

**NATIONAL LABOR RELATIONS BOARD**

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**In the Matter of:**

**SUB ACUTE REHABILITATION CENTER  
AT KEARNY, LLC D/B/A BELGROVE  
POST-ACUTE CARE CENTER,**

**Employer**

**Case No.: 22-RC-80916**

**AND**

**REQUEST FOR REVIEW**

**DISTRICT 1199J, NUHHCE, AFSCME,  
AFL-CIO,**

**Petitioner,**

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**SUB ACUTE REHABILITATION CENTER AT KEARNY, LLC D/B/A BELGROVE  
POST-ACUTE CARE CENTER'S REQUEST FOR REVIEW OF THE REGIONAL  
DIRECTOR'S DECISION AND DIRECTION OF ELECTON**

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## I PRELIMINARY STATEMENT

District 1199J , National Union of Hospital and Health Care Employees, AFSCME, AFL-CIO (“District 1199J” or “Union”) filed a petition to represent licensed practical nurses (“LPNs”) working at a skilled nursing facility, Sub-Acute Rehabilitation Center at Kearny, LLC, d/b/a Belgrove Post-Acute Care Center (“Belgrove”). Belgrove asserted that the petition must be dismissed because the LPNs are supervisors under Section 2(11) of the National Labor Relations Act, 29 U.S.C. § 152(11) (hereinafter referred to as “Section 2(11)”).

A hearing was held on May 30, 2012 and June 1, 2012. The Regional Director (“RD”) issued a Decision and Direction of Election (“DD&E”) on June 26, 2012. The RD found that the LPNs were not supervisors.

This case presents important issues on whether the DD&E is consistent with the National Labor Relations Board’s (“Board” or NLRB”) decision in Oakwood Healthcare, Inc., 348 NLRB 686, 689 (2006) and with Section 2(11). Belgrove asserts that the RD’s decision is a substantial departure from Oakwood Healthcare, Inc.. In fact, the RD found that the LPNs were not supervisors even though the LPNs performed the identical duties that the Board gave as examples in Oakwood Healthcare, Inc. of job functions that would make a nurse a supervisor. Moreover, the RD cites new criteria and tests for determining supervisory status that are inconsistent with prior Board decisions on this issue. The RD’s factual determinations are clearly erroneous and not supported by the record. The NLRB must grant Belgrove’s Request for Review, reverse the Regional Director’s decision and find that the LPNs are supervisors under Section 2(11).

## II. STATEMENT OF THE FACTS

The Company called in two witnesses in support of its position that LPNs are supervisors. The Union called no witnesses.

The first witness called by Belgrove was its Administrator, Ms. Jacqueline Baumrind. Baumrind testified that Belgrove is a sub-acute care facility with seventy-five (75) beds for sub-acute residents and forty-five (45) beds for long term residents. (Tr. 20)<sup>1</sup> Two floors are for sub-acute patients and one floor is for the long term residents. Belgrove purchased the facility on December 9, 2010. (Tr. 22)

As a sub-acute facility, Belgrove provides rehabilitation, nursing services and other services, such as speech services, for residents who need this care. (Tr. 20-21) The sub-acute services are “24/7” nursing care. (Tr. 20) The sub-acute residents are there to rehabilitate, including to recover from wounds or hip replacements. (Tr. 21) The sub-acute residents are there for short-term care. The forty-five (45) other beds are for the long-term residents who reside at the facility. (Tr. 21)

Baumrind is in charge of the facility. (Tr. 22) She is responsible for all of the departments at the Company. (Tr. 22)

The nursing department is led by a Director of Nursing. (Tr. 23) The hierarchy below the Director Nursing is the Assistant Director of Nursing, then house supervisors and unit managers, then floor nurses and then certified nurses aides. (“CNAs”) (Tr. 78-79)

There are three shifts: 7:00 A.M.-3:00 P.M., 3:00 P.M to 11:00 P.M., and 11:00 P.M. to 7:00 A.M..(Tr. 24) A house supervisor is in charge of the building on the 3:00 P.M to 11:00 P.M. and 11:00 P.M.-7:00 A.M. shifts and the 7:00 A.M.-3:00 P.M. shift on the weekend. The house supervisor is in charge of and is responsible for the building. (Tr. 24, Tr. 40 and Tr. 60) A

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<sup>1</sup> “Tr.” followed by a page refers to the page in the transcript of the hearing.

house supervisor can be an LPN or a registered nurse (“RN”). If the LPN is a house supervisor, the LPN can supervise an RN. The house supervisor ensures that there are replacements if someone calls. (Tr. 24-26 and Tr. 36) They can require an employee to stay as a replacement if there is a call-out. (Id.) The house supervisors assign employees to perform tasks, and reorganize the staff based on the needs of the residents. (Tr. 26) The house supervisors can move employees throughout the building. (Id.) They attend supervisory meetings. (Tr. 156)

House supervisors can suspend employees (Tr. 26 and Tr. 155). They can also discipline employees through verbal or written warnings (Tr. 24-26) Baumrind gave several examples of LPNs who disciplined employees while they were house supervisors. Employer Exhibit 1 was a written warning given by an LPN, Ms. Josefina Naglieri, acting as a house supervisor to a CNA.

Baumind further testified that the Company follows a policy of progressive discipline. (Tr. 33) Generally, there is a verbal warning, two or three written warnings, suspension and then a discharge. (Id.) A warning notice can affect an employee’s job. (Tr. 34) Once a written warning is completed, it is placed in the employee’s file. (Tr. 31) Employees can ultimately be terminated after receiving written warnings. (Tr. 34)

House supervisors can adjust a grievance as well. (Tr. 156) If there is a problem between two CNAs or nurses, the house supervisor would adjust the grievance. (Tr. 158)

With respect to unit managers, Baumrind testified that they work on the 7:00 A.M. to 3:00 P.M. shift during the week. (Tr. 42) A unit manager can be an RN or an LPN. (Tr. 46) The unit manager coordinates care on the floor and the staff on the floor. (Tr. 40) The unit manager is responsible for the floor. (Tr. 48) A unit manager directs the work of nurses. (Tr. 47) They assign work to the floor nurses, who then assign work to the CNAs. (Tr. 49) They also can

assign work to CNAs. (Tr. 53) The unit managers can move nurses and CNAs throughout the floor. (Tr. 149)

Baumrind stated that unit managers can discipline employees. (Tr. 48) They can suspend employees, including for abuse or neglect. (Tr. 50)

Unit managers also adjust grievances. (Tr. 149) They can move CNAs throughout the floor to adjust a grievance. Id.

Unit managers attend supervisory meetings. (Tr. 150) They attend morning meetings with other supervisors. Id.

Baumrind further testified that LPNs fill-in as unit managers or house supervisors when needed. (Tr. 85-86) At different times, LPNs have been assigned to be unit managers or house supervisors on a regular basis for a period of time. (Tr. 86) All LPNs have the ability to act as a unit manager. (Tr. 89) Naglieri and Ms. Natalie Watkins, who are LPNs, served as unit managers on a regular basis. (Tr. 88) Naglieri, Watkins, Christine Hate, Ayena Johnson, Joshua Carrero, Carmina Figureroa, Tina Sanitate, and Melonissa Beadle have served as unit managers. (Tr.108-109 and Tr. 128-129) Naglieri has served as unit manager. (Tr. 129) Naglieri, Watkins and Hate served as a house supervisor or a unit manager on a regular basis. (Tr. 137)

As for floor nurses, Baumrind stated that floor nurses are assigned to the floors. (Tr. 43) They can be RNs or LPNs. The nurses rotate so that every other weekend they are off. (Tr. 43-44)

Baumrind testified that floor nurses assign work to the CNAs. (Tr. 53) The work is assigned at the beginning of the shift and also based upon admissions. (Tr. 57 and Tr. 72) A daily assignment sheet is made by floor nurses. (Tr. 140) The floor nurses assign and direct CNAs to perform tasks such as bathing residents, preparing residents for therapy, dressing

residents, feeding residents, and toileting residents. (Tr. 54-56) The job duties of the CNAs change daily, particularly in the sub-acute units. (Tr. 103) On sub-acute floors, the floor nurses have to give assignments and directions more frequently to CNAs than on the long term care floor. (Tr. 55) The duties of the CNAs change daily. (Tr. 57) Assignments are made by floor nurses to CNAs based upon their independent judgment. (Tr. 71) Baumrind witnessed an LPN floor nurse direct a CNA to change an equipment order. (Tr. 57)

She further stated that there is a job description for LPNs. Under “responsibilities/accountabilities,” the job description states that the LPNs are to supervise the nursing personnel. (Employer Exhibit Two) The floor nurses supervise CNAs. (Tr. 59) The floor nurses follow-up to ensure that the work is completed by the CNAs. (Tr. 72) The floor nurses are held responsible for the CNAs work. (Tr. 61, Tr. 65, and Tr. 72) They can be disciplined if the CNAs do not perform their jobs. (Tr. 72)

The floor nurses can discipline employees. (Tr. 64) They can issue verbal or written warnings to CNAs. (Id.) Verbal warnings given by floor nurses to CNAs are communicated to the unit manager or the Director of Nursing. (Tr. 74) A CNA can be in-serviced as a result of a verbal warning. (Tr. 74) They can suspend a CNA for serious misconduct. (Tr. 67)

Baumrind testified that the facility has had few suspensions. (Tr. 139) Employees do the right thing so that discipline is rarely needed. (Id.)

The floor nurses also determine when employees take a break and lunch. (Tr. 66 and Tr. 77) CNAs assigned by floor nurses have different break times. (Id.)

Belgrove introduced records showing the staffing complement for the period of January 1, 2012 through May 28, 2012. (Employer Exhibits 3, 4, 8, 9 and 10) These records show when LPNs served as unit managers or house supervisors.

The second witness at the hearing was Naglieri. Naglieri is an LPN at Belgrove. (Tr. 166) She has worked on all shifts in the positions as floor nurse, house supervisor, and unit manager. (Tr. 167)

Naglieri testified that when she works as a floor nurse she starts the shift by counting the employees present, giving the CNAs a report and making out the CNA assignment sheet. (Tr. 168) When she gives the report, she tells the CNAs what is happening on the floor with respect to the residents, such as when there is need to collect specimens from a resident and which resident is on antibiotics.

As a floor nurse, Naglieri also completes an assignment sheet. (Tr. 170) Naglieri completed Employer Exhibit 5, which was an assignment sheet. (Tr. 169) All floor nurses complete assignment sheets. (Tr. 172) Floor nurses indicate on the assignment sheet when CNAs are to take a break. (Tr. 171) The floor nurses also direct on the assignment sheet which CNAs are to perform tasks. The CNAs are designated to perform work involving the pantry to ensure that the unit is clean. The CNAs are assigned by floor nurses to the fire team to be responsible for fire alarms in the unit. The CNAs are assigned by the floor nurses to inspect the unit at the beginning and the end shift to see if it is clean. They are assigned by floor nurses to check linen carts. The floor nurse assigns CNAs to transport residents. (Tr. 171-174) Floor nurses determine which CNAs perform these tasks. (Id.) The floor nurse also designates on the assignment sheet which CNAs watch over residents while they watch television and congregate. (Tr. 219) The floor nurses also assign CNAs bathroom duties. (Id.) These assignments are made by floor nurses without any input from house supervisors. (Tr. 221-222)

CNAs are regularly re-directed to alter their routines. (Tr. 226) It is up to the floor nurse to decide what assignments are made to the CNAs. (Tr. 173) The nurse has discretion to assign the work to the CNAs. (Tr. 174)

Besides completing the assignment sheet, the floor nurses instruct the CNAs on what work to perform that occurs during their shifts. (Tr. 174-175 and Tr. 254) Naglieri gave an example of how the work is assigned during the shift when she described how the Sunday before the hearing she instructed a CNA to clean a resident, to monitor him, and to report to her any further incidents of vomiting. (Tr. 176)

Naglieri testified about CNAs being instructed on assisting residents with meals. (Tr. 195) The floor nurse decides who accompanies residents to the dining room. (Tr. 196)

The floor nurses also schedule breaks and lunches for the CNAs. (Tr. 171 and Tr. 245) The schedules are made by the floor nurses in their own discretion.

When a new resident is admitted, the floor nurse tells the CNA what jobs to perform. (Tr. 183 and Tr. 243) The CNA is directed to assist her. (Tr. 227) Naglieri testified to examples of the assignments given to a CNA by a floor nurse. Naglieri gave as examples that she told CNAs how to lift residents or how to handle residents who were in isolation. (Tr. 183) The CNAs are assigned to the residents based upon their experience and skill level. (Tr. 184 and Tr. 249)

When a resident is discharged, the floor nurses instruct the CNAs on matters involving the discharge. (Tr. 186) This includes telling CNAs to assist the patients with packing, getting the necessary paperwork, and escorting the patient out of the building. (Tr. 186) The floor nurses direct CNAs on their duties based upon their own judgments. (Tr. 187)

In the sub-acute units, the residents get therapy. (Tr. 188) The residents stay for short periods on the sub-acute floors. (Tr. 181) When the conditions of the patients change, the duties of the CNAs change. (Tr. 189)

During the shifts, Naglieri follows-up to ensure that the CNA perform their jobs. (Tr. 179 and Tr. 185) The floor nurse is held accountable if a CNA does not perform his/her job. (Tr. 180 and Tr. 186) Naglieri was told that floor nurses would be held accountable if the CNAs do not perform their job at the orientation when the Company purchased the building. (Tr. 215 and Tr. 243)

CNAs can be moved by floor nurses to different residents if they are not performing their assignments. (Tr. 191) Naglieri has re-assigned CNAs to different residents when a patient has had a problem with a CNA. (Tr. 248)

If a CNA refuses to take direction from the floor nurse, the floor nurse can write up a CNA without consulting anyone. (Tr. 176-177 and Tr. 186) The disciplinary forms are on each unit. (Tr. 239) Naglieri has not had to write up a CNA because the CNAs have followed her directions. (Tr. 225) A floor nurse also can issue verbal warnings. (Tr. 186 and 209) Naglieri has issued a verbal warning as a floor nurse to a CNA. (Tr. 210)

Naglieri was told that she has the authority to discipline CNAs by giving verbal or written warnings at the orientation. (Tr. 212-214 and Tr. 240) She was provided with a job description. (Employer Exhibit 2)

With respect to house supervisors, Naglieri testified that a house supervisor is in charge of the "entire building." (Tr. 192) They oversee all the units to ensure that the employees are performing their duties. (Id.) They can move LPNs and staff throughout the building. (Tr. 200-201) The house supervisor assigns work to employees. (Tr. 201) They try to fill vacancies

resulting from employees not reporting to work. (Tr. 207) The house supervisor is held accountable and disciplined for the operation of the building. (Tr. 197) The house supervisor has the authority to discipline, including writing up employees, and suspending employees for serious infractions such as intoxication. (Tr. 194)

House supervisors also can adjust grievances. They can separate staff members to avoid problems and re-organize the staffing. (Tr. 202-203)

Like house supervisors, unit managers can adjust grievances. (Tr. 208) Naglieri testified that she adjusted a dispute between a CNA and a hospice employee. (Id.)

Naglieri testified that unit managers also have authority to discipline. (Tr. 196) Naglieri has disciplined employees as unit manager. (Id.) Naglieri has written up CNAs, LPNs and RNs. (Tr. 197-198 and Employer Exhibits 5, 6 and 7) She has also given a verbal warnings. (Tr. 209)

Unit managers attend morning meetings. (Tr. 205) They review the residents with other departments and decide on care. (Tr. 205)

A unit manager is responsible for the entire unit. (Tr. 206) They assign work to the floor nurses. (Tr. 203) Naglieri was written up as a unit manager because during a shift as a unit manager the CNAs did not change water pitchers. Id.

Naglieri was an acting unit manager from July 22, 2011 until February 22, 2012. (Tr. 238-239) Naglieri fills in as a house supervisor when a house supervisor is out sick or on vacation. (Tr. 231-232)

### III. THE REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The RD issued the DD&E on June 26, 2012. The RD found that the LPNs are not supervisors.

With respect to the assignment of work, the RD stated that the floor nurses “fill in the CNA name assigned to a specific post, as well as any special assignments required of that employee.” (Page 4 of the DD&E) The RD stated that “no specific skill set is required of the CNA assigned to these tasks and all CNAs on duty are qualified to perform these tasks. (Page 5 of the DD&E) He further indicated that floor nurses can temporarily reassign CNAs to different residents but the unit manager or house supervisor makes a permanent assignment. (Id.)

As for resident care and direction of the CNAs, the RD found that CNAs perform their work based upon the assignment sheet as well as upon the directions that the CNAs receive from the floor nurses at the start of the shift regarding specific tasks to be completed. (Page 6 of the DD&E) During the shifts, the floor nurses oversee the work of the CNAs. (Id.)

The RD further said that, even though the LPNs job description states that they supervise nursing personnel and are supposed to have a general knowledge of policies and procedures, there is no evidence that floor nurses’ “performance appraisals were impacted by their imposition of discipline on CNAs, their supervision acumen related to CNAs, or failure to perform these task based on the enumerated elements of the job description.” (Page 7-8 of the DD&E)

With respect to disciplining nurses, the RD stated that Baumrind testified that floor nurses could discipline employees. Baumrind testified about a verbal warning and Naglieri testified about a verbal warning. (Page 8-9 of the DD&E)

In the DD&E, the RD concluded that the LPNs did not assign work to the CNAs so as to make them supervisors under Section 2(11). He stated that the selection by the floor nurses of the break times is routine since the staffing coordinator determines the time of the breaks. (Page 12 of the DD&E) The RD further said that “CNAs are assigned to their rooms by the staffing

coordinator or unit manager.” (Page 13 of the DD&E) In addition, the RD stated that daily, predetermined tasks (such as pantry duty) given by the floor nurses to the CNAs can be performed by any CNA, that work experience is not factored into the decision into the assignments and that assignment are “ostensibly rotated” among the CNAs. (Id.) These “daily tasks supplement the CNAs’ regular patient care responsibilities” to the nurse. (Id.) The floor nurses also give other tasks during the shifts to the CNAs but these discrete tasks are insufficient to establish supervisory status according to the RD. (Page 14 of the DD&E)

As for transferring a CNA to another resident because of a conflict with a resident or disagreement with a co-worker, the RD concluded that the transfers are only temporary. (Id.) In further support that this is not an assignment of work, the RD said that only a house supervisor or unit manager can permanently transfer to another floor.

The RD also concluded that the floor nurses do not exercise independent judgment in the assignment of tasks. The RD indicated that “the Employer has not shown that they performed a detailed analysis of CNAs abilities and residents needs” when floor nurses assign the pre-determine tasks, such as pantry duty. (Pages 16-17 of the DD&E)

In further support of his conclusion that LPNs do not exercise independent judgment in assigning work, the RD stated that “the CNAs overall tasks are largely defined by the routine nature of the daily living function with which they assist.” The RD said that the assignment of the discrete tasks and the temporary of switching of tasks are “completely controlled actions” rather than “‘free’ actions.” (Page 17-18 of the DD&E)

As for finding that the LPNs do not direct the work of CNAs, the RD stated that Belgrove did not establish that the nurses responsibly direct the work because there is no evidence that “nurses risk a real prospect of adverse action for CNAs’ poor performance.” (Page 18 of the

DD&E) According to the RD, there is no evidence that floor nurses would be held accountable if the CNAs do not perform their job. (Id.) The RD said that Belgrove also did not train the floor nurses on the “ramifications” of being held responsible for the work and that Belgrove had not produced evidence that they would suffer some adverse consequence for the CNAs not performing their work.

With respect to discipline, the RD said that there was a “paucity” of evidence regarding nurses disciplining CNAs. (Page 20 of the DD&E) The RD found that Naglieri’s testimony of verbally warning a CNA was insufficient to establish that she acted as a supervisor because it was unclear whether a note was placed in the employee’s file. (Id.)

As for adjusting grievances, the RD stated that floor nurses do not possess authority to adjust grievance. According to the RD, an LPN reassigning a CNA from a resident if there is a problem is not evidence of adjusting a grievance to make an employee a supervisor under Section 2(11).

The RD finally concluded that the occasions that the LPNs filling in as unit managers or shift supervisors are insufficient to deem them supervisors. (Page 22 of the DD&E) The RD stated that these assignments are only temporary and sporadic.

#### IV. QUESTIONS PRESENTED

1. Are the LPNs supervisors under the Section 2(11)?

#### V. SUMMARY OF ARGUMENT

The NLRB must grant Belgrove’s Request for Review. This case presents very important issues. The RD’s determination is a substantial “departure from, officially reported Board

precedent.” NLRB Rules and Regulations 102.67(c)(1). The RD’s decision also “is clearly erroneous on the record” and the RD’s errors “affects” Belgrove’s rights. NLRB Rules and Regulations 102.67(c)(2). The RD, in effect, has nullified Section 2(11) by departing from existing Board law, by creating new tests and standards to determine the supervisory status of nurses, and by substantially disregarding or misreading the record. The RD’s analysis on determining supervisory status is the same analysis used by the Board. If the RD’s analysis is allowed, such as requiring evidence on whether nurses engaged in a “detailed analysis” of the residents’ needs and the CNAs’ skill sets in assigning work to the CNA, there will be longer hearings, there will be more costs to the parties, delays in elections, and more expenses for the Board. ((Pages 16-17 of the DD&E) Further, there are compelling reasons why the NLRB should reconsider its policies on what conduct of a nurse would constitute adjusting a grievance so as to make the nurse a supervisor under Section 2(11) and its policies of how much time a nurse can spend as a fill-in in a supervisory position, that oversee the bargaining unit, before the nurse can be considered a supervisor. NLRB Rules and Regulations 102.67(c)(4).

The petition must be dismissed because the LPNs are supervisors under Section 2(11). The LPNs are clearly supervisors because they assign work to the CNAs, direct the CNAs, have the authority to discipline CNAs, adjust grievances among workers, transfer CNAs to different patients and different duties and fill-in on a regular basis for supervisory positions. While the Board has not always found nurses to be supervisors, this case is clearly one those instances where the Board must find that nurses are supervisors under Section 2(11). There is simply no way to distinguish the facts in this case from the facts that the Board stated in Oakwood Healthcare, Inc., 348 NLRB 686, 694 (2006) would make a nurse a supervisor.

The LPNs assign work to the CNAs so as to establish supervisory status under Section 2(11) because the floor nurses assign the CNAs to residents and give the CNAs their significant overall duties. (All LPNs serve as floor nurses if they are not filling in in a supervisory position or performing a special task. Tr. 106-115) The LPNs make these assignments by exercising their independent judgment. The LPNs alone weigh the skill sets of the CNAs in assigning the work.

The RD's determination that the LPNs do not assign work was based partly on a clearly erroneous reading of the record. His determination was also based on things that are not even in the record and that are not even correct. In addition, the RD disregards that the LPNs perform the identical type of work that the Board in Oakwood Healthcare, Inc., 348 NLRB 686, 694 (2006) said would constitute an individual being a supervisor. Besides making a decision that it is completely unsupported by the record, the RD incorrectly applies Board law, resulting in the RD, in effect, nullifying the Board's decisions and creating new and unworkable standards of what constitutes supervisory activity under Section 2(11). For example, the RD found that the LPNs were not supervisors because Belgrove had "not shown that they [floor nurses] performed a detailed analysis of CNAs abilities and residents needs" when the floor nurses assigned work to the CNAs. (Pages 16-17 of the DD&E) No Board decision has ever required this "detailed analysis." Id. When the care of a resident is involved and something must be done immediately, it is totally realistic to believe that the nurse should not be required to prove that she made a detailed analysis in assigning a CNA to a resident in order to be considered a supervisor; rather he/she should only be required to show that he/she took into account the need of the resident and the different skill sets of the CNA in assigning the CNA to the resident. Thus, Belgrove asserts that the Board must grant review on issue of the assignment of work and find that the LPNs are supervisors because they assign work.

The LPNs also direct employees in the manner that would make them supervisors under Section 2(11). While the RD said that the LPNs direct employees, the RD stated that they do not responsibly direct employees because they are not held accountable for the CNAs' failure to perform their job. The RD's determination is clearly erroneous and is a substantial departure from Board law. As an example of how erroneous the RD's determination is that the RD ignored or disregarded that Naglieri testified that if the CNAs did not perform their jobs, it "would be ultimately be the floor nurse's responsibility and we would also be subject to discipline." (Tr. 215)

Besides directing and assigning work, the LPNs can discipline and suspend. Belgrove uses progressive discipline in determining how to discipline. The RD said that there was no evidence that floor nurses could discipline employees because they had not disciplined employees. However, both Baumrind and Naglieri testified that LPNs could discipline. Naglieri testified that she was told at orientation that she could discipline and that she would discipline a CNA if needed. (TR. 212-214 and Tr. 240) Baumrind said LPNs also can suspend. Both said that verbal warnings had been given by LPNs to CNAs and that other discipline had not been given because there was not any need for the discipline. (Tr. 73 and Tr. 210) The RD's decision that LPNs do not have the authority to discipline is clearly erroneous on the record and a substantial departure from Board law. In essence, the RD created new law by finding that an individual cannot be supervisor under Section 2(11) because an individual, who has the authority to discipline and suspend, has not exercised his/her authority to discipline or suspend because there was no need or instance to discipline or suspend an employee. It is ironic that the RD found that the floor nurses do not discipline when, in fact, the floor nurse's ability to assign and direct

the CNAs is the reason that there are no problems. (Tr. 255) The Board must grant review and find that the LPNs have the authority to discipline and suspend.

The LPNs also are supervisors because they can adjust grievances. Citing existing Board law, the RD found that the LPNs' movement of employees from residents or co-workers because of personal disputes does not constitute the adjustment of grievances. The Third Circuit, where this case arises, holds differently.

In addition, the LPNs are supervisors because they can transfer employees. The RD stated that transfers by floor nurses are temporary and that the CNAs can only be moved to a different floor by a unit manager or a house supervisor. The RD's statement that these transfers are temporary is clearly erroneous because there is no evidence in the record to support his statement that the transfers are temporary. There is also no support under Board law for the RD's assertion that a transfer has not occurred because the CNA is not transferred to another floor.

Lastly, LPNs are supervisors because they act as unit managers and house supervisors. The RD found that the LPNs only fill-in sporadically. Belgrove asserts that the LPNs fill-in a substantial amount of time so that placing them in a bargaining unit when they spend a substantial time as supervisors is unwarranted and unworkable. To the extent existing Board law would allow these employees to be placed in the LPN bargaining unit, this case presents the compelling reason why the Board should re-examine its decisions, particularly based in this case upon how much time the LPNs spend as fill-ins in supervisory positions.

## VI. ARGUMENT

### A. THE LPNs ARE SUPERVISORS BECAUSE THEY ASSIGN AND DIRECT THE WORK OF THE CNAs.

Section 2(11) defines a supervisor “as any individual having 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 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.” If an employee possesses any one of the indicia stated in Section 2(11), the employee is deemed to be a supervisor. Arlington Masonry Supply, Inc., 339 NLRB 817, 818 (2003); Heartland of Beckley, 328 NLRB 1056 (1999). The employer has the burden has the burden of proving supervisory status. Oakwood Healthcare, Inc., 348 NLRB 686, 694 (2006); NLRB v. Kentucky River Community Care, 532 U.S. 706, 711-712 (2001).

In the case at bar, all LPNs work as floor nurses unless they are acting as unit managers or house supervisors or doing special projects. The RD’s decision that the LPNs, as floor nurses, do not assign work to the CNAs or direct work of the CNAs mandates that the Board grant Belgrove’s Request for Review in accordance with the NLRB Rules and Regulations 102.67(c)(1). The RD’s determination is a substantial “departure from, officially reported Board precedent.” NLRB Rules and Regulations 102.67(c)(1). The RD’s decision also “is clearly erroneous on the record” and the RD’s errors “affects” Belgrove’s rights. NLRB Rules and Regulations 102.67(c)(2). Further, if the RD’s analysis is correct (which Belgrove asserts it is not) the NLRB should reconsider its policies on how the supervisory status of LPNs should be determined because, in effect, the RD has nullified Section 2(11). NLRB Rules and Regulations 102.67(c)(4). The LPNs clearly are supervisors because they assign work to the CNAs and direct the CNAs.

1. The LPNs Assign Work To The CNAs

In Oakwood Healthcare, Inc., the Board defined what it means for an individual to assign work for the purposes of determining whether an individual is a supervisor under Section 2(11).

The Board held that the authority to:

“assign” refers to the “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. That is, the place, time and work of the employer are part of his/her terms and conditions of employment. In the health care setting, the term “assign” encompasses the charge nurses’ responsibility to assign nurses and aides to particular patients. It follows that the effective recommendation to affect one of these- place, time, or overall tasks, can be a supervisory function.”

Id. at 689.

The Board in Croft Metals, Inc., 348 NLRB 717 (2006), citing Oakwood Healthcare, Inc., further defined what exercising independent judgment means under Section 2(11) in assigning work:

“[T]o exercise ‘independent judgment,’ an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” [Oakwood Healthcare, Inc.] at 8. “[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.” [Oakwood Healthcare, Inc.] slip op. at 8. “On the other hand, the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices.” [Oakwood Healthcare, Inc.] slip op. at 8 (citations omitted). Explaining the definition of independent judgment in relation to the authority to assign, the Board stated that “[t]he authority to effect an assignment ... must be independent [free of 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.] slip op. at 8 (citations omitted).

Id. at 722.

As floor nurses, the LPNs assign work to CNAs so as to make them supervisors as defined in Section 2(11). The record is replete with examples of the floor nurses assigning work to CNAs based upon their independent judgment.

In Oakwood Healthcare, Inc., the Board held that the term “to assign” would include a nurse assigning CNAs to a particular patient. Id. at 689. The Board further held that “if the registered nurse weighs the individualized condition and needs of the patient against the skills or special training of available nursing personnel, the nurse’s assignment involves the exercise of independent judgment.” Id.

The LPNs in the case at bar clearly assign the CNAs to particular patients. The floor nurses complete assignment sheets which assign nurses to particular patients. (Tr. 71) The floor nurses also move CNAs from one patient to another. (Tr. 190) Naglieri testified that when she is a floor nurse she moves CNAs to particular residents “based on skill level of the CNA.” (Tr. 190) When Naglieri was asked who determines the skill level of the CNAs, she replied “That would- it would be my job as the floor nurse.” (Tr. 184) The floor nurses also move the CNAs based upon the floor nurses’ discretion and without any guidelines. Naglieri testified that, as a floor nurse, “If I’ve seen a CNA not performing up to their standards, I would move them to a different assignment.” (Tr. 191)

In the DD&E, the RD erroneously indicates or implies that the staffing coordinator or unit manager assigns the CNAs to their rooms. (Page 13 of the DD&E) The RD’s argument that the LPNs do not assign the CNAs is simply not supported by the record. While the staffing coordinator or unit manager may indicate the unit where the CNA will work, the record is clear that, as stated by both Naglieri and Baumrind, the floor nurses assign the CNAs to the specific residents. (Tr.71 and Tr.190)

The RD also incorrectly states that the floor nurses' transfer of a CNA to a different resident are temporary assignments and that only the house supervisor or unit manager can permanently transfer a CNA to another floor. (Page 14 of the DD&E) There is nothing in the record to support these statements by the RD. No one testified that the floor nurses' transferring of CNAs from one resident to another was temporary. Moreover, the test of supervisory status cannot be predicated on whether a worker is transferred to another floor. This test is unworkable and obfuscates that transfers can occur even if a worker only is transferred to a different resident on the floor. Oakwood Healthcare, Inc., 348 NLRB 686, 695 (2006) (finding charge nurses to have assigned work within meaning of Section 2(11) when they assigned nurses within an emergency room).

Further, the RD totally ignores in the DD&E both that the floor nurses determine which CNAs will be assigned to a resident when the resident is admitted and that these assignments are made based upon skill level. (Tr. 183-184) These assignments happen frequently since seventy-five (75) out of the one hundred twenty (120) beds house patients who change about every 100 days. (Tr. 181) Naglieri gave an example of how she determined as a floor nurse which CNA would be assigned to a patient that had MRSA and required isolation. Naglieri testified as follows:

Q: Now how do you determine which CNA would handle a case like that?

A: It was a new CNA, I would have a more experienced CNA go with them to assist through the process. **But it also goes based on the skill level of the CNA.** (emphasis added)

Q: And who determines the skill level of the CNA?

A: That would- it would be my job as the floor nurse?

Tr. 184.

Thus, the RD's determination that LPNs do not assign the CNAs to residents is "is clearly erroneous on the record" and the RD's errors affects Belgrove's rights to a fair determination of the issue of the supervisory status. NLRB Rules and Regulations 102.67(c)(2). Moreover, the case at bar, presents the identical example of what the NLRB said in Oakwood Healthcare, Inc. that, if the nurse weighs the conditions of the resident against the individualized skill of the CNAs, the nurses' assignment of work would render them supervisors. There can be no other reading of the record other than that a floor nurse's assignment of a CNA to a resident is based upon the CNA's experience "[b]ut it also goes based on the skill level of the CNA." (Tr. 184) The LPNs must be supervisors under based Oakwood Healthcare, Inc. The RD's finding that floor nurses do not assign work CNAs to residents is clearly erroneous on the record and his decision is a substantial departure from Board law. NLRB Rules and Regulations 102.67(c)(1), (2) and (4).

Besides determining which residents the CNA is assigned to, the floor nurses give the CNAs "significant overall duties." Id. The record is replete with examples of how the floor nurses assign duties to the CNAs. These duties are the very essence of the work that is performed by the CNAs.

The floor nurse assigns CNAs to handle daily, predetermined tasks, such as to handle pantry duties, to be on a fire team, to check units to see if they are clean at the beginning and end of the shifts, to check linen carts, and to transport residents. (Tr. 172-174 and Employer Exhibit 5) The RD states in the DD&E that these "assignments can be performed by any CNA, experience or work performance is not factored into the assignment, and said assignments are ostensibly rotated among the entire CNA complement." (Page 13 of the DD&E) It is unclear

how the RD reached this conclusion because there is no support in the record for this conclusion. Naglieri testified that the floor nurses determine who will perform these tasks in their own discretion. (Tr. 174 and Tr. 221-222) While the floor nurse may try to alternate who will perform these tasks, there is no rotation because the floor nurses determine in their own discretion who to give these tasks to on any given day.

With respect to patient care, the floor nurses assign the CNAs the tasks of taking care of the residents. For new admissions, the floor nurse instructs the CNAs on the tasks needed to care for the resident, such as how to lift the resident and how to handle the situation if the resident is in isolation. (Tr. 183) In addition, since seventy-five (75) beds of the one hundred twenty (120) beds are for sub-acute patients, who are there for rehabilitation for short period, the floor nurses constantly give new duties to the CNAs based upon the needs of the particular residents.

In addition to the floor nurses assigning work on the assignment sheets and assigning work based upon new patients, the floor nurses assign duties to the CNAs during the shifts. For example, during a shift the floor nurses change the routines of the CNAs when residents have to be sent to a doctor or a resident has to be discharged from the facility. (Tr. 226) Naglieri testified how she assigned work to a CNA on the Sunday before the hearing involving a resident who was vomiting and had to be monitored by the CNA. (Tr. 176) The floor nurses assign these tasks to the CNAs using their own discretion and without guidelines. The floor nurses follow-up to make sure that the CNAs follow their directions. The CNAs can be written up by the floor nurses if they do not follow the floor nurses' directions. (Tr. 176-177 and Tr. 186)

The RD in his decision indicates that these tasks given by the floor nurses to the CNAs during the shift are "discrete tasks" and are "closer to 'ad hoc assignments' described in Croft Metals, 348 NLRB 717, 721 (2006), rather than the ER assignments described in Oakwood."

(Page 14 of the DD&E) The RD is clearly wrong in his analysis based of the record and his analysis also is a substantial departure from existing Board law. The “ad hoc” tasks given by the lead persons in Croft Metals were those that “regular line or crew members who perform, consistent with their classifications, the same task or job on the line or in their department every day.” Id. In the case at bar, as in the case of the ER assignments, the tasks given by the floor nurses to the CNAs vary based upon the needs of the patients. The floor nurses’ “assignments determine what will be the required work for an employee during the shift, thereby having a material effect on the employee's terms and conditions of employment.” Oakwood Healthcare, Inc., 348 NLRB 686, 694 (2006).

The RD further concluded that even if the floor nurses assign CNAs to residents and assign significant overall duties, the floor nurses do not exercise independent judgment in making these assignments. The RD said that “the Employer has not shown that they performed a **detailed analysis** of CNAs abilities and residents needs” when floor nurses assign the pre-determined tasks, such as pantry duty. (emphasis added) (Pages 16-17 of the DD&E) He stated that CNAs do not have specific training or skills in the medical areas and that the “CNAs assignments are routine in nature and based upon their title, rather than on any particular expertise.” (Page 17 of the DD&E) The RD further said that he would not “extinguish the floor nurses Section 7 rights on the basis of Naglieri’s vague assertions” that floor nurses make assignments based upon the CNA’s skill sets. Id.

The RD’s holding that an employer must demonstrate that nurses had to engage in a “detailed analysis” of CNAs abilities and residents’ needs in assigning work to CNAs before they can be deemed to be a supervisor is a substantial departure from Board law and untenable. Id. The RD never indicated what type of “detailed analysis” should be done and how it would be

done. This vague and amorphous standard, in effect, would create a new layer and test in determining what makes an employee a supervisor under 2(11). Would there have to be a hearing and determination on whether a “detailed analysis” was done each time the nurse assigned work to a CNA? This test is unrealistic and unworkable. Obviously, the statute provides only that the nurse use independent judgment and not that the nurse engage in a detailed analysis each time the nurse assigns work to the CNA.

Moreover, the RD’s conclusion that CNAs do not receive specific training or have skills is not based in the record. In fact, it is also incorrect. The New Jersey Department requires that nurses aides be trained in order to become a certified nurses aide. N.J.A.C. 8:39-43.1.

Not only is the RD’s conclusion that CNAs do not receive specific training wrong, his assertions that Naglieri’s testimony was “vague” is also not supported by the record. First, Naglieri was not the only witness that said the CNA’s skill sets are used in determining assignments. Baumrind, the Belgrove’s administrator, also testified that CNA’s skill sets are used in determining assignments by floor nurses. (Tr. 71) Second, Naglieri’s testimony was not vague; rather, it was specific. Naglieri’s clearly testified, including with examples, of how the floor nurses assign work to the CNAs based upon their skill sets. The example above about assigning a CNA to a patient with MRSA is such an instance of how floor nurses use the CNAs’ skill sets in assigning work.

In further support of his conclusion that LPNs do not exercise independent judgment in assigning work, the RD indicated that the assignment of CNAs by floor nurses is controlled because the staffing coordinator states the pre-assigned rooms (unit) where the CNAs can be assigned and that there is a sheet which has the daily special tasks. Here again the RD’s statements are incorrect and disregard that the record unequivocally states that the floor nurses

assign the CNAs to specific residents and that the floor nurses decide which CNAs perform the special tasks.

Lastly, the RD also stated the assignment of the duties is controlled. He stated that “the CNAs overall tasks are largely defined by the routine nature of the daily living functions with which they assist.” The RD said that the assignment of the discrete tasks and the temporary switching of tasks is “**completely controlled**” actions rather than “**free actions**” (emphasis added) (Page 17-18 of the DD&E) These vague statements are completely contradicted by the record. Seventy-five (75) beds out of the one hundred twenty (120) beds have patients that are constantly changing. This results in there being no routine daily functions, in most cases, but changing functions based upon the needs of the patients, whether it be recovering from a hip fracture or wound, for example. There are no “completely controlled” actions in the assignment of these and other tasks. The assignments are based upon the needs of the resident, which result in the floor nurses making assignments based upon the CNAs skill sets.

Besides assigning the CNAs to the residents and assigning the tasks that the CNAs are to perform, the floor nurses assign the CNAs lunches and breaks. (Tr. 66, Tr. 77, Tr. 170 and Tr. 245) The RD stated that the assignment by the floor nurses is accomplished by selecting the CNAs into slots on the daily assignment sheet. The RD said that this is “routine, without consideration of CNA skill level or experience.” (Page 12 of the DD&E) There is nothing in the record to support this statement by the RD. The floor nurses assign lunch and meal breaks based upon their independent judgment. When Naglieri was asked who determines dinner breaks, Naglieri replied that “The floor nurses, they determine when they [CNAs] have lunch break or dinner break...” (Tr. 171)

In sum, LPNs, including floor nurses in particular, assign work. They also use their independent judgment in assigning the work. Therefore, they are supervisors under Section 2(11).

## 2. The LPNs Direct The Work Of Employees

Besides being supervisors because they assign work, the floor nurses are supervisors because they direct the work of employees to make them supervisors under Section 2(11). The RD does not dispute that the floor nurses direct the work of the CNAs. The RD claims that there is no responsible direction of the floor nurses of the CNAs. The RD's claim that there is no responsible direction is clearly erroneous based upon the record and is a substantial departure from Board law.

In Oakwood Healthcare, Inc., the Board defined the criteria to be used in deciding whether an individual is a supervisor because that individual directs other employees. The Board held that an individual is a supervisor if the individual's responsibility to direct employees arises because the individual has " 'men under him,' and if that person decides 'what job shall be undertaken next or who shall do it,' ... provided that the direction is both 'responsible'... and carried out with independent judgment." Id. at 691. In order for an individual's direction to be deemed responsible, "the person performing the oversight must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed are not properly performed." Id. at 691-692. Thus, it must be shown that the employer delegated to the individual "the authority to direct the work and the authority to take corrective action, if necessary," and that there is a "prospect" that the individual will suffer "adverse consequences" if that individual does not take corrective action. Id. at 692. The individual also must exercise that authority in directing the employee not in a

“routine or clerical nature” but by using “independent judgment” (citations omitted). Croft Metals, Inc., 348 NLRB 717, 721 (2006).

The floor nurses direct work so as to make them supervisors as defined under Section 2(11). The floor nurses instruct the CNAs on the work to be performed. The floor nurses decide “what job shall be undertaken [by the CNA] next or who shall do it.” Id. The floor nurses continually make these decisions on the tasks to be performed by the CNAs and the order in which these tasks are to be performed. There are numerous examples in the record of the floor nurses directing the CNAs, such as the floor nurses switching or varying the routines of the CNAs in order to get a resident ready to go to the doctor or to get a patient ready to be discharged. Naglieri gave an example of how a few days before the hearing she directed a CNA to monitor a resident who was vomiting. (Tr. 176)

Moreover, floor nurses direct the work based upon their independent judgment. They decide how to direct the CNAs based upon patient needs and skill levels of the CNAs.

The floor nurses are also required to follow-up on the work that they assign and direct to the CNAs. The LPNs’ job descriptions state that they are responsible for supervising nursing personnel. (Employer Exhibit 2) Thus, one of the tasks mandated in the job description under “responsibilities/accountabilities” is the supervision of nursing personnel. (Employer Exhibit 2) Not only are they responsible for supervising, the job description further states the LPNs are accountable for their supervision of the nursing personnel. The floor nurses can be disciplined if the CNAs do not do their work. (Tr. 61, Tr. 65, Tr. 72, Tr. 180, and Tr. 186) The floor nurses were told that they would be held responsible at orientation. (Tr. 215 and Tr. 243)

Since Naglieri is responsible for the work of the CNAs, Naglieri follows-up to ensure that the CNA perform their jobs. (Tr. 179 and Tr. 185) The floor nurses write-up the CNAs if they do not follow the floor nurses' direction. (Tr. 176-177 and Tr. 186)

In the DD&E, the RD did not claim that the floor nurses do not direct the work of the CNAs. Rather, the RD stated that "the Employer failed to establish that the floor nurses direct responsibly" because there is no evidence that a floor nurse has been disciplined for the failure to oversee or correct a CNA's work." (Page 18 of the DD&E) The RD further relied upon the Board's determination in Beverly Enterprises-Minnesota, Inc. d/b/a Golden Crest Healthcare Center, 348 NLRB 727 (2006) that nurses were not supervisors because there was no evidence that a charge nurse was ever told that they would be held accountable for their performance in directing the CNAs. In addition, the RD stated that there is no evidence that floor nurses would receive a poor performance rating or suffer any adverse consequences and that the floor nurses were "trained as to the ramifications of their being held responsible for others." (Page 19 of the DD&E) The RD also indicated that the LPNs' job description, which stated that they would be held accountable nursing personnel, does not "trump" that there was no actual discipline of the floor nurses received on account of the CNAs.

The RD's statement that the nurses were not told that they would suffer adverse consequences if they did not properly direct the CNAs is clearly erroneous. NLRB Rules and Regulations 102.67(c)(2). The floor nurses were told of the "ramifications" if the CNAs did not perform their jobs. The floor nurses were told that they would be disciplined. Naglieri testified at the orientation the floor nurses were told as follows:

A: It was basically instructed then it is our responsibility as a floor nurse to make sure that our residents are taken care of adequately by the CNAs.

And if not, it would be ultimately be the floor nurse's responsibility and we would also be subject to discipline.

Tr. at 215

Thus, in contrast to Beverly Enterprises-Minnesota, Inc. d/b/a Golden Crest Healthcare Center and Lynwood Manor, 350 NLRB 489, 491 (2007), two cases cited by the RD where the LPNs were not informed of the consequences of the CNAs not properly performing their work, the LPNs in the case at bar were told specifically that they were accountable for the work of the CNAs. (Tr. 180, 186, Tr. 215 and Tr. 243) It also was explicitly stated in writing in the job descriptions of the LPNs that the LPNs would be held responsible for the nursing personnel. (Employer Exhibit 2)

The RD's claim that there is no evidence that LPNS were disciplined, and that the job descriptions do not show the LPNs would be held accountable, is belied by the fact that floor nurses have not been held accountable because the CNAs have performed their job. Both Baumrind and Naglieri testified that there really have been no instances where the floor nurses would have to be held accountable for the CNAs. (Tr. 210 and 225-226) Obviously there is no discipline because the CNAs follow the floor nurses' directions. Thus, the Board's finding in Avante at Wilson that nurses were not supervisors because they had not disciplined employees is inapposite because in the case at bar there was no reason to discipline the LPNs for the CNAs' actions. The RD's assertion that, since the floor nurses have not been disciplined because of the CNAs' job performance, the LPNs are not held accountable is a substantial departure from Board law and/or the Board must re-examine existing Board law if the RD is correct. Clearly, a nurse must be deemed a supervisor if the nurse is explicitly told that he/she is subject to discipline if the CNA does not perform the work that the CNA is directed to perform.

Therefore, the LPNs must be deemed supervisors because they direct work of the CNAs, they are responsible for the work being performed by the CNAs, and they exercise independent judgment in directing the work.

B. THE LPNS ARE SUPERVISORS BECAUSE THEY CAN DISCIPLINE AND SUSPEND EMPLOYEES

Under Section 2(11), an individual is a supervisor if the individual can suspend, discharge or discipline or effectively recommend such action. The RD found that there was no evidence that the floor nurses discipline employees. The RD's claim is clearly erroneous on the record and is a substantial departure from Board law. NLRB Rules and Regulations 102.67(c)(1) and (2). The LPNs can suspend and discipline employees.

In Berthold Nursing Care Center, Inc. d/b/a Oak Park Nursing Care Center, 351 NLRB 27 (2007), the Board held that:

Under Section 2(11) of the Act, individuals are supervisors if they have the authority, in the interest of the employer, to discipline other employees, 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. Oakwood Healthcare, Inc., 348 NLRB 9 (2006); Arlington Masonry Supply, 339 NLRB 817, 818 (2003). The burden of proving that an individual is a supervisor rests on the party alleging such status. Arlington Masonry, supra.

While the Regional Director found that the LPNs do have the authority to fill out employee counseling forms, he concluded that the LPNs' role in doing so was merely a reportorial role that did not evince any supervisory authority. His finding in this respect was based, in large part, on his determination that the counseling forms neither constitute discipline, nor automatically lead to discipline. Contrary to the Regional Director, however, it is clear that the counseling forms are a form of discipline because they lay a foundation, under the progressive disciplinary system, for future discipline against an employee. See Promedica Health Systems, 343 NLRB 1351 (2004), enfd. in relevant part 206 Fed. Appx. 405 (6th Cir. 2006), cert. denied 127 S.Ct. 2033 (2007).

Id. at 28,

Belgrove has a progressive discipline system. (Tr. 33) Generally the Company's policy is to issue a verbal warning, followed by two or three written warnings, a suspension and then a discharge. (Tr. 33) A written warning is placed in the employee's personnel file. (Tr. 31) Baumrind testified that the verbal warnings given by floor nurses to CNAs are reported to the unit manager or to the Director of Nursing. (Tr. 74) Baumrind further said that a CNA can be in-serviced as a result of a verbal warning. (Tr. 74)

Floor nurses can discipline employees. Naglieri was told at the orientation that floor nurses have authority to discipline CNAs by giving verbal or written warnings. (Tr. 212-214 and Tr. 240) If a CNA refuses an assignment, the floor nurse can write-up the CNA. (Tr. 176-177 and Tr. 186) Naglieri also has issued verbal warnings to CNAs. (Tr. 210) In one instance where she issued a verbal warning, the CNA stopped her conduct. (Tr. 210) Since the floor nurses "here have the discretion to write-up infractions on employee counseling forms," the floor nurses must be "vested with the authority to exercise independent judgment in deciding whether to initiate the progressive disciplinary process against an employee." Id. at 29.

Further, the verbal warnings and the write-ups constitute discipline because it affects the CNAs job status. Colonial Manor 1977, Inc. d/b/a Wedgewood Health Care, 267 NLRB 525, 526 (1983). Baumrind testified that a CNA, for example, could be in-serviced for a verbal warning. (Tr. 74)

The verbal and written warnings "also lay the foundation for future discipline. (citation omitted)." Berthold Nursing Care Center, Inc. d/b/a Oak Park Nursing Care Center, 351 NLRB 27, 29 (2007). The verbal and written warnings are reported by the floor nurses to the supervisors above them. The written warnings are placed in the employee's file. (Tr. 31) Thus, the verbal and written warnings affect the CNAs' job. Moreover, one of the consequences of

these warnings is that the CNAs ultimately could be terminated based upon the Company's progressive discipline policy. (Tr. 34)

The floor nurses also can suspend employees. Baumrind testified that floor nurses have the authority to suspend employees. (Tr. 67)

In finding that the floor nurses did not discipline, the RD found that there was no evidence of discipline. (Page 19 of the DD&E) The RD indicated that the only evidence of discipline was a verbal warning by Naglieri, who did not state the date or location of the warning. (Page 20 of the DD&E) Naglieri did not know if the verbal warning was placed in the employee's personnel file. Id.

The RD's conclusion that the LPNs do not have the authority to discipline employees is not based upon the record and inconsistent with Board law. First, Naglieri and Baumrind testified that there was discipline because verbal warnings were issued. The fact that Baumrind knew of the verbal warning is evidence that verbal warnings are conveyed by floor nurses to supervisors and that they are considered discipline. Second, the floor nurses have the authority to discipline regardless of whether they have exercised the authority to discipline. Possession of this authority to discipline is enough to establish the LPNs' authority to discipline. Fred Meyer Alaska, Inc., 334 NLRB 646 fn. 8 (2001). Clearly, as testified by Naglieri and Baumrind, LPNs have authority to discipline employees, including issuing written warnings. In responding to a question of what would happen if the CNA had refused to follow her directions to clean-up a resident's vomit, Naglieri replied that "I would write her up." (Tr. 176)

The RD ignored totally that floor nurses have authority to suspend employees. The fact that LPNs have not had to exercise this authority to suspend an employee does not mean that they do not have the authority to suspend. Fred Meyer Alaska, Inc., 334 NLRB 646 fn. 8 (2001).

In sum, LPNs are supervisors because they have the authority to discipline and suspend employees as required under Section 2(11). The RD's findings are clearly erroneous based upon the record and are a substantial departure from Board law.

C. THE LPNs ARE SUPERVISORS BECAUSE THEY CAN ADJUST GRIEVANCES

The RD held that under existing Board law that LPNs do not adjust grievances. However, the LPNs' adjustment of the grievances constitutes supervisory conduct under Section 2(11).

In determining whether an individual is deemed to be a supervisor because that individual adjusts grievances, the Board has held that an individual's authority to adjust minor disputes, such as personal disputes between employees, does not confer supervisory status on that individual. Ken-Crest Services, 335 NLRB 777, 779 (2001). The RD followed this rationale in finding that the LPNs handling of personal grievances are not sufficient to confer supervisory status. However, the Third Circuit, where this case arises, has held that the authority to adjust even minor grievances confers supervisory status on an individual. NLRB v. Attleboro Associates, LTD, 176 F.3d 154, 166 (3<sup>rd</sup> Cir. 1999).

The floor nurses adjust grievances. If the CNA has a problem with a resident, the floor nurse can re-assign the CNA to another resident.

Thus, the floor nurses have authority to adjust grievances so as to make them supervisors under Section 2(11). Thus, there is a compelling reason for the Board to re-examine its holdings and to follow the Third Circuit's holdings. NLRB Rules and Regulations 102.67(c)(4). There should be no difference in determining whether the individual is exercising supervisory status based upon whether the grievance is minor or major.

D. THE LPNs ARE SUPERVISORS BECAUSE THEY CAN TRANSFER EMPLOYEES

The RD failed to analyze whether LPNs are supervisors because they transfer employees. Under Section 2(11) an individual is a supervisor if he/she can transfer employees.

In the case at bar, floor nurses can transfer CNAs. If a CNA has a problem with a resident, another employee, or is not adequately performing the work, the floor nurse can transfer the CNA in the sole discretion of the floor nurse. (Tr. 191 and Tr. 248) As indicated above, the RD's statement that these transfers are temporary is clearly erroneous because there is no evidence in the record to support this statement. Moreover, there is also no support for the RD's assertion that a transfer has not occurred because the CNA is not transferred to another floor.

Therefore, LPNs are supervisors because they can transfer employees. The RD's decision is clearly erroneous on the record and is a substantial departure from existing Board. NLRB Rules and Regulations, 102.67(c) (1) and (2).

E. THE LPNs ARE SUPERVISORS BECAUSE THEY ACT AS UNIT MANAGERS AND HOUSE SUPERVISORS

The RD stated that he would not determine whether unit managers and house supervisors were supervisors under Section 2(11) because LPNs do not spend sufficient time as unit managers and house supervisors to be deemed supervisors. The RD's determination that LPNs do not spend sufficient time in these categories to be deemed supervisors is clearly erroneous on the record and not supported by applicable Board law. NLRB Rules and Regulations, 102.67(c) (1) and (2). To the extent the RD's decision is deemed to be consistent with extant Board law, there is a compelling reason to change Board law. NLRB Rules and Regulations, 102.67(c) (4). Otherwise, as in the case at bar, individuals will be included in a unit even though they spend substantial time working in supervisory positions overseeing the employees in the very same LPN bargaining unit. Moreover, all LPNs can be unit managers or house supervisors. (Tr. 89)

It is beyond peradventure that both unit managers and house supervisors are supervisors under Section 2(11). They met several of the criteria to be supervisors under Section 2(11).

The house supervisors clearly are supervisors as defined under Section 2(11) because they assign work to floor nurses and CNAs to their locations and wings, are involved in establishing the hours that employees work and assign their overall duties. Both Baumrind and Naglieri testified that house supervisors, whether RN or LPNs, are in charge of the building. (Tr. 24, Tr. 40, Tr. 60, and Tr. 192) As such, the house supervisors designate where employees are to work. They move staff throughout the building based on the needs of the residents. (Tr. 26 and 192) House supervisors can move a CNA or an LPN from one unit to another unit. (Tr. 200-201)

The house supervisors also are responsible for ensuring that positions are filled. (Tr. 24-26 and Tr. 207) They can call employees into work or require employees to work overtime. (Id.)

Besides setting the locations where they work and filling positions, the house supervisors tell the CNAs and nurses what duties to perform. (Tr. 201-202) Naglieri testified to an example of how she divided up work among nurses when a new resident was admitted. (Tr. 201)

Moreover, the house supervisors act independently because they are the ones in charge of the building. For virtually the entire time that they are in the building, no one is there to oversee their assignments. Thus, they are supervisors because they “designat[e] an employee to a place, appoint... an employee to a time (such as a shift or overtime period), or give significant overall duties, i.e., tasks...” Oakwood Healthcare, Inc., 348 NLRB 686, 689 (2006).

Like the house supervisors, the unit managers, who can be RNs or LPNs, also are supervisors because of their assignment work to the floor nurses and to the CNAs. The unit managers can move nurses and CNAs throughout the floor. They also assign the work to the nurses. (Tr. 203) Naglieri gave an example of the assignment of work of when she was a unit

manager when she assigned floor nurses to perform quarterly nursing assessments. (Tr. 203) Therefore, like the house supervisors, unit managers are supervisors because the unit managers “designat[e] an employee to a place, appoint... an employee to a time (such as a shift or overtime period), or give significant overall duties, i.e., tasks...” Id.

House supervisors and unit managers also are supervisors because they direct the work of other nurses and the CNAs. The house supervisors are in charge of the building. The house supervisors have everyone in the building “under him.” Oakwood Healthcare, Inc., 348 NLRB 686, 689 (2006). The house supervisors decide what should be done in the building and instructs on how it should be done. Not only do they direct employees and decide what should be done, they are held accountable for what the employees do in the building. They are subject to discipline for their conduct in operating the building if the work is not done correctly by the employees under them. (Tr. 194 and Tr. 197)

Similarly, the unit managers are in charge of the floor. The unit manager has people “under him.” Oakwood Healthcare, Inc., 348 NLRB 686, 689 (2006). The unit managers assign and direct the work to be done by the floor nurses. (Tr. 47) Unit managers are held accountable for the work that is not performed by the employees that work under them. When she was a unit manager, Naglieri received a warning because the CNAs had failed to change water pitchers. (Tr. 203)

Further, house supervisors are clearly supervisors under Section 2(11) because they discipline employees. They give verbal warnings and written warnings and suspend employees. (Tr. 24-26 and Tr. 194) The house supervisors can suspend an employee. (Tr. 194) Since the house supervisor is in charge of the building, any disciplinary actions by the supervisor, including a suspension, perforce must be based upon the supervisor’s independent judgment.

Unit managers also can discipline employees. (Tr. 48 and Tr.196) The unit managers can suspend employees, including for neglect and abuse. (Tr. 50) They also can write-up employees. Naglieri wrote-up several employees. (Employer Exhibits 5, 6 and 7)

Clearly the house supervisors also adjust both major and minor grievances making them supervisors under Section 2(11). (Tr. 56) The house supervisors are in charge of the building. They are the ones to handle the grievances, whether minor or major, that arise during their shift.

Similarly, unit managers also adjust both major and minor grievances. They can move employees throughout the floor. Naglieri testified that she adjusted a grievance between a CNA and a hospice aide by re-assigning the CNA to the other part of the floor. (Tr. 208)

Finally, house supervisors and unit managers have the authority to transfer nurses and CNAs. (Tr. 26 and 208) Thus, house supervisors and unit managers are supervisors under Section 2(11) because they transfer employees.<sup>2</sup>

The Board has held that individuals can be deemed supervisors if they act in that capacity at least 10-15 percent of their total time that they work. Id. at 694. In the case at bar, LPNs were assigned at least to 10-15 percent time to work as either the house supervisor and unit managers shifts for the period of January 1, 2012 through May 28, 2012.

As Employer Exhibits 3, 4, 8, 9, and 10 demonstrate LPNs have served as unit managers or house supervisors for that period. LPNs have served as unit managers and house supervisors on a regular basis when they have been vacancies. The LPNs also have filled in as unit managers and house supervisors when there is a call-out.

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<sup>2</sup> The house supervisors and unit managers also have secondary indicia of supervisory authority. Both unit managers and house supervisors attend meetings of supervisors. (Tr. 150 and 156) Unit managers also are deemed to be supervisors by other employees. (Tr. 152) The Board has held that secondary indicia of supervisory authority are further corroboration that individuals are supervisors. Starwood Hotels & Resorts Worldwide, Inc., d/b/a Sheraton Universal Hotel, 350 NLRB 1115, 1118 (2007).

Employer Exhibits, 3, 4, 8, 9 and 10 establish that LPNs served either as unit managers or house supervisors one hundred eleven (111) times out of six hundred fifty-eight (658) shifts for the period of January 1, 2012 through May 28, 2012. This means that for 18.2% of this time period, LPNs were supervisors either because they acted in the supervisory role of as a house supervisor or a unit manager.

Citing Oakwood Healthcare, the RD stated that the LPNs substitution as unit managers and house supervisors was sporadic. Id. at 694. The RD further held that that Naglieri's time as a unit manager from July, 2011 through February, 2012, Ayana Johnson's service as a unit manager or house supervisor nineteen times in 2012, and Natalie Watkins almost one month's service as a unit manager was not a basis to exclude these individuals as supervisors. (Tr. 241 and Employer Exhibits 3, 4, 8, 9, and 10)

Belgrove asserts that the Board should re-examine the criteria for determining whether an LPN, who spends a substantial amount of time serving as a supervisor, should be part of the LPN bargaining unit when for substantial periods time they will supervise their fellow LPNs. In the case at bar, LPNs served as unit managers and house supervisors 18.2%, almost one out five times. Thus, there is a compelling reason to grant review and decide this issue.

**CONCLUSION**

The LPNs are supervisors under Section 2(11). The Board must grant Belgrove's Request for Review and dismiss the petition.

Dated: July 24, 2012  
New York, New York

Respectfully submitted,

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**NATIONAL LABOR RELATIONS BOARD  
REGION 22**

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**In the Matter of:**

**SUB ACUTE REHABILITATION CENTER  
AT KEARNY, LLC D/B/A BELGROVE  
POST-ACUTE CARE CENTER,**

**Employer**

**Case No.: 22-RC-80916**

**AND**

**AFFIRMATION OF SERVICE**

**DISTRICT 1199J, NUHHCE, AFSCME,  
AFL-CIO,**

**Petitioner,**

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STUART WEINBERGER, declares pursuant to 28 U.S.C. Section 1746, as follows:

I am not a party to this action and reside in Westchester, New York. On July 24, 2012, I served the Request for Review in this matter by e-mailing the post-hearing brief to William Hannan of Oxfeld Cohen, P.C., 60 Park Place, 6<sup>th</sup> Floor, Newark, New Jersey 07102 at the e-mail address of [whannan@oxfeldcohen.com](mailto:whannan@oxfeldcohen.com), which is the address designated by him.

On July 24, 2012, I also served the Request for Review upon the Regional Director, Michael Lightner by e-mailing the Request for Review to him at [Michael.Lightner@nlrb.gov](mailto:Michael.Lightner@nlrb.gov) and the supervisor at Region 22, Eric Schechter, at [eric.shechter@nlrb.gov](mailto:eric.shechter@nlrb.gov)

I declare under the penalty of perjury that the foregoing is true and correct. Executed on the 24th day of July, 2012.

/s/ Stuart Weinberger  
Stuart Weinberger