

**Nos. 11-1115 & 11-1129**

---

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**735 PUTNAM PIKE OPERATIONS, LLC,  
d/b/a GREENVILLE SKILLED NURSING AND  
REHABILITATION 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**

---

**FINAL BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

---

**JULIE B. BROIDO**  
*Supervisory Attorney*

**MILAKSHMI V. RAJAPAKSE**  
*Attorney*

*National Labor Relations Board*  
1099 14th Street, N.W.  
Washington, D.C. 20570  
(202) 273-2996  
(202) 273-1778

**LAFE E. SOLOMON**  
*Acting General Counsel*

**CELESTE J. MATTINA**  
*Acting Deputy General Counsel*

**JOHN H. FERGUSON**  
*Associate General Counsel*

**LINDA DREEBEN**  
*Deputy Associate General Counsel*  
*National Labor Relations Board*

---

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

735 PUTNAM PIKE OPERATIONS, LLC,	)	
d/b/a GREENVILLE SKILLED NURSING AND	)	
REHABILITATION CENTER	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 11-1115, 11-1129
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	1-CA-46619

**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certify the following:

**A. Parties and Amici**

735 Putnam Pike Operations, LLC d/b/a Greenville Skilled Nursing and Rehabilitation Center was the Respondent before the Board in the above-captioned case and is the Petitioner/Cross-Respondent in this court proceeding. The Board’s General Counsel was a party before the Board. The New England Health Care Employees Union, District 1199, a/w Service Employees International Union (SEIU) was the charging party before the Board.

## **B. Rulings Under Review**

The case under review is a Decision and Order of the Board, issued on April 13, 2011 and reported at 356 NLRB No. 138, which relies on the findings of the Board's Regional Director for Region 1 in an earlier representation proceeding. The Regional Director's findings in the representation proceeding are contained in an unpublished Decision and Direction of Election, which issued on September 17, 2010.

## **C. Related Cases**

This case has not previously been before this Court. The Board is not aware of any related cases either pending or about to be presented before this or any other court.

/s/ Linda Dreeben

Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1099 14th Street, NW  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, D.C.  
this 20<sup>th</sup> day of October 2011

## TABLE OF CONTENTS

<b>Headings</b>	<b>Page(s)</b>
Statement of jurisdiction .....	1
Statement of issue presented .....	3
Statement of the case.....	4
Statement of facts.....	4
I. The findings of fact.....	4
A. Background: the Center’s business and its organizational structure .....	4
B. Duties and authority of the Center’s RNs when acting as charge nurses.....	7
C. Duties and authority of the Center’s RNs when acting as shift supervisors.....	8
D. The representation proceeding .....	9
E. The unfair labor practice proceeding.....	10
II. The Board’s conclusions and Order .....	10
Summary of argument.....	11
Argument.....	14
The Board reasonably found that the Center violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the exclusive collective-bargaining representative of an appropriate unit of the Center’s registered nurses .....	14
A. Introduction.....	14

## TABLE OF CONTENTS

<b>Headings – Cont’d</b>	<b>Page(s)</b>
B. Substantial evidence supports the Board’s finding that the registered nurses at issue are not supervisors within the meaning of the Act .....	15
1. Applicable principles and standard of review .....	15
2. The Center failed to carry its evidentiary burden of proving that its charge nurses and shift supervisors are “supervisors” within the meaning of the Act .....	19
a. The Board reasonably found that the Center failed to meet its burden of showing that charge nurses responsibly direct the work of CNAs and CMTs .....	20
b. The Board reasonably found that the Center failed to meet its burden of showing that charge nurses and shift supervisors assign work to CNAs and CMTs.....	24
c. The charge nurses do not discipline CNAs or effectively recommend their discipline .....	29
i. The Center failed to establish that charge nurses exercise independent judgment in handling complaints of resident mistreatment and writing up disciplinary warnings.....	30
ii. The Center also failed to establish that the write-ups constitute, or result in, discipline affecting CNAs’ employment status.....	34
d. Given the Center’s failure to meet its burden of establishing that the RNs exercise any of the enumerated Section 2(11) functions, the Center cannot rely on so-called “secondary indicia” of supervisory status.....	38
Conclusion .....	42

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>Amalgamated Clothing Workers of Am. v. NLRB</i> , 420 F.2d 1296 (D.C. Cir. 1969).....	17
* <i>Beverly Enters.-Mass., Inc. v. NLRB</i> , 165 F.3d 960 (D.C. Cir. 1999) .....	17, 18, 23, 26, 40
<i>Beverly Enters.-Penn., Inc. v. NLRB</i> , 129 F.3d 1269 (D.C. Cir. 1997).....	20
<i>Boire v. Greyhound Corp.</i> , 376 U.S. 473 (1964).....	2
<i>Chevron U.S.A., Inc.</i> , 309 NLRB 59 (1992) .....	23, 40
* <i>Croft Metals, Inc.</i> , 348 NLRB 717 (2006) .....	17, 20, 24
<i>Desert Hosp. v. NLRB</i> , 91 F.3d 187 (D.C. Cir. 1996).....	18
<i>Franklin Home Health Agency</i> , 337 NLRB 826 (2002) .....	30
<i>Freund Baking Co.</i> , 330 NLRB 17 (1999) .....	3
<i>Harborside Healthcare</i> , 330 NLRB 1334 (2000) .....	29
* <i>Golden Crest Healthcare Ctr.</i> , 348 NLRB 727 (2006) .....	18, 22, 24, 27, 28, 29

---

\* Authorities upon which we chiefly rely are marked with asterisks.

## TABLE OF AUTHORITIES

<b>Cases – Cont’d</b>	<b>Page(s)</b>
<i>Jochims v. NLRB</i> , 480 F.3d 1161 (D.C. Cir. 2007).....	30, 35, 39
<i>Loyalhanna Care Center</i> , 352 NLRB 863 (2008), <i>incorporated by reference in</i> 355 NLRB No. 102 (2010), <i>application for enforcement</i> <i>and cross-petition for review pending</i> , Nos. 10-3549 & 10-3840 (3d Cir.) .....	23-26, 40
<i>Lynwood Manor</i> , 350 NLRB 489 (2007) .....	18
<i>Metro. Edison Co. v. NLRB</i> , 460 U.S. 693 (1983).....	14
<i>NLRB v. Attleboro Assocs., Ltd.</i> , 176 F.3d 154 (3d Cir. 1999).....	37
<i>NLRB v. Bell Aerospace Co.</i> , 416 U.S. 267 (1974).....	17
<i>NLRB v. Hilliard Dev. Corp.</i> , 187 F.3d 133 (1st Cir. 1999).....	35-36
* <i>NLRB v. Kentucky River Cmty. Care, Inc.</i> , 532 U.S. 706 (2001).....	16-17
<i>NLRB v. Metro. Life Ins. Co.</i> , 405 F.2d 1169, 1172 (2d Cir. 1968) .....	18
* <i>NLRB v. Res-Care, Inc.</i> , 705 F.2d 1461 (7th Cir. 1983) .....	18, 23, 31, 33

---

\* Authorities upon which we chiefly rely are marked with asterisks.

## TABLE OF AUTHORITIES

<b>Cases – Cont’d</b>	<b>Page(s)</b>
<i>New York Univ. Med. Ctr. v. NLRB</i> , 156 F.3d 405 (2d Cir. 1998).....	18
<i>Oak Park Nursing Care Ctr.</i> , 351 NLRB 27 (2007) .....	35, 37
* <i>Oakwood Healthcare, Inc.</i> , 348 NLRB 686 (2006) .....	16, 21, 23-24, 28, 40
* <i>Oil, Chem. &amp; Atomic Workers Int’l Union, AFL-CIO v. NLRB</i> , 445 F.2d 237 (D.C. Cir. 1971).....	17, 18, 19, 26, 31, 39
<i>Passaic Daily News v. NLRB</i> , 736 F.2d 1543 (D.C. Cir. 1984).....	32
<i>Progressive Transp. Servs.</i> , 340 NLRB 1044 (2003) .....	37
<i>Public Serv. Co. of Colo. v. NLRB</i> , 405 F.3d 1071 (10th Cir. 2005) .....	38
<i>Riverchase Health Care Ctr.</i> , 304 NLRB 861 (1991) .....	29
<i>Teamsters Local 115 v. NLRB</i> , 640 F.2d 392 (D.C. Cir. 1981).....	34
<i>Ten Broeck Commons</i> , 320 NLRB 806 (1996) .....	35
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	19

---

\* Authorities upon which we chiefly rely are marked with asterisks.

**TABLE OF AUTHORITIES**

<b>Cases – Cont’d</b>	<b>Page(s)</b>
* <i>VIP Health Servs., Inc. v. NLRB</i> , 164 F.3d 644 (D.C. Cir. 1999).....	15, 16, 18, 20, 23, 39, 41

**Statutes:**

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

Section 2(3) (29 U.S.C. § 152(3)).....	15
Section 2(11) (29 U.S.C. § 152(11)).....	11-13, 15-17, 20-24, 29, 35, 38-39
Section 7 (29 U.S.C. § 157).....	11
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	2-4, 10-12, 14, 15, 41
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	2-4, 10-12, 14, 15, 41
Section 9(c) (29 U.S.C. § 159(c)) .....	3
Section 9(d)(29 U.S.C. § 159(d)).....	2
Section 10(a) (29 U.S.C. § 160(a)) .....	2
Section 10(f)(29 U.S.C. 160(f)) .....	2

**MISCELLANEOUS**

Sen. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947).....	17
--	----

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

---

**Nos. 11-1115 & 11-1129**

---

**735 PUTNAM PIKE OPERATIONS, LLC,  
d/b/a GREENVILLE SKILLED NURSING AND  
REHABILITATION 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**

---

**FINAL BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

---

**STATEMENT OF JURISDICTION**

This case is before the Court on the petition of 735 Putnam Pike Operations, LLC, d/b/a Greenville Skilled Nursing and Rehabilitation Center (“the Center”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Decision and Order issued by the Board on April 13, 2011,

and reported at 356 NLRB No. 138. (A 632-35.)<sup>1</sup> In its Decision and Order, the Board found that the Center violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 158(a)(5) and (1)) (“the Act”) by failing and refusing to bargain with the New England Health Care Employees Union, District 1199, a/w Service Employees International Union (“the Union”) as the exclusive collective-bargaining representative of certain registered nurses employed by the Center. (A 632-33.)

The Board had subject matter jurisdiction under Section 10(a) of the Act (29 U.S.C. § 160(a)), and its Order is final with respect to all parties. This Court has jurisdiction under Section 10(f) of the Act (29 U.S.C. § 160(f)), which allows an aggrieved party to obtain review of a Board order in this Circuit, and allows the Board to cross-apply for enforcement.

As the Board’s unfair labor practice Order is based, in part, on findings made in an underlying representation proceeding, the record in that proceeding (Board Case No. 1-RC-22474) 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 (1964). Under Section 9(d), the Court has jurisdiction to review the Board’s

---

<sup>1</sup> Record references in this final brief are to the Joint Appendix (“A”) filed by the Center. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” references are to the Center’s opening brief.

actions in the representation proceeding solely for the purpose of “enforcing, modifying or setting aside in whole or in part the [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) (citing cases).

The Center filed its petition for review on April 19, 2011. The Board filed its cross-application for enforcement on May 5, 2011. These filings were timely, as the Act places no time limit on the institution of proceedings to review or enforce Board orders.

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

The ultimate issue in this case is whether the Board reasonably 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 as the exclusive collective-bargaining representative of an appropriate unit of registered nurses employed by the Center. The resolution of this issue turns on a subsidiary issue: whether substantial evidence supports the Board’s finding that the Center did not carry its burden of proving that the registered nurses in the bargaining unit are statutory supervisors excluded from the Act’s protections.

## STATEMENT OF THE CASE

This case involves the Center's failure and refusal to bargain with the Union after the Center's registered nurses voted in favor of union representation in a Board-conducted election. (A 632-33.) The Board found that the Center's refusal to bargain violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) and ordered the Center to recognize and bargain with the Union. (*Id.*) The Center does not dispute that it has refused to bargain. Instead, it claims that, in the underlying representation proceeding, the Board erred in finding that the Center failed to meet its burden of proving that the registered nurses who comprise the bargaining unit are statutory supervisors. (Br. 5, 31-50.) 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 FINDINGS OF FACT

#### A. Background: the Center's Business and Its Organizational Structure

The Center is a nursing facility in Greenville, Rhode Island, providing both long-term and short-term care to numerous residents. (A 492, 633; A 19-20.) Since about October 2008, the Center has been managed by a separate entity called Genesis Healthcare ("Genesis"). (A 492; A 19.) Before that, the facility was

operated by a company referred to in the record only as “TC”; and, still earlier, by a company called “Haven Health.” (*Id.*)

The 15 registered nurses (“RNs”) at issue in this case are part of the Center’s Nursing Department, which operates 24 hours a day, 7 days a week, with each day divided into three shifts. (A 492; A 31-32, 35, 150.) The “day shift” runs from 7:00 a.m. to 3:00 p.m., the “evening shift” runs from 3:00 p.m. to 11:00 p.m., and the “night shift” runs from 11:00 p.m. to 7:00 a.m. (A 492; A 31-32.)

The operations of the Nursing Department are controlled by several managers: the Center’s Administrator, Wallace Greenhalgh; the Acting Director of Nursing (“DON”), Donna Goulden; the Day Supervisor/Unit Manager, Samantha Ascoli; and the Nurse Practice Educator, Tammie Parkhurst.<sup>2</sup> (A 492-93; A 11-12, 15, 146-47.) Greenhalgh and Goulden are on call 24 hours a day, 7 days a week, to handle issues in the Nursing Department. (A 502; A 150, 230-31.) In addition, Goulden is physically present at the Center from 6:00 a.m. to 2:00 p.m. on weekdays. (A 492; A 22.) Ascoli, who reports to Goulden, works 5 days a week—with Tuesdays off and every other weekend at work—from 7:30 a.m. to

---

<sup>2</sup> Goulden, Ascoli, and Parhurst are RNs, but they do not perform the day-to-day nursing work of the RNs in the bargaining unit at issue here. (A 11-15.) Accordingly, they are excluded from the bargaining unit, and the Union and the Center so stipulated in the proceedings below. (A 493 n.5; A 11-15.) The parties further stipulated that the position of Evening Supervisor/Unit Manager (corresponding to Ascoli’s Day Supervisor position), which was vacant as of the hearing below, is also excluded from the unit. (A 493 n.8; A 13-15, 17-18, 29-30.)

3:30 p.m. (*Id.*) Parkhurst, who also reports to Goulden, works from 8:00 a.m. to 4:00 p.m. on weekdays. (A 492-93; A 22-23.)

These managers oversee nursing services in 5 resident units: “Sun,” “Star,” “Lily of the Valley,” “Buttercup,” and “Daisy.”<sup>3</sup> (A 492; A 31-32.) Each unit is headed by a “charge nurse,” who may be either an RN or a Licensed Practical Nurse (“LPN”).<sup>4</sup> (A 493; A 34, 141-42, 217.) The identity of the charge nurse in any given unit and shift varies depending on the individual RN and LPN schedules, but in every shift there is a charge nurse assigned to each unit. (A 493; A 31-32, 34.) During the day shift on weekdays, the charge nurses report either to Day Supervisor/Unit Manager Ascoli or, if Ascoli is not working, to Acting DON Goulden. (A 493; A 35.) During the day shift on weekends when Ascoli is not working, and on all of the evening and night shifts, the charge nurses report to the RN charge nurse who has been designated as the shift supervisor for the entire facility. (A 493, 501 n.32; A 34, 39, 145-46, 149.) RNs serve as shift supervisors in order of seniority. (A 501; A 23-25.) Each designated shift supervisor must continue to perform her regular charge-nurse duties in her assigned unit, while also

---

<sup>3</sup> The care provided in the various units is the same, but some units house more residents than others. (A 492; A 31-32.) The units range in capacity from 18 to 34 residents. (*Id.*)

<sup>4</sup> The Center’s LPNs, including those who serve as charge nurses, have been represented by the Union for many years in a different bargaining unit. (A 493 n.6; A 143-44, 461-482.)

performing certain limited additional duties relevant to all of the units. (A 493; A 23-29, 226.)

Along with the RNs and LPNs, there are between two and five certified nursing assistants (“CNAs”) working in every unit, on every shift, and some of the units are additionally staffed by a certified medication technician (“CMT”). The CNAs and CMTs receive and implement instructions from the charge nurse in their unit regarding the individual needs of the residents. (A 494; A 217-18.)

**B. Duties and Authority of the Center’s RNs When Acting as Charge Nurses**

Charge nurses are generally responsible for making sure that their units are running as they should be, and that residents in the unit are receiving proper care. (*Id.*) At the beginning of the shift, the charge nurse receives a report from her counterpart on the previous shift, regarding each resident’s medical needs and any changes in their condition. (*Id.*) After receiving this report, the charge nurse meets with the CNAs and CMTs (if any) who are assigned to the unit and lets them know what needs to be done for each resident.<sup>5</sup> (*Id.*) Thereafter, the CNAs and CMTs proceed with their duties (e.g., bathing, feeding, and otherwise assisting residents with their daily activities), while the charge nurse attends to the residents’ medical

---

<sup>5</sup> There is no evidence as to how the CNAs and CMTs are assigned to specific units, shifts, or patients. (A 495 n.11, 508; A 235-36.)

needs (e.g., administering medication, reporting lab results to doctors, and notifying the residents' families of any issues). (A 494; A 217-18, 294-301.)

### **C. Duties and Authority of the Center's RNs When Acting as Shift Supervisors**

About 9 of the Center's 15 RNs also serve as shift supervisors. (A 501; A 383-405.) The Administrator and the Acting DON are available during their shifts, because they are available 24 hours a day, 7 days a week, to handle any problems that arise, including staffing issues such as approving overtime. (A 502; A 150.)

When RNs serve as shift supervisors, they carry a book containing employee names, contact information, and schedules. (A 502; A 227-28.) The information in the book allows the shift supervisor to secure replacement workers when a CNA or CMT is unable to work their scheduled shift. (*Id.*) In such situations, shift supervisors follow a pre-established procedure in finding replacements. (A 502; A 152-53, 227-29.) In accordance with that procedure, the shift supervisor must first seek a replacement among the per-diem and part-time employees listed in the book. (A 502; A 153, 227.) If the shift supervisor cannot secure a replacement from one of these two groups, she is authorized to seek a replacement among the full-time employees, but she cannot require employees to stay over or come in to work an additional shift. (A 502-03; A 152-53, 227-29.) If the shift supervisor is unable to find a replacement, she relies on employees who are already working to equalize the staffing on each unit. (A 503; A 153-55, 227-29.)

### **D. The Representation Proceeding**

On August 6, 2010, the Union filed a representation petition seeking certification as the collective-bargaining representative of the Center's RNs. (A 484-85, 522.) The Center argued that the registered nurses are supervisors under the Act, and therefore ineligible to vote on union representation in a Board-conducted election.

To resolve this dispute, the Regional Director held a representation hearing. (A 10.) Following the hearing, the Board's Regional Director for Region 1 issued a Decision and Direction of Election, finding that the Center failed to meet its burden of proving that the RNs are statutory supervisors. (A 515-16, 523-546.) Accordingly, the Regional Director ordered a secret-ballot election in an appropriate unit of RNs. (A 516.)

The Center filed a Request for Review of the Regional Director's Decision, reiterating its claim that the RNs are statutory supervisors. (A 516, 547-90.) On October 15, 2010, the Regional Director conducted a secret-ballot election among the RNs. (A 516.) Because of the Center's pending Request for Review, the ballots cast at the election were impounded. (*Id.*) Thereafter, the Board (Chairman Liebman and Member Becker, Member Hayes dissenting) denied the Center's Request for Review. (A 591.) The Regional Director later issued a tally of ballots showing that the RNs had selected the Union by a vote of 13-0, and further issued

a Certification of Representative and Corrected Certification of Representative, certifying the Union as the exclusive collective-bargaining representative of the unit of RNs. (A 516-17, 592-93.) The Union then requested bargaining, which the Center refused, claiming the certification was not valid because the unit consisted of statutory supervisors. (A 517, 594-95.)

### **E. The Unfair Labor Practice Proceeding**

In January 2011, the Union filed an unfair labor practice charge and an amended charge. (A 517-18, 596-600.) After an investigation, the Board's General Counsel issued a complaint alleging that the Center's refusal to bargain violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (A 518, 602-15.) In response, the Center admitted its refusal, repeating its position that the RNs are statutory supervisors. (A 617-19.) Accordingly, the General Counsel filed a motion for summary judgment, which the Center opposed. (A 515-21, 621-31.) Ruling on the motion, the Board found that the Center had violated the Act as alleged and ordered it to bargain with the Union. (A 632-33.)

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

On April 13, 2011, the Board (Chairman Liebman, and Members Becker and Hayes) issued its Decision and Order, granting the General Counsel's motion for summary judgment. (A 632-33.) The Board found that "[a]ll representation issues raised by the [Center] were or could have been litigated in the prior representation

proceeding.” (A 632.) The Board also found that the Company did “not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor [did] it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceedings.” (*Id.*) 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 as the exclusive collective-bargaining representative of the charge nurses. (*Id.*)

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 the rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157). (*Id.*) Affirmatively, the Board’s Order requires the Center, upon request, to bargain with the Union, and, if an understanding is reached, to embody it in a signed agreement. (*Id.*)

### **SUMMARY OF ARGUMENT**

The Board reasonably found that the Center failed to carry its burden of proving that its RNs are “supervisors” within the meaning of Section 2(11) of the Act (29 U.S.C. § 152(11)). Accordingly, the Board properly certified a bargaining unit consisting of those RNs, and 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 as the RNs’ duly elected collective-bargaining representative.

Contrary to the Center (Br. 44-47), the RNs do not have authority to “responsibly direct” the work of employees under Section 2(11) of the Act. Although the RNs, when acting as charge nurses, delegate tasks to the CNAs and CMTs who work alongside them, and oversee their work, there is no evidence that such delegation and oversight involves “independent judgment,” as required for supervisory status under the Act. There is also no evidence that the charge nurses are accountable for the work done by the CNAs and CMTs. Specifically, the Center failed to show that the RN charge nurses are required to take corrective action if the CNAs or CMTs do not perform their work correctly. The Center also failed to show that the RN charge nurses are rewarded or punished based on the CNAs’ or CMTs’ performance.

The Center also failed to show that the RNs “assign” work to the CNAs and CMTs within the meaning of Section 2(11). The Center claims that RN charge nurses exercise supervisory authority by letting CNAs and CMTs leave early in non-emergency situations, and that RN shift supervisors do the same by finding replacements or equalizing workloads when CNAs and CMTs “call out.” The Board, however, reasonably rejected the Center’s arguments. Thus, the record shows only one specific instance in which a charge nurse denied an employee’s request to leave early in a non-emergency situation, and in that instance the employee renewed her request before the DON, indicating that the charge nurse

lacked final authority. As for shift supervisors, they can only seek volunteers to replace absent employees, and in so doing are bound to follow the procedure and criteria set by the Center, which relieves them of discretion. Moreover, to the extent that the shift supervisors reallocate staff to equalize workloads, there is no evidence that this task involves the use of independent judgment.

Similarly unavailing is the Center's claim that its RNs discipline the CNAs and CMTs, or effectively recommend their discipline. Although the Center submitted into evidence numerous disciplinary warnings signed by RNs, along with other officials, the Center presented no explanatory testimony as to how the vast majority of warnings were prepared. And the little testimony relating to the remaining warnings provides conflicting accounts as to whether the RNs act on the instructions of higher-level officials in writing up employee infractions. The Center thus failed to show, by a preponderance of the evidence, that its RNs exercise the requisite independent judgment in preparing disciplinary warnings. The Center also failed to show that the disciplinary warnings constitute "discipline" or effective recommendations of discipline, within the meaning of Section 2(11) of the Act, because there is no evidence that the warnings led to job-affecting discipline. Accordingly, the Board reasonably found that the Center failed to carry its burden of proving that its RNs are statutory supervisors by virtue

of their authority to discipline, or effectively recommend the discipline of, other employees.

## ARGUMENT

### **THE BOARD REASONABLY FOUND THAT THE CENTER VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION AS THE EXCLUSIVE COLLECTIVE-BARGAINING REPRESENTATIVE OF AN APPROPRIATE UNIT OF THE CENTER'S REGISTERED NURSES**

#### **A. Introduction**

The Act prohibits an employer from refusing to bargain collectively with the representative of its employees. 29 U.S.C. § 158(a)(5).<sup>6</sup> The Center does not dispute that it has refused to bargain with the Union. Rather, it contends (Br. 5) that it has no obligation to bargain because the bargaining unit certified by the Board consists of statutory supervisors who are excluded from the Act's protections.

Given the Center's position, the narrow question presented to this Court is whether the RNs who comprise the bargaining unit are supervisors under the Act. As explained below, substantial evidence supports the Board's finding that the

---

<sup>6</sup> Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of [its] employees." An employer's failure to meet its Section 8(a)(5) bargaining obligation constitutes a derivative violation of Section 8(a)(1) (29 U.S.C. § 158(a)(1)), which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the[ir] [statutory] rights." See *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

Center did not carry its burden of proving that the nurses at issue are statutory supervisors. Accordingly, the Center has an obligation to bargain with the Union as the exclusive collective-bargaining representative of those nurses, and its refusal to so bargain constitutes a violation of Section 8(a)(5) and (1) of the Act. (29 U.S.C. § 158(a)(5) and (1)). *See VIP Health Servs., Inc. v. NLRB*, 164 F.3d 644, 645 (D.C. Cir. 1999).

**B. Substantial Evidence Supports the Board’s Finding that the Registered Nurses at Issue Are Not Supervisors Within the Meaning of the Act**

**1. Applicable principles and standard of review**

Section 2(3) of the Act (29 U.S.C. § 152(3)) excludes from the term “employee,” and hence from the Act’s protections, “any individual employed as a supervisor.” *See VIP Health Servs.*, 164 F.3d at 648 (D.C. Cir. 1999). Section 2(11) of the Act (29 U.S.C. § 152(11)) defines the term “supervisor” as follows:

[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.

In accordance with this definition, individuals are statutory supervisors only “if (1) they have the authority to engage in any of the 12 listed supervisor functions” *and* “(2) their ‘exercise of such authority is not merely of a routine or clerical nature,

but requires the use of independent judgment.”<sup>7</sup> *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 712 (2001) (citation omitted). *Accord VIP Health Servs.*, 164 F.3d at 648; *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006).

In *Oakwood Healthcare*, the Board clarified that “to exercise ‘independent judgment,’ an individual must at a minimum act, or effectively recommend action, free from the control of others and form an opinion or evaluation by discerning or comparing data.” 348 NLRB at 692-93. “[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.* (citations omitted).<sup>8</sup>

The Board’s interpretation of the term “independent judgment” follows, in part, from the general legislative purpose behind Section 2(11) to distinguish between truly supervisory personnel, who are vested with “genuine management

---

<sup>7</sup> The third requirement for supervisory status—that the authority is held “in the interest of the employer,” *Kentucky River*, 532 U.S. at 713—is not at issue here because the first two requirements are not met.

<sup>8</sup> As the Supreme Court has explained, “the statutory term ‘independent judgment’ is ambiguous with respect to the degree of discretion required for supervisory status.” *Kentucky River*, 532 U.S. at 713 (emphasis in original). Therefore, “[i]t falls clearly within the Board’s discretion to determine, within reason, what scope of discretion qualifies” an employee for supervisory status. *Id.*

prerogatives,” 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 (1974) (quoting Sen. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947)). *Accord Amalgamated Clothing Workers of Am. v. NLRB*, 420 F.2d 1296, 1300 (D.C. Cir. 1969). 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, 962 (D.C. Cir. 1999). Indeed, “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.” *Kentucky River*, 532 U.S. at 713 (citation omitted).

It is settled that the burden of demonstrating employees’ Section 2(11) supervisory status rests with the party asserting it. *Kentucky River*, 532 U.S. at 711-12; *accord Beverly Enters.-Mass.*, 165 F.3d at 962. The party seeking to prove supervisory status must establish it by a preponderance of the evidence. *See, e.g., Croft Metals*, 348 NLRB 717, 721 (2006). 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, AFL-*

*CIO 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 at 963; *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1467 (7th Cir. 1983); *Lynwood Manor*, 350 NLRB 489, 490 (2007); *Golden Crest Healthcare*, 348 NLRB 727, 731 (2006). 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).

The Board’s supervisory determination must be upheld as long as it is supported by substantial evidence, and will not easily be overturned on appeal. *VIP Health Servs.*, 164 F.3d at 648. 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 relative thereto are entitled to great weight.” *Oil, Chem. & Atomic Workers*, 445 F.2d at 241 (quoting *NLRB v. Metro. Life Ins. Co.*, 405 F.2d 1169, 1172 (2d Cir. 1968)). *See also Desert Hosp. v. NLRB*, 91 F.3d 187, 193 (D.C. Cir. 1996) (“A Board determination regarding supervisory status is entitled to special weight and is to be accepted if it has warrant in the record and reasonable basis in the law.”). Under the substantial evidence test, 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 Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951).

**2. The Center failed to carry its evidentiary burden of proving that its charge nurses and shift supervisors are "supervisors" within the meaning of the Act**

The Center does not contend that any of the 15 RNs in the bargaining unit have authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, or reward other employees, or adjust their grievances, or effectively recommend those actions. Instead, the Center argues only that the RNs who also serve as charge nurses and shift supervisors exercise three forms of statutory supervisory authority, namely: authority to responsibly direct the work of the CNAs and CMTs (Br. 44-47); authority to assign work to them (Br. 47-49); and authority to discipline them, or effectively recommend their discipline (Br. 32-43). The Center also cites (Br. 49-50) so-called "secondary indicia" of the charge nurses' supervisory status. For the reasons explained below, the Board reasonably rejected (DDE 14-21) all of the Center's supervisory-status claims. Because substantial evidence supports the Board's findings, they should not be disturbed on review.

**a. The Board reasonably found that the Center failed to meet its burden of showing that charge nurses responsibly direct the work of CNAs and CMTs**

Substantial evidence supports the Board’s finding (A 508) that the Center failed to carry its burden of proving that charge nurses responsibly direct the CNAs and CMTs who work with them. To be sure, charge nurses delegate tasks—for example, the taking of residents’ vital signs—to the CNAs and CMTs, and ensure that they are providing proper care to the residents. (A 494; A 217-18.) *See* p. 7 above. But as the Board reasonably found (A 508), the Center adduced no evidence that the charge nurses exercise “independent judgment” under Section 2(11) of the Act (29 U.S.C. § 152(11)) in delegating and overseeing these tasks. *See Beverly Enters.-Penn., Inc. v. NLRB*, 129 F.3d 1269, 1270 (D.C. Cir. 1997) (holding that nurse’s instructions to CNAs as to what needed to be done for patients during the shift—“for example, monitoring vital signs more frequently or cleaning up a mess”—was “merely routine” and did not involve exercise of independent judgment); *accord VIP Health Servs.*, 164 F.3d at 649. Indeed, the Center did not show what specific factors charge nurses allegedly weigh in directing the work of the CNAs and CMTs, thus eliminating any basis for a finding of independent judgment. *See Croft Metals*, 348 NLRB at 722 (independent judgment not shown where employer “adduced almost no evidence regarding the

factors weighed or balanced” by the putative supervisors in directing the work of other employees).

Moreover, the Center failed to show that the direction provided by the charge nurses to the CNAs and CMTs is “responsible” within the meaning of Section 2(11). For direction to be “responsible,” the person giving direction “must be accountable for the performance of the task by the other . . . .” *Oakwood Healthcare*, 348 NLRB at 691-92. Accountability, in turn, requires that the person giving direction has “the authority to take corrective action, if necessary,” and that “some adverse consequence may befall [the person giving direction] if the tasks performed by the employee are not performed properly.” *Id.* at 692. Here, as the Board found (A 508), there is no evidence that the charge nurses are held accountable for the work done by the CNAs and CMTs who are purportedly under their direction.

Specifically, there is no evidence that the charge nurses are required to take corrective action if the CNAs and CMTs do not perform their work properly. (A 508; A 242.) Nor is there any evidence that the charge nurses are either punished or rewarded based on how well the CNAs and CMTs perform their work. (A 508; A 243.) Thus, as the Board noted (A 508), there is no evidence that the charge nurses have been disciplined or faced with the prospect of discipline due to a CNA’s or CMT’s performance. The evidence does not even show that the charge

nurses' evaluations are based on the performance of those they purportedly supervise. (A 494, 508.) Moreover, even if the charge nurses' evaluations had some connection to the performance of the CNAs and CMTs, the evaluations still would not establish accountability where, as here, the evaluations have no effect on charge-nurse wages. (A 494, 508; A 173, 225.) *See Golden Crest Healthcare*, 348 NLRB at 731 (finding accountability not established where charge-nurse evaluations were not connected to "any material consequences to [the charge nurses'] terms and conditions of employment, either positive or negative," and evidence specifically showed that employer did not award merit wage increases or bonuses based on evaluations).

Further, Charge Nurse Iwenekha specifically denied ever being told by her superiors that she would be held accountable as a charge nurse if CNAs failed to perform their jobs properly. (A 494; A 225, 234.) Given this testimony, and the lack of evidence countering it, the Board reasonably found (A 508) that the Center did not prove that the charge nurses have authority, under Section 2(11) of the Act, to responsibly direct the CNAs and CMTs working with them.

Relying mainly on its own job description for the position of charge nurse (A 447-50), the Center nevertheless argues (Br. 44, 47) that the charge nurses "are responsible and accountable to ensure that CNAs do their job." However, as this Court has recognized, such "[s]tatements by management purporting to confer

authority do not alone suffice” to establish supervisory authority for purposes of the Act. *Beverly Enters.-Mass.*, 165 F.3d at 963 (citing *Chevron, U.S.A., Inc.*, 309 NLRB 59, 69 (1992) (no weight given “job descriptions that attribute supervisory authority where there is no independent evidence of its possession or exercise”)); *accord Oakwood Healthcare*, 348 NLRB at 690 n.24.

Equally unavailing is the Center’s argument (Br. 46-47) that the charge nurses as well as shift supervisors responsibly direct CNAs and CMTs because they are, on certain shifts, the highest-ranking employees on site in the Nursing Department. Under well settled law, employees who do not exercise any form of Section 2(11) authority are not deemed statutory supervisors simply because they are, on occasion, or even regularly, the highest ranking employees at the facility. *See VIP Health Servs.*, 164 F.3d at 649-50 (“[I]f the [nurses] whom the [e]mployer contends are in charge do not possess Section 2(11) supervisory authority, then the absence of anyone else with such authority does not then automatically confer it upon these nurses.” (internal quotation marks and citation omitted)). *Accord Res-Care, Inc.*, 705 F.2d at 1467 (“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.”); *Loyalhanna Care Ctr.*, 352 NLRB 863, 864-65 (2008) (rejecting theory that nurses are supervisors simply because they are highest ranking employees at nursing home 14 to 16 hours per

day), incorporated by reference in 355 NLRB No. 102 (2010), application for enforcement and cross-petition for review pending, Nos. 10-3549 & 10-3840 (3d Cir.).

**b. The Board reasonably found that the Center failed to meet its burden of showing that charge nurses and shift supervisors assign work to CNAs and CMTs**

As the Board found (A 508-511), the Center also failed to carry its burden of proving that the RNs who double as charge nurses and shift supervisors assign work to the CNAs and CMTs using independent judgment within the meaning of Section 2(11) of the Act. In *Oakwood Healthcare*, and its two companion cases, *Croft Metals, Inc.*, 348 NLRB 717 (2006), and *Golden Crest Healthcare Ctr.*, 348 NLRB 727 (2006), the Board stated that “assign” under Section 2(11) of the Act (29 U.S.C. § 152(11)) means “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.” *Oakwood Healthcare*, 348 NLRB at 689-90. Further, in the healthcare setting, “the term ‘assign’ encompasses the charge nurses’ responsibility to assign nurses and aides to particular patients” and 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 employees perform a discrete task.” *Id.* at 689.

Here, the Center does not contest the Board’s finding (A 495, 508 & n.11) that CNAs and CMTs have permanent assignments, and that there is “no evidence” to show RNs assign CNAs or CMTs to their shifts or units. (A 235-36.) Nor does the Center challenge the Board’s further finding (*id.*) that even assuming they assign CNAs and CMTs to particular patients—which is unclear from the record—there is “no evidence” that they exercise independent judgment in making such assignments.

Instead, the Center (Br. 48) pins its hopes on a claim that charge nurses “assign” work because they can let employees leave early in non-emergency situations. In a similar vein, the Center alleges (Br. 48) that shift supervisors on some shifts “assign” work because they find replacements when employees “call out,” and if replacements are not available, they equalize workloads by moving CNAs to different units. As shown below, the Board reasonably rejected the Center’s claims.

Contrary to the Center (Br. 48), substantial evidence supports the Board’s finding (A 509) that charge nurses do not “assign” work using independent judgment when they deal with requests from CNAs and CMTs to leave work early. As the Board noted, Acting DON Goulden “conceded that charge nurses may not refuse to let them leave early in the case of illness or emergency. (A 509; A 124.) *See, e.g., Loyalhanna Care Ctr.*, 352 NLRB at 864 (putative supervisor does not

exercise independent judgment by permitting sick employee to leave work). With respect to employee requests to leave work early for other reasons, the Board reasonably regarded Goulden's statement that a charge nurse "could" make the decision as too generalized to establish that charge nurses exercise independent judgment. (A 509; A 122.) This conclusion accords with Board and court precedent recognizing that the party claiming supervisory status must provide "tangible examples" demonstrating that the statutory elements of supervisory status have been met. *See Beverly Enters.-Mass.*, 165 F.3d at 963; *Oil, Chem. & Atomic Workers*, 445 F.2d at 243; *Loyalhanna Care Ctr.*, 352 NLRB at 864 (testimony that "[we] have had cases" where nurses released subordinates early was conclusory, absent examples). As the Court stated in *Oil, Chem. & Atomic Workers*, "beyond the statements [of management regarding an individual's supervisory authority], what the statute requires is evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority." 445 F.2d at 243. Such "tangible examples"—showing that the charge nurses exercise independent judgment in addressing requests to leave early—are completely lacking here. *See Beverly Enters.-Mass.*, 165 F.3d at 963.

Moreover, the only example that Goulden could recall actually undermines the Center's claim that charge nurses act independently in disposing of requests to leave work early. In the instance she cited, the charge nurse denied the CNA's

request but, as the Board found (A 509), “the CNA appealed the charge nurse’s adverse decision to Goulden, suggesting that charge nurses do not have final authority to make such decisions on the day shift.” (A 123-25.) The testimony of Charge Nurse Iwenekha also corroborates Goulden’s testimony that the charge nurses do not act independently on early-departure requests. (A 509; A 223.) Iwenekha, who works during the day shift, testified that she refers such requests to the unit manager or the DON.<sup>9</sup> (A 223.)

The Center is no more successful in its argument (Br. 47-48) that RNs who serve as shift supervisors exercise independent judgment when they deal with an employee’s “call-out” or absence from a shift. In particular, there is no evidence to support the Center’s assertion (Br. 47, 49) that shift supervisors have “discretion” to decide that an absent worker need not be replaced on the shift. On the contrary, Goulden’s testimony shows that the Center’s policy controls exactly what the shift supervisors must do when an employee calls out from work. (A 511; A 152-53.) Under that established policy, the shift supervisor must attempt to fill the vacancy, first, by calling the per-diem and part-time nurses listed in the shift supervisors’

---

<sup>9</sup> The Center likewise errs (Br. 50) in relying on the charge nurses’ authority to sign the “Time Clock Exception Log” so that CNAs may be paid if they forget to punch the clock or it malfunctions. (A 495; A 110-12, 344-82.) As the Board noted (A 508), it has consistently held that “authority to ‘okay’ or initial changes in CNAs’ computerized time clock entries is routine and clerical and does not indicate supervisory authority.” *See, e.g., Golden Crest Healthcare*, 348 NLRB at 730 n.10 (2006).

book. (*Id.*) If those nurses are not able to come in and fill the vacancy, then the shift supervisor must attempt to fill the vacancy “any way they can,” by approaching full-time employees. (*Id.*) Moreover, as the Board also noted, shift supervisors “are restricted to asking for volunteers; they may not require employees who are not on the schedule to come in to work or to stay for an extra shift if they are already working.” (*Id.*) *See, e.g., Golden Crest Healthcare Ctr.*, 348 NLRB at 729 (finding that supervisory assignment authority was not established where charge nurses could solicit volunteers to replace absent employees, but could not mandate that anyone serve as a replacement).

As the Board further noted (A 511), the shift supervisors’ role in reallocating existing staff to equalize workloads also does not confer supervisory status, because it does not involve the exercise of independent judgment. *See, e.g., Oakwood Healthcare, Inc.*, 348 NLRB at 693 (reassignments made solely on the basis of equalizing workloads do not establish the requisite use of independent judgment). Nor does the task of selecting the particular CNA to be transferred to another unit require independent judgment, as the choice is governed by “float lists” maintained pursuant to the CNAs’ collective-bargaining agreement. (A 511; A 153-55, 461-81.)

In these circumstances, the Board reasonably found (A 511) that the shift supervisors do not exercise “independent judgment” in addressing an employee’s

absence from the shift. Rather, the shift supervisors follow a set employer policy controlling how they should proceed in dealing with employee absences. (*Id.*) The Board's finding is consistent with well-settled Board precedent, under which an individual's authority to call in replacement workers is not indicative of statutory supervisory authority where the individual is merely following a set employer procedure to solicit volunteers to replace absent workers. *See Golden Crest Healthcare*, 348 NLRB at 729; *Harborside Healthcare*, 330 NLRB 1334, 1136 (2000); *Riverchase Health Care Ctr.*, 304 NLRB 861, 864 (1991).

**c. The charge nurses do not discipline CNAs or effectively recommend their discipline**

The Center argues (Br. 32-44) that its charge nurses play a role in the disciplinary process by handling the complaints of residents and their families about the CNAs, and by preparing disciplinary warnings that are eventually placed in the CNAs' personnel files. As we now show, substantial evidence supports the Board's finding (A 499, 504-07) that the charge nurses' involvement in these activities does not establish that they use "independent judgment," or even that they "discipline" or "effectively recommend discipline," under Section 2(11) of the Act.

**i. The Center failed to establish that charge nurses exercise independent judgment in handling complaints of resident mistreatment and writing up disciplinary warnings**

As the Board noted (A 504), “for authority to discipline to confer supervisory status, the discipline must lead to personnel action without independent investigation or review of other management personnel.” (A 504.) *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002); *accord Jochims v. NLRB*, 480 F.3d 1161, 1170 (D.C. Cir. 2007). The evidence presented by the Center fails to show that charge nurses handle complaints about resident mistreatment, and write up disciplinary warnings, without the intervention of Nursing Department managers.

With regard to the charge nurses’ alleged authority to handle complaints of resident mistreatment, the Board correctly noted that the evidence does not reveal any concrete instance in which a charge nurse handled such a complaint. (A 499.) In arguing, nevertheless, that the charge nurses independently handle such complaints, the Center relies (Br. 35-37) entirely on the testimony of Acting DON Goulden as to what the charge nurses “would” do in a hypothetical situation involving a complaint of mistreatment. (A 136-38.) However, such hypothetical and self-serving testimony from an employer representative, unmoored from any reference to an actual incident in which a charge nurse handled a complaint of mistreatment, does not suffice to establish that the charge nurses act independently

of their managers in addressing such complaints. *See Oil, Chem. & Atomic Workers*, 445 F.2d at 243 (“what the statute requires is evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority”); *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).

In any event, Goulden’s testimony fails, on its own terms, to establish the independence of the charge nurses in regard to complaints of resident mistreatment. According to Goulden, if a complaint suggests “something severe” that implicates resident safety, the charge nurse “would get the supervisor, explain what happened,” and then “that supervisor would . . . either remove [the CNA named in the complaint] from the wing totally, or tell them they’d have to go home pending investigation.” (A 138.) Goulden’s testimony does not reveal who the “supervisor” is in this hypothetical situation, or where they might fall in the Nursing Department’s hierarchy. In any event, even in this hypothetical situation, Goulden testified that it is the DON or the Administrator who would preside over the investigation of the incident, and the CNA involved would not be permitted to return to work until the DON and Administrator had spoken to him or her. (A 499; A 161-62.) Thus, contrary to the Center’s contention (Br. 35), Goulden’s own

testimony shows that charge nurses do not act independently of their managers in dealing with accusations of resident abuse.

Substantial evidence also supports the Board's further finding (A 504-05) that the Center failed to establish that charge nurses "write up" disciplinary warnings without the intervention of their managers. Although the Center submitted into evidence numerous write-ups (A 250-76) signed by charge nurses over the years, some of which pre-date the Center's current management by Genesis, it presented explanatory testimony from only one of the charge nurses involved (Elizabeth Iwenekha).<sup>10</sup> As a result, the record contains almost no information as to how the write-ups in evidence were produced, and what role managers (who co-signed some of the write-ups) may have played in their preparation. (*See* A 498-99, 505.)

The Center nevertheless claims (Br. 39), again relying solely on the testimony of Acting DON Goulden, that the charge nurses write up disciplinary warnings without prior consultation with any managers. Goulden, however, only

---

<sup>10</sup> The Board appropriately declined to consider the write-ups that pre-date the current management of the Center by Genesis. (Br. 37.) As the Board reasonably found (A 505), those older write-ups are of questionable value in this proceeding, as they were "generated under the tenure of an employer that no longer operates the facility and that may have conferred different authority on the charge nurses." *See Passaic Daily News v. NLRB*, 736 F.2d 1543, 1550 (D.C. Cir. 1984) (in determining whether an individual has supervisory authority, "past supervisory status is not determinative"; rather, "great weight is given to the individual's current status").

had personal knowledge of two write-ups involving a single incident on a night shift after Genesis assumed management of the Center in 2008. (A 492, 505 & n.44; A 68-69, 262-63.) As to those write-ups, Goulden was only able to say that she “believe[d]” they were already prepared by the time she arrived at work in the morning, without any prior consultation with her. (A 68-69.) Goulden also “believe[d]” that she was present when the write-ups were presented to the employee, but she could not recall whether the charge nurses who prepared the write-ups were also present. (A 55-56.) Importantly, Goulden did not testify as to whether she independently investigated the allegations made in the write-ups before they were presented to the employee. In these circumstances, the Board reasonably concluded (A 505) that Goulden’s testimony did not suffice to establish that charge nurses prepare write-ups with the “independent judgment” required to establish supervisory status. *See Res-Care, Inc.*, 705 F.2d at 1467 (upholding Board’s finding that LPNs had no supervisory authority where evidence of such authority was “limited very largely to the [nursing home] administrator’s general assertions” at hearing).

Goulden’s testimony is further undermined because it is in tension with that of Iwenekha, the only charge nurse to testify as to how write-ups are generated. (A 499, 505 n. 45.) Iwenekha testified that the charge nurses “are told” to prepare write-ups “if there’s a problem on the unit between the staff and the charge nurse,”

but the write-ups are subject to review by the DON. (A 220-21.) And in testifying about a 2007 write-up proffered into evidence by the Center, Iweneka stated that she was instructed by the DON to prepare it. (A 499, 505 n. 45; A 220, 222.)

On this record of inadequate and even conflicting testimony, the Board reasonably rejected (A 504-05) the Center's claim, which it repeats here (Br. 39), that the charge nurses write up disciplinary warnings "on their own" without prior consultation with, or independent review by, managers in the Nursing Department. *See Teamsters Local 115 v. NLRB*, 640 F.2d 392, 396 (D.C. Cir. 1981) (upholding Board's finding that employees were not supervisors under the Act, and noting that "the Board's conclusions on a record of conflicting [factual] claims [were] well within the measure of the substantial evidence test"). Thus, the evidence produced by the Center fails to establish that the charge nurses exercise "independent judgment" in preparing disciplinary write-ups. The Center therefore errs in relying on the write-ups to establish that the charge nurses exercise supervisory authority.

**ii. The Center also failed to establish that the write-ups constitute, or result in, discipline affecting CNAs' employment status**

The Board reasonably rejected the Center's reliance on the write-ups as evidence of the charge nurses' supervisory status, not only because the Center failed to establish that the charge nurses act independently, but also because it failed to show that the write-ups constitute discipline, or effectively recommend

eventual discipline, affecting a subordinate's employment status. (A 505-06.) The Center makes much (Br. 39-43) of the fact that its employee handbook contains a progressive discipline policy stating that "discipline issued by a charge nurse could affect the job status of a subordinate." (A 304-07.) The problem for the Center, however, is its failure to establish that it actually utilized the policy. (A 505-06; A 168.) *See also* p.32 n.10 above. Lacking such evidence, it was also unable to show that the charge nurses' write-ups affected the employment status of CNAs. (A 505; A 250-76.) And absent evidence of such an impact, the Center could not meet its burden of proving that the write-ups constitute or lead to "discipline" within the meaning of Section 2(11) of the Act. *See Ten Broeck Commons*, 320 NLRB 806, 812 (1996), *cited in Jochims v. NLRB*, 480 F.3d at 1170 (recognizing that, under Board law, written reprimands and warnings do not establish disciplinary authority absent record evidence that they lead to job-affecting discipline). *Cf. Oak Park Nursing Care Ctr.*, 351 NLRB 27, 28 (2007) (LPNs who issued counseling forms independently were supervisors because the forms were part of a chain of progressive discipline leading to suspension of one CNA, and discharge of another, for subsequent offenses). Instead, the write-ups were at best merely reports that did not transform their authors into statutory supervisors. *See NLRB v. Hilliard Dev. Corp.*, 187 F.3d 133, 147 (1st Cir. 1999) (charge nurses are

not rendered statutory supervisors based on their reporting of employee infractions that could warrant discipline, as they had “reportorial authority” only).

The record in this case fully supports the Board’s finding that the Center failed to prove that it actually utilized a progressive disciplinary policy under which write-ups by charge nurses impacted the employment status of CNAs and CMTs. As the Board found (A 506), “the record . . . lacks any examples of an employee advancing to the next step in the progressive discipline process based on an RN’s prior warnings.” Simply put, the Board found “no evidence” that charge nurses or higher level officials “ever actually relied on any previous warning issued by an RN as a foundation for subsequent discipline under the system described in the [employee] handbook.” (A 505.) Indeed, as the Board noted (A 506), there was “no evidence” that higher level managers even check employee files for prior discipline. The charge nurses themselves have no access to personnel files, and therefore no basis for knowing whether a CNA was previously disciplined by someone else. (A 506; A 168.) As for Acting DON Goulden, she was unsure how the charge nurses’ write-ups play into subsequent discipline. (*Id.*) She testified that she could not say whether individuals who issue discipline bump the discipline up to the next level if they happen to know there has been a prior warning. (*Id.*)

Accordingly, the write-ups at issue are also distinguishable from those in the Board case cited by the Center (Br. 41-42)—which were shown to be the basis for subsequent, job-affecting discipline—and the Board properly so found (A 506). *See Oak Park Nursing*, 351 NLRB at 28 (evidence showed that counseling forms initiated progressive disciplinary process that culminated in suspension of one employee, and discharge of another). *Accord Progressive Transp. Servs.*, 340 NLRB 1044, 1044-47 (2003) (evidence showed that putative supervisor’s warning notices and “Employee Communication” notices consistently led to discipline, including suspension of one employee, pursuant to employer’s progressive discipline policy). For the same reason, the Center errs in relying (Br. 33-34) on cases such as *NLRB v. Attleboro Assocs., Ltd.*, 176 F.3d 154, 158, 165 (3d Cir. 1999), which involved an employer that utilized a progressive disciplinary system—unlike the Center.

In sum, the record does not support the Center’s claims that the charge nurses exercise independent judgment in handling complaints of resident mistreatment and preparing disciplinary write-ups, or that the write-ups play a part when job-affecting discipline eventually is issued to the employee. Given the absence of evidence supporting the Center’s claims, the Board reasonably found that the Center failed to carry its burden of proving that the charge nurses, using

independent judgment, discipline or effectively recommend discipline within the meaning of Section 2(11) of the Act.

**d. Given the Center’s failure to meet its burden of establishing that the RNs exercise any of the enumerated Section 2(11) functions, the Center cannot rely on so-called “secondary indicia” of supervisory status**

The Center refers (Br. 49-50) to several so-called “secondary indicia” of supervisory status—“indicia not included in the statutory definition of supervisor but that often accompany the status of supervisor”—to advance its argument that the charge nurses are statutory supervisors. *Public Serv. Co. of Colo. v. NLRB*, 405 F.3d 1071, 1080 (10th Cir. 2005). Thus, the Center notes that: the charge nurses prepare performance evaluations, and the DON relies heavily on the charge nurses’ comments in those evaluations (Br. 50); there is only one charge nurse per unit, while there are several employees in other classifications in each unit (*id.*); the shift supervisors on the evening and night shifts also serve as charge nurses in one of the resident units (*id.*); the charge nurses refer to themselves as “supervisors” (*id.*); and the charge nurses are paid an extra dollar when they serve as shift supervisors (*id.*).

The Center’s arguments miss the mark because it is well settled that secondary indicia of supervisory status cannot substitute for a showing that an individual uses independent judgment in exercising the primary indicia of Section

2(11) authority. *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); *accord Jochims*, 480 F.3d at 1173. *See also Oil, Chem. & Atomic Workers*, 445 F.2d at 242 (finding that pay differential could not support finding of supervisory status where employer failed to show “evidence of the actual possession of supervisory responsibility”). As shown above, the Center utterly failed to meet its burden of proving that the charge nurses and shift supervisors possess any of the primary indicia of supervisory status. Accordingly, the secondary indicia are of no import here, and do not remedy the Center’s failure to meet its burden of proving that its RNs possess any of the supervisory powers enumerated in Section 2(11) of the Act.

Furthermore, as the Board noted (A 509-510), authority to evaluate is not listed in Section 2(11) as an indicator of supervisory status. And where, as here, the CNAs’ and CMTs’ evaluations do not by themselves affect their wages or job status, the charge nurses’ involvement with preparing such evaluations does not make them supervisors. (A 500, 509; A 91, 219, 461-81.) *See Lakeview Health Ctr.*, 308 NLRB 75, 78 (1992), *cited in Jochims*, 480 F.3d at 1173 (noting with approval Board law on this point). As the Board noted, the pay and benefits of CNAs and CMTs are established by the collective-bargaining agreement that covers them—not by their evaluations. (A 500; A 91, 219, 461-81.) Thus, as the

Board found (A 510), because “there is no evidence” that the CNAs’ and CMTs’ evaluations affect their wages, the charge nurses’ role in preparing those evaluations does not render them supervisors.<sup>11</sup>

The Center also errs in relying (Br. 19, 50) on the charge nurses’ job descriptions as evidence of supervisory status. (A 277-93.) As the Board noted (A 510), it has long held that “employer-prepared job descriptions are not controlling; what matters is the authority that an individual actually possesses and the work . . . [she] actually performs.” *See, e.g., Loyalhanna Care Ctr.*, 352 NLRB at 864; *Oakwood Healthcare*, 348 NLRB at 690 n.24. *See also Beverly Enters.-Mass.*, 165 F.3d at 963 (citing *Chevron, U.S.A., Inc.*, 309 NLRB 59, 69 (1992) (no weight given “job descriptions that attribute supervisory authority where there is no independent evidence of its possession or exercise”)).

Thus, the Board reasonably found (A 512) that the Center failed to meet its burden of proving the supervisory status of its RNs. Because the RNs are statutory employees, the Center is legally obligated to bargain with the Union as the collective-bargaining representative that the RNs have selected, and its refusal to do so violates Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)), as

---

<sup>11</sup> In any event, the charge nurses’ role in preparing evaluations is limited to filling out portions of the evaluation forms used by the Center for CNAs and CMTs, and the DON and the Administrator have authority to change the charge nurses’ assessments. (A 500; A 195-96.)

the Board properly found (A 632). *See VIP Health Servs.*, 164 F.3d at 646 (D.C. Cir. 1999) (upholding Board finding that employer violated Section 8(a)(5) and (1) by refusing to bargain with union as representative of nurses, where employer had failed to establish its defense that nurses were statutory supervisors).

**CONCLUSION**

The Board respectfully requests that the Court enter a judgment denying the Center's petition for review and enforcing the Board's Order in full.

/s/ Julie B. Broido  
JULIE B. BROIDO  
*Supervisory Attorney*

/s/ Milakshmi V. Rajapakse  
MILAKSHMI V. RAJAPAKSE  
*Attorney*

National Labor Relations Board  
1099 14th Street N.W.  
Washington, D.C. 20570  
(202) 273-2996  
(202) 273-1778

LAFE E. SOLOMON  
*Acting General Counsel*

CELESTE J. MATTINA  
*Acting Deputy General Counsel*

JOHN H. FERGUSON  
*Associate General Counsel*

LINDA DREEBEN  
*Deputy Associate General Counsel*

National Labor Relations Board

October 2011

H:/Putnam Pike-final brief-jbmr

**STATUTORY ADDENDUM**

**Relevant provisions of the National Labor Relations Act,  
29 U.S.C. §§ 151-69 (2000):**

Sec. 2. [§152.] When used in this Act [subchapter]—

\*\*\*

(3) The term “employee” shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act [this subchapter] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

\*\*\*

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Sec. 7. [§ 157.] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a

condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

Sec. 8. [§ 158.] (a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];

\*\*\*

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [section 159(a) of this title].

Sec. 9 [§ 159.]

\*\*\*

(c) [Hearings on questions affecting commerce; rules and regulations]

(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) [subsection (a) of this section], or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) [subsection (a) of this section]; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a) [subsection (a) of this section]; the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists

shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c) [section 160(c) of this title].

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act [subchapter] in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) [of this section] the extent to which the employees have organized shall not be controlling.

(d) [Petition for enforcement or review; transcript] Whenever an order of the Board made pursuant to section 10(c) [section 160(c) of this title] is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f)

[subsection (e) or (f) of section 160 of this title], and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Sec. 10. [§ 160.] (a) [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

\*\*\*

(e) [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce

additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

735 PUTNAM PIKE OPERATIONS, LLC, )  
d/b/a GREENVILLE SKILLED NURSING AND )  
REHABILITATION CENTER )  
)  
Petitioner/Cross-Respondent ) Nos. 11-1115, 11-1129  
)  
v. )  
)  
NATIONAL LABOR RELATIONS BOARD )  
) Board Case No.  
Respondent/Cross-Petitioner ) 1-CA-46619

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 9,700 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

/s/ Linda Dreeben  
Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1099 14th Street, NW  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, D.C.  
this 20th day of October 2011

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

735 PUTNAM PIKE OPERATIONS, LLC,	)	
d/b/a GREENVILLE SKILLED NURSING AND	)	
REHABILITATION CENTER	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 11-1115, 11-1129
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	1-CA-46619

**CERTIFICATE OF SERVICE**

I hereby certify that on October 20, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the address listed below:

J. Michael McGuire  
Darryl G. McCallum  
Shaw & Rosenthal, LLP  
20 South Charles Street, 11<sup>th</sup> Floor  
Baltimore, MD 21201

/s/ Linda Dreeben

Linda Dreeben

Deputy Associate General Counsel

National Labor Relations Board

1099 14th Street, NW

Washington, DC 20570

(202) 273-2960

Dated at Washington, DC  
this 20th day of October 2011