

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

In the matter of:)	
)	
BLOSSOM VIEW NURSING, INC.)	
)	
Employer,)	
)	
and)	Case No. 3-RC-073573
)	
RETAIL, WHOLESALE, AND DEPARTMENT)	
STORE UNION/UFCW LOCAL 220,)	
)	
Petitioner.)	

**UNION’S STATEMENT IN OPPOSITION
TO EMPLOYER’S REQUEST FOR REVIEW**

INTRODUCTION

Petitioner, Retail, Wholesale, and Department Store Union/UFCW Local 220 (“Union”), submits that the National Labor Relations Board should deny Blossom View Nursing, Inc.’s (“Employer”) Request for Review of Regional Director’s Decision and Direction of Election. Section 102.67(c) of the Board’s Rules and Regulations states the “[t]he Board will grant a request for review only where compelling reasons exist therefor,” and sets forth four specific and limited grounds for review. 9 C.F.R. § 102.67(c). The Employer has failed to meet the “stringent” requirements of Section 102.67(c) governing a grant of review. *See St. Barnabas Hosp.*, 355 NLRB No. 39, 2010 WL 2264972 (2010).

The Employer seeks review of the Regional Director’s Decision and Direction of Election (“DDE”) in which the Regional Director found that the Employer’s positions of Senior Staff Nurse, Staff Nurse, and Nurse Scheduler (“LPNs”) are not statutory supervisors under Section 11 of the National Labor Relations Act (“Act”), 29 U.S.C. § 152(11). The Employer seeks review pursuant

to Section 102.67(c)(2) on the grounds that “the Regional Director’s decision on factual issues was clearly erroneous on the record and such error prejudicially affects the rights of the Employer,” and Section 102.67(c)(1) on the grounds that “the Regional Director misapplied Board precedent regarding supervisory status under the Act.” (Employer’s Request for Review at 1.) The Employer does not seek review under Sections 102.67(c)(3) or 102.67(c)(4).

The Board should deny review because review should be granted “*only* where *compelling* reasons exist.” 29 C.F.R. § 102.67(c) (emphasis added). In its Request for Review, the Employer does not delineate any “substantial factual issue [that] is clearly erroneous on the record,” 29 C.F.R. § 102.67(c)(2), or a “substantial question of law or policy [that] is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent,” 29 C.F.R. § 102.67(c)(1). Instead, the Employer merely rehashes essentially the same arguments it made in its post-hearing brief, but this time complains that the Regional Director gave too much weight to facts pointed to by the Union and insufficient weight to facts it relied on, which utterly fails to establish “clearly erroneous” fact-finding, and argues against the parallels the Regional Director drew between the facts of the present matter and Board precedent, which utterly fails to establish “a departure from...Board precedent” raising “a substantial question of law or policy.”

ARGUMENT

I. THE EMPLOYER HAS FAILED TO ESTABLISH THAT THE REGIONAL DIRECTOR’S DECISION ON ANY SUBSTANTIAL FACTUAL ISSUE IS CLEARLY ERRONEOUS ON THE RECORD AND THAT SUCH ERROR PREJUDICIALLY AFFECTS THE EMPLOYER’S RIGHTS

The Employer has failed to show that the Regional Director either (1) overlooked any substantial factual issues, or (2) credited a material fact, or made an adverse determination regarding

a material fact asserted by the Employer, without any supporting record evidence. The “facts” pointed to by the Employer in its Request for Review were either controverted at the hearing or are witnesses’ conclusory statements that were found to lack support in the record. Accordingly, the Employer’s claim that the Regional Director made clearly erroneous fact findings is unsubstantiated. Moreover, as we demonstrate below, the Employer merely takes issue with the weight assigned by the Regional Director to certain facts as opposed to others. For these reasons, the Employer has failed to establish that the Regional Director’s decision on any substantial factual issue is clearly erroneous on the record and that such error prejudicially affects the Employer’s rights.

II. THE EMPLOYER HAS FAILED TO ESTABLISH THAT THE REGIONAL DIRECTOR’S DECISION THAT THE LPNS ARE NOT STATUTORY SUPERVISORS SHOULD BE REVIEWED

A. Legal Standard for Supervisory Exclusion

Section 2(11) of the Act provides that an individual is a “supervisor” and not entitled to federal labor law protection if that individual has the “authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively to recommend such action,” and the exercise of such authority is not “of a merely routine or clerical nature, but requires the use of independent judgment.” 29 U.S.C. § 152(11).

The traditional test for determining supervisory status is: (1) whether the individual has the authority to engage in, or effectively recommend, any one of the twelve criteria listed in Section 2(11) of the Act; (2) whether the exercise of such authority requires the use of independent judgment; and (3) whether the individual holds the authority in the interest of the employer. *NLRB v. Health Care & Ret. Corp.*, 511 U.S. 571, 573-74 (1994). As a general principle, the Board has

cautioned “not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied rights which the Act is intended to protect.” *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995) (internal quotations omitted). The Board has held that “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 a collective bargaining agreement.” *Oakwood Healthcare, Inc.*, 348 NLRB 686, 693 (2006).

The party asserting that supervisory status exists bears the burden of proving such status. *Oakwood Healthcare, Inc.*, 348 NLRB at 687. Supervisory status must be established by a preponderance of the evidence. *Oakwood Healthcare, Inc.*, 348 NLRB at 694. Lack of evidence is construed against the party asserting supervisory status. *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1048 (2003). “[W]henver the evidence is in **conflict or otherwise inconclusive** on a particular indicia of supervisory authority, the Board will find that supervisory status has not been established, at least on the basis of those indicia.” *Phelps Cmty. Med. Ctr.*, 295 NLRB 486, 490 (1989) (emphasis added). Mere inferences or conclusory statements, without detailed, specific evidence of independent judgment, are insufficient to establish supervisory authority. *Golden Crest Healthcare Ctr.*, 348 NLRB 727, 731 (2006); *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006). Further, job descriptions and job titles are only paper authority and are not given any controlling weight by the Board. *Avante at Wilson, Inc.*, 348 NLRB at 1057; *Training Sch. at Vineland*, 332 NLRB 1412, 1416 (2000).

B. The Employer Has Failed to Establish That the Regional Director’s Fact Finding and Decision Regarding the LPNs’ Role in Assigning and Directing the CNAs’ Work Is Clearly Erroneous or a Departure from Board Precedent

In its Request for Review, the Employer claims that the Regional Director mistakenly found

that the LPNs are not statutory employees because they allegedly assign and direct the certified nursing assistants' ("CNAs") work. This argument is wholly without merit for several reasons.

First, the Regional Director clearly and correctly rejected the Employer's assertion of supervisory status based upon these indicia because the LPNs' role does not require independent judgment due to the fact that such assignments are routine and clerical in nature, and the LPNs are not responsible for the CNAs' work. The overall record evidence amply supports the Regional Director's conclusion that the LPNs' involvement in the assignment of work is limited to splitting residents up evenly or following established Employer protocols. (Tr. 117, 196, 204-05, 349, 393-94.) The Regional Director correctly noted that in the "healthcare setting, a nurse uses independent judgment in assigning when she independently weighs the individualized condition and needs of a patient against the *skills or special training* of the available staff." (DDE at 24 (emphasis added) (citing *Barstow Cmty. Hosp.*, 352 NLRB 1052, 1053 (2008).)

Second, the Employer quarrels with the Regional Director's determination that LPNs do not assess new residents and their needs. (Employer's Request for Review at 20.) But the record evidence clearly indicates that nurse case managers (who the parties stipulated are statutory supervisors) **and** the Senior Staff Nurse create CNA assignment sheets based upon the type and level of care each patient needs. (Tr. 185-86, 189.) Clearly, such assignments are not done *independently* by the LPNs.

Third, the Employer asserts that the colloquy between its witness and the Hearing Officer supports its contention that LPNs consider "specific skills and *experiences* of CNAs when making assignments." (Employer's Request for Review at 20-21.) This is wrong for several reasons. One, *experience* is not one of the enumerated factors in *Barstow Community Hospital*. See *Barstow Cmty.*

Hosp., 352 NLRB at 1053. Two, the Night Nurse Supervisor testified that it is only because of the CNA's "seniority" and her gender (she is an "older woman") that Senior Staff Nurses don't assign heavier residents to her. (Tr. 344.) Again, these characteristics are not special skills or special training. Three, the Night Nurse Supervisor admitted that "[she] would probably make sure that the senior staff nurse didn't assign a heavier resident to the **older** CNA." (Tr. 344 (emphasis added).) Thus, the witness's statement is intrinsically contradictory and hence the Employer presented insufficient evidence to establish supervisory authority based upon the ability to assign work.¹

Fourth, the Employer asserts that the Regional Director mistakenly found that the LPNs do not use independent judgment when transferring employees due to staffing shortages or personality conflicts. (Employer's Request for Review at 21.) But the record clearly indicates that the only individual who transferred an employee due to such a circumstance, Lisa Moore, was a nurse manager at the time. (DDE 26 n.57.) There is no evidence that LPNs exercised independent judgment in transferring an employee, because the record contains no example of such a transfer. (DDE at 26.) Hypothetical ability is not enough to establish supervisory authority.

In summary, the Employer has failed to establish that the Regional Director's fact finding and decision regarding the LPNs' role in assigning and directing the CNAs' work is clearly erroneous or a departure from board precedent.

¹ In addition, the Employer also asserts, without citation to the record, that "Lessord unambiguously testified that she did not (and could not) supervise similar decisions made by Senior Staff Nurses and Staff Nurses." (Employer's Request for Review at 21.) Because the Employer failed to provide a citation, this assertion should not be credited.

C. The Employer Has Failed to Establish that the Regional Director’s Fact Finding and Decision Regarding the LPNs’ Role in Evaluating Employees are Clearly Erroneous or a Departure from Board Precedent

In the Employer’s Request for Review, the Employer argues that the Regional Director mistakenly found that the LPNs do not supervise CNAs through their evaluations. This argument is wholly without merit for several reasons.

First, the ability to evaluate is not an indicia of supervisory status. *Williamette Indus.*, 336 NLRB 743, 743 (2001).

Second, the Employer has misread and mischaracterized the hearing evidence. Specifically, the Employer asserts that the hearing evidence shows that those evaluations are consulted when considering raises and promotions for CNAs. (Employer’s Request for Review at 23.) But the Employer’s Human Resource Manager testified that when the Employer previously gave raises to the CNAs, it resulted from a *market* adjustment. (Tr. 320.) Further, the record evidence, as found by the Regional Director, clearly shows that evaluations are *jointly* completed by a Senior Staff Nurse and either the Nurse Manager or Nurse Supervisor, and that the DON adjusts the evaluations. (Tr. 44-45, 153.)

The Employer mistakenly assumes that because Senior Staff Nurses Lessord and Sanzotta were told that their performance evaluations impacted their raises, that it did not need to provide evidence the Senior Staff Nurses’ and Staff Nurses’ evaluations of CNAs impacted the latter’s wages. (*See* Employer’s Request for Review 23.) As such, the Regional Director correctly concluded that “without evidence that the purported supervisor’s participation in the evaluation process was directly linked to wage increases [or promotion to a permanent CNA position],” the Board will not find supervisory status based upon the ability to evaluate. (DDE at 37 (citing *Ten*

Broeck Commons, 320 NLRB 806 n.12 (1996).)

For these reasons, the Employer has failed to establish that the Regional Director's fact finding and decision regarding the LPNs' role in evaluating employees are clearly erroneous or a departure from board precedent.

D. The Employer Has Failed to Establish that the Regional Director's Fact Finding and Decision Regarding the LPNs' Role in Disciplining Employees are Clearly Erroneous or a Departure from Board Precedent

The Employer, in its Request for Review, argues that the Regional Director mistakenly found that the LPNs are not statutory employees because they are allegedly involved in the process of disciplining CNAs. The overall record evidence amply supports the Regional Director's conclusion that the LPNs' Role in disciplining employees is merely reportorial. (DDE at 28); *see Franklin Home Health Agency*, 337 NLRB 826, 830 (2002) (reporting on incidents of employee misconduct is not supervisory if the reports do not always lead to discipline and do not contain disciplinary recommendations).

First, the Employer disregards Administrator Nancy Tourje's testimony that the Staff Nurses report all verbal notices to Senior Staff Nurses who then go to Nurse Case Managers, and the Nurse Case Managers are the individuals who issue any verbal warning. (Tr. 76-77.) Second, Administrator Tourje testified that nurse case managers conduct *independent investigations* into any potential discipline. (Tr. 139-40.) Senior Staff Nurses and Staff Nurses merely "give facts" according to Tourje. (Tr. 143.) And Tourje could not provide one specific example where a Nurse Case Manager accepted a Senior Staff Nurse or Staff Nurse recommendation as to discipline. (*See* Tr. 143-44.) Therefore, the Employer presented contradictory evidence, which is inconclusive to establish supervisory authority in regards to the LPNs' ability to discipline CNAs. (*See* Tr. 140-44);

Phelps Cmty. Med. Ctr., 295 NLRB at 490. Further, as the Regional Director correctly found, no documented verbal warnings are in the record which makes this case distinguishable from the case cited by the Employer in its Request for Review. (DDE at 13 fn. 32; *see* Employer’s Request for Review at 27 (citing *Berthold Nursing Care Ctr., Inc., d/b/a Oak Park Nursing Ctr.*, 351 NLRB 27 (2007)).

Next, the Employer resorts to its default argument, that the Regional Director drew an incorrect parallel between the facts of this case and Board precedent. (Employer’s Request for Review at 27-29.) As such the Employer’s argues not so much that the Regional Director “departed from Board precedent,” but rather rehashes its previously rejected theory. This does not serve as a compelling reasons for Board review.

In summary, the Employer has failed to establish that the Regional Director’s fact finding and decision regarding the LPNs’ role in disciplining employees are clearly erroneous or a departure from board precedent.

E. The Employer Fails to Establish that the Regional Director’s Fact Finding and Decision Regarding the LPNs’ Role in the Adjusting of Employee Grievances are Clearly Erroneous or a Departure from Board Precedent

The Employer, in its Request for Review, argues that the Regional Director mistakenly found the LPNs not to be statutory employees because they are allegedly involved in the adjustment of employee grievances. The Regional Director relied upon Board precedent and factually determined that these adjustments related to workload issues and minor squabbles between employees which are insufficient to establish supervisory status. (DDE at 34 (citing *Ohio Masonic Home*, 295 NLRB 390, 394 (1989)).) The Employer merely relies on Third Circuit precedent issued prior to the Board’s decision in *Ken-Crest Services*, 335 NLRB 777, 779 (2001), the latter of which continued to adhere

to the prior Board precedent. (DDE at 35.) The Employer is unable to point to any factual finding that the employees' issues are of more than a minor nature. As such, the Regional Director correctly adhered to prior Board precedent with amply supported factual findings. Therefore, the Employer has failed to establish that the Regional Director's fact finding and decision regarding the LPNs' role in the adjusting of employee grievances are clearly erroneous or a departure from board precedent.

CONCLUSION

The Employer has failed to demonstrate that the Regional Director either failed to adhere to Board precedent or engaged in clearly erroneous fact-finding. Accordingly, the Employer has failed to meet the criteria for review under 29 C.F.R. § 102.67(c) (1) and (2), and the Board should deny the Employer's Request for Review of Regional Director's Decision and Direction of Election.

Respectfully submitted,

CORNFIELD AND FELDMAN

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By: /s/Robert A. Seltzer

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that he caused the foregoing document to be served upon the following by depositing same in the U.S. mail, postage prepaid, on April 6, 2012:

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