

**Nos. 11-12000 and 11-12638**

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

**LAKELAND HEALTH CARE ASSOCIATES, LLC  
D/B/A WEDGEWOOD HEALTHCARE CENTER**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

---

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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FOR THE ELEVENTH CIRCUIT

LAKELAND HEALTH CARE ASSOCIATES, LLC	*
D/B/A WEDGEWOOD HEALTHCARE CENTER	*
	*
Petitioner/Cross-Respondent	* Nos. 11-12000
	* 11-12638
v.	*
	* Board Case No.
NATIONAL LABOR RELATIONS BOARD	* 12-CA-27044
	*
Respondent/Cross-Petitioner	*
	*

**CERTIFICATE OF INTERESTED PERSONS AND  
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1-1 of the Court’s Rules, Petitioner National Labor Relations Board (the “Board”), by and through its undersigned attorneys, hereby certifies that the following persons and entities have an interest in the outcome of this case:

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Harris, Glenn, Representative, United Food & Commercial Workers, Local 1625

Hayes, Brian E., Board Member

Case Nos. 11-12000 & 11-12638  
*Lakeland Healthcare Associates, LLC v. NLRB*  
C-2 of 2

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Dated at Washington, DC  
this 12th day of October 2011

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**BRIEF FOR  
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**STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION**

This case involves an employer’s failure to bargain with its employees’ union. The National Labor Relations Board (“the Board”) had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”). This Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and

(f)). The Board's Decision and Order issued on April 29, 2011, and is reported at 356 NLRB No. 147. (D&O 1-3.)<sup>1</sup> The Board's Order is a final order under Section 10(e) and (f) of the Act.

Lakeland Health Care Associates, LLC d/b/a Wedgewood Healthcare Center ("the Center") filed its petition for review of the Board's Order on May 4, 2011. The Board filed its cross-application for enforcement on June 8, 2011. The parties' filings were timely, as the Act places no time limitation on filing for review or enforcement of Board orders.

As the Board's unfair labor practice order is based, in part, on findings made in the underlying representation (election) proceeding, the record in that proceeding (Board Case No. 12-RC-9426) is also before the Court pursuant to Section 9(d) of the Act (29 U.S.C. § 159(d)). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79, 84 S. Ct. 894, 896-98 (1964). Under Section 9(d), the Court has jurisdiction to review the Board's actions in the representation proceeding solely for the purpose of "enforcing, modifying, or setting aside in whole or in part the

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<sup>1</sup> "D&O" refers to the Board's Decision and Order; it appears at Tab 20 of the Board's volume of pleadings, and at Tab 3 of the Center's excerpts of record. "DDE" refers to the Regional Director's Decision and Direction of Election, which is contained at Tab 5 of the Board's pleadings, as well as Tab 2 of the Center's record excerpts. "Tr." refers to the transcript of the preelection hearing held before a Board hearing officer. "EX," "UX," "BDX," and "JX" refer to exhibits introduced at that hearing by, respectively, the Center, the Union, the Board, and jointly. References preceding a semicolon are to the Board's/Regional Director's findings; those following are to the supporting evidence.

[unfair labor practice] order of the Board” (29 U.S.C. § 159(d)). The Board retains authority under Section 9(c) of the Act (29 U.S.C. § 159(c)) to resume processing the representation case in a manner consistent with the ruling of the Court. *See Freund Baking Co.*, 330 NLRB 17, 17 & n.3 (1999); *Medina County Publ’ns*, 274 NLRB 873, 873 (1985).

### **STATEMENT OF THE ISSUE PRESENTED**

The ultimate issue is whether substantial evidence supports the Board’s finding that the Center violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the United Food and Commercial Workers Union, Local 1625 (“the Union”), as the certified representative of the Center’s Licensed Practical Nurses (“LPNs”). The Center admits it refused to bargain with the Union in order to test the validity of the Union’s certification. Thus, this case turns on whether substantial evidence supports the Board’s finding that the Center failed to prove that the LPNs were not entitled to a union election because they are supervisors within the meaning of Section 2(11) of the Act.

### **STATEMENT REGARDING ORAL ARGUMENT**

The Board believes that this case involves the application of well-settled principles to straightforward facts and that argument would therefore not be of material assistance to the Court. However, if the Court believes that argument is

necessary, the Board requests that it be permitted to participate and submits that 10 minutes per side would be sufficient.

## **STATEMENT OF THE CASE**

This case involves the Center's refusal to bargain with the Union after its LPNs voted in favor of union representation in a Board-conducted election. The Board found that the Center's refusal violated Section 8(a)(5) and (1) of the Act.<sup>2</sup> (D&O 1.) The Center does not dispute (Br. 12) its refusal to bargain. Instead, it contends that it had no duty to bargain because the Board erred in the representation case in finding that the LPNs were not supervisors. The Board's findings in the representation and unfair labor practice proceedings, as well as the Decision and Order under review, are summarized below.

## **STATEMENT OF FACTS**

### **I. THE BOARD'S FINDINGS OF FACT**

#### **A. The Representation Proceeding**

##### **1. The Center's operations and organization**

The Center operates a nursing facility in Lakeland, Florida. The facility has a capacity for 120 residents, who are housed in two wings. One, the Northside or Rosewood unit, houses 60 temporary residents who are undergoing short-term postoperative rehabilitation and stay about 25 to 28 days. (DDE 2; Tr. 19-26.) The

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<sup>2</sup> 29 U.S.C. § 158(a)(5) and (1).

other unit, which also houses 60 residents, is known as the Southway or the Southside unit. It is for those residents who require long-term care and includes a secure, locked unit for 18 residents with Alzheimer's disease or dementia.

(DDE 2-3; Tr. 19-26.)

The Center is managed overall by the Administrator. The Director of Nursing (the "DON") works directly under her; she manages the Nursing Department and resident health care. (DDE 3 n.14; Tr. 18, EX 2.) The DON is on call 24 hours per day, 7 days a week. (DDE 5; Tr. 316-17, 337.) Two unit managers work under the DON. Except for a brief period in 2005, the unit managers have always been registered nurses ("RNs"). The unit managers work weekdays from 7:15 a.m. to 5:30 p.m. There are also two weekday shift supervisors and one weekend supervisor. RNs also occupy those positions. The weekday supervisors work overlapping shifts Monday through Friday: the first shift is scheduled from 12:00 p.m. to 8:00 p.m. and the second shift is scheduled from 3:00 p.m. to 11:00 p.m. (DDE 4-5; Tr. 46, EX 2.) The weekend supervisor works Saturdays and Sundays, each day from 7:00 a.m. to 11:00 p.m. (DDE 5; Tr. 53, EX 2.)

## 2. The CNAs' and LPNs' scheduling and duties

The above-described management/supervisory complement prevails over about 28 LPNs and 96 Certified Nursing Assistants (“CNAs”). (DDE 2; Tr. 303, 307, 508-09.) Together, those employees staff the Center 24 hours a day, work as a team, and are the principal providers of medical and personal care to the residents. (DDE 6-7, 8, 9; Tr. 881-82, 949-51, EX 3, 4.) The LPNs, who are also referred to as team leaders,<sup>3</sup> and the CNAs work together in three shifts. The first shift runs from 6:45 a.m. until 3:15 p.m.; the second shift from 2:45 p.m. until 11:15 p.m.; the third shift from 10:45 p.m. until 7:15 a.m. (DDE 4-5; Tr. 47.)

In the Rosewood unit, there are generally three LPNs and six CNAs scheduled on both the first and the second shifts. Another two LPNs and four CNAs are scheduled on the third shift. In the Southway unit, there are two or three LPNs and eight CNAs scheduled on the first shift. In addition, there are two LPNs and seven or eight CNAs scheduled on the second shift. (DDE 4-5; Tr. 405-08.) Two LPNs and five CNAs are scheduled on the third shift. (DDE 4-5; Tr. 408.) Staffing varies according to the number of housed residents. When scheduled

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<sup>3</sup> Throughout its opening brief, the Center refers to the LPNs as “charge nurses,” apparently relying on *Glenmark Associates, Inc. v. NLRB*, 147 F.3d 333, 344-45 (4th Cir. 1998), which noted the special significance the term “charge nurse” holds in implying full responsibility for the nursing home. Yet, even the DON admitted (Tr. 54) that the term was not used in the Center. Instead, the LPNs wore badges identifying them as team leaders and were referred to that way. (DDE 4; Tr. 205, 860-62, 1015.)

employees call off or are otherwise absent, the Center, acting through its staffing coordinator, assigns “PRNs” (on-call or as-needed employees) if the existing staff is insufficient. (DDE 4 & n.17; Tr. 321-23, 406, 470, 511-12, 595-96.)

The LPNs and the CNAs work corresponding shifts in teams. The Center’s staffing coordinator creates the unit shift assignment sheet that determines the unit, date, shift, and room assignments for the first- and second-shift LPNs and CNAs as well as their lunch and break times. (DDE 24; Tr. 398-99, 420-22, EX 11.) On the third shift and weekends, LPNs complete the unit shift assignment sheet based on the information the staffing coordinator placed on the daily assignment sheets. (DDE 24-25; Tr. 409, 912-23.) To promote continuity of care, the scheduling coordinator tries to keep the same assignments from day to day. (DDE 23; Tr. 323, 332-33.) The staffing coordinator reassigns CNAs due to unequal workloads, residents’ requests, LPNs’ personal preferences, and to meet regulatory staffing requirements when absences occur. (DDE 26-28; Tr. 398-99, 409, 411-14, 419-20, 431-33.) CNAs report absences to the staffing coordinator, who handles the situation. If CNAs fail to report to work, the LPNs report it to the staffing coordinator, who obtains a substitute. (DDE 27-28; Tr. 397, 409.)

The CNAs generally assist in providing personal care to the residents, while the LPNs provide them with a level of medical care. (DDE 6-7, 9; Tr. 881-82, 949-51, EX 3, 4.) Pursuant to the Center’s dictates, which are embodied in the

“Nursing Procedure Manual” and the “unit shift assignment sheet,” CNAs perform hygiene and personal care functions for the Center’s residents, including bathing and dressing. (DDE 6-7; Tr. 55-56, 671-77, 713-14, 900, EX 11, 17.) In addition to hygienic care, CNAs lift and turn residents to avoid bed sores, assist in transferring residents from their beds to chairs and bathtubs, and escort them to the dining room or elsewhere if they need assistance. (DDE 6; EX 3.) CNAs also take residents’ vital signs. They get residents ready for medical procedures, social programs, family visits, and other activities. (DDE 6-7; EX 3.)

The Center requires CNAs to document residents’ daily activities on a form entitled Activities of Daily Living. Likewise, the Center requires a CNA to follow the resident’s care card. It contains detailed information regarding the personal care that is to be delivered to a particular resident. The Center’s Minimum Data Set (“MDS”) staff of non-bargaining unit LPNs and RNs maintain and oversee the care cards. (DDE 4 & n.16, 7 & n.31; Tr. 385-88, 1035-36.)

The LPNs’ shifts begin by meeting with the LPNs coming off the prior shift to receive updates on the residents’ status. The LPNs then confer with the CNAs concerning their assigned residents. The LPN reviews, for example, any special treatments, physician appointments, and family visits. She prepares and administers drugs ordered by the attending physician, and reports the results, whether positive or negative, to her relief LPN. She also checks on the CNAs

throughout the shift to monitor their care of the residents and whether they conform to regulations and applicable standards. (DDE 8-9; Tr. 69-74, EX 3, 4.) The LPN advises the shift supervisor of staffing needs and reports any absences on her team. (DDE 9; Tr. 73-74, EX 4.) The LPNs also chart and document orders and note other nursing care to be performed. (DDE 9-10; Tr. 452-55, EX 4, 11a-j) At the end of the shift, the LPNs meet with CNAs to obtain a status report on the CNAs' assigned residents. The LPN then updates and transmits the information contained in that report to the incoming shift. (DDE 8; Tr. 234, 388-89, 932, 1037-38.)

### **3. The Center's coaching plans**

To deal with errors or misconduct, the Center has two levels of "coaching" plans. Coaching may ultimately lead to discipline or it may not. For Level 1 infractions such as not clocking in or out on time or failing to act professionally, an employee may receive a "corrective action/coaching plan" designed to improve the employee's conduct. (DDE 13 & n.39; Tr. 141-42, EX 9 pp. 24-26.) Failure to meet the expectations of this Level 1 coaching plan may result in another. Under the Center's policy, four Level 1 actions will result in automatic termination. The record does not show any occasions of the Center taking that action. (DDE 13; EX 9 p. 25, 14a-ddd.)

The Center's staffing coordinator tracks CNAs' attendance and assesses an

“occurrence” for incidents of being tardy, leaving early, or calling in sick. (DDE 15-16; Tr. 459-60.) If any CNA reaches a third occurrence within 30 days, the staffing coordinator notifies the DON, the unit manager, and the payroll department. The unit manager then instructs an LPN to issue a Level 1 coaching plan. (DDE 16; Tr. 460-62.) In other Level 1 situations, LPNs consulted with management or issued the coaching on management’s orders. (DDE 22-23; Tr. 869-71, 980-82.)

For Level 2 violations such as abuse or neglect of a resident or refusal to perform an assignment, the Center immediately and automatically suspends the CNA pending management’s investigation. (DDE 14 & n.41; Tr. 142-43, EX 9 p. 25.) If the investigation shows a violation, the CNA may be terminated or reinstated subject to termination for another violation within 12 months. (DDE 14; Tr. 142-43, EX 8a-f, 9 p. 25.) Only the Administrator and the DON are authorized to terminate employees. (DDE 14; Tr. 157, 201.) The unit managers’ job description states that they provide day-to-day supervision including disciplinary action; the LPNs’ job description states that they “report performance related issues of CNAs to nursing supervisor.” (DDE 14-15; EX 4 p. 5, 18 p. 1.)

The record reflects several Level 2 suspension forms signed by LPNs and with their handwriting, but there is no indication whether the LPN handled those independently or after conferring with superiors or what steps she took in the

investigation. (DDE 18-20.) Specifically, the documentary evidence included the following Level 2 forms with LPNs' signatures:

- a CNA permitted a resident to smoke while being administered oxygen causing nasal burns; the CNA was terminated (Tr. 146-48, 828-31, 834, EX 8a);
- a CNA left a resident alone who was found lying on the dining room floor; the CNA was not terminated (Tr. 149-50; EX 8b);
- a CNA self-reported to an LPN that he had transferred a resident by himself rather than with another CNA, resulting in a possible injury to the resident; he was not terminated (Tr. 151-55, EX 8c);
- a CNA refused to assist a bedridden resident and was terminated (Tr. 156-59; EX 8d); and
- numerous residents complained to an LPN regarding the poor care a CNA gave, including failing to clean a bowel movement in a resident's bed and failing to provide proper hygiene to others; the CNA was terminated (Tr. 159-61, 837-39; EX 8e, f).

The record does not reflect what role the LPNs played in these Level 2 coachings; the Center did not call those LPNs to testify. Instead, the DON testified

that the LPNs were “involved” in the investigation and termination process and that, based on the LPNs’ signatures of the forms, she believed they made the decisions to issue discipline. (DDE 18-20; Tr. 147-49, 152-53, 161-62, 170-71.)

A shift supervisor similarly believed the LPNs were “involved” in the investigation and decision-making process, but did not state what their specific roles were; she also stated that the DON conducted the investigation in the first incident involving the burned resident. (Tr. 828-31, 834, 837-39.)

**4. The Board agrees with the Regional Director that the LPNs are not supervisors; the Union wins the election**

Based on the evidence taken at the preelection hearing, the Regional Director rejected the Center’s claim that the LPNs are supervisors and directed an election in the petitioned-for LPN unit. (DDE 45-46.) The Center filed a request for review of the Regional Director’s decision with the Board. (Request for Review, Vol. III, Pleadings Tab 8.) The election proceeded according to the Regional Director’s direction. The tally of ballots revealed a vote of 13 to 8 in favor of representation by the Union, with 1 challenged ballot, which was insufficient to affect the results of the election. (Tally of Ballots, Vol. III, Pleadings Tab 9.) The Board (Chairman Liebman and Member Becker; Member Hayes dissenting) denied the request for review (Order, Vol. III, Pleadings Tab 11), and the Regional Director certified the Union as the LPNs’ representative (Certification of Representative, Vol. III, Pleadings Tab 12).

**B. The Unfair Labor Practice Proceeding**

By letter dated January 12, 2011, the Union requested that the Center bargain with it. (D&O 2.) The Center denied the Union's request. (D&O 2 n.3.)

Pursuant to the Union's unfair labor practice charge, the Acting General Counsel issued an unfair labor practice complaint alleging that the Center violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to bargain with the Union. (D&O 1.) In its answer, the Center admitted its refusal to bargain but denied the validity of the Board's certification, claiming that the unit certified by the Board was inappropriate. (D&O 2.)

On March 18, 2011, the Acting General Counsel filed a motion for summary judgment, and thereafter the Board issued an order transferring the proceeding to itself and a notice to show cause why the motion should not be granted. (D&O 1.)

**II. THE BOARD'S CONCLUSIONS AND ORDER**

On April 29, 2011, the Board (Chairman Liebman and Members Becker and Hayes) issued a Decision and Order granting the Acting General Counsel's motion for summary judgment. (D&O 1.) The Board concluded that all issues pertaining to the validity of the Union's certification had been, or could have been, litigated in the representation case proceeding and thus could not be relitigated in the unfair labor practice proceeding. (D&O 1.) Accordingly, the Board found that the

Center violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to bargain with the Union. (D&O 1, 2.)

The Board's Order requires the Center to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their statutory rights.

(D&O 2.) Affirmatively, the Board's Order requires the Center to bargain with the Union upon request and to embody any understanding that is reached in a signed agreement; and to post an appropriate notice in hard copy and electronically if the Center communicates with its employees in that manner. (D&O 2.)

### **SUMMARY OF ARGUMENT**

The Center failed to meet its burden of showing that the LPNs are statutory supervisors such that they cannot be represented by the Union. The Court grants considerable deference to the Board's supervisory findings which, in this case, are well supported by the record.

First, the LPNs' role in Level 1 and 2 coaching is insufficient to demonstrate their supervisory status. LPNs issue Level 1 coaching plans to CNAs upon the direction of others or based on set criteria such as the attendance policy. Further, there is no nexus between those Level 1 forms and any concrete discipline or consequences for the CNAs. The LPNs' role in Level 2 coaching is no more significant. While they may report problems with CNAs' performance to

management, the evidence failed to show that they effectively recommended consequences for the CNAs, especially where suspension is automatic pending the required investigations by management and where there was no evidence that the LPNs play any substantive role in those investigations. The Center's witnesses merely asserted, without support, that LPNs determined the consequences for the CNAs based only on the LPNs' titles and signatures on the Level 2 forms.

Second, the record fails to support the Center's argument that the LPNs assign CNAs using independent judgment. The LPNs do not assign the CNAs to places of work, times of employment, or overall duties. At best, they give the CNAs *ad hoc* tasks, which the Board has declared are insufficient under its clarified supervisory standards. The LPNs' role in requesting the reassignment of CNAs does not carry the Center's burden where the staffing coordinator holds the ultimate authority to effect reassignment. Moreover, the record does not demonstrate with the requisite specificity that LPNs use independent judgment—such as matching a resident's needs with a CNA's skill—to even make the request. And, the third-shift LPNs do not exercise any independent judgment where management is available and actually called upon for consultation. In any event, the physical absence of admitted managers does not transform LPNs into supervisors by default.

Third, the Center did not demonstrate that the LPNs responsibly direct the CNAs because the LPNs are not held accountable for the CNAs' work. The Center offered no evidence showing that the LPNs suffer adverse consequences for poor CNA work; in fact, its witnesses conceded that they do not. Speculation about the consequences for LPNs in hypothetical situations does not meet its heavy evidentiary burden.

Finally, the Center's reliance on the LPNs' completion of evaluation forms and the supervisor-employee ratios at the facility on the third shift is unavailing. Neither of those factors is listed as a Section 2(11) power and therefore cannot demonstrate supervisory status in the absence of actual statutory, supervisory authority. Moreover, the Center admits that the evaluations do not have any effect on CNAs' terms and conditions of employment; that nexus is required for evaluations to even be considered.

## ARGUMENT

### **Substantial Evidence Supports the Board’s Finding That the Center Did Not Meet Its Burden in Showing That its LPNs are Supervisors as Defined by the Act and Thus It Violated Section 8(a)(5) and (1) of the Act by Refusing To Bargain with the Union**

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) prohibits an employer from refusing to bargain collectively with the representative of its employees. Here, the Center admittedly (Br. 12) refused to bargain with the Union in order to contest the validity of its certification as the LPNs’ bargaining representative. As shown below, substantial evidence supports the Board’s finding that the LPNs are not statutory supervisors; thus, the Center’s refusal to bargain violated Section 8(a)(5) and (1) of the Act.<sup>4</sup>

#### **A. Applicable Supervisory Principles and Standard of Review**

Section 2(3) of the Act (29 U.S.C. § 152(3)) excludes from the definition of the term “employee” “any individual employed as a supervisor.” Section 2(11) of the Act (29 U.S.C. § 152(11)), in turn, defines the term “supervisor” as:

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<sup>4</sup> Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [S]ection 7.” Section 7 (29 U.S.C. § 157), in turn, grants employees “the right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing ....” A violation of Section 8(a)(5) constitutes a derivative violation of Section 8(a)(1). *See generally Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4, 103 S. Ct. 1467, 1471 n.4 (1983).

[a]ny 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.

Accordingly, individuals are statutory supervisors “if (1) they have the authority to engage in 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.’” *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 712-13, 121 S. Ct. 1861, 1867 (2001) (citation omitted) In *Kentucky River*, the Supreme Court held that “the statutory term ‘independent judgment’ is ambiguous with respect to the *degree* of discretion required for supervisory status,” and that “[i]t falls clearly within the Board’s discretion to determine, within reason, what scope of discretion qualifies.” *Id.* at 713, 121 S. Ct. at 1867 (emphasis in original). *See also VIP Health Servs., Inc. v. NLRB*, 164 F.3d 644, 648 (D.C. Cir. 1999) (observing that independent judgment is an ambiguous term that the “Board must be given ‘ample room to apply’” (citation omitted)). The burden of demonstrating employees’ Section 2(11) supervisory status rests with the party asserting it. *Kentucky River*, 532 U.S. at 711, 121 S. Ct. at 1866.

To meet this burden, the party seeking to prove supervisory status must support its claim with specific examples, based on record evidence. *See Oil, Chem. & 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.”). Accordingly, merely conclusory or generalized testimony is insufficient to establish “independent judgment” or any other element necessary for a supervisory finding. *See, e.g., Beverly Enters.-Mass., Inc.*, 165 F.3d 960, 963 (D.C. Cir. 1999) (“Statements by management purporting to confer authority do not alone suffice.”); *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006) (same). Moreover, it is settled that job descriptions and other “paper power” are insufficient to prove supervisory status. *New York Univ. Med. Ctr. v. NLRB*, 156 F.3d 405, 414 (2d Cir. 1998).<sup>5</sup>

In enacting Section 2(11), Congress sought to distinguish between truly supervisory personnel, who are vested with “genuine management prerogatives,”

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<sup>5</sup> That authority from various courts requiring specific, tangible evidence of the exercise of supervisory authority is a robust counterpoint to the Center’s reliance (Br. 40, 53-54) on *Glenmark Assoc., Inc v. NLRB*, 147 F.3d 333, 338 (4th Cir. 1998), to claim that the employer need only delegate supervisory authority to the putative supervisor who need not ever actually exercise it. *See also NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1467 (7th Cir. 1983) (nurses had no supervisory authority where evidence was “limited very largely to the [nursing home] administrator’s general assertions”).

and employees—such as “‘straw bosses, leadmen, and set-up men, and other minor supervisory employees’”—who enjoy the Act’s protections even though they perform “‘minor supervisory duties.’” *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81, 94 S. Ct. 1757, 1765 (1974) (quoting Sen. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947)). Accordingly, in implementing that congressional intent, “the Board must guard against construing supervisory status too broadly to avoid unnecessarily stripping workers of their organizational rights,” which Congress sought to protect. *Beverly Enters.-Mass., Inc. v. NLRB*, 165 F.3d 960, 963 (D.C. Cir. 1999); *see Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996) (the Board “must take care to assure that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach”). Indeed, “[m]any 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.” *Kentucky River*, 532 U.S. at 713, 121 S. Ct. at 1867 (citation omitted).

In *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006) and its two companion cases, *Croft Metals, Inc.*, 348 NLRB 717 (2006) and *Golden Crest Healthcare Center*, 348 NLRB 727 (2006), the Board clarified its standards for examining supervisory status. First, the Board stated that “to exercise ‘independent judgment,’ an individual must at minimum act, or effectively recommend action,

free of the control of others and form an opinion or evaluation by discerning and comparing data.” *Oakwood*, 348 NLRB at 693. Further, “a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” *Id.* Rather, the judgment must involve “a degree of discretion that rises above the ‘routine or clerical.’” *Id.* Also, as discussed below, the Board clarified its views on the authority to assign and responsibly direct. *Id.* at 689-92.

The Board’s supervisory determination is “conclusive if it is supported by substantial evidence on the record as a whole.” *TRW-United Greenfield Div. v. NLRB*, 716 F.2d 1391, 1395 (11th Cir. 1983). Substantial evidence consists of “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S. Ct. 456, 459 (1951). The interpretation of Section 2(11) “calls upon the Board’s ‘special function of applying the general provisions of the Act to the complexities of industrial life.’” *TRW*, 716 F.2d at 1395 (citation omitted). *See also Cooper/T. Smith, Inc. v. NLRB*, 177 F.3d 1259, 1269 (11th Cir. 1999) (“‘judges, who are generalists, should respect the specialized knowledge of the Board and accede to its factbound determinations as long as they are rooted in the record’” (citation omitted)); *NLRB v. Big Three Indus. Equip. Co.*, 579 F.2d 304, 309 (5th Cir. 1978)

(granting deference to the Board’s determination of “the infinite gradations of authority within a particular industry”).<sup>6</sup> Generally, a reviewing court may not displace the Board’s choice between two fairly conflicting views, even if the court “would justifiably have made a different choice had the matter been before it *de novo*.” *Universal Camera*, 340 U.S. at 488, 71 S. Ct. at 465; *accord Purolator Armored, Inc. v. NLRB*, 764 F.2d 1423, 1428 (11th Cir. 1985).

**B. The Center Failed To Meet Its Burden of Proving that the LPNs Exercised Section 2(11) Supervisory Powers Over the CNAs**

**1. The Center did not show that the LPNs played a supervisory role in disciplining, suspending, or terminating CNAs**

The Center contends (Br. 44-60) that the LPNs are statutory supervisors because they assertedly participate in disciplining, suspending, and terminating employees. For this argument, the Center principally relies on paper authority, the generalized testimony of the DON, and the testimony of shift supervisor Baxter, who was once a team leader, but has always been an RN.<sup>7</sup> The Board considered all of the Center’s evidence on this matter, but found it did not meet the burden for depriving LPNs of their statutory rights as employees to organize.

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<sup>6</sup> Fifth Circuit decisions issued prior to October 1, 1981 are precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

<sup>7</sup> The parties agreed that RN team leaders do not belong in the LPN bargaining unit. (DDE 4 n.4; BDX 2.)

**a. Level 1 coaching**

The Center's written policies establish two levels of "coaching plans." Level 1 coaching involves lesser infractions of the Center's rules, and principally attendance violations. Other incidents leading to Level 1 coaching may include not keeping residents' rooms orderly, not properly bathing them, or not washing wheelchairs. (DDE 13; Tr. 141-43, EX 9 pp. 24-25, 14a-ddd.) The LPNs' role in Level 1 coaching for attendance issues is limited to following set criteria or the directions of others, which is insufficient to show supervisory authority. The Center's staffing coordinator tracks CNAs' attendance and handles resulting "occurrences" for infractions; if a CNA accumulates three occurrences within one month, the staffing coordinator notifies the DON, the unit manager, and the payroll department. (DDE 15-16; Tr. 459-62.) The unit manager then directs the LPN to issue a Level 1 coaching form to the CNA. (DDE 16; Tr. 460-62.) If an employee incurs more than two adjustments to her time record within a pay period or three within 30 days, the payroll department notifies the unit manager who tells the LPN who, in turn, issues a Level 1 form. (DDE 16; Tr. 567-69, EX 10.)

The admitted managers direct LPNs to issue Level 1 forms in other circumstances including complaints from residents or their families. (DDE 20-21, 42-43; Tr. 742-49, EX 14b, 14c, 14d, 14e.) For example, an LPN testified that the only coaching plan she issued in 10 years at the Center was for a Level 1 violation

and that she consulted with a weekend supervisor, who suggested that the LPN issue it and who was present during the coaching. (DDE 22-23; Tr. 869-71, UX 1.) Likewise, a CNA testified that the DON saw that she had a wet resident and informed her that it would result in a Level 1 coaching; shortly afterwards, an LPN approached her and said “I need to write you up. Can you tell me what happened? [The DON] told me to write you up, and that’s all I know.” (DDE 23; Tr. 980-81, 991-92.) As the Board concluded (DDE 42), the preparation of the Level 1 forms based on set criteria or the direction of others does not involve independent judgment. *Hospital General Menonita v. NLRB*, 393 F.3d 263, 267-68 (1st Cir. 2004) (“Filling out forms related to performance issues, without more, does not qualify employees for supervisory status”); *Oakwood Healthcare*, 348 NLRB at 692 (to be independent, a decision cannot be “subject to control by others”); *Anamag*, 284 NLRB 621, 622 (1987) (no independent judgment exercised with warnings automatically generated based on set number of attendance occurrences).

Moreover, the Board found that even assuming that the LPNs initiate Level 1 coaching plans, the Center did not establish any nexus between those Level 1 forms and actual discipline. (DDE 43.) *See Ten Broeck Commons*, 320 NLRB 806, 812 (1996) (“nurses are not supervisors either because their warnings do not result in any personnel action, or, if they do, such action is not taken without independent investigation or review by others”); *see also NLRB v. St. Clair Die*

*Casting*, 423 F.3d 843, 849 (8th Cir. 2005) (“[t]he Board has stated that for the issuance of reprimands or warnings to constitute statutory supervisory authority, the warning must not only initiate, or be considered in determining future disciplinary action, but also it must be the basis of later personnel action without independent investigation or review by other supervisors” (internal quotations omitted)). While under Center policy, four Level 1 write-ups result in discharge, the Center admits (Br. 54) that the record does not show any such discharges. (DDE 20-23.) The LPNs’ role at Level 1 is to sign the form, but make no written recommendation regarding discipline. In fact, the form does not have a space for any recommendation. (DDE 20-21; EX14a-ddd.) Thus, her function is reportorial, which is insufficient to show supervisory authority to discipline. *See NLRB v. City Yellow Cab Co.*, 344 F.2d 575, 580-81 (6th Cir. 1965) (mere reportorial function is not sufficient).

The Board noted (DDE 43; Tr. 771) that, in orientation, the DON informed a unit manager “[t]hat the immediate supervisors needed to be the ones to do the coachings; as far as their disciplinary action, they had to . . . follow-up with the chain of command.” As the Board reasonably concluded (DDE 43.): “This suggests that Level One coaching plans are not, in themselves disciplinary documents, and that discipline can only issue through the ‘chain of command’—

nursing supervisors, unit managers, and the director of nursing, so that LPNs coach but don't discipline CNAs.”<sup>8</sup>

**b. Level 2 coaching and terminations**

Next, the record failed to show that the LPNs' involvement in Level 2 coaching and terminations for more serious infractions of the Center's rules and policies was supervisory activity involving independent judgment. The Center's evidence was not specific or detailed and consisted of, at best, sporadic instances.<sup>9</sup> (DDE 40-41.) Employees receive a Level 2 coaching for conduct such as abuse or refusal to perform a job assignment; a Level 2 form results in an automatic suspension pending investigation. (DDE 14 & n.41.) The Center did not present

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<sup>8</sup> The Center challenges (Br. 22-23 n.2) the Board's rejection of additional Level 1 coaching plans. As the Board pointed out (DDE 21-22 & n.61), the record already included more than 50 Level 1 coaching plans and rejected the additional 2 Level 1 coaching plans as cumulative; it did not adopt the Hearing Officer's "outside the scope" reasoning challenged by the Center. The rejected exhibit would have shown only more of the same; neither the admitted exhibits, nor the rejected exhibit, without convincing supporting testimony, showed that LPNs exercised Section 2(11) supervisory powers. The Board reasonably exercised its discretion in making this evidentiary ruling. *See, e.g., Cooper/T. Smith, Inc. v. NLRB*, 177 F.3d 1259, 1268 (11th Cir. 1999) (no abuse of "broad discretion to exclude evidence in order to prevent needless introduction of cumulative evidence"); *NLRB v. Phaostron Instrument & Elec. Co.*, 344 F.2d 855, 858 (9th Cir. 1965) (same).

<sup>9</sup> Contrary to the Center's assertion (Br. 49), the Board never "discredited" its evidence in finding it insufficient. In fact, "a preelection hearing is investigatory in nature and credibility resolutions are not made." *Marian Manor for the Aged & Infirm, Inc.*, 333 NLRB 1084, 1084 (2001).

any of the LPNs involved in Level 2 coachings or any witness who could testify that she executed it of her own volition and without instruction from her superiors.

Moreover, the DON admitted (Tr. 373) that she could not provide a single example of an LPN electing to suspend a CNA. With the documented Level 2 instances, the DON and shift supervisor provided only vague testimony that the LPNs were “involved” and simply assumed that, by virtue of their positions and their signatures on the forms, they must have determined the consequences for the offending CNA.<sup>10</sup> Assumptions without tangible and detailed evidence do not meet the Center’s burden. *See Oil, Chemical & Atomic Workers Int’l Union v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971) (“what the statute requires is evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority”); *see also NLRB v. Dole Fresh Vegetables*, 334 F.3d 478, 489 (6th Cir. 2003) (employer failed to present specific evidence supporting the plant manager’s general statements about leads’ duties); *W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 874 (6th Cir. 1995) (noting that “the Board

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<sup>10</sup> The Board also correctly found (DDE 42 & n.96) that, in any event, those isolated, egregious circumstances do not show the LPNs exercised any independent judgment. Removing a negligent or dangerous CNA from service is self-evident and hardly requires independent judgment. *See Vencor Hosp.-L.A.*, 328 NLRB 1136, 1139 (1999) (authority “limited to situations involving egregious misconduct, i.e., behavior which endangers the health or safety of the patients [or] flagrant employee conduct is typically found by the Board not to constitute statutory supervisor authority”).

is not required to accept an employer's self-serving declarations" (quotation and citation omitted)).

Similarly, the Center's reliance (Br. 58, Tr. 785-86) on a unit manager's estimation that 70 percent of the coachings on her unit are directly initiated by LPNs is insufficient without any details and is hardly the specific, non-conclusory testimony required by applicable law. Indeed, while the Center complains (Br. 58) that the Board unfairly "ignored" the manager's testimony because she "could not remember the specific dates and times of all the coachings....," the record contains scant details of those supposedly numerous incidents that the manager actually did remember. And, the Center ignores that much of its witnesses' testimony was the product of leading questions by its counsel;<sup>11</sup> throughout the Center's case, the Hearing Officer repeatedly admonished counsel to avoid leading questions (Tr. 109-10, 417, 462, 620, 642, 645, 705, 764, 765, 767, 850). The Board did not err in adhering to the applicable standard requiring specific detailed evidence and tangible examples to find that individuals are supervisors, not employees, and therefore are stripped of their rights under the Act.

By neglecting to show what input, if any, the LPNs had in management's investigations, the Center failed to show LPNs' independent judgment in Level 2

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<sup>11</sup> *E.g.*, Tr. 86-87, 89-90, 100-01, 111-12, 141-42, 147, 150, 152, 158, 186, 234, 236, 243, 391, 417, 427, 433-34, 437, 439, 452, 473, 519, 619, 642, 645, 668-69, 705, 764-65, 767, 784-85, 806, 817-18, 821-22, 838, 849-50.

coaching and effective recommendation. Under established law, effective recommendation of discipline requires a showing that nurses submit actual recommendations that are regularly followed “without independent investigation or review by other[s].” *See Waverly-Cedar Falls Health Care Ctr., Inc. v. NLRB*, 933 F.2d 626, 630 (8th Cir. 1991). Not only was there no space on the Level 2 form for an LPN recommendation, the effect of any recommendation would have been limited because the Center’s policy dictated automatic suspension for Level 2 violations pending management’s investigation. (DDE 20 n.55, 40; EX 8a-f, 14a-ddd.) Even though management conducted an investigation before any termination, they could give no examples of eliciting information from an LPN, whose recommendation allegedly led to the termination. The Center’s own job descriptions support the Board’s view; the unit manager (DDE 44; EX 18) had the authority to discipline while the LPNs’ job description (DDE 10, 44; EX 4) states only that they “report[] performance related issues of CNAs to nursing supervisor.”<sup>12</sup>

Thus, based on the record evidence, the Board reasonably determined that the LPNs’ involvement in Level 2 coaching was merely reportorial in

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<sup>12</sup> Interestingly, of the documented Level 2 incidents (EX 8a-f), none even required the LPNs’ observation of CNAs’ performance: two arose from residents’ complaints; one was self-reported by the CNA; one involved a resident found alone on the dining room floor; and the last was obvious from the resident’s nasal burns requiring a trip to the hospital.

communicating CNAs' deficiencies; the consequences for those deficiencies were out of the LPNs' hands. (DDE 18, 40-41.) For example, the Rosewood unit manager's sole example of an LPN purportedly issuing a Level 2 coaching plan involved a CNA who was sleeping on the job; even there, the unit manager went with the LPN to wake up the CNA and testified that she informed the LPN, "that's a Level Two coaching." The unit manager and DON then investigated and terminated him. (DDE 19 & n.54; Tr. 797-802.) Reports of misconduct to upper managers without recommendation do not support a supervisory finding. See *Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260, 265-66 (2d Cir. 2000) (referring aide misconduct to nurse managers without a recommendation is not supervisory); *NLRB v. Hillard Dev. Corp.*, 187 F.3d 133, 138, 147 (1st Cir. 1999) (nurses reported misconduct and resident abuse, but upper managers made the disciplinary decisions); *NLRB v. City Yellow Cab Co.*, 344 F.2d 575, 580-81 (6th Cir. 1965) (mere reportorial function is not sufficient).

The remainder of the record fails to support the Center's position. An LPN, with 10 years' experience at the Center, and the sole CNA witness, who had 7 years' experience at the Center, knew of no terminations of a CNA made upon an LPN's recommendation. (Tr. 975.) Shift Supervisor Baxter's testimony (Br. 48-49) about her own involvement in Level 2 situations when she was an *RN* team leader fails to prove that any *LPN* has exercised the requisite supervisory authority.

Also, as shown, there were few incidents of Level 2 coaching with 96 CNAs. The LPNs' involvement in coaching was infrequent; they even lacked a dedicated space like other managers and had to "request to use" the unit manager's office to speak with CNAs, as the Center notes (Br. 58). *Golden Crest Healthcare*, 348 NLRB at 730 n.9 (sporadic or infrequent exercise of supervisory authority is insufficient). While the Center relies (Br. 50-51) on *Glenmark Associates, Inc. v. NLRB*, 147 F.3d 333 (4th Cir. 1998), to claim that even one instance of an LPN suspending a CNA is sufficient to demonstrate supervisory status, this Court has indicated otherwise: "one who engages in an isolated incident of supervision is not necessarily a supervisor under the Act." *TRW-United Greenfield Div. v. NLRB*, 716 F.2d 1391, 1395 (11th Cir. 1983); *see also NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1467 (7th Cir. 1983) ("the Board did not have to be persuaded by a single instance in which a recommendation for discharge was made and followed").

The record therefore reveals the paucity and vagueness of evidence from the Center's representatives as counterbalanced by the LPN and CNA witnesses regarding their limited involvement in the disciplinary process. Substantial evidence supports the Board's finding that the Center did not provide the requisite specific detailed evidence that LPNs disciplined, terminated, or effectively recommended those actions using independent judgment. *See Oil, Chemical & Atomic Workers Int'l Union*, 445 F.2d at 243.

**c. The Center's cited cases do not require reversal of the Board's decision**

The cases cited by the Center (Br. 42-43, 55-57) do not warrant reversal of the Board's decision. The Center primarily relies (Br. 43-44) on a series of Sixth Circuit cases applying an incorrect standard holding that the Board bore the burden of proving that an employee was not a supervisor, rather than placing the burden on the proponent of supervisory status. Subsequently, the Supreme Court in 2001 reversed the Sixth Circuit on this crucial point. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-12; 121 S. Ct. 1861, 1866-67 (2001), *reversing in relevant part*, 193 F.3d 444, 453 (6th Cir 1999); *accord NLRB v. Dole Fresh Vegetables, Inc.*, 334 F.3d 478, 485 (6th Cir. 2003) (recognizing that *Kentucky River* overruled that court's prior allocation of the burden to the Board). The Supreme Court recognized the significant impact that the allocation of the burden can have on the outcome of a case, noting that it is easier for the employer to prove the exercise of one supervisory function than for the Board to disprove all twelve. *Kentucky River*, 532 U.S. at 711, 121 S. Ct. at 1866. The applicability of those pre-*Kentucky River* Sixth Circuit cases is significantly undercut because they incorrectly allocated a heavy burden of proof to the Board.

Similarly, other cases cited by the Center (Br. 42-43, 46, 55-56) provide insufficient support for its position. In *Extendicare Health Services v. NLRB*, 182 F.App'x. 412, 417 (6th Cir. 2006), the court found that the LPNs were supervisors

where the evidence showed they had discretion in choosing the discipline that would be imposed on an employee.<sup>13</sup> In *Beverly Enterprises, West Virginia., Inc v. NLRB*, 165 F.3d 307, 309-10 (4th Cir. 1999), cited by the Center (Br. 42-43), the court found, contrary to the evidence here, that the employer actually produced evidence that the LPNs had authority to issue oral and written warnings and suspend on their own discretion, and it relied heavily on the fact that the LPNs were in charge of the facility for half the week. In *Glenmark Associates, Inc v. NLRB*, 147 F.3d 333, 343 (4th Cir. 1998), the nurses could suspend on their own discretion and could initiate the disciplinary process. As shown, here, the LPNs' role in discipline was following set policies or merely reporting to higher-ups who determined the consequences of the CNAs' conduct relayed by LPNs. The Center also failed to show the LPNs' use of independent judgment, relying only on the vague and conclusory testimony of managers.

**2. The Center failed to show that the LPNs assign or reassign employees under the *Oakwood* standard**

In *Oakwood*, the Board stated that “assign” under Section 2(11) means “the act of designating an employee to a place (such as a location, department, or wing),

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<sup>13</sup> The Center also relies (Br. 55) on this single unpublished decision to claim that it is “well settled” that any written counseling constitutes discipline. In any event, as here, in the absence of evidence demonstrating the LPNs' actual role and any use of independent judgment in supposedly issuing the discipline, the LPNs remain non-supervisory employees.

appointing an employee to a time (such as a shift or overtime period), of giving significant overall duties, i.e., tasks, to an employee.” 348 NLRB at 689. Further, in the “health care setting, the term ‘assign’ encompasses the charge nurses’ responsibility to assign nurses and aides to particular patients.” *Id.* at 689.

Assignment in the health care setting also refers to “the charge nurse’s designation of significant overall duties to an employee, not to the charge nurse’s ad hoc instruction that the employee perform a discrete task.” *Id.* at 689.

Here, substantial evidence supports the Board’s finding that the LPNs do not assign CNAs to their places of work, times of employment, particular residents, or overall duties. (DDE 36-39.) Instead, the facility’s staffing coordinator, using a state-mandated staff-to-patient ratio, determines the CNAs’ overall assignments and scheduling, including adjusting the daily schedule of CNAs, their shift and room assignments, and even their break and lunch times. (DDE 23-24, 36.) Likewise, the CNAs’ duties in meeting their assigned residents’ needs are detailed by documents not written by the LPNs, including residents’ care cards maintained by MDS staff and the unit shift assignment sheet created by the staffing coordinator. (DDE 7 & n.31.) Additionally, the CNAs follow the Employee Handbook and the 300-page Nursing Procedure Manual, which describes the treatment of everything from “Artificial Eye Care” to taking urine specimens, analyzing weights, and treating wounds. (Tr. 671-77, EX 9, 17.) Those

instructions, and not the LPNs, give CNAs the necessary information to care for their residents. The Board, in *Oakwood*, 347 NLRB at 693, stated that “a judgment is not independent if it is dictated or controlled by detailed instructions. . . .” *See also Kentucky River*, 532 U.S. at 713-14 (preexisting detailed orders may eliminate the need or use of independent judgment).

Where the staffing coordinator and preexisting documents determine the overall scheduling and duties for CNAs, the Center focuses (Br. 60-64) on LPNs giving CNAs discrete tasks on a day-to-day basis, the procedure for occasional reassignments of CNAs, and assignments for shifts in which the staffing coordinator and managers are not present at the facility. Yet, the Center fails to establish supervisory authority with the LPNs’ roles in each area.

**a. Assignment of *ad hoc* discrete tasks is insufficient to establish supervisory authority**

The Board acknowledged that, during shifts, an LPN might need to make some minor judgments relating to a CNA’s care of a particular resident that did not require consultation with higher authority. (DDE 24; EX 4.) Contrary to the Center’s argument (Br. 26, 60-61), the LPNs’ assignment of discrete tasks to CNAs—such as helping another CNA with lifting a resident, or taking vital signs from a resident not assigned to them—in response to particular situations is not sufficient to show supervisory power. The Board in *Oakwood* required the assignment of significant overall duties, not *ad hoc* instructions to perform discrete

tasks and stated that, for example, “the charge nurse’s ordering an LPN to immediately give a sedative to a particular patient does not constitute an assignment.” *Oakwood*, 348 NLRB at 689.

The Center’s incorrectly concludes (Br. 60-61) that because it is a nursing facility and “not an industrial assembly line” the importance of the LPNs’ judgments in responding to changes in residents’ needs establishes supervisory assignment authority. The importance of the LPNs’ role in the residents’ care is not in dispute. Yet, the Board’s decisions in *Oakwood* and *Golden Crest*—both involving healthcare facilities—establish that the types of on-the-fly discrete tasks referenced by the Center are not sufficient to show that the LPNs supervise the CNAs under the Act. Additionally, some changes to the treatment of a resident are based on doctor’s orders and therefore do not require any independent judgment by the LPNs in conveying those orders to the CNAs. (DDE 36; Tr. 807, EX 4.)

Even if the LPNs’ assignment of *ad hoc* tasks were sufficient under *Oakwood*, the Center failed to provide detailed, specific information regarding the criteria by which the LPNs make those decisions to demonstrate independent judgment. The Center claims (Br. 61) that the LPNs assign additional tasks by considering “the number of CNAs available, their relative skill levels, the number of residents to whom care is to be provided, the residents’ acuity levels, CNA preferences and personalities, and resident preferences[,]” as proof of the LPNs’

supervisory assignment power. However, as the Board noted (DDE 36-38), the Center relies on the conclusory testimony of undisputed managers, not testimony from an LPN who could explain what she considers in making those adjustments. *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1467 (7th Cir. 1983) (upholding Board’s finding that nurses had no supervisory authority where evidence of such authority was “limited very largely to the [nursing home] administrator’s general assertions” at hearing). And contrary to the Center’s citation (Br. 56) to the Fourth Circuit’s decision in *Glenmark Associates, Inc.*, 147 F.3d at 344, relying on a DON’s generalized testimony about nurses’ authority, this Court’s precedent holds that the “[B]oard [i]s not required to defer to conclusory testimony of others” regarding a disputed supervisor’s duties. *Cent. Freight Lines, Inc. v. NLRB*, 653 F.2d 1023, 1025 (5th Cir. 1981).

On the other hand, the Union’s witnesses—an LPN and a CNA—refuted the Center’s claim that they understood that the LPNs had the breadth of power and authority claimed by the Center—including assigning, serving as the highest authority at night, and granting permission for CNAs to leave early—or that the LPNs had a right to exercise any supervisory powers. (Tr. 912-23, 982-85, 987-88.) Although the Center maintains (Br. 41, 51, 58) that its documentary and second-hand evidence should have sufficed to prove its case, it ignores that it had the burden of proving supervisory status with detailed, specific evidence. *See*

*Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006) (evidence was insufficient when testimony lacked specific “examples of situations or details of circumstances” when supervisory authority was exercised).

**b. The LPNs do not exercise independent judgment in their limited role in CNAs’ reassignments**

As shown, the normal practice is that the staffing coordinator gives CNAs permanent assignments to their residents or rooms for continuity of care. Changes are infrequent and primarily made according to resident preference or in a no-call/no-show situation on the third shift. (DDE 24 n.67, 26 & n.74.) For the first and second shifts, the staffing coordinator deals with short staffing and may reassign CNAs to cover absences. The Center failed to show that the LPNs’ role in making staffing adjustments (mainly on third shift) or in requesting a particular CNA be moved to a different assignment required the use of independent judgment.

As the Board concluded (DDE 38), reassignments, even if made by LPNs, to cover absences or to conform to state or policy requirements regarding staffing do not require the exercise of independent judgment. Where the disputed individuals follow set criteria or policies, independent judgment is not required. *See VIP Health Servs., Inc. v. NLRB*, 164 F.3d 644, 649 (D.C. Cir. 1999) (field nurses did not exercise independent judgment in directing home health aides where constrained by established care plans); *Beverly Enters. v. NLRB*, 148 F.3d 1042,

1047 (8th Cir. 1998) (nurses' adjusting aides' duties and priorities in response to changes in patient condition and in staff availability "does not require the use of independent judgment but is instead narrowly circumscribed by an elaborate system of procedures, policies, and protocol regarding patient care"); *NLRB v. Meenan Oil Co.*, 139 F.3d 311, 321-22 (2d Cir. 1998) (dispatchers did not exercise independent judgment where direction of employees was pursuant to the employer's procedures).

The Board acknowledged (D&O 24) that the LPNs could make certain adjustments in assignments based on the resident's preference, or to cover for a no-call/no-show on the third shift. The record, however, failed to show the frequency of those incidents. (DDE 27 n.76.) And, the record failed to show that the LPNs based any adjustments on an assessment of a resident's needs weighed against a CNA's skill; as the Board noted (DDE 37 n.91 (quoting *Oakwood* 348 NLRB at 692-93)), "these requests [or assignments] lacked independent judgment, which requires, 'at minimum . . . form[ing] an opinion or evaluation by discerning and comparing data.'" Likewise, reassignments to balance CNAs' workloads are routine and do not require independent judgment. (DDE 26, 38.) *Oakwood Healthcare, Inc.*, 348 NLRB at 693 (reassignments made solely to equalize workloads do not establish the requisite use of independent judgment); *Golden Crest Healthcare Center*, 348 NLRB at 730 n.10 (same).

In other instances of reassigning CNAs to different residents, the staffing coordinator remains in control although she considers the LPNs' preferences, among other factors including residents' preferences. Indeed, the Center admits (Br. 21-23), that the LPNs make *requests* of the staffing coordinator who may "honor" them, taking into account that the [LPN] "is the nurse" and "she can ask me to do that." As one CNA described the staffing coordinator, "Christy is a CNA, and she'll be telling the nurses what to do, absolutely." (Tr. 1023-24.) A weekend LPN testified that in 10 years she has never requested a particular CNA, and she cannot reassign a CNA from one room to another without talking to the weekend supervisor. (Tr. 868, 895, 949.) And, on other occasions, the DON has moved a CNA from one wing to another without the involvement of the LPNs. (Tr. 1030-32.) Further, as in *Golden Crest Healthcare Center*, 348 NLRB at 730, the record here does not establish that the LPNs can *require* CNAs to be reassigned or fill in or that any adverse consequences will result if the CNA does not comply. It is clear that the others, not the LPNs, have the discretion to make the reassignment. Thus, the LPNs do not effect assignment and reassignment of CNAs.

Moreover, the Center failed to establish that the LPNs exercise independent judgment in even requesting particular CNAs be reassigned. As with the other disputed supervisory indicia, the Center provided no LPNs to testify as to what

criteria they used in requesting CNA reassignments; thus the record consists once again of conclusory testimony regarding others' impressions of what the LPNs do and consider. As this Court has stated, "for an assignment function to involve independent judgment, the putative supervisor must select employees to perform specific tasks on the basis of a judgment about the individual employee's skills."

*Cooper/T. Smith, Inc. v. NLRB*, 177 F.3d 1259, 1265 (11th Cir. 1999). The Center offers only assumptions and conjecture that LPNs request reassignments on that basis; no LPN testified that was so. For example, the Center's citation (Br. 62) to the staffing coordinator's testimony that she relies on the LPNs' judgment goes to the staffing coordinator's judgment and does not show what factors the LPNs relied upon in requesting particular CNAs. (Tr. 417.) There is no detailed, non-conclusory evidence showing how LPNs decided particular CNAs would be good candidates for reassignment or good matches for a particular resident.

**c. The LPNs' role in assignment on the third shift is insufficient to show supervisory status**

Next, the Center relies (Br. 63) on management's absence on third shift to show that its LPNs must be supervisors. Yet, even on the third (night) shift, the LPNs do not exercise supervisory assignment authority with independent judgment. On that shift, the LPNs' involvement with the assignment sheets largely consists of transferring the information from the daily assignment sheet prepared by the staffing coordinator for that shift. (DDE 24-25, 36; Tr. 487-88, 912-23.)

The evidence regarding reassignments on the third shift does not show the LPNs' exercise of independent judgment. For example, the staffing coordinator testified about one incident in which a third-shift CNA became ill after starting work and had to be replaced by a reassigned CNA; the coordinator did not know who handled the reassignment, but presumed that an LPN did so. (DDE 27 & n.75, 28; Tr. 425-28.) Similarly, the staffing coordinator stated that third-shift LPNs should contact her regarding no-show CNAs, but that often they do not and reassign a CNA from elsewhere in the facility. (DDE 28; Tr. 427-29.) Yet, the record does not show on what basis the LPNs select a substitute other than to maintain required staffing or accommodate a resident's request.

Contrary to the Center's view, the LPNs' status as highest-ranking employee at night does not warrant reversal of the Board's decision. Being the highest-ranking employee is not one of the specified indicia of supervisory authority in Section 2(11) and is, at best, a secondary indicium that does not control. *See NLRB v. Dole Fresh Vegetables*, 334 F.3d 478, 488 (6th Cir. 2003) (noting the Board's consistent position that secondary indicia are not dispositive without at least one primary indicator); *VIP Health Servs.*, 164 F.3d at 648 (stating that an employee "must possess at least one of the twelve types of authority set out in the statute" in order to have supervisory status). Nurses do not become supervisors simply based on the presence or absence of higher authority on a particular shift.

*See NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1467 (7th Cir. 1983) (“[a]lthough on the evening (3 p.m. to 11 p.m.) and night (11 p.m. to 7 a.m.) shifts the licensed practical nurses are the highest-ranking employees on the premises, this does not ipso facto make them supervisors. A night watchman is not a supervisor just because he is the only person on the premises at night, and if there were several watchmen it would not follow that at least one was a supervisor”); *NLRB v. Hillard Dev. Corp.*, 187 F.3d 138, 146 (1st Cir. 1999) (charge nurses were not supervisors even though they were the highest level of staff physically present at the nursing home at night and on weekends).

And the record shows that the LPNs were not “on their own” as the Center claims (Br. 63) based on the testimony of the DON. For example, a third-shift CNA testified that when she had to leave work early the LPN called the unit manager who spoke directly to the CNA and authorized her to leave. (DDE 29 & n.80; Tr. 982-83, 1033-35.) There is no evidence of an LPN ever using her supposed authority to deny a CNA’s request to leave early on the third shift. Likewise, when a resident needed to be transferred to a hospital, the unit manager stayed past midnight to oversee the situation. (Tr. 984, 988.) And when a fire alarm sounded on third shift, the LPNs telephoned the unit manager for instructions. (Tr. 999-1000.) Additionally, the DON was available to make

decisions because she is on call 24 hours a day, 7 days a week.<sup>14</sup> Given the availability of a true manager, the LPNs were not left to their own devices such that they must be supervisors by default. *See Children's Habilitation Ctr., Inc. v. NLRB*, 887 F.2d 130, 133 (7th Cir. 1989) (nurses in charge of night shift were not supervisors where actual supervisors were “only a telephone call away;” court rejected argument that if charge nurses were not supervisors there would be no supervision); *Providence Alaska Med. Ctr. v. NLRB*, 121 F.3d 548, 555 (9th Cir. 1997) (nurses not supervisors where admitted supervisors were “on call at all times”); *see also TRW-United Greenfield Div. v. NLRB*, 716 F.2d 1391, 1394 (11th Cir. 1983) (second shift dispatchers were not supervisors where their supervisor “left the plant every day around 6:00 p.m., but was available by phone should problems arise after that time”).

**3. The Center failed to show that the LPNs responsibly direct employees where they were not held accountable for the performance of others**

The term “responsibly to direct” was included in Section 2(11) to encompass individuals who exercise “basic supervision but lack the authority or opportunity to carry out any of the other statutory functions,” but it was not meant to include “minor supervisory functions performed by lead employees, straw bosses, and set-

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<sup>14</sup> The Southway unit manager testified that she works until late in the evening, sometimes the middle of the night. (DDE 5 n.21; Tr. 1050.)

up men.” *Oakwood*, 348 NLRB at 690. In *Oakwood*, 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.’” *Id.* at 691 (citation omitted). 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.” *Id.* at 692. The Board explained (DDE 32-34) that, in following several courts of appeals, the accountability requirement distinguishes between those individuals aligned with management and those who simply direct employees in completing a certain task. *See Northeast Utilities Serv. Corp.*, 35 F.3d 621, 625 (1st Cir. 1994) (alleged supervisors were not answerable for conduct of others); *NLRB v. KDFW-TV, Inc.*, 790 F.2d 1273, 1278 (5th Cir. 1986) (same). Courts defer to the Board’s judgment in drawing the line between supervisors and employees while being mindful “not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights which the [A]ct is intended to protect.” *NLRB v. GranCare, Inc.*, 170 F.3d 662, 666 (7th Cir. 1999).

The Board acknowledged that the LPNs have authority to direct the CNAs, but found that the Center failed to show that it held the LPNs responsible or accountable for CNAs’ performance. (DDE 33.) Although the Center claims

(Br. 28) that the LPNs are held responsible for the CNAs' performance, it provided not one example of that. Indeed, it admits (Br. 65) that the record includes no instances of an LPN being disciplined or discharged for failing to supervise a CNA. As the Board noted (DDE 33-34 n.89; Tr. 87, 842), neither the DON nor shift supervisor Baxter had taken such action against an LPN. And, significantly, the DON and a unit manager stated that the LPNs are *not* disciplined when CNAs fail to properly perform. (DDE 34; Tr. 211, 692.)

Faced with that compelling evidence and those concessions, the Center attempts to minimize its requirement of demonstrating supervisory authority with specific, tangible evidence by asserting (Br. 65) that it need only show the "prospect" of its taking adverse action against the LPNs for not supervising the CNAs. For example, it cites (Br. 28, Tr. 936) an LPN's testimony that *if* a CNA failed to perform properly, she would be held responsible. That LPN was obviously reluctant to answer counsel for the Center's hypothetical questions in the same exchange regarding what she would do if faced with a CNA's inadequate performance, stating: "That's another surmised situation. I guess I could do that, yes, sir" (Tr. 936) and "You're asking me to surmise a situation that has not occurred. I cannot tell you what is going to happen" (Tr. 938). And, moreover, she testified that, in 10 years at the Center, she was never actually held accountable for the work of the CNAs on her team. (Tr. 905-06.)

Similarly, the Center relies (Br. 28, Tr. 842) on shift supervisor Baxter's hypothetical testimony that *if* she observed an LPN failing to supervise a CNA she *would* issue a coaching form to the LPN. The DON's testimony cited by the Center (Br. 28, 65, Tr. 87) is equally speculative: "if" an LPN failed to supervise a CNA, she "could" face disciplinary action; she later conceded (Tr. 211) that LPNs could not be disciplined in those circumstances. The Board properly discounted the Center's testimony as conclusory. (DDE 34 n.89.) *Golden Crest Healthcare Center*, 348 NLRB at 731 ("The Board has long recognized that purely conclusory evidence is not sufficient to establish supervisory status"). A purely speculative prospect of discipline does not satisfy *Oakwood's* evidentiary standard, 348 NLRB at 691-92, as further clarified in *Golden Crest Healthcare Center*, 348 NLRB at 731.

The Center's reliance (Br. 26-27) upon alleged disciplinary evaluations of CNAs by LPNs misses the point regarding accountability. The Board found (DDE 33) that even assuming the LPNs could take corrective action for CNAs' errors, the Center failed to show, as it must, that the LPNs face adverse action if they do not correct the CNAs' performance. In other words, the issue is not whether the *CNAs* faced consequences for their own performance, but whether the *LPNs* faced consequences for CNAs' errors. Similarly, the issue is not whether the LPNs evaluated the CNAs; as discussed below, that is not a statutorily recognized

supervisory power. In *Golden Crest Healthcare Center*, 348 NLRB at 731, the Board rejected as speculative better evidence of responsible direction than what the Center offered here; in that case, the nurses at issue were evaluated on their direction of CNAs, but there was no evidence of any material consequences for the nurses from those evaluations. Here, the Board correctly found (DDE 34 (quoting *Golden Crest Health Care Center*, 348 NLRB at 731)), that “there is no evidence in the record to suggest that any LPN ‘has experienced any material consequences to her terms and conditions of employment, either positive or negative, as a result of his/her performance in directing CNAs.’”

**4. The Center’s evidence regarding evaluations and supervisory ratios does not meet its burden**

**a. LPNs’ evaluations of CNAs do not affect the CNAs’ terms and conditions of employment**

To be relevant to Section 2(11), evaluations must be directly correlated to the evaluated employees’ employment conditions because “evaluating” is not one of the 12 statutory indicia. It is well settled that “[f]illing out forms related to performance issues, without more, does not qualify employees for supervisory status.” *Hospital General Menonita v. NLRB*, 393 F.3d 263, 267-68 (1st Cir. 2004); *see also New York Univ. Med. Ctr. v. NLRB*, 156 F.3d 405, 413 (2d Cir. 1998); *Beverly Health & Rehab. Servs., Inc.*, 335 NLRB 635, 668 (2001), *enforced in relevant part*, 317 F.3d 316, 323-24 (D.C. Cir. 2003). What is required is

specific evidence of “a ‘direct correlation’ between the evaluations” and the resulting change in employment terms, such as wage increases or bonuses. *NLRB v. Hilliard Dev. Corp.*, 187 F.3d 133, 145 (1st Cir. 1999); *see also Edward Street Daycare Ctr., Inc. v. NLRB*, 189 F.3d 40, 51-52 (1st Cir. 1999).

The Center misreads the Board’s analysis of the flaws in its evidence regarding the LPNs’ evaluation of CNAs. The Center argues (Br. 66) that the “Board incorrectly concluded that LPNs failed to exercise independent judgment in performance evaluations because there was no record evidence that CNAs were disciplined for failing to comply with directives for improvement in the performance evaluations.” Instead, the Board found (DDE 44-45) the Center’s evidence insufficient because it did not show that the LPNs’ alleged evaluations of the CNAs “have a demonstrable impact on employees’ terms and conditions of employment or job status.” Substantial evidence supports the Board’s finding that the Center did not meet its burden of proof. The Center did not produce any LPN evaluator as a witness to testify concerning the impact of the evaluation—whether it led to good or bad consequences for the CNA. All the Center points to (Br. 66-67) is evidence that LPNs completed evaluations forms stating how the CNAs’ could improve their performance. Those forms (EX 16) have no provision for LPNs’ recommendation for any wage increases or other actions for the CNAs.

On a related point, the Center incorrectly suggests (Br. 66) that the Board required “that evidence be submitted to demonstrate additional disciplinary action was taken against a CNA for failing to follow the directives in a performance evaluation.” To the contrary, under the correct framework, the Board only reviewed the record for any impact of the evaluations on the CNAs’ terms and conditions of employment. It could find none because the Center did not produce the requisite evidence. As the Board noted (DDE 45), among other things, the “[e]valuations ha[d] no impact on wage rates.”<sup>15</sup> Indeed, the Center does not claim that they did so. In short, the Board correctly observed that “[a]lthough the evaluations instruct CNAs as to improvements needed in their work performance, ‘there is no evidence that the [Center] has taken any action in response to an employee’s failure to follow an evaluation’s recommendation.’” (DDE 45 (citing *Willamette Indus.*, 336 NLRB 743, 744 (2001))).<sup>16</sup>

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<sup>15</sup> The CNAs’ collective-bargaining agreement sets their wage rates. (Tr. 383, JX 1 pp. 16-17.)

<sup>16</sup> The Center cites (Br. 66) *Caremore, Inc. d/b/a Altercare of Hartville v. NLRB*, 129 F.3d 365, 369-70 (6th Cir. 1997), another pre-*Kentucky River* Sixth Circuit case applying an incorrect burden of proof. Further, the LPNs there, in completing evaluations, made recommendations—regarding employees’ continued employment—a fact not present here. See *Hilliard Dev. Corp.*, 187 F.3d at 145 (distinguishing *Caremore* and finding LPNs not supervisors where their evaluations of others did not affect pay).

**b. The supervisory ratios do not demonstrate that the LPNs were supervisors**

The ratio of supervisors to employees is not included in the Section 2(11) definition of supervisor. *See, e.g., NLRB v. Prime Energy Ltd. Partnership*, 224 F.3d 206, 209 (3d Cir. 2000) (“We do not consider the ratio of supervisors to employees when determining the supervisory status of a position”). As the Board stated (DDE 38), secondary indicia are insufficient to establish supervisory authority where the disputed position does not exercise any of the powers listed in Section 2(11).

Here, the Center erroneously relies (Br. 68) on the physical absence of supervisors on the third (night) shift and the presence of one supervisor on weekends to claim that those ratios of supervisors to employees demand a finding that the LPNs are supervisors. Contrary to the Center’s view (Br. 68), the fact that supervisors are not physically present in the same numbers on third and weekend shifts as on the day and evening shifts during the week does not mean that the LPNs *must* be found to be supervisors to avoid the troubling conclusion that residents are somehow left with insufficient care. *See NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1467 (7th Cir. 1983) (rejecting lack of supervision on evening and night shifts as basis to find that LPNs were supervisors). And, as noted above with respect to assignment, the DON is on call 24 hours a day, 7 days a week and the night shift LPNs called on admitted managers for direction. *See Golden Crest*

*Healthcare Center*, 348 NLRB at 730 n.10 (nurses were not supervisors despite being “in charge” on nights and every other weekend; “this factor is even less probative where management is available after hours”). Where substantial evidence supports the Board’s finding that the Center failed to demonstrate that the LPNs exercise any Section 2(11) powers with independent judgment, the Center’s representations regarding supervisor-employee ratios do not carry its burden.

## CONCLUSION

Because the Center failed to meet its burden of proving the LPNs' supervisory status, the Court should enter a judgment denying the petition for review and enforcing the Board's order in full.

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National Labor Relations Board

October 2011

UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

LAKELAND HEALTH CARE ASSOCIATES, LLC	*	
D/B/A WEDGEWOOD HEALTHCARE CENTER	*	
	*	
Petitioner/Cross-Respondent	*	Nos. 11-12000
	*	11-12638
v.	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	12-CA-27044
	*	
Respondent/Cross-Petitioner	*	
	*	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 12,507 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC  
this 12th day of October 2011

UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

LAKELAND HEALTH CARE ASSOCIATES, LLC	*	
D/B/A WEDGEWOOD HEALTHCARE CENTER	*	
	*	
Petitioner/Cross-Respondent	*	Nos. 11-12000
	*	11-12638
v.	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	12-CA-27044
	*	
Respondent/Cross-Petitioner	*	
	*	

**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the Board's brief has this day been served by U.S. mail upon the following counsel at the address listed below:

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Dated at Washington, DC  
this 12th day of October 2011