

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

BLOSSOM VIEW NURSING HOME, INC.¹

Employer

And

Case 3-RC-073193

**RETAIL WHOLESALE AND DEPARTMENT
STORE UNION/UFCW LOCAL 220**

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to Section 3(b) of the Act, the Board has delegated its authority in the proceeding to the undersigned.

Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The parties stipulated that Blossom View Nursing Home, Inc., hereinafter referred to as the Employer, is a New York corporation with a principal place of business located in Sodus, New York, where it is engaged in the operation of a skilled nursing facility. Annually, in the course and conduct of its business, the Employer derives gross revenues in excess of \$100,000 and purchases and receives at its Sodus, New York

¹ The Employer's name appears as stipulated at the hearing.

location goods valued in excess of \$5,000 directly from points located outside the State of New York.

I find that the Employer is a health care institution as defined in Section 2(14) of the Act.

Based on the parties' stipulations and the record as a whole, I find that the Employer is engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated, and I find, that Retail Wholesale and Department Store Union/UFCW Local 220, hereinafter referred to as the Union, is a labor organization within the meaning of Section 2(5) of the Act.

4. The parties stipulated that there is no collective-bargaining agreement that would bar a representation election with respect to the petitioned-for unit herein.

5. The parties stipulated that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time certified nurses aides employed by the Employer at its 6884 Maple Avenue, Sodus, New York facility; excluding all licensed practical nurses, dietary employees, maintenance employees, activities employees, nursing and unit secretaries, central supply employees, physical therapy employees, office and clerical employees, professional employees, housekeeping employees, laundry employees, temporary employees, confidential employees, and all guards and supervisors as defined in the Act.

6. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

The sole issue is whether the certified nursing assistant mentors, hereinafter referred to as CNA mentors, are supervisors as defined in Section 2(11) of the Act. The

Employer seeks to exclude CNA mentors because they exercise the following supervisory authority over certified nursing assistants, hereinafter referred to as CNAs: to effectively recommend hiring and discipline, evaluate, assign work, and adjust grievances. The Petitioner argues that the CNA mentors do not possess supervisory authority and should be included in the Unit.

No party asserts that CNA mentors have the authority to transfer, suspend, layoff, recall, promote, discharge, or reward employees, or to effectively recommend such actions.

Based on the evidence adduced at the hearing and the relevant case law, I find that the Employer has not met its burden of establishing that CNA mentors are statutory supervisors within the meaning of Section 2(11) of the Act. Accordingly, I shall include all CNA mentors in the Unit.

FACTS

The Employer operates a nursing home which provides around-the-clock skilled nursing care, rehabilitation and other medical services. The nursing home consists of three wings: Empire and Cortland wings, which each have a 40-bed capacity; and the Baldwin wing, which has a 50-bed capacity. There are approximately 225 employees employed by the Employer at its facility.

Administrator Nancy Tourje² oversees all aspects of the Employer's operations. According to the Employer's organizational chart and the testimony of Administrator Tourje, the Director of Nursing, hereinafter referred to as the "DON," reports directly to the Administrator and is responsible for the operation of the nursing department. The DON has one assistant. There are three nurse case managers³ who report directly to the

² Tourje was the only Employer witness to testify at the hearing.

³ Also referred to in the record as floor managers.

DON. Two senior staff nurses/team leaders, who are licensed practical nurses (LPNs), report to the nurse case manager. Thirteen staff nurses report to the two senior staff nurses/team leaders. According to the organizational chart, CNAs, including nourishment aides and transport CNAs, report to the staff nurses.

On a separate line item, the organizational chart shows that the Education Nurse reports directly to the DON.⁴ The Education Nurse is responsible for providing education, which includes orientation and in-service training for all employees, the CNA training program, and education of the nurses. The chart indicates that CNA mentors report to the Education Nurse. According to the organization chart, no job titles report to the CNA mentors. Administrator Tourje testified that, in addition to reporting to the Education Nurse for the training/educational aspect of their job, CNA mentors also report to the senior staff nurse/team leaders regarding the CNA tasks they perform. Thus, according to Tourje, there should be a dotted line on the chart which indicates that the CNA mentors report to the senior staff nurse/team leaders and the CNAs report to the CNA mentors.

There are three CNA mentors and approximately 52 CNAs. Each CNA mentor is assigned to a wing. Candy Law is assigned to Baldwin wing and has been a CNA mentor for approximately 10 years. Kristina Reed is assigned to the Cortland wing and has been a CNA mentor since April 2011. Connie Grant is assigned to the Empire wing and has been a CNA mentor since October 2011. Administrator Tourje testified that Cortland wing is the more stable unit in which the residents require long-term care and there is very little patient turnover. The other two wings encounter more regular patient turnover.

CNAs and CNA mentors are responsible for performing or assisting residents with the activities of daily living, such as bathing, grooming, transfers, ambulation,

⁴ The record reveals that the Education Nurse has one assistant.

feeding and toileting. The record reveals that the standard CNA work load consists of caring for eight patients in a shift.⁵ Administrator Tourje testified that the CNA mentors carry a reduced patient load because of the additional functions they perform as CNA mentors. However, the three CNA mentors testified that they carry the same patient load as the other CNAs on the floor.⁶ In addition, the CNA mentors testified that they are responsible for educating and training the CNAs.

In order to become a CNA mentor, a CNA has to apply or be asked by the DON to fill the position. The record reveals that once the CNA mentor accepts the position, she receives between a \$1 and \$2.75 per hour wage increase. CNA mentors generally work the day shift, which is from 6:00 a.m. until 2:30 p.m. and, with the exception of CNA Mentor Law, the CNA mentors and all CNAs work every other weekend.⁷ CNA mentors do not have offices. They work on the floor with the CNAs. The CNA mentors receive the same benefits as the CNAs. CNA mentors are identified as such on their name tags.

EFFECTIVELY RECOMMENDS HIRING

There are two ways that individuals obtain employment with the Employer for a CNA position. They can successfully complete the Employer's CNA training program, including obtaining the requisite certification after passing the New York State exam or, if an individual already possesses a certification, he or she can apply directly for an

⁵ The record contains the job description for CNA mentors. CNA mentor Grant testified that she never saw the job description before the hearing nor has she been told by the Employer what her job duties are as a CNA mentor. The CNA mentors testified that they perform most of the duties in the job description, with the exception of weekly meetings with the nurse case manager and providing input in CNA evaluations, which is discussed in further detail below.

⁶ CNA Law testified that she has been assigned to Baldwin wing with a full patient load for the past six months. The record is not clear as to whether Law was assigned to a wing or had a patient load prior to that time.

⁷ The record reveals that Law does not have to work weekends because she has obtained Tier III status.

opening. The record is unclear as to whether the trainees are actually employed by the Employer while in the CNA training program.

The record reveals that CNA mentors Law and Reed participate, with Sherry Diamond, the assistant to the Education Nurse, in reviewing applications and attending interviews for the CNA training program. Administrator Tourje testified that the DON and the Education Nurse decide who is accepted into the program and that CNA mentors' recommendations are considered but not always followed.⁸ CNA mentor Law testified that she provides an opinion to Diamond as to whether the applicant is qualified. The record does not disclose what impact, if any, Law's opinion has on the DON and the Education Nurse's decision to accept an applicant into the program. CNA mentor Reed testified that she does not know whether her recommendations to accept an applicant into the CNA training program directly results in the Nurse Educator's decision to select a candidate. Reed further testified that on one occasion, she did not recommend a particular candidate but that individual was accepted into the program. Tourje testified that the CNA mentors' recommendations are not always followed.

The training program is of four-weeks duration. During the first two weeks, the Education Nurse teaches theory in a classroom setting. During the next two weeks, a CNA mentor conducts the clinical portion of the program by taking trainees onto the floor and teaching basic CNA skills.⁹ Administrator Tourje testified that the trainees in the program are monitored by the CNA mentor and the nurse case manager on the floor. The trainees are required to satisfactorily demonstrate that they can perform all of the skills on an Employer checklist. The record reveals that the CNA mentor is responsible

⁸ The record does not reveal how often the Employer conducts a CNA training program.

⁹ As of the date of the hearing, only CNA mentor Law has provided the full two-week clinical training part of the program. Since becoming CNA mentors, Reed has assisted Law during clinical training and Grant has not provided any clinical training.

for initialing next to the particular skill on the checklist once trainees have demonstrated that they can perform the skill satisfactorily. The skills checklist does not require the CNA mentor to rank the level of proficiency with which the trainee can perform the skill. Once the trainees pass the New York State Department of Health CNA exam and are certified by the State, they are qualified to practice in the nursing home.¹⁰ CNA mentor Law testified that she has expressed to the Education Nurse that a particular CNA in the training program is “a keeper.” CNA Law further testified that the majority of the individuals who take the CNA training course and are certified are subsequently hired by the Employer.

The record reveals that CNA mentor Law has requested that the Education Nurse allow her to provide additional weeks of training for individuals who have not completed all of the skills on the checklist satisfactorily. The record does not demonstrate how often this has occurred or whether the Education Nurse granted Law’s request(s).

The record reveals that none of the CNA mentors participates in the interviews of CNA applicants who have State certification. The certified newly-hired individuals go through an orientation, and then spend approximately two weeks working with a CNA mentor in a wing. CNA mentors are responsible for educating and ensuring that new CNA hires, who already have their certification, can perform the basic skills on the checklist and are familiar with company policies. The record demonstrates CNAs have also initialed the skills checklist when a new CNA has successfully demonstrated she is capable of a particular skill on the list. CNA mentors Law and Reed testified that every previously certified CNA who has been hired since they became CNA mentors has successfully completed the skills checklist. Training periods have been extended for up to

¹⁰ CNA Law testified that the individuals are not employees because they have not been hired. The evidence does not reveal whether the trainees are paid by the Employer for participating in the program.

one month when a trainee failed to demonstrate within the two-week period that he/she can perform all of the skills on the checklist. Administrator Tourje testified that the CNA mentor, “with a lot of input from the staff nurse,” would determine if the individual has not successfully completed the skills. CNA mentor Grant testified regarding an occasion where she recommended to the case nurse manager that the training period for a newly-hired individual who already had her certification be extended because the individual did not complete all items on the skills checklist. It is unclear from the record whether the new CNA received additional training. Grant testified that she never conducted the additional training because the individual was transferred from Empire wing to Cortland wing. Grant further testified that she had no involvement in the transfer.

The record reveals that individuals have used CNA mentors as references on their applications and that CNA mentors have recommended the hiring of CNAs. CNA mentor Law testified that CNAs can also be used as a reference on an individual’s application and can also recommend that an individual be hired. CNA mentor Reed testified that she has been used as a reference and has recommended individuals for hire while she was a CNA and since she became a CNA mentor.

There is no record evidence as to specific instances where the Employer hired CNAs, either through the CNA training program or previously certified, as a direct result of the CNA mentors’ recommendations. The record fails to disclose whether the Education Nurse, the DON or the nurse case manager acts upon the CNA mentors’ recommendations or independently reviews the applications and/or observes the individual and makes an independent decision regarding hiring.

EFFECTIVELY RECOMMENDS DISCIPLINE

The record reveals that CNA mentor Law has on two occasions expressed her opinion to the Education Nurse that an individual is not going to make it through the

CNA training program.¹¹ Ultimately, the two individuals were placed in other positions in the building. The record fails to disclose who decided to terminate the individual's participation in the program, the significance, if any, that was placed on the CNA mentor's recommendation or whether the Education Nurse made an independent assessment of the two trainees' skills.

The record reveals that one of the job duties of a CNA mentor is to observe and reeducate a CNA when the CNA is engaged in an incorrect procedure, such as not wearing gloves. The record further reveals that if the conduct continues, the CNA mentor is expected to write an incident report describing the conduct and provide it to the Education Nurse, nurse case manager or DON. Administrator Tourje testified that the incident report is given to one of the aforementioned nurses so that disciplinary action can be taken when appropriate. The record reveals that any employee who witnesses improper conduct can write an incident report and provide it to nursing management for further action. There is no record evidence that the employee reporting an incident, including the CNA mentors, recommends disciplinary action.

Tourje testified that CNA mentor Law sits in on discussions between the DON and/or Education Nurse and the CNA when Law submits written incident reports and that Law's recommendations regarding discipline are followed 98 percent of the time. CNA mentor Law testified that she is not normally present when an employee is disciplined but that, on one occasion, she was present when discipline was given to a CNA by the DON. Law testified that she had no input into the decision to discipline but "was a body in the room." CNA mentor Law further testified that she has been asked her opinion about incidents but she does not make recommendations about what discipline, if any, is

¹¹ The CNA mentors' job description states that one of the CNA mentors' responsibilities is to "suggest" to the Education Coordinator that a CNA, who has been given a couple of opportunities to correct a problem and has not shown improvement, leave the training program.

warranted. The other two CNA mentors testified that they have never disciplined or recommended discipline.

AUTHORITY TO ASSIGN WORK

The record discloses that full-time CNAs have permanent assignments and part-time and per diem CNAs have daily assignments. Administrator Tourje testified that the nurse case manager and CNAs determine the level of care for each patient.¹² There is no evidence that CNA mentors make permanent assignments to full-time CNAs and the record demonstrates that CNA mentors do not change the assignments once they are made.

CNA mentor Law testified that full-time CNAs in Baldwin wing are permanently assigned to the north or south side of the building. Law testified that if the patient load becomes “heavy” on the north side of the wing, for example, she will assign CNAs from the south side to help out on the north side. Law testified that she works on the north side and has assisted the CNAs on the south side when necessary due to patient load.¹³

CNA mentor Law testified that, recently, in response to CNA complaints about her to the DON, the DON told her that she cannot change anything on the floor without consulting with the DON first. Law also testified that only the nurse case manager can transfer an employee out of a wing.

CNA mentor Grant testified that there are three full-time CNAs in Empire wing and that she does not provide them with direction or prioritize their work. Grant further testified that on the Empire wing there is one per diem CNA per shift and possibly a second per diem CNA, if one is necessary to fill in when a full-time CNA is absent. These individuals get daily assignments. Grant testified that on several occasions she

¹² The three levels of care are “independent,” “partial” and “total.”

¹³ Administrator Tourje also testified that CNA mentors assign additional CNAs to assist a CNA assigned to a patient for whom care is more difficult, such as obese or abusive patients.

attempted to change “heavier” assignments to make them more equitable and was told that the nurse case manager has to make those changes.

Grant testified regarding an occasion when she assigned a CNA who infrequently works on the Empire wing to the group of rooms the CNA is usually assigned to when she does work in Empire wing.¹⁴ Later, a non-mentor CNA changed that assignment.¹⁵

CNA mentor Reed testified that Cortland wing, which has the least amount of patient turnover, has all full-time CNAs who have permanent assignments. Thus, she makes daily CNA assignments only when a full-time CNA is absent.¹⁶ Frequently, the LPN team leader from the night shift has already filled in the CNA assignment sheets by the time Reed arrives to work. Reed testified that she has never changed the assignments of the per diem CNAs if the LPN has filled out the assignment sheet, but believes she could. She further testified that she provides direction to and prioritizes the work of per diem CNAs and if they do not follow her direction, there is no disciplinary consequence to them. If the assignment sheet is not filled out by the LPN prior to her shift, she suggests to a per diem CNA to take a certain group of patients because that group is easier. Reed testified that if one CNA feels she has too many hard patients, the CNAs and the CNA mentor meet and work as a team, come up with a resolution, and the CNA mentor brings the problem and suggested resolution from the group to the nurse case manager. Reed testified regarding one occasion when a new patient requiring more care was admitted to Cortland wing and she decided to take that patient herself and assign one of her easier patients to the CNA initially assigned to the new patient. She testified that

¹⁴ The record reveals that CNAs are assigned to care for residents by room groupings, which appear to be based on the geographic proximity of the rooms.

¹⁵ The CNA whose assignment was changed was angry about her change in assignment and Grant learned, after the fact, that the CNA had reported it to the LPN team leader. Grant told the team leader that she was not the one who changed the CNA’s assignment. Grant also asked the CNA who changed the schedule why she had done so. Grant testified that she does not know what happened after her conversation with the LPN team leader and the CNA who changed the schedule.

¹⁶ The record does not disclose the frequency with which this occurs.

she requested permission from the nurse case manager before changing residents with the CNA. She also testified that she assigns per diem CNAs to groups based on strength and weakness. The record is not clear as to whether she was referring to physical strength and weakness, or the per diem CNAs' skills or experience. There is no testimony in the record as to how CNA mentor Reed knows the experience level of any particular per diem CNA or the types of basic skills at which a particular CNA may be more proficient than others.

The record reveals there are three ways a change in assignment is initiated. The nurse case manager can independently decide a change is needed or a CNA mentor or a CNA can make a suggestion or a complaint to the nurse case manager. CNA mentor Law testified regarding a recent occasion when the nurse case manager on Baldwin wing was considering rearranging CNA work assignments because one end of the wing was "heavier" than the other. According to Law, the nurse case manager asked her opinion about such change but none was made as of the date of the hearing.

CNA mentor Law testified that if a problem arises with a CNA's work assignment, the CNA can bring it to the CNA mentor's attention or go directly to the nurse case manager. If the problem is brought to the CNA mentor, she will have a discussion with the CNAs and try to come up with a solution. She then brings the problem and the proposed solution to the nurse case manager and requests permission to implement the solution. Law testified that she has never been told that she cannot implement her suggested solution.

Administrator Tourje also testified that CNA mentors can make a "suggestion" to the nurse case manager to change an assignment based on a CNA complaint, but the nurse case manager makes the decision as to whether the change will be made. Tourje

testified that the nurse case manager follows the CNA mentors' recommendations 98 percent of the time.

CNA mentors Law and Reed testified that CNAs can also bring assignment issues and proposed solutions directly to the nurse case manager. Specifically, Reed testified regarding an occasion when a CNA complained about her workload and directly proposed a resolution to the nurse case manager in a meeting attended by the nurse case manager, Reed and the two CNAs involved in proposing the resolution. Reed testified that the only thing she did was express her agreement with the CNAs' proposed resolution. The record fails to disclose whether the nurse case manager requested Reed's input or Reed simply offered it. The nurse case manager implemented the CNAs' proposal; however, the record fails to disclose what weight, if any, the nurse case manager gave to Reed's expressed agreement with the proposed change.

There is no record evidence that CNA mentors are held responsible for the work performance of the CNAs.

ADJUST GRIEVANCES

Administrator Tourje testified that CNA mentors have the authority to resolve CNA complaints about one another or about their work load by "suggesting" to the nurse case manager that a change in assignment be made. As stated above, Tourje further testified that the nurse case manager follows the suggestion of the CNA mentor 98 percent of the time. CNA mentor Law testified that if a CNA is having a problem with other employees, the CNA will address the issue directly with the nurse case manager, and if the problem involves the CNA completing tasks more efficiently or needing assistance in completing tasks, then the CNA will address it with the CNA mentor. As discussed above, the record evidence demonstrates that the nurse case manager makes the final decision regarding changes in assignments.

EVALUATIONS

Administrator Tourje testified that written employee performance evaluations are conducted twice per year (June and December) and that wage increases are dependent on an employee's evaluation. She further testified that the nurses and the CNA have a discussion as to how the CNA is doing and the evaluation reflects "50/50" input from the nurses and the CNA. The job description for CNA mentors states that CNA mentors provide input on the evaluation of new employees. The record reveals that there is a place for the DON, the nurse case manager, the CNA mentor and the CNA to have input on a CNA's evaluation. Tourje testified that she was not sure if the CNA mentors participated in the last CNA performance evaluations conducted in December 2011, but was told by the DON that all evaluations were complete and the CNA mentors were part of the process. CNA mentor Law testified that she participated in new employee evaluations "in the past," but she was not asked for her input on the most recent December 2011 evaluations. CNA mentors Reed and Grant have never been asked to evaluate CNAs.

OTHER INDICIA

The record reveals that CNA mentors do not schedule hours of work, assign overtime, discipline, promote, or grant bonuses or time off. Record evidence demonstrates that while CNA mentors, as well as CNAs, may ask other CNAs if they want to work if there is a need, it is the scheduler's responsibility to staff the wings and CNA mentors cannot require an employee to come to work.

The Employer offers training programs in which CNAs and CNA mentors can participate to increase their skills and pay. There are three tiers to the training program. Each tier has a training requirement which must be completed in order to advance to the next tier. In addition, CNAs are required to work for one year in the tier before becoming

eligible to advance to the next tier. The record reveals that CNA mentor Law is the only employee who has advanced to Tier III,¹⁷ the highest tier, and that many CNAs have advanced to Tier I and Tier II. Administrator Tourje testified that CNA mentors Reed and Grant have not had any of the training.

CNA mentors do not attend management or supervisory meetings. They attend floor meetings with all CNAs and other staff in the wing. CNA mentors participate in the Employer's Six Sigma committee, which holds safety meetings. No CNAs attend these meetings. CNA mentor Reed testified that the CNA mentors' role on the committee is to provide CNA audits they have performed for the quality assurance department and to reeducate CNAs if they are engaged in unsafe procedures that the CNA mentor discovers while conducting an audit. The CNA mentor decides which CNAs will be audited and fills out the audit form. The CNA mentor gives the form to the quality assurance person at the safety meeting who performs a second audit. The record testimony reveals that the audits are not used for disciplinary purposes.

CNA mentors Law and Reed also participate on the problem solving committee. The record discloses that the purpose of the problem solving committee is to provide a forum, without supervision or management participation, where employees can make suggestions or point out problems and the committee tries to resolve them. Administrator Tourje testified that management is not allowed to know who is on the committee.¹⁸

ANALYSIS

Section 2(11) of the Act defines a statutory supervisor as any individual with the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or

¹⁷ Any CNA can advance to Tier III by completing the requisite training.

¹⁸ There are times, however, when a committee member's identity cannot be avoided such as when funds were requested for the installation of lighting in a parking lot. Other than this request, the record is unclear as to how the committee brings about resolutions to the problems brought before it.

discipline other employees, or responsibly 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.

Individuals are statutory supervisors if they hold the authority to engage in any one of the twelve supervisory functions (e.g. assign or responsibly direct); their exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment; and their authority is in the interest of the employer. NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706, 713 (2001).

The party asserting that an individual has supervisory authority has the burden of proof. Dean & Deluca New York, Inc., 338 NLRB 1046 (2003); NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706, 713 (2001). Purely conclusory evidence is not sufficient to establish supervisory status; rather, the party must present evidence that the employee actually possesses the Section 2(11) authority at issue. Golden Crest Healthcare Center, 348 NLRB 727 (2006). A “paper showing” or testimony merely asserting generally that individuals exercised certain supervisory duties is not sufficient to meet the burden of proof. Rather, the testimony must include specific details or circumstances demonstrating the existence of supervisory authority. Avante at Wilson, Inc., 348 NLRB 1056, 1057 (2006). Any lack of evidence in the record is construed against the party asserting supervisory status. Elmhurst Extended Care Facilities, 329 NLRB 535, 536 fn. 8 (1999).

The Employer seeks to exclude CNA mentors because they exercise supervisory authority over certified nursing assistants. I note that, in its brief, the Employer cites no cases in which the Board has found a CNA to possess supervisory authority. For the reasons discussed below, I find that the Employer has failed to meet its burden of

establishing that the CNA mentors are supervisors within the definition of Section 2(11) of the Act.

EFFECTIVELY RECOMMENDS HIRING

Based on the evidence contained in the record, I find that the Employer has failed to establish that the CNA mentors effectively recommend hiring.

The Board defines the power to effectively recommend as meaning “that the recommended action is taken with *no* independent investigation by superiors,” *ITT Corp.*, 265 NLRB 1480, 1481 (1982); *Wesco Electrical Co.*, 232 NLRB 479 (1982). Thus, in order to establish that the putative supervisors possess supervisory indicia based on the authority to effectively recommend hiring, the party asserting supervisory status must demonstrate that the management official made the decision to hire based solely on the recommendation from the putative supervisor without further inquiries. See *Waverly-Cedar Falls Health Care*, 297 NLRB 390, 392 (1989), *enfd.* 933 F.2d 626 (8th Cir. 1990). Mere participation in the hiring process, absent the authority to effectively recommend hire, is insufficient to establish 2(11) supervisory authority. See *Training School at Vineland*, 332 NLRB 1412, 1417 (2000); *North General Hospital*, 314 NLRB 14, 16 (1994).

In *Third Coast Emergency Physicians, P.A.*, 330 NLRB 756 (2000), the Board upheld the regional director’s finding that the employer failed to establish that senior advisory council members exercised independent judgment with regard to, among other things, effective recommendations to hire. While the senior advisory council members participated in interviews, ranked candidates, and made recommendations to the medical director, there was no evidence detailing specific instances of what role the senior advisory council members played in the medical director's ultimate decision to hire or not

hire an applicant and the medical director retained the final decision-making authority associated with any and all employment hiring.

While the record in the instant case demonstrates that Law and Reed participate in reviewing applications and interviewing for the CNA training program, there is no dispute that the DON and Education Nurse decide who is accepted into the program. While CNA mentor Law testified that she provides an opinion to nurse educator assistant Diamond as to whether the applicant is qualified, the record does not disclose what criteria Law uses in determining whether the applicant is qualified; whether her assessment is based on any independent judgment or is routine and clerical in nature; what role Diamond plays in the interviewing and selection process; whether she recommends an applicant out of the qualified group; and if she does, what impact, if any, Law's recommendation has on the ultimate decision to accept an applicant into the program. CNA mentor Reed testified that she does not know whether her recommendations to accept an applicant into the CNA training program directly resulted in the Nurse Educator's decision to select a candidate and on one occasion, an applicant was accepted in spite of Reed not having recommended her. Based on the record evidence, I find that the Employer has failed to establish that CNA mentors effectively recommend hiring of applicants to the CNA training program. *Third Coast Emergency Physicians, P.A.*, supra.

The Employer in its brief, relies on *Venture Industries, Inc.*, 327 NLRB 918, 919-920 (1999), in support of its position that CNA mentors effectively recommend hiring. In *Venture Industries*, the putative supervisor interviewed applicants and made a recommendation to the department manager based on his selection of a candidate, and the manager followed his recommendations 80 to 90 percent of the time. In the instant case, the record demonstrates that Law merely advised Diamond if an applicant was qualified;

there is no evidence that any CNA mentor selected candidates from a pool of applicants. Thus, I find that the Employer has failed to meet its burden in demonstrating that CNA mentors effectively recommend applicants for hire into the training program. See North General Hospital, supra, at 16, where the Board found that a doctor's participation in the interview of a candidate for an attending physician position, absent evidence that he effectively recommended the applicant for hire, is insufficient to establish supervisory authority.

The Employer also contends that CNA mentor Law's recommendations, which are routinely followed, serve as the primary source of information used to determine whether an individual passes the training course and should be offered further employment. I note the absence of any record evidence of specific instances where the Employer hired CNAs, either upon completion of the CNA training program or otherwise, as a direct result of CNA mentor Law's recommendations. On the contrary, Administrator Tourje provided conclusory testimony that the nurse case manager and the CNA mentor monitor the progress of the trainee on the floor during the clinical portion of the training. Further, the record fails to disclose whether the DON or Education Nurse acts solely on the recommendations of the CNA mentors and/or the nurse case manager or whether they conduct an independent review prior to making a decision to offer a CNA position to the trainee.

Finally, I find that the record discloses that any employee can be used for a reference on a CNA's application for the training program or for a CNA position, and that any employee can recommend an applicant for hire. Further, the record does not provide any specific examples where a CNA mentor effectively recommending hiring.

EFFECTIVELY RECOMMENDS DISCIPLINE

Regarding the Employer's position that CNA mentor Law can determine when someone should be removed from the CNA training program, I find that the record fails to establish that any of the CNA mentors effectively recommend discipline. The record demonstrates that CNA Law, on two occasions, expressed her opinion to the Education Nurse that an individual is not going to make it through the training program. However, the record contains no evidence that Law, or any CNA mentor, has participated in the decision to terminate the individuals' participation in the program. Further, the record fails to disclose the significance, if any, that the Employer placed on Law's opinion or whether the Education Nurse, or any other supervisor or manager, made an independent assessment of the two trainees' skills.

The Employer also argues that the record demonstrates that CNA mentors possess supervisory authority because they complete incident reports when a CNA's work performance is not corrected through training and reeducation, and submit the reports to a nurse manager so further action can be taken.¹⁹ The Employer proffered no evidence that the incident reports completed by the CNA mentors have led to any personnel actions or that they have affected the CNAs' terms and conditions of employment. Further, the record reveals that incident reports can be completed by any employee and submitted to a nurse manager, such as the DON or the nurse case manager. The Board has found that the reportorial function of writing out incident reports does not require the use of independent judgment and does not confer supervisory status. See *Springfield Terrace Ltd.*, 355 NLRB 937, 946 (2010); *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995); *Ohio River Co.*, 303 NLRB 696, 716 (1991); *Passavant Health Center*, 284 NLRB 887, 892 (1987).

¹⁹ No incident reports are in evidence.

The cases cited by the Employer in its brief are distinguishable. In Oak Park Nursing Care Center, 351 NLRB 27 (2007), the Board found that LPNs were supervisors by virtue of their authority to discipline, and effectively recommend discipline. In so finding, the majority relied on the fact that the LPNs had the authority to fill out employee counseling forms under the employer's progressive disciplinary policy, which then laid a foundation for future discipline against an employee. Additionally, the Board found that the LPNs had the authority to effectively recommend discipline against employees where those recommendations were accepted by the employer without further independent investigation.

In the instant case, there is no evidence that incident reports lay the foundation for future discipline. Further, the record contains no evidence of any occasion where the CNA mentors have even effectively recommended discipline. The Board in Rest Haven Nursing Home, 322 NLRB 210, 211 (1996), found that LPNs do not effectively recommend discipline where they, as well as any other employee, could submit incident reports regarding CNA conduct to the DON, who investigated and decided what action, if any, to take against the CNA. Cf. Bon Harbor Nursing & Rehabilitation Center, 348 NLRB 1062 (2006), where the Board found that LPNs were supervisors inasmuch as they had the authority to provide written warnings which were the first step of the disciplinary process; they indicated a level of discipline on the disciplinary action reports; their disciplinary determinations were never independently reviewed or overruled by higher management; and the disciplinary action reports issued by LPNs were relied on by the DON when administering subsequent discipline.

The Employer also argues that the audit forms that CNA mentors complete and submit to the Six Sigma safety committee are the basis for further action by management.

However, the record testimony reveals that the audits are not used for disciplinary purposes.

Based on the foregoing and the record as a whole, I conclude that the Employer has failed to establish that CNA mentors possess the authority to effectively recommend discipline.

ASSIGNMENT OF WORK

I find that the Employer has failed to meet its burden in demonstrating that CNA mentors exercise independent judgment in assigning work to CNAs.

In Oakwood Healthcare, Inc., 348 NLRB 686 (2006), the Board clarified the criteria for finding that a putative supervisor “assigns” or “responsibly directs” the work of others, and uses “independent judgment” in doing so. The Board held that the authority to assign refers to “the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties as opposed to discrete tasks. Oakwood Healthcare, Inc., supra, at 689. The authority to make an assignment, by itself, does not confer supervisory status. The putative supervisor must also use independent judgment when making such assignments. Id. at 692-693.

In Oakwood Healthcare, Inc., the Board found that a charge nurse exercised independent judgment when she made assignments based on her “analysis of an available nurse’s skill set and level of proficiency at performing certain tasks, and her application of that analysis in matching that nurse to the condition and needs of a particular patient. The supporting evidence must be sufficient to establish that nurses “make assignments that are both tailored to patient conditions and needs and particular [employees’] skill sets.” Id. at 695. In Lynwood Manor, 350 NLRB 489 (2007), the Board made clear that

merely conclusory testimony that staffing needs are based on an assessment of “patient acuity” is insufficient to establish independent judgment.

Finally, the Board has found that in order to exercise independent judgment, the direction “must be independent [free from the control of others], it must involve a judgment [forming an opinion or evaluation by discerning and comparing data], and the judgment must involve a degree of discretion that rises above the ‘routine or clerical.’”

Oakwood Healthcare, Inc., supra, at 693.

The Employer argues that CNA mentors regularly exercise independent judgment in assigning work to employees. Specifically, the Employer argues in its brief that CNA mentors assign work to CNAs based on their knowledge of resident needs and each CNA’s skills and that they change assignments in order to equalize the work load so no single CNA is burdened by an unfairly heavy caseload. The Employer also argues that the CNA mentors’ recommendations regarding assignments are followed 98 percent of the time.

The record reveals that the CNA mentors make the initial daily assignments for part-time and per diem CNAs. CNA mentor Reed testified that she assigns these CNAs the easier groups of patients. She also testified that she assigns part-time and per diem CNAs based on their strengths and weaknesses. However, I note that the record is not clear as to whether Reed makes these assignments based on physical strength or an assessment of the CNAs’ skills, and the record contains no evidence as to whether Reed is familiar with the experience level or skill set of any particular part-time or per diem CNA. The record evidence is ambiguous and is, therefore, insufficient to establish that CNA mentors use independent judgment in making initial assignments to part-time and

per diem CNAs.²⁰ The Board has found that any lack of evidence in the record is to be construed against the party asserting supervisory status. See *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 fn. 8 (1999). Based on the foregoing, I find that the Employer has failed to meet its burden in establishing that CNA mentors use independent judgment when making initial assignments of work for part-time and per diem CNAs.

The record demonstrates that CNA mentors do not make the full-time CNAs' initial assignments, and that nurse case managers must approve any change in assignment. I find that the CNA mentors do not exercise independent judgment in making changes to CNA assignments.²¹ See *Oakwood Healthcare, Inc.*, supra, (one of the determining factors in establishing the use of independent judgment is whether the putative supervisor's exercise of judgment that is free from the control of others.).

The record evidence demonstrates that CNA mentors make some assignments based on the need for additional CNAs to help other CNAs with "heavy" residents. In this regard, CNA Mentor Law testified that if there are heavy or more difficult patients on the north side of the wing, for example, she assigns CNAs from the south wing to help the CNAs on the north wing complete their work. Assignments based on the availability of CNAs to assist others with work assignments, without regard to individualized assessments of the CNAs' skills in relation to the needs of the residents, are routine and do not require independent judgment. *Springfield Terrace Ltd.*, 355 NLRB 937, 943

²⁰ Even if the record had established that CNA mentors assign lighter work loads based on the needs of the residents to all part-time and per diem nurses, I would conclude that such assignment would not constitute independent judgment because it requires no assessment as to the skill level of any particular part-time or per diem CNA. See *Lynwood Manor*, supra. If, on the other hand, CNA mentors assign lighter work loads to CNAs with "weaker" skills and heavier work loads to CNAs with "stronger" skills, I would conclude that the record is insufficient to infer supervisory status, based on the absence of specific details as to the particular skills the CNA mentor assesses or how she uses them to determine assignments. Conclusory testimony is insufficient to establish independent judgment. *Golden Crest Healthcare Center*, 348 NLRB 727 (2006).

²¹ To the extent that Administrator Tourje claims that the nurse case manager follows the CNA mentors' recommendations 98 percent of the time, I find this assertion to be conclusory and insufficient to rebut the record evidence that all changes in assignments must be approved by the nurse case manager. Finally, I note that the record demonstrates that CNAs can also recommend changes in assignment.

(2010); Oakwood Healthcare, Inc., supra at 693; Children's Farm Home, 324 NLRB 61, 64 (1997).

The record reveals that CNA mentors do not provide guidance regarding prioritization of work to full-time CNAs with a permanent assignment because these are experienced individuals. To the extent that CNA mentors do, however, provide guidance to new CNAs as to the manner in which they can most efficiently complete their assignments, I find that this guidance is based on the CNA mentors' experience in the field and does not constitute an assignment of work within the meaning of Oakwood.²² Regardless, choosing the order in which employees perform discrete tasks is not indicative of the authority to assign work as contemplated by the Board. See Oakwood Healthcare Inc., supra, at 689.

ADJUST GRIEVANCES

I find that the record fails to establish that CNA mentors have the authority to adjust grievances. In support of the Employer's position, Administrator Tourje provided conclusory testimony that CNA mentors may be approached by a CNA with a concern about a conflict with another employee or dealing with a resident care issue. The conclusory testimony, without specific examples, that CNA mentors resolve conflicts between employees is not sufficient to establish supervisory status. Golden Crest Healthcare Center, 348 NLRB 727 (2006).²³

²² No party is contending that CNA mentors responsibly direct CNAs. The Board in Oakwood stated: "[T]o establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct work and the authority to take corrective action, if necessary....and a prospect of adverse consequences for the putative supervisor if he/she does not take these steps." Oakwood Healthcare, Inc., supra, at 692. There is no evidence that CNA mentors are held accountable for the CNAs' work performance. Accordingly, I find that CNA mentors do not possess the supervisory authority to responsibly direct the work of CNAs.

²³ In any event, the record establishes if the problem is one of employee conflict, the CNA mentors refer the matter to the nurse case manager, further under-cutting the Employers position that CNA mentors are statutory supervisors.

CNA Mentors Law and Reed testified that if a CNA is having a problem completing their work and needs assistance, the CNA raises the issue with them and they will try to resolve the matter. The Board has found that the fact that putative supervisors sometimes resolve minor employee complaints regarding workload or personality conflicts is insufficient to establish supervisory status. See Ohio Masonic Home, 295 NLRB 390, 394 (1989). See also Ken-Crest Services, 335 NLRB 777, 779 (2001) and St. Francis Medical Center-West, 323 NLRB 1046, 1047-1048 (1997), where the Board found that the authority to resolve personality conflicts or “squabbles” between employees does not warrant an inference sufficient to establish supervisory status.

In its brief, the Employer cites two Third Circuit court cases, Passavant Retirement & Health Center v. NLRB, 149 F.3d. 243, 248 (3d Cir. 1998) and NLRB v. Attleboro Associates, LTD, 176 F.3d 154, 166 (3d Cir. 1999) and one Board case, The Atlanta Newspapers, 306 NLRB 751 (1991), in support of the its position that individuals who resolve minor problems or gripes regarding work assignments are supervisors. Subsequent to the issuance of these three decisions, however, the Board in Ken-Crest Services, supra, specifically stated that it adheres to the principal that the authority to resolve minor squabbles or disputes between employees does not sufficiently establish supervisory status, contrary to the dissent’s argument and reliance on the same two Third Circuit cases cited by the Employer in the instant case.

Accordingly, I find that the Employer has failed to establish that the CNA mentors possess the authority to adjust grievances.

EVALUATIONS

I find that the record fails to establish that CNA mentors are supervisors based on their purported authority to evaluate CNAs.²⁴ The Board will not find an individual to be a statutory supervisor unless the evaluation affects the wages and/or job status of the employee being evaluated. See *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535, 536 (1999).

The Employer claims that that all three CNA mentors have the authority to evaluate CNAs. In support of this position, it relies on CNA mentors' job description which states that they provide input on evaluations of new employees. However, the Board has found that job descriptions are only paper authority and are not given any controlling weight by the Board. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006); *Training School at Vineland*, 332 NLRB 1412, 1416 (2000).

The Employer further relies on Administrator Tourje's testimony that the DON, the nurse case manager, the CNA mentor and the CNA provide input on a CNA's evaluation, and that she believes the CNA mentors participated in the December 2011 evaluation process. Conclusory statements, without detailed, specific evidence are insufficient to establish supervisory authority. *Golden Crest Healthcare Center*, 343 NLRB 727 (2006); *Avante at Wilson, Inc.*, supra.

Tourje provided conclusory testimony that CNAs' evaluations determine the amount of wage increase they will receive. However, the record is devoid of evidence as to who determines wage increases for CNAs or how they are determined. Further, there is no evidence that the CNA mentors' comments on the evaluation are the sole basis upon which wage increases are given.

²⁴ Section 2(11) does not include the authority to "evaluate" in its enumeration of supervisory functions.

The record fails to demonstrate that CNA mentors participate in the biannual evaluation of CNAs. In this regard, CNA mentor Law testified that while she had participated in CNA evaluations in the past, she was not involved in the December 2011 CNA evaluations.²⁵ To the extent that the Employer may rely on Law's past participation, the Board has refused to find supervisory status where there is no evidence that the purported supervisor's participation in the evaluation process is directly linked to wage increases. See *Nymed, Inc.*, 320 NLRB 806, 813 fn. 12 (1996), where the Board found that, while LPNs played an important role in preparing employee evaluations, their role was reviewed by higher authority, was sometimes changed by the reviewer, and there was no direct connection between the LPNs' input and wage increases and, therefore, did not constitute the exercise of Section 2(11) authority.

The cases cited by the Employer in its brief relative to evaluations are inapposite. In every case, the Board found that the putative supervisors were statutory supervisors because there was a direct correlation between the evaluation completed by the purported supervisor and the pay increase given. For example, in *Trevilla of Golden Valley*, 330 NLRB 1377 (2000), the Board determined that LPNs were statutory supervisors because they were the only individuals to complete the evaluation form and, based on the ranking they provided, the DON applied a formula to determine the nursing assistants' merit wage increase.²⁶ In the instant case, the Employer has failed to provide the same type of compelling evidence, specifically, that CNAs' wage increases are based on the recommendation of the CNA mentors.

²⁵ The other two CNA mentors testified that they have never completed CNA evaluations.

²⁶ The additional cases cited by the Employer essentially stand for the same proposition, i.e., that the Board found the purported supervisors to be statutory supervisors because they were the sole individuals who prepared the evaluations that the employer relied on in determining employees' wage increases. See *Cape Cod Nursing & Retirement Home*, 329 NLRB 233 (1999); *Hillhaven Kona Healthcare Center*, 323 NLRB 1171 (1997); and *Bayou Manor Health Center, Inc.*, 311 NLRB 955 (1993).

The Employer argues that, in addition to written performance evaluations, CNA mentors conduct evaluations in many other ways, e.g., through the use of the checklist in the CNA training program and orientation process; in deciding whether a trainee should undergo further training or be transferred out of the program; and in determining when a CNA can work independently on the floor. The Employer further argues that CNA Mentor Law, in particular, uses independent judgment in deciding whether individuals have the requisite skill to be permitted to work alone or whether they need additional training and education. Finally, the Employer argues that managers and supervisors rely on Law's recommendations in order to make decisions that impact individual's terms and conditions of employment, e.g., whether they work alone.

The Board found in Harbor City Volunteer Ambulance Squad, Inc., 318 NLRB 764 (1995), that the ability of field training officers to make recommendations to extend the training periods of new paramedics or to advance new paramedics to solo status, absent any evidence of the impact on the employees' job status, did not constitute the kind of personnel decision that establishes statutory supervisory authority. (Cf. Burns International Security Services, 278 NLRB 565 (1986), in which the Board found sergeants to be supervisors because they were responsible for the training and evaluation of probationary guards and could remove probationary guards from their posts for retraining without consulting senior supervisors.).

In the instant case, the record establishes that the nurse care manager and/or the Education Nurse, together with the CNA mentors, monitor the progress of the trainees. The record fails to disclose any specific instances where Law, or any other CNA mentor made effective recommendations that impacted CNAs' terms and conditions of employment beyond those considered by the Board in Harbor City, supra. Accordingly, I find that the Employer presented insufficient evidence that the CNA mentors exercise

supervisory authority to make effective recommendations that impact CNAs' terms and conditions of employment.

SECONDARY INDICIA

The record discloses some evidence of secondary indicia of supervisory status, such as the CNA mentors' higher rate of pay, and their participation on the Six Sigma safety committee. However, the Board has found that where there is no evidence that the purported supervisors possess any one of the enumerated indicia of supervisory status set forth in Section 2(11) of the Act, secondary indicia are insufficient by themselves to establish supervisory status. See *Ken-Crest Services*, 335 NLRB 777, 779 (2001); *General Security Services Corp.*, 326 NLRB 312 (1998), *enfd.* 187 F.3d 629 (8th Cir. 1998); *Billows Electric Supply*, 311 NLRB 878 fn. 2 (1993). See also *Northcrest Nursing Home*, 313 NLRB 491, 500 (1993)(secondary indicia, such as higher rate of pay, can support a finding of supervisory status, but only where the employee also performs one or more of the functions set forth in Section 2(11) of the Act.). Inasmuch as the Employer has failed to establish that CNA mentors possess any one of the supervisory indicia, I find that the evidence of secondary indicia is immaterial and that the CNA mentors are not supervisors within the meaning of Section 2(11) of the Act.²⁷

Based on the above and current Board case law, I find that the Employer has failed to meet its burden of establishing that the CNA mentors are supervisors within the definition of Section 2(11) of the Act.

Accordingly, I find that the following employees constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

²⁷ In any event, the record fails to disclose that the Six Sigma safety committee is comprised solely of supervisors and managers, and the record demonstrates that CNA mentors Law and Reed participate in the problem solving committee, from which managers and supervisors are excluded.

All full-time and regular part-time certified nurses aides and CNA mentors employed by the Employer at its 6884 Maple Avenue, Sodus, New York facility; excluding all licensed practical nurses, dietary employees, maintenance employees, activities employees, nursing and unit secretaries, central supply employees, physical therapy employees, office and clerical employees, housekeeping employees, laundry employees, temporary employees, confidential employees, guards, and all professional employees and supervisors as defined in the Act.

There are approximately 55 employees in the unit.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit, as described above. The employees will vote whether or not they desire to be represented for collective bargaining purposes by: **RETAIL WHOLESALE AND DEPARTMENT STORE UNION/UFCW LOCAL 220**. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

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

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

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

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

To be timely filed, the list must be received in the Regional Office on or before **March 9, 2012**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted

to the Regional Office by electronic filing through the Agency's website www.nlr.gov,²⁸ by mail, by hand or courier delivery, or by facsimile transmission at (716) 551-4972. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

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

C. Notice of Posting Obligation

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on non-posting of the election notice.

²⁸ To file the eligibility list electronically, go to www.nlr.gov and select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party. Further guidance for electronic filing can be found under the E-Gov heading on the Agency's website. Since the list will be made available to all parties to the election, please furnish a total of 2 copies, unless the list is submitted by facsimile or electronic filing, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington, DC by 5 p.m. EDT **March 16, 2012**. The request may be filed electronically through the Agency's web site, www.nlr.gov,²⁹ but may not be filed by facsimile.

DATED at Buffalo, New York this 2nd day of March, 2012.

/s/Michael J. Israel

MICHAEL J. ISRAEL, Acting Regional Director
Acting Regional Director
National Labor Relations Board
Niagara Center Building – Suite 630
130 S. Elmwood Avenue
Buffalo, New York 14202

²⁹ Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.