in their testimony, without supporting evidence, do[] not establish supervisory authority.”).

Board noted (A. 32), Mars Home failed to present any evidence that an RA has faced adverse consequences for not working any schedule supposedly assigned by an ARPM. In fact, witnesses repeatedly testified that staff members routinely switch schedules with each other without consequence. (A. 525-27, 974-75, S.A. 26.) The testimony is unclear about whether such switches even needed approval. One manager testified that all schedule switches must be approved by a resident program manager (S.A. 26-27), but ARPM Householder testified that sometimes RAs just leave him notes telling him that they are switching shifts (A. 974). Either way, the record fully supports the Board's conclusion that the schedule the ARPM drafts is not set in stone, and an RA who does not want to work his "assigned" schedule is permitted to trade shifts with a coworker as long as staffing ratios are met.

b. When Acting as On-Duty Manager, the ARPMs Did Not Exercise Independent Judgment in Assigning Work

Mars Home claims (Br. 45) that, in their temporary role of on-duty manager, the ARPMs exercise independent judgment in assigning work by arranging transportation of residents to medical and other appointments. The Board, however, reasonably found to the contrary based on evidence that transports are generally done by an RA of the same gender and from the same unit as the resident involved, and that the on-duty manager usually just asks for a volunteer who meets these requirements. (A. 35-36; A. 355-56, 432-33, 543, 933, 992, 995, 1105-06,

S.A. 54.) As the First Circuit has noted, “assignment of work through a cooperative process such as this does not meet the criteria of ‘independent judgment’ required by the Act.”⁵⁵

Mars Home further claims (Br. 41-44) that the ARPMs exercise independent judgment in their on-duty manager role of filling vacancies. However, the Board reasonably concluded (A. 33-35; A. 600-01) that in such circumstances the ARPMs follow an informal routine that does not require independent judgment. That determination is amply supported by the testimony, which reveals that the primary goal of the ARPMs is to ensure that Mars Home complies with the legally required staffing ratios. (A. 33; A. 331, 523.)

Once the staffing requirements are met, the ARPMs rely on the RAs to determine for themselves whether the unit with the vacancy can run short-staffed. (A. 33; A. 541-42, 601-02, 1069-70.) If the RAs need assistance, the ARPM asks any unit with extra employees to send someone to the unit that needs assistance, without specifying which employee should be sent. (A. 33; A. 515-18.) If there are no extra staff members on campus and the ARPM must select someone to stay past the end of their shift, they typically choose the most junior RA. (A. 34; A. 522, 986.) And the ARPM cannot fill a vacancy without approval from a manager if it would require overtime, unless failure to do so would cause Mars

⁵⁵ *Hosp. Gen. Menonita v. NLRB*, 393 F.3d 263, 267 (1st Cir. 2004).

Home to dip below the required staffing ratio. (A. 34 n.46; A. 320-23, 524, 983, 1515, 1549, S.A. 29, 43, 44, 55.) As the Board properly found (A. 35), following this routine does not involve the use of independent judgment.⁵⁶ And because management must approve overtime, the ARPM does not actually have the authority on her own to *require* an RA to stay past the end of his shift. (A. 36.)

Contrary to the record evidence, Mars Home claims that the on-duty manager need not get approval from upper management before assigning an RA to work overtime. But the testimony Mars Home cites (Br. 43) shows that such authorization is, indeed, required. Specifically, ARPM Kihn was asked at the hearing if there is “any process that you have to go through to get authorization before you ask employees if they can work overtime?” (A. 320.) In response, she testified that she must get approval from either the residential program manager or the director of residential services. ARPM Weber similarly testified that he must get approval for overtime during day shifts, but not for overnight shifts because “there’s generally no other option that that shift has to be filled. You [legally] can’t run shorter than two” staff members. (A. 523-24.) And as ARPM Householder testified, he must contact a manager to “request that this overtime be

⁵⁶ *NLRB v. Don’s Olney Foods, Inc.*, 870 F.2d 1279, 1284 (7th Cir. 1989) (“[A]n informal seniority system minimized [putative supervisor’s] need to exercise independent judgment by helping the employees allocate job assignments among themselves”); *Oakwood Healthcare*, 348 NLRB at 693 (stating no independent judgment where scheduling “is determined by a fixed nurse-to-patient ratio”).

approved.” (A. 983.) This testimony fully supports the Board’s finding (A. 34 n.46) that the only time an ARPM has the authority to assign overtime is when failure to fill a shift would result in a violation of the law. In such cases, the on-duty managers follow the above-described informal routine in determining which RA will be required to work, which does not require any exercise of independent judgment. (A. 986.)

Mars Home also claims (Br. 44) that the on-duty managers exercise statutory assignment authority in deciding *not* to fill a vacancy and instead allowing the unit to run short-staffed. The Board reasonably concluded (A. 35 n.48), however, that this does not constitute an “assignment,” which instead “refer[s] to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.”⁵⁷ Even if it were, the testimony is clear that the ARPMs do not use their own independent judgment but instead rely on the staff members at the unit in question to determine whether the unit can run short-staffed. (A. 33; A. 541-42, 601-02, 1069-70.) Indeed, not a single ARPM testified about an instance in which they independently determined, based on the qualifications of the staff on hand, that a unit could run with fewer staff than usual. In fact, as the Board pointed out (A. 35 n.48), the vacancy is often

⁵⁷ *Oakwood Healthcare*, 348 NLRB at 689.

in a unit other than the one where the ARPM regularly works; since the ARPMs are not familiar with the abilities of the RAs in units other than their own, it would be impossible for them to independently determine whether the RAs need assistance. (A. 550, 636-37, 1129-30, S.A. 56-57, 63-64.)

c. Responding to Crises Is Direction Rather Than Assignment

Mars Home claims (Br. 46-50) that the Board should have considered the ARPMs' actions during crisis situations as assignments. As noted on page 13, there are 12 different types of authority that demonstrate supervisory status. Each is distinct and has different elements. Mars Home has confused two different kinds of authority: responsible direction, and assignment. Here, the Board reasonably considered an ARPM's actions during a crisis to be direction (though not "responsible" direction). (A. 23-24.)

The Board has held that "the terms 'assign' and 'responsibly to direct' were not intended to be synonymous."⁵⁸ To "direct" is to decide "what job shall be undertaken next or who shall do it," and includes "ad hoc instructions to perform discrete tasks."⁵⁹ In contrast, "assign" means designating an employee to a place or time, or assigning significant overall duties.⁶⁰ (A. 20-21.) The Board

⁵⁸ *Id.* at 688-89.

⁵⁹ *Id.* at 689-91.

⁶⁰ *Id.* at 689-90.

reasonably determined (A. 23) that, given these definitions, the ARPMs are engaged in direction rather than assignment when they give instructions to the RAs during a crisis. However, the Board concluded (A. 26) that it is not “responsible” direction because, as explained above on pages 18-26, the ARPMs are not held accountable for the performance of the RAs.

3. The ARPMs Did Not Discipline or Effectively Recommend Discipline Using Independent Judgment

Mars Home next contends (Br. 51-60) that ARPMs Minto, Kihn, and Tellez have the authority to discipline or effectively recommend discipline. However, the Board reasonably concluded (A. 37-47) that the record lacks evidence to support those claims and therefore rejected them.

It is settled that supervisory discipline is not proven where, as here, the putative supervisor is merely “a conduit of information” for those who make the disciplinary decisions.⁶¹ At most, the ARPMs’ reports to management create the possibility of discipline. Under established case law, an individual cannot be deemed a statutory supervisor merely because she makes a factual report that

⁶¹ *NLRB v. Meenan Oil Co., LP*, 139 F.3d 311, 322 (2d Cir. 1998); *accord Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260, 265-66 (2d Cir. 2000) (reporting misconduct to management does not establish disciplinary authority); *NLRB v. Atlantic Paratrans of NYC, Inc.*, 300 F. App’x 54, 57 (2d Cir. 2008) (reporting incidents, testifying at disciplinary hearing, and being present when warnings are given does not establish supervisory status if the putative supervisor is not the decision-maker).

creates the possibility of discipline.⁶² As shown below, Mars Home failed to show that the ARPMs have such authority.

a. ARPM Minto Did Not Independently Discipline any RA

Mars Home makes much (Br. 51-52) of testimony that ARPM Minto was repeatedly encouraged by her manager to take a larger role in the disciplining of the RAs, but the record as a whole shows that Minto's authority to discipline is more "apparent than real."⁶³ As the Board reasonably concluded, Minto's job is to report misconduct to her manager, who then decides whether the RA in question will be disciplined. (A. 46; A. 1086-91, 1095-96, 1098-1100, 1452-53, S.A. 7, 59-60.)

⁶² See *NLRB v. Hilliard Dev. Corp.*, 187 F.3d 133, 147 (1st Cir. 1999) (finding that charge nurses are not rendered statutory supervisors based on their reporting of employee infractions that could warrant discipline, as charge nurses had "reportorial authority" only); *VIP Health Servs., Inc. v. NLRB*, 164 F.3d 644, 648 (D.C. Cir. 1999) (finding that "mere reporting is insufficient to establish that the [putative supervisors] effectively recommend discharge or discipline") (citation omitted); *Beverly Enters. v. NLRB*, 148 F.3d 1042, 1046 (8th Cir. 1998) (same); *Meenan Oil*, 139 F.3d at 322 ("The fact that these reports [of misconduct] may result in discipline is irrelevant; the [putative supervisor] is acting as a conduit for information and exercises no judgment in passing the knowledge along to management.") (citation omitted).

⁶³ *Fed. Compass & Warehouse Co. v. NLRB*, 398 F.2d 631, 634-35 (6th Cir. 1968) (no supervisory finding even though the record was "replete with evidence that shed clerks were told of their power to fire" because there were no instances of such a firing with independent judgment).

The Board’s finding is well-supported, even by the evidence Mars Home itself cites (Br. 52). For example, in one of their monthly meetings, Minto’s supervisor told her to “follow up on disciplinary actions with staff *when asked*.” (A. 1328 (emphasis added).) And Minto’s testimony confirmed that this is exactly what happens: “[My manager] told [me] that I needed to write these two employees up for not listening to my directives.” (A. 1089, 1095.) This contrasts with the facts of *Metro Transportation*,⁶⁴ cited by Mars Home (Br. 53 n.10), where the supervisor had been given clear discretion to issue a wide range of discipline, including to “send them home, write them up, or terminate them,” without consulting anyone else.⁶⁵ Accordingly, the Board found (A. 45-46) that Minto did not exercise independent judgment in disciplining employees but merely followed the direct instructions of her supervisor.⁶⁶

Nor is there evidence that Minto effectively recommended discipline. In the example Mars Home highlights (Br. 55-56), the Board found that Minto merely reported to upper management when an RA had failed to follow the direct

⁶⁴ 351 NLRB 657 (2007).

⁶⁵ *Id.* at 660.

⁶⁶ *NLRB v. Dole Fresh Vegetables, Inc.*, 334 F.3d 478, 486 (6th Cir. 2003) (stating two employees “exercised no independent judgment about whether to fill out the notices or their content because they were simply following the instructions of the maintenance manager”); *Oakwood Healthcare*, 348 NLRB at 692 (to be independent, a decision cannot be “subject to control by others”).

instructions of a manager and a Mars Home nurse. (A. 47; A. 672-73, 1116, S.A. 31-32, 35-36.) Although she characterized the RA's actions as "insubordination," Minto did not recommend any discipline. (A. 47; A. 1415.) As noted, an employee is not rendered a statutory supervisor based on the mere reporting of infractions that could warrant discipline.⁶⁷

Moreover, Minto's supposed "recommendation" could not possibly be considered "effective." The manager to whom Minto made her report thanked Minto for the information and indicated she would look into it. (S.A. 40.) Afterwards, the manager conducted an independent investigation,⁶⁸ spoke to the RA and the nurse about the situation (but not Minto), and decided to document the conversation in a record of supervision, which, according to the HR director's testimony, is not discipline. (A. 24 n.26, 47; A. 115, 665-66, 1413, S.A. 35, 38.) Since Minto did not recommend any discipline and no discipline was issued, Mars Home's claim that this incident proves the exercise of independent judgment to effectively recommend discipline must fail.⁶⁹

⁶⁷ See *supra* notes 61-62.

⁶⁸ See *Ten Broeck Commons*, 320 NLRB 806, 812 (1996) (disciplinary authority is not supervisory unless it results in "personnel action . . . taken without independent investigation or review by others"), cited with approval by *Jochims v. NLRB*, 480 F.3d 1161, 1170 (D.C. Cir. 2007).

⁶⁹ Compare *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002) ("Reporting on incidents of employee misconduct is not supervisory if the reports

b. ARPM Kihn Did Not Effectively Recommend the Discipline of an RA

Mars Home contends (Br. 56-58) that ARPM Kihn effectively recommended the termination of an RA who, without a valid driver's license, transported a resident to an appointment. However, the Board reasonably concluded (A. 43) that Kihn did not use independent judgment in making a recommendation.

First, given the company policy requiring RAs to have a driver's license and Acting Director Lehocky's direct instructions that the RA was not to drive while on duty, the Board found that Kihn had little discretion in reporting the RA to management. (A. 43; A. 431, 891-92, S.A. 65.) Second, as the Board noted (A. 43), the evidence was unclear about whether Kihn actually made a specific recommendation that the RA be terminated. Although Lehocky generally claimed that Kihn did make such a recommendation, Kihn testified that she only told her supervisor, "I feel as if we need to do something about this" because she "felt that there needed to be some type of disciplinary action." (S.A. 66, 69-70.)

But most importantly, there is no evidence that Mars Home gave meaningful weight to Kihn's opinion about what should be done. Instead, Lehocky and HR

do not always lead to discipline, and do not contain disciplinary recommendations."), *with Progressive Transp. Servs., Inc.*, 340 NLRB 1044, 1045 (2003) ("The 33 disciplinary notices in the record signed by Yozzo establish that . . . when Yozzo decides that a potentially disciplinary issue should be brought to [her supervisor's] attention, discipline ensues.").

Director Hays conducted an investigation, during which they questioned several employees, before they themselves ultimately made the decision to terminate the RA. (A. 43; A. 1115-16, S.A. 62.) Kihn reported the RA to her superiors, but she was not “an integral part of the disciplinary process.”⁷⁰ Indeed, after reporting the facts to her supervisor, Kihn “play[ed] no role in determining whether” the RA was disciplined or “in determining the type of discipline to be imposed.”⁷¹ Therefore, the Board reasonably rejected (A. 43-44) Mars Home’s contention that Kihn effectively recommended discipline as those terms are used in Section 2(11).

c. ARPM Tellez Did Not Effectively Recommend the Discipline of an RA

Finally, Mars Home claims (Br. 58-60) that ARPM Tellez effectively recommended the termination of a male RA who allegedly made inappropriate sexual comments to several female employees. In fact, Tellez did not recommend termination; she recommended that the RA be moved to another unit, and that recommendation was not followed. (A. 44; A. 716, 778.) Instead, management decided to terminate the RA. (A. 778-79.) Again, there is no evidence that management gave meaningful weight to Tellez’s recommendation. Rather, once Tellez notified Lehocky and HR Director Hays of the facts as she understood them,

⁷⁰ *Beverly Enters.-Minn, v. NLRB*, 148 F.3d 1042, 1046 (8th Cir. 1998).

⁷¹ *Id.*

she had no involvement in determining what should be done. Tellez played no part in management's decision to terminate the RA and was not present when the decision was made. (S.A. 67-68.) Afterwards, Tellez's supervisor notified her that a decision had been made to terminate the RA. (S.A. 68.) Therefore, the Board reasonably concluded (A. 44) that Tellez did not effectively recommend the discipline of this RA.

Mars Home attempts to confuse the issue by referring (Br. 58) to a record of supervision documenting a meeting Tellez conducted with the same RA. But the record of supervision was unrelated to the sexual harassment allegation, was never placed in the RA's file, and was not relied on by the managers who made the decision to terminate the RA. (A. 768-69.) Moreover, Tellez testified that her manager made the decision to conduct the record of supervision:

Q. Mr. Jordan is the one who said we have to do the record of supervision, is that correct?

A. Yes.

Q. Okay. And he had you set it up, is that correct?

A. Yes.

(A. 768.) As ARPM Tellez did not independently decide to conduct this record of supervision – which is not a disciplinary action and did not play any role in the

RA's termination – the Board reasonably concluded that this incident does not support a finding that Tellez effectively recommended the termination of the RA.⁷²

CONCLUSION

The Board respectfully requests the Court deny the petition for review and grant in full its cross-application for enforcement against Mars Home.

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⁷² *NLRB v. Dole Fresh Vegetables*, 334 F.3d 478, 486 (6th Cir. 2003) (stating two employees “exercised no independent judgment about whether to fill out the notices or their content because they were simply following the instructions of the maintenance manager”).

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Dated at Washington, DC
this 27th day of June, 2011

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MARS HOME FOR YOUTH	*
	*
Petitioner/Cross-Respondent	* Nos. 11-1250
	* 11-1590
v.	*
	* Board Case No.
NATIONAL LABOR RELATIONS BOARD	* 6-CA-37135
	*
Respondent/Cross-Petitioner	*
	*
and	*
	*
PENNSYLVANIA SOCIAL SERVICES UNION, LOCAL 668, SEIU, AFL-CIO	*
	*
	*
Intervenor	*

CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I further certify that all persons who have filed appearances are e-filers and will receive service electronically. Additionally, all parties were served with courtesy copies by mail.

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Dated at Washington, DC
this 27th day of June, 2011