

Nos. 12-1529, 12-1628

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

**GGNSC SPRINGFIELD LLC,
d/b/a Golden Living Center-Springfield**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR THE
NATIONAL LABOR RELATIONS BOARD**

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR
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**BRIEF FOR THE
NATIONAL LABOR RELATIONS BOARD**

JURISDICTIONAL STATEMENT

This case is before the Court on the petition for review of GGNSC Springfield LLC, d/b/a Golden Living Center-Springfield (“the Center”), and the cross-application for enforcement of the National Labor Relations Board (“the Board”), of a Decision and Order issued by the Board on April 9, 2012, and reported at 358 NLRB No. 27. (Board Decision and Order [hereinafter D&O])

(Apx. 357-59).)¹ The Board’s Decision and Order is final with respect to all parties under Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 151 *et seq.*, 160(e) (“the Act”).

The Board had jurisdiction over the proceedings below pursuant to Section 10(a) of the Act, which empowers the Board to prevent unfair labor practices. *Id.* § 160(a). The Charging Party before the Board was the International Association of Machinists and Aerospace Workers, AFL-CIO (“the Union”). The Center’s petition for review and the Board’s cross-application for enforcement are timely, as the Act places no time limit on such filings. This Court has jurisdiction over these proceedings pursuant to Sections 10(e) and (f) of the Act, because the unfair labor practices occurred in Springfield, Tennessee. *Id.* §§ 160(e), (f).

The Board’s Decision and Order is based, in part, on findings made in an earlier representation proceeding (Board Case No. 26-RC-067840) to determine whether the Center’s registered nurses are eligible for union representation. The record of that case is also before the Court pursuant to Section 9(d) of the Act, 29 U.S.C. § 159(d). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964).

The Court may review the Board’s actions in the representation proceeding for the limited purpose of deciding whether to enforce, modify, or set aside the Board’s

¹ In this brief, “Ex.” refers to the Center’s exhibits at the representation hearing and “Tr.” to the hearing transcript, all of which are included in the Joint Appendix. “Apx.” references are to pages of the Joint Appendix and “Supp. Apx.” refers to the Board’s Supplemental Appendix. “Br.” refers to the Center’s opening brief.

unfair labor practice order in whole or in part. 29 U.S.C. § 159(d). The Board retains authority under Section 9(c) of the Act, 29 U.S.C. § 159(c), to resume processing the representation case in a manner consistent with the ruling of the Court. *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999) (citing cases).

STATEMENT CONCERNING ORAL ARGUMENT

The Board believes that this case involves the application of well-settled legal principles to straightforward facts and, therefore, that argument would not be of material assistance to the Court. However, if the Court believes that argument is necessary, the Board requests to participate and submits that 10 minutes per side would be sufficient.

STATEMENT OF THE ISSUE PRESENTED

The single issue before the Court is whether substantial evidence supports the Board's finding that the Center failed to meet its burden of showing that its registered nurses are supervisors within the meaning of Section 2(11) of the Act. If this question is resolved in the Board's favor, then the Board is entitled to enforcement of its subsequent finding that the Center violated Section 8(a)(5) and (1) of the Act when it admittedly refused to bargain with the Union.

STATEMENT OF THE CASE

The Board found that the Center violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by refusing to bargain with the Union as the collective-bargaining representative of an appropriate unit of registered nurses at its facility in Springfield, Tennessee. The Center does not dispute that it refused to bargain with the Union, and that it continues to do so. It contests only the Board's finding that the registered nurses are employees who are entitled to the Act's protections. The Board's findings in the representation and unfair labor practice proceedings are summarized below.

STATEMENT OF FACTS

A. An Overview of the Center and Its Staffing Pattern

The Center is a state-licensed nursing home in Springfield, Tennessee, and has approximately 100 employees. (Decision and Direction of Election (Nov. 30, 2011) [hereinafter DDE], at 1 (Apx. 1).) It is a single-story building with two wings, East and West. (DDE 2 (Apx. 2); Tr. 20, 111, 130 (Apx. 43, 134, 153).) Each wing has its own nurse's station and approximately 60 patient beds. (DDE 2 (Apx. 2); Tr. 20, 63 (Apx. 43, 63).) In all, the Center can accommodate up to 120 short- and long-term patients of varying levels of alertness and ambulatory capacity. (DDE 2 (Apx. 2); Tr. 14, 130 (Apx. 37, 153).)

The Executive Director oversees all of the facility's departments. (DDE 3 (Apx. 3); Tr. 13 (Apx. 36).) The Nursing Department is led by the Director of Nursing ("DON") and two Assistant Directors of Nursing ("ADONs").² (DDE 3 (Apx. 3); Tr. 132-33 (Apx. 155-56).) The Executive Director and the DON work from 7 a.m. to 6 p.m. on weekdays and remain on call at all other times. (DDE 3 (Apx. 3); Tr. 134 (Apx. 157).) The ADONs work from 8 a.m. to 4 p.m. weekdays, but they are also on call and may work nights and weekends to cover staffing shortages. (DDE 3 (Apx. 3); Tr. 29-30, 134-35 (Apx. 52-53, 157-58).)

The Nursing Department also includes 22 charge nurses and 46 certified nursing assistants ("CNAs"). (DDE 3 (Apx. 3); Ex. 1 at 1-3 (Apx. 167-69).) Of the 22 charge nurses, 12 are registered nurses ("RNs") and 10 are licensed practical nurses ("LPNs").³ (DDE 3-4 (Apx. 3-4); Ex. 1 at 1-2 (Apx. 167-68).) The charge-nurse duties of the RNs are the same as the charge-nurse duties of the LPNs, in

² The nursing department's supervisory staff also includes a Director of Clinical Education and three Resident Nursing Assistant Coordinators. (DDE 3 (Apx. 3).) These individuals, as well as the DON and ADONs, are stipulated to be supervisors under Section 2(11) of the Act. (*Id.*)

³ In this brief, the term "charge nurse" refers indiscriminately to RNs and LPNs in that position. If a distinction must be made, the terms "RN charge nurse" or "LPN charge nurse" are used.

relation to the CNAs.⁴ (DDE 4 n.2 (Apx. 4 n.2); Tr. 18-19, 80, 83 (Apx. 41-42, 103, 106).)

All charge nurses work in 12½-hour shifts⁵ (6:45 a.m. to 7:15 p.m. or 6:45 p.m. to 7:15 a.m.). (DDE 3 (Apx. 3); Ex. 3 (Apx. 204-07); Tr. 20 (Apx. 43).) All charge nurses report to the DON or her assistants, the ADONs. (Ex. 6 at 1 (Apx. 217); Tr. 95, 111, 112 (Apx. 118, 134, 135).) Unlike charge nurses, CNAs work in 8-hour shifts (7 a.m. to 3 p.m., 3 p.m. to 11 p.m. or 11 p.m. to 7 a.m.). (DDE 3 (Apx. 3); Ex. 3 (Apx. 204-07); Tr. 20 (Apx. 43).) Shifts are staggered, such that charge nurses and CNAs do not start work at the same time.

⁴ These proceedings are solely concerned with the status of RNs, who, the Center claims, are statutory supervisors by virtue of their charge-nurse duties in relation to CNAs. Although the supervisory status of LPNs is not at issue, at the hearing in this case, an LPN testified about the responsibilities of charge nurses. Since the Center's charge nurses have the same duties in relation to CNAs, this testimony is relevant to determining whether RNs are statutory supervisors.

⁵ Two RNs work different schedules than the other charge nurses. RN Patsy Meadows was the "weekend supervisor" until she went on leave prior to the hearing in this case. (DDE 4, 17 (Apx. 4, 17); Tr. 21-22 (Apx. 44-45).) RN Misty Wilmot works only weekdays and is referred to as the "supervisor" for the 3 p.m. to 11 p.m. shift. (DDE 4 (Apx. 4); Tr. 22-23, 85, 105, 110-13 (Apx. 45-46, 108, 128, 133-36).) Wilmot's duties are mostly administrative. (DDE 4, 18 (Apx. 4, 18); Tr. 23, 112-13 (Apx. 46, 135-36).) Her main responsibility is to handle new resident admissions, but she also does dining-room duty and helps other charge nurses when needed. (DDE 4, 18 (Apx. 4, 18); Tr. 23, 110 (Apx. 46, 133).) Because of the uniqueness of Meadows's and Wilmot's positions, the Board declined to pass on whether they are statutory supervisors. (DDE 17-18 (Apx. 17-18).) Since the Board's decision on this point is not in dispute, the supervisory status of Meadows and Wilmot is not before the Court.

Work assignments for the charge nurses and CNAs are determined and scheduled on a daily basis by the administration. A scheduler prepares a “daily assignment sheet” that lists the 8- and 12½-hour shifts for each wing and the RNs, LPNs or CNAs assigned to each shift. (DDE 3, 5 (Apx. 3, 5); Ex. 3 (Apx. 204-07); Tr. 19, 66, 109 (Apx. 42, 89, 132).) Typically, a shift consists of two charge nurses and two to six CNAs. (DDE 3-4 (Apx. 3-4); Ex. 3 (Apx. 204-07).) The charge nurses and CNAs are divided into 2 groups, each responsible for about 30 patients. (DDE 3 (Apx. 3); Tr. 63, 65, 94 (Apx. 86, 88, 117).) Within each group, individual CNAs are assigned a certain number of residents. (DDE 5 (Apx. 5).) A “group assignment form” lists the groups of residents assigned to each CNA and the specific tasks to be completed during the shift. (DDE 4, 5 (Apx. 4, 5); Ex. 16 (Apx. 341-44); Tr. 48-50 (Apx. 71-73).)

Although charge nurses and CNAs are assigned to work together, they each proceed about their work independently. (DDE 6-7 (Apx. 6-7); Tr. 81-82, 88-89 (Apx. 104-05, 111-12).) A charge nurse’s shift starts by checking in with the outgoing nurse and reviewing the residents’ status. (DDE 4 (Apx. 4); Tr. 62-63 (Apx. 85-86).) Then, she checks her narcotics inventory, stocks her medication cart and does a “medication pass,” distributing individualized medications to each of her 30 patients. (*Id.*) Afterward, the charge nurse documents each patient’s condition, prints the list of all physicians’ orders for the previous 24 hours and

verifies that each order was properly added to the residents' charts. (*Id.*) Once this is done, she runs through a checklist of tasks, such as disposing of expired medications, calibrating glucometer machines and checking refrigerator temperatures. (DDE 4 (Apx. 4); Tr. 64 (Apx. 87).) Then, she begins another medication pass. (*Id.*)

While the charge nurse goes about her duties, the CNAs are going about theirs. (DDE 6 (Apx. 6); Tr. 81-82 (Apx. 104-05).) Due to the staggering of shifts, CNAs are already at work when the charge nurses arrive. (Tr. 66, 81-82, 89 (Apx. 89, 104-05, 112).) CNAs take care of the same patients on each shift. (DDE 5 (Apx. 5); Tr. 66, 81, 109 (Apx. 89, 104, 132).) Their duties follow a routine of 2-hour rounds in which they help residents with daily living activities, such as providing incontinence care, repositioning and turning residents who cannot get up, and offering other necessary assistance. (DDE 5 (Apx. 5); Ex. 7 (Apx. 223-25); Tr. 65, 69, 81 (Apx. 88, 92, 104).) CNAs also take care of recurring tasks like showers, snacks and meal services. (DDE 5 (Apx. 5); Tr. 49-50, 65-66, 121 (Apx. 72-73, 88-89, 144).) Once during each shift, CNAs gather residents' vital signs and provide them to the charge nurse, who documents this information in the patients' files. (DDE 4, 5 (Apx. 4, 5); Tr. 65, 82, 121 (Apx. 88, 105, 144).) If a patient requires medical attention the CNAs cannot provide, they call the charge nurse, who either treats the patient or calls the doctor. (DDE 5 (Apx. 5); Tr. 82

(Apx. 105.) Otherwise, CNAs and charge nurses have little interaction with one another. (DDE 6-7 (Apx. 6-7); Tr. 81-82, 88-89 (Apx. 104-05, 111-12).)

The Center handles employee misconduct by way of a four-step, progressive discipline system. (DDE 7, 13 (Apx. 7, 13); Ex. 2 at 20-22 (Apx. 196-98); Tr. 35, 56 (Apx. 58, 79).) Charge nurses (RNs or LPNs) can document the misconduct and work deficiencies of CNAs by completing an employee memorandum, commonly referred to as a “write-up,” and conveying it to the DON. (DDE 7, 13 (Apx. 7, 13); Tr. 35-37, 56, 68-70, 97-100 (Apx. 58-60, 79, 91-93, 120-23).) Write-ups are kept in the Center’s personnel files, to which charge nurses do not have access without prior permission. (DDE 7 (Apx. 7); Tr. 37, 52, 69, 87, 102 (Apx. 60, 75, 92, 110, 125).) Charge nurses also have the option to fill out verbal counseling forms, also referred to as “coaching statements,” as a means to advise employees about deficiencies in their performance and give counsel on how to improve. (Tr. 38, 86-87, 99 (Apx. 61, 109-10, 122).) Finally, a charge nurse can send home an employee who abuses a patient, but only for the remainder of the charge nurse’s shift. (DDE 14 (Apx. 14); Tr. 77-78, 101 (Apx. 100-01, 124).)

B. The Board’s Representation Proceeding

On October 31, 2011, the Union filed a representation petition with Region 26 of the Board, seeking certification as the collective-bargaining representative of the Center’s full-time and regular part-time RNs. The Center opposed the petition,

arguing that RNs are supervisors under Section 2(11) of the Act because of their relationship to the CNAs, and thus not entitled to be represented by a union. After a hearing, the Regional Director issued a Decision and Direction of Election rejecting the Center's claim and directing a secret-ballot election in the petitioned-for unit. (DDE18-19 (Apx. 18-19).) The Center filed a Request for Review of the Regional Director's Decision by the Board (Supp. Apx. 370-383), which the Board denied. (Board Order (Apx. 360).)

In the election, the RNs chose representation by a vote of six to three, with one nondeterminative challenged ballot. Accordingly, the Regional Director certified the Union as the collective-bargaining representative of all full-time and regular part-time RNs employed at the Center. (D&O 1 (Apx. 357).) The Center refused to recognize or bargain with the Union.⁶ (D&O 2 (Apx. 358).)

C. The Board's Unfair Labor Practice Proceeding

On January 19, 2012, the Union filed an unfair labor practice charge against the Center over its refusal to bargain. After investigating the Union's charge, the Board's Acting General Counsel issued an unfair labor practice complaint alleging that the Center's refusal to bargain violated Section 8(a)(5) and (1) of the Act, 29

⁶ See *NLRB v. Duriron Co.*, 978 F.2d 254, 256 n.1 (6th Cir. 1992) ("Because representation proceedings are not directly reviewable by the courts, an employer that wants a judicial determination of the fairness of an election must refuse to bargain with the victorious union. The validity of the election can then be challenged in the ensuing unfair labor practice proceeding." (citation omitted)).

U.S.C. § 158(a)(5) and (1). (D&O 1 (Apx. 357).) In response, the Center admitted its refusal, repeating its position that the RNs are statutory supervisors. (*Id.*) The Acting General Counsel then filed a motion to transfer the case to the Board and for summary judgment. (*Id.*)

D. The Board's Conclusions and Order

On April 9, 2012, the Board (Chairman Pearce and Members Hayes and Griffin) granted the Acting General Counsel's motion for summary judgment and found that the Center violated Section 8(a)(5) and (1) of the Act by refusing to bargain with its RNs' collective-bargaining representative. (D&O 1-2 (Apx. 357-58).) In so doing, the Board concluded that all representation issues raised by the Center were or could have been litigated in the representation proceeding. (D&O 1 (Apx. 357).) The Center did not offer to adduce newly discovered or previously unavailable evidence, nor did it allege any special circumstance that would require the Board to reexamine the decision made in the representation proceeding. (*Id.*)

The Board's Order requires the Center to cease and desist from the unfair labor practices found and, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act, 29 U.S.C. § 157. (D&O 2 (Apx. 358).) Affirmatively, the Board's Order requires the Center to bargain in good faith with the Union and, if an understanding is reached, embody the understanding in a signed agreement.

(D&O 2 (Apx. 358).) The Board's Order also requires the Center to post paper copies of a remedial notice and to distribute this notice electronically to its employees, if the Center customarily communicates with them by such means.

(D&O 2-3 (Apx. 358-59).)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Center failed to sustain its burden of proving that RN charge nurses are supervisors. Therefore, the Board is entitled to enforcement of its finding that the Center violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union. The Center insists that RN charge nurses have supervisory authority, but its evidence is generalized and conclusory, without specific examples showing the extent or exercise of this supposed authority. In addition, the Center almost entirely ignores *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298 (6th Cir. 2012), this Court's most recent, and arguably most relevant, decision on supervisory determinations.

The Center failed to prove that RN charge nurses have the authority to discipline or effectively recommend the discipline of other employees. Instead, the record shows that the role of charge nurses is simply to document and report misconduct by way of employee memoranda or "write-ups." The Center does not cite a single instance in which a write-up written by a charge nurse resulted in an investigation or disciplinary proceeding. Moreover, charge nurses do not use

independent judgment when issuing write-ups. Significantly, charge nurses cannot weigh the severity of an employee's misconduct against the consequences of filing a report because they have no awareness of that person's disciplinary history or the sanctions that the employee may face, if any. The evidence substantially supports the Board's determination that RN charge nurses do not have any authority to discipline or effectively recommend discipline.

The Center also failed to show that RN charge nurses assign or recommend assignments within the meaning of the Act. Rather, the record establishes that an administrator prepares the daily assignment sheet, assigning CNAs to shifts and wings. And as a practical matter, CNAs always take care of the same patients and have routine duties that do not vary significantly from one shift to the next; consequently, CNAs rarely require direction on what task to perform or how to accomplish it. Generally, when a CNA is absent, the scheduler will call a replacement. Although charge nurses may occasionally reassign CNAs when a particular shift is understaffed, such assignments are always temporary, do not alter the CNAs' overall duties, and do not require the exercise of independent judgment. More typically, however, CNAs adjust workloads between themselves, without consulting charge nurses.

The Center's evidence of responsible direction is similarly deficient. CNAs require little direction because their duties follow a set routine. As a result, charge

nurses give only discrete, common-sense instructions to CNAs. Moreover, there is no evidence that charge nurses are held accountable when CNAs fail to adequately perform their job responsibilities, as is required to show responsible direction under the Act.

Even less persuasive are the Center's claims that RN charge nurses evaluate the work performance of CNAs and that they are the highest-ranking employees at nights and on weekends. These secondary indicia of supervisory authority do not confer supervisory status under the Act where, as here, there is no evidence that RN charge nurses exercise at least one of the primary indicia as well. Moreover, the evidence shows that RN charge nurses do not currently evaluate CNAs and that, in any case, evaluations do not affect the CNAs' conditions of employment. Similarly, the record establishes that the Center's undisputed managers always retain final authority in supervisory matters and that charge nurses seek their guidance and permission even at night and on weekends.

Ultimately, the Center failed to meet its burden of showing that RN charge nurses exercise any supervisory authority with independent judgment. Instead, the evidence shows that charge nurses and CNAs proceed independently with their respective duties, with charge nurses occasionally making small adjustments or reporting misconduct. Accordingly, the Board properly found that the Center violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union.

ARGUMENT

Section 8(a)(5) of the Act prohibits employers from refusing to bargain collectively with the representatives of their employees. 29 U.S.C. § 158(a)(5). The Center admits that it refused to bargain with the Union, but contends that the Board erred in determining that RN charge nurses are not supervisors under the Act. (Br. 3.) Therefore, as long as the Board reasonably rejected that claim in the representation proceeding, the Center’s refusal to bargain with the Union violates Section 8(a)(5) and (1) of the Act.⁷ *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946); *NLRB v. Duriron Co.*, 978 F.2d 254, 255 (6th Cir. 1992).

A. The Center Has the Burden of Showing that Individuals Possess Supervisory Responsibilities Requiring Exercise of Independent Judgment

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

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their

⁷ Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [S]ection 7.” 29 U.S.C. § 158(a)(1). Section 7, in turn, grants employees “the right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing” *Id.* § 157. A violation of Section 8(a)(5) constitutes a derivative violation of Section 8(a)(1). *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *NLRB v. Centra, Inc.*, 954 F.2d 366, 367 n.1 (6th Cir. 1992).

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.

29 U.S.C. § 152(11). These powers are listed in the disjunctive, so possession of any one is enough to make an individual a supervisor. *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 713 (2001). However, authority is only supervisory within the meaning of the Act if it is exercised with independent judgment. *Id.*; *NLRB v. Dole Fresh Vegetables, Inc.*, 334 F.3d 478, 485 (6th Cir. 2003). The mere “routine” or “clerical” performance of these duties does not constitute independent judgment elevating an employee to the status of supervisor. 29 U.S.C. 152(11); *NLRB v. Child World, Inc.*, 817 F.2d 1251, 1254 (6th Cir. 1987).

In *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), and its two companion cases, *Croft Metals, Inc.*, 348 NLRB 717 (2006), and *Golden Crest Healthcare Center*, 348 NLRB 727 (2006), the Board clarified that “to exercise ‘independent judgment,’ an individual must at a 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*, 348 NLRB at 692-93. The Board further explained that “a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining

agreement.” *Id.* at 693 (footnote omitted). This Court defers to *Oakwood Healthcare*’s interpretation of “independent judgment” because it “reasonably defines the ‘*degree* of discretion required for supervisory status.” *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 304 n.1 (6th Cir. 2012) (quoting *Kentucky River*, 532 U.S. at 713).

The Board’s interpretation of the term “independent judgment” follows, in part, from the legislative purpose behind Section 2(11) to distinguish between truly supervisory personnel, who are vested with “‘genuine management prerogatives,’” and employees – such as “‘straw bosses, leadmen, and set-up men, and other minor supervisory employees’” – who enjoy the Act’s protections even though they perform “minor supervisory duties.” *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81 (1974) (quoting S. Rep. No. 80-105, at 4 (1947)). Accordingly, “[i]t is important for the Board not to construe supervisory status too broadly, for a worker who is deemed to be a supervisor loses his organizational rights.” *Williamson Piggly Wiggly v. NLRB*, 827 F.2d 1098, 1100 (6th Cir. 1987) (alteration in original) (quotation marks and citation omitted); *see also Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996) (“[The Board] and reviewing courts must take care to assure that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach.” (citations omitted)). Indeed, “[m]any nominally supervisory functions may be

performed without the ‘exercise of such a degree of judgment or discretion as would warrant a finding’ of supervisory status under the Act.” *Kentucky River*, 532 U.S. at 713 (alteration and ellipses omitted) (quoting *Weyerhaeuser Timber Co.*, 85 NLRB 1170, 1173 (1949)).

As noted above, it is now settled that the burden of demonstrating supervisory status rests with the party asserting it. *Kentucky River*, 532 U.S. at 711-12; *Frenchtown*, 683 F.3d at 305; *Dole Fresh Vegetables*, 334 F.3d at 485. To meet this burden, a party seeking to prove supervisory status must establish it by a preponderance of the evidence. *See, e.g., Frenchtown*, 683 F.3d at 305; *Dean & Deluca N.Y., Inc.*, 338 NLRB 1046, 1047 (2003); *Croft Metals*, 348 NLRB at 721. Moreover, inconclusive or conflicting evidence is insufficient to support a finding of supervisory status. *N.Y. Univ. Med. Ctr.*, 324 NLRB 887, 908 (1997), *enforced in relevant part*, 156 F.3d 405 (2d Cir. 1998). Rather, a party must support its claim with specific evidence of an employee’s actual responsibilities and not just conclusory or generalized testimony. *See Dole Fresh Vegetables*, 334 F.3d at 489 (employer failed to present specific evidence supporting manager’s general statements about employees’ duties); *W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 874 (6th Cir. 1995) (noting that “the Board is not required to accept an employer’s self-serving declarations” (quotation marks and citation omitted)). Finally, it is settled

that job descriptions and other “paper power” are insufficient to prove supervisory status. *Frenchtown*, 683 F.3d at 314; *N.Y. Univ. Med. Ctr.*, 156 F.3d at 414.

Because of the Board’s “special expertise, [it] is afforded broad discretion” in determining whether an individual is a supervisor. *Williamson Piggly Wiggly*, 827 F.2d at 1100; *accord Frenchtown*, 683 F.3d at 305-06. Such a determination is a “mixed question of law and fact.” *Highland Superstores, Inc. v. NLRB*, 927 F.2d 918, 923 (6th Cir. 1991) (citing *NLRB v. Lauren Mfg. Co.*, 712 F.2d 245, 247 (6th Cir. 1983)). The Board’s factual findings and its application of the law to those facts are conclusive “if supported by substantial evidence on the record considered as a whole.” 29 U.S.C. §160(e); *Frenchtown*, 683 F.3d at 306; *Dole Fresh Vegetables*, 334 F.3d at 484. Moreover, the Court may not displace the Board’s inferences, even if it “may have reached a different conclusion had the matter been before us de novo.” *Frenchtown*, 683 F.3d at 304.

B. The Board Reasonably Found that the Center Failed To Carry Its Burden of Proving that RN Charge Nurses Are Statutory Supervisors

The Center contends that RN charge nurses have the authority to discipline, assign and responsibly direct CNAs, or effectively recommend these actions, and are thus supervisors under the Act.⁸ The Center also relies on secondary indicia of

⁸ In its statement of facts, the Center includes a section on the ability of charge nurses to adjust CNA grievances. (Br. 16.) However, the Center fails to raise this issue in the argument section of its brief and does not cite to any relevant case

supervisory authority – claiming that RN charge nurses evaluate the CNAs’ job performances and are the highest-ranking employees at nights and on weekends – which do not, on their own, confer supervisory status under the Act. For each of these claims, the Center fails to carry its burden of showing that RN charge nurses are statutory supervisors.

Before turning to the merits of this case, it is important to highlight this Court’s recent decision in *Frenchtown*, 683 F.3d at 298. To understand *Frenchtown*’s significance, it is necessary to recall that, in *Kentucky River*, the Supreme Court held that the burden of proving supervisory status falls on the party claiming that an individual is a supervisor, and rejected the Board’s interpretation of the term “independent judgment.” 532 U.S. at 711-12, 721. Subsequently, the Board reconsidered the meaning of the terms “independent judgment,” “assign” and “responsibly to direct,” all key concepts relative to the determination of supervisory status. *Oakwood Healthcare*, 348 NLRB at 686.

In *Frenchtown*, this Court held that the Board had fulfilled its mandate under *Kentucky River* to provide a reasonable interpretation of “independent judgment.” *Frenchtown*, 683 F.3d at 304 n.1. *Frenchtown* also recognized the reasonableness of *Oakwood Healthcare*’s definitions of “assign” and “responsibly to direct.” *Id.*

law. “[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.” *Conley v. NLRB*, 520 F.3d 629, 638 (6th Cir. 2008) (quotation marks and citation omitted).

at 311 n.8, 314. Lastly, *Frenchtown* acknowledged that *Kentucky River* undercut the applicability of prior Sixth Circuit decisions on supervisory status because these cases allocated a very heavy burden of proof to the Board. *Id.* at 305 n.2; *see also Kentucky River*, 532 U.S. at 711 (recognizing that it is easier for an employer to prove the exercise of one supervisory function than for the Board to disprove all twelve).

1. The Center Failed To Meet Its Burden of Showing that RN Charge Nurses Have Authority To Discipline or Effectively Recommend Discipline

The Center argues that RN charge nurses are statutory supervisors because they can write-up CNAs who commit misconduct and send them home in cases of abuse.⁹ (Br. 28-34.) The Board reasonably found that these abilities do not satisfy the Act's definition of imposing or effectively recommending discipline. (DDE 13-14 (Apx. 13-14).)

The Center claims that RN charge nurses are supervisors because they can fill out employee memoranda, or "write-ups," to report misconduct and work deficiencies of CNAs to the DON. (Br. 29-31.) The evidence, however, shows that although charge nurses fill out the portions of the form that describe the

⁹ The Center acknowledges that RNs can also write-up LPNs and send them home in cases of abuse. If this were truly supervisory authority, one would expect that the Center would similarly claim that the RNs thereby also supervise the LPNs. But the Center makes no such claim. To the contrary, as the record shows and the Center acknowledges (Br. 5), the LPNs report directly to the ADONs.

incident and identify the employee involved, they leave blank the sections indicating the employee's prior disciplinary history and the level of discipline to be imposed. (DDE 7, 13 (Apx. 7, 13); Ex. 9 (Apx. 234-53); Tr. 69, 98 (Apx. 92, 121).) Indeed, as the Board recognized, because charge nurses do not have access to the Center's personnel files where write-ups are kept, they are unaware of an employee's disciplinary history. (DDE 7, 13 (Apx. 7, 13); Tr. 69, 87 (Apx. 92, 110).)

Moreover, the Center fails to provide any example of charge nurses making specific recommendations to discipline CNAs. (DDE 13 (Apx. 13).) To the contrary, the charge nurses who testified stated emphatically that they do not recommend any type of discipline, whether on the write-up form or otherwise. (DDE 13 (Apx. 13); Ex. 9 (Apx. 234-53); Tr. 74, 87, 98, 118 (Apx. 97, 110, 121, 141).) The evidence also establishes that the administrators who receive the write-ups do not consult with charge nurses, or provide any feedback, before deciding whether and what discipline to impose. (DDE 13 (Apx. 13); Tr. 98, 100, 104 (Apx. 121, 123, 127).)

Given this substantial evidence, the Board reasonably determined that the role of RN charge nurses in the Center's disciplinary process is simply to document and report misconduct, and that they do not have the authority to discipline employees or to effectively recommend discipline. (DDE 13 (Apx. 13);

Tr. 74, 87, 98, 101-02, 103, 118 (Apx. 97, 110, 121, 124-25, 126, 141).) This finding is consistent with well established case law holding that simply reporting factual information is not enough to demonstrate supervisory status under the Act. *See, e.g., Highland Superstores*, 927 F.2d at 922; *NLRB v. St. Clair Die Casting, L.L.C.*, 423 F.3d 843, 850 (8th Cir. 2005); *NLRB v. Meenan Oil Co.*, 139 F.3d 311, 322 (2d Cir. 1998); *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002).

Furthermore, as the party asserting supervisory status, the Center was required to provide “specific evidence” that RN charge nurses discipline or effectively recommend discipline. *Dole Fresh Vegetables*, 334 F.3d at 489. The record, however, is devoid of such examples.¹⁰ Although the Center quotes a small excerpt of RN Vicki Jones’s testimony and presents it as “direct evidence” that RN charge nurses possess disciplinary authority (Br. 28), the most informative part of this testimony (emphasized below) is missing from the Center’s brief:

[Q]: Can you impose discipline?

[A]: I’m not sure I understand.

[Q]: The Employer provided a list of HR policies and procedures. If somebody violates one of those, can you impose discipline?

[A]: Yes.

[Q]: Tell me about that.

¹⁰ An RN charge nurse recalled one instance where an employee she had written up was suspended for that incident (Tr. 104-05 (Apx. 127-28)), but nothing suggests that she recommended suspension as an appropriate discipline, or that she was consulted before the sanction was imposed. The employee’s record of prior misconduct and position on the four-step scale are also unknown.

[A]: It just depends on what they violated. I would write up a memorandum on them. That's all I can do is write up a memorandum.

[Q]: *Is your role then limited to documenting the incident or do you do more?*

[A]: *That's it.*

(Tr. 101-02 (Apx. 124-25).) This testimony confirms the Board's finding that RN charge nurses serve a reporting function that consists only of filling out an employee memorandum. *See Meenan Oil Co.*, 139 F.3d at 322 (“[Employee] acting as a conduit for information . . . exercises no judgment in passing the knowledge along to management.” (citations omitted)).

Rather than provide specific evidence of RN charge nurses imposing or recommending discipline, the Center argues that they are supervisors because they can decide whether and how to address misconduct by CNAs. (Br. 29-30.) As an initial matter, the Center implies that charge nurses have the option of filling out verbal counseling forms, also referred to as “coaching statements,” as a way of disciplining other employees. (Br. 28-29, 34.) However, coaching statements are educational in nature and are not part of the Center's disciplinary framework. (Ex. 2 at 20-22 (Apx. 196-98); Tr. 39, 99 (Apx. 62, 122).) As such, coaching statements are analogous to the “one-on-one in-services” used by charge nurses in *Frenchtown*, 683 F.3d at 306-07. *Frenchtown* held that “in-services” were not evidence of disciplinary authority because they were not part of the employer's disciplinary process. *Id.* The same reasoning applies to coaching statements.

Furthermore, even if deciding whether to document an incident on a write-up form constitutes discipline or recommending discipline, it would not establish supervisory status unless RN charge nurses exercise independent judgment in doing so. The Center fails to provide any evidence of independent judgment. The only RN charge nurse to testify on this point stated that she always seeks the DON's guidance before issuing write-ups, which effectively mitigates the use of independent judgment. (Tr. 100-01, 104 (Apx. 123-24, 127).) *See Phelps Cmty. Med. Ctr.*, 295 NLRB 486, 492 (1989) (calling supervisor before imposing discipline, even for information purposes, affords supervisor a chance to review the proposed action and approve or countermand it, thus negating independence of judgment).

Moreover, as explained *supra* pp. 21-22, charge nurses have no access to personnel files¹¹ and no involvement beyond filling out the factual portion of the form. (DDE 7, 13 (Apx. 7, 13).) Therefore, to the extent judgment is exercised in determining what discipline, if any, to impose, that is exercised by administrators with no input from the charge nurse who filled out the form. In fact, a charge nurse who testified on this point stated that she never knew if a particular write-up

¹¹ The DON's office is closed at night and weekends (Tr. 69, 87, 98, 100, 104 (Apx. 92, 110, 121, 123, 127)), so charge nurses working those shifts would not be able to review employee files even if they wanted to.

resulted in an investigation, sanctions, or nothing at all. (Tr. 98, 104 (Apx. 121, 127).)

The Center also fails to provide evidence to support its claim that RN charge nurses are supervisors because they “initiate the formal disciplinary process.” (Br. 30.) As an initial matter, the Center did not raise this argument in its Request for Review. (See Employer’s Request for Review 4 (Supp. Apx. 376).) Since the Board did not have the chance to consider this claim, this Court is jurisdictionally barred from hearing it. See 29 U.S.C. § 160(e); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *Van Dorn Plastic Mach. Co. v. NLRB*, 881 F.2d 302, 306 (6th Cir. 1989). In any event, there is no evidence that charge-nurse write-ups are prerequisites to discipline, or that they inevitably or even routinely result in the initiation of disciplinary proceedings. See *Meenan Oil Co.*, 139 F.3d at 322 (“The fact that . . . reports may *result* in disciplinary action is irrelevant”).

Moreover, the Center’s reliance on this Court’s unpublished decision in *Extendicare Health Services, Inc. v. NLRB*, 182 F. App’x 412 (6th Cir. 2006), does not further its argument as that case is factually different. In *Extendicare*, the filing of a disciplinary action report triggered an investigation by management, which determined an appropriate sanction. *Id.* at 416. In the instant case, the Center fails to show that write-ups trigger investigations or have a disciplinary effect, or serve any purpose beyond informing management about employee

misconduct. Although the record contains evidence that third- or fourth-level write-ups trigger an investigation or possible sanction, there is no evidence that charge nurses initiate third- or fourth-level write-ups.¹² Lastly, it is important to note that *Extendicare* was decided before the Board reformulated its definition of the term “independent judgment” in *Oakwood Healthcare*.¹³

Finally, the Center claims that RN charge nurses are statutory supervisors because they can send employees home in cases of abuse. (Br. 34.) However, the Board has consistently found that the ability to remove employees whose behavior endangers the health or safety of residents does not constitute supervisory authority. *See, e.g., Vencor Hosp. – Los Angeles*, 328 NLRB 1136, 1139 (1999);

¹² The Center supplies one example of a CNA who was fired after receiving four write-ups (Ex. 12 (Apx. 274-84), and asserts that “all of [that CNA’s] write-ups were initiated and signed by Charge Nurses as the supervisor.” (Br. 33.) In fact, only the first two write-ups are signed by charge nurses. (Ex. 12 at 9, 11 (Apx. 282, 284).) Write-ups three and four – the only ones to carry actual penalties, according to the evidence – are signed by the DON herself. (Ex. 12 at 2, 5 (Apx. 275, 278).) The employee’s file contains a coaching statement (Ex. 12 at 7 (Apx. 280)), which is not disciplinary, *see infra* note 16.

The Center also mentions a third-step write-up issued to LPN charge nurse Elizabeth Blair. (Br. 33; Ex. 9 at 7-8 (Apx. 240-41); Tr. 36-37 (Apx. 59-60).) However, this write-up is signed by RN Misty Wilmot, whom the Union agreed to exclude from the bargaining unit. *See supra* note 5. Accordingly, Wilmot’s authority cannot be used to determine the supervisory status of other RNs. All other write-ups are either first- or second-level, for which there is no discipline. (Ex. 9 at 1, 4, 10, 13, 15, 17, 19 (Apx. 234, 237, 243, 246, 248, 250, 252).)

¹³ In the same vein, the Center relies on *Wilshire at Lakewood*, 345 NLRB 1050 (2005), which also predates *Oakwood Healthcare* and was reversed by the D.C. Circuit Court of Appeals in *Jochims v. NLRB*, 480 F.3d 1161 (D.C. Cir. 2007).

Northcrest Nursing Home, 313 NLRB 491, 497 (1993); *Phelps Cmty. Med. Ctr.*, 295 NLRB at 492. As this Court stated in *Frenchtown*, “Sending employees home for egregious misconduct does not require independent judgment.” 683 F.3d at 309 (citation omitted). Moreover, the Center does not refute testimony that the immediate removal of abusive employees is required by law. (Tr. 78 (Apx. 101).)¹⁴

In sum, the Center has failed to carry its burden of showing that RN charge nurses disciplined or recommended discipline, or, if they did, that they exercised independent judgment in doing so. Accordingly, substantial evidence supports the Board’s determination that RN charge nurses merely report misconduct and do not impose or recommend imposing discipline.

2. The Center Failed To Meet Its Burden of Showing that RN Charge Nurses Assign or Effectively Recommend Assignments Using Independent Judgment

The Board reasonably found that the Center failed to meet its burden of showing that RN charge nurses assign or effectively recommend assignments within the meaning of the Act. (DDE 9-10, 12 (Apx. 9-10, 12).) The evidence on

¹⁴ See Tenn. Code Ann. § 63-7-115(a)(1)(C), (F) (West, Westlaw through June 30, 2012); Tenn. Bd. of Nursing, *Rules & Regulations of Registered Nurses*, Rule 1000-01-.13(1)(r), (s) (Nov. 2011), available at <http://www.state.tn.us/sos/rules/1000/1000-01.20111103.pdf> (last visited Sept. 7, 2012); Tenn. Bd. of Nursing, *Rules & Regulations of Licensed Practical Nurses*, Rule 1000-02-.13(1)(r), (s) (Nov. 2011), available at <http://www.state.tn.us/sos/rules/1000/1000-02.20111103.pdf> (last visited Sept. 7, 2012).

which the Center relies only confirms that charge nurses have limited assigning authority, such as making occasional transfers due to short staffing or assigning discrete tasks on an ad hoc basis.

As construed by the Board, the term “assign” refers to “the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” *Oakwood Healthcare*, 348 NLRB at 689; *accord Frenchtown*, 683 F.3d at 311. In the healthcare setting, assignment of work refers to “the charge nurse’s designation of significant overall duties to an employee, not to the charge nurse’s ad hoc instruction that the employees perform a discrete task.” *Oakwood Healthcare*, 348 NLRB at 689. The term ‘assign’ also “encompasses the charge nurses’ responsibility to assign nurses and aides to particular patients.” *Id.* However, such assignments must involve the exercise of independent judgment by “weigh[ing] the individualized condition and needs of a patient against the skills or special training of available nursing personnel.” *Id.* This Court recognizes the reasonableness of, and defers to, the Board’s definition of “assign” as set forth in *Oakwood Healthcare*. *Frenchtown*, 683 F.3d at 311 n.8.

Despite the Center’s various protestations to the contrary (Br. 34-40), the record firmly establishes that charge nurses do not have the authority to assign

overall job duties to CNAs and cannot permanently assign CNAs to certain rooms, a specific wing or shift, or recommend such assignment. (DDE 10 (Apx. 10); Tr. 73-74, 119-23 (Apx. 96-97, 142-46).) Rather, as shown *supra* p. 7, the Center's administrators prepare the daily assignment sheet, which assigns CNAs to a wing and a shift. Moreover, charge nurses cannot modify CNA schedules without prior permission from the DON's office. (DDE 6, 10, 12 (Apx. 6, 10, 12).) As a result, when a CNA is absent during normal business hours, the Center's scheduler finds a substitute, and at night and on weekends, charge nurses must get the DON's permission to call a replacement.¹⁵ (DDE 6, 10 (Apx. 6, 10); Tr. 50, 67-68, 87-88 (Apx. 73, 90-91, 110-11).) The DON may give instructions not to call certain people if they require overtime pay; otherwise, charge nurses proceed by going down a list of available CNAs. (Tr. 67, 88 (Apx. 90, 111).) Given that schedule modifications require prior approval from the DON, the Board reasonably found that RN charge nurses do not exercise independent judgment in scheduling the work of CNAs.¹⁶ (DDE 12 (Apx. 12).)

¹⁵ Similarly, it is undisputed that charge nurses cannot authorize CNAs to take a day off, leave work early, or work overtime without prior approval from the DON. (DDE 6 (Apx. 6); Tr. 73, 124-25 (Apx. 96, 147-48).)

¹⁶ Despite the Center's suggestion to the contrary (Br. 16), "time clock adjustments are not evidence of supervisory authority because they are routine and clerical in nature. If a nursing employee (RN, LPN or CNA) has a minor schedule change such as having to work through lunch, the employee must complete a time clock adjustment form and have it signed by the charge nurse on duty. (DDE 6 (Apx. 6);

In some instances, if a replacement is not called in for a sick or absent CNA, charge nurses may have CNAs in the same wing cover that person's rooms for the remainder of a shift, or bring someone from the other wing to help. (DDE 10 (Apx. 10); Tr. 118-20 (Apx. 141-43).) However, in practice, CNAs usually redistribute workloads amongst themselves, without the charge nurses' approval or involvement. (DDE 6, 10 (Apx. 6, 10); Tr. 81, 88 (Apx. 104, 111).) In these circumstances, the Board reasonably found that occasional transfers by charge nurses do not confer supervisory status because they are not permanent and there is no evidence that they involve independent judgment as defined under the Act. (DDE 10, 12 (Apx. 10, 12); Tr. 118-22, 127 (Apx. 141-45, 150).)

The Center takes issue with the Board's finding that RN charge nurses execute only occasional transfers that are not sufficient on their own to confer supervisory status. (Br. 38.) However, the testimony on which the Center relies merely confirms that such transfers are uncommon, temporary, and do not involve significant overall duties. (Br. 36 (quoting Tr. 118-20 (Apx. 141-43)).) Moreover, this testimony does not refute evidence that CNAs usually "work it out between themselves [to] pick up the rooms" of an absent colleague. (Tr. 81 (Apx. 104).)

Ex. 5 (Apx. 209-16); Tr. 25-27, 66-67, 83-84 (Apx. 48-50, 89-90, 106-07).) Charge nurses sign each others' forms, such that LPNs sign for RNs and vice-versa. (DDE 6 (Apx. 6); Tr. 84 (Apx. 107).) Time clock adjustments are done after the fact, to document the event and ensure proper compensation; they do not serve as permission slips. (DDE 6 (Apx. 6); Tr. 66-67, 84 (Apx. 89-90, 107).)

One witness recalled a specific instance where a CNA called the DON for permission to leave early during a night shift and explained how her colleagues had arranged to cover her rooms in her absence. (Tr. 88 (Apx. 111).) Notably, the CNAs did not discuss their arrangement with the charge nurse beforehand, and the DON did not ask the charge nurse to verify that everything was in order. (*Id.*) This case is thus analogous to *Frenchtown*, where nursing aides divided residents between themselves and swapped rooms when necessary to balance workloads or accommodate patient preferences. 683 F.3d at 311. On those facts, this Court held that charge nurses were not statutory supervisors because their role in assigning patients and adjusting assignments was “marginal at best.” *Id.* The Board’s determination in the instant case is supported by substantial evidence and consistent with this Court’s decision in *Frenchtown*.

The Center also contends that RN charge nurses assign CNAs to individual patients based on the CNAs’ skill levels and the residents’ needs, among other factors. (Br. 38-40.) However, the Center offers only generalized statements that charge nurses can adjust CNA assignments based on resident acuity. (*Id.*) Conclusory testimony of this sort is not enough to satisfy the Center’s burden of proof. *See Dole Fresh Vegetables*, 334 F.3d at 489. Furthermore, the Center provides no evidence that charge nurses consider the CNAs’ skills or training in order to match them with specific residents. *See Frenchtown*, 683 F.3d at 312

(holding that company failed to establish independent judgment because it did not provide “actual examples of nurses adjusting patient assignments that also described the factors the nurse considered in making the adjustment”). To the contrary, the evidence shows that charge nurses do not assign residents to CNAs at the start of a shift because CNAs always take care of the same halls and the same patients each time they come to work. (Tr. 66, 81, 89, 109 (Apx. 89, 104, 112, 132).) Likewise, charge nurses do not assign tasks to CNAs because the duties of CNAs follow “a set routine” from one shift to the next. (Tr. 65, 81, 121 (Apx. 88, 104, 144).) In addition, the record establishes that, if circumstances require altering assignments to balance workloads, CNAs handle such adjustments by themselves, without the charge nurses’ involvement. Lastly, we note that the Center relies almost entirely on *Extendicare* for this point (Br. 38-40), when *Extendicare* actually upheld Board’s finding that the nurses’ assignment authority was “routine in nature and [did] not require the use of independent judgment.” 182 F. App’x at 415.

Finally, the Center is incorrect in claiming that RN charge nurses are statutory supervisors simply because they can move CNAs around as needed. (Br. 37.) “[N]urses are not supervisors by virtue of simply instructing an ‘employee [to] perform a discrete task’; they instead must designate ‘significant overall duties to an employee’ in order to be a supervisor.” *Frenchtown*, 683 F.3d at 311

(footnote omitted) (quoting *Oakwood Healthcare*, 348 NLRB at 689). The examples on which the Center relies – telling CNAs to shower patients out of turn or to deliver vital signs at the beginning of a shift (Br. 37; Tr. 121 (Apx. 144)) – are merely ad hoc instructions to perform discrete tasks, which do not confer supervisory status. See *Frenchtown*, 683 F.3d at 312 (telling an aide to help another shower a resident is “not an example of *assigning* under the Act” (citation omitted)); *Oakwood Healthcare*, 348 NLRB at 689 (“[A] charge nurse’s ordering [a CNA] to immediately give a sedative to a particular patient does not constitute an assignment.”).

Despite its claims to the contrary, the Center has not met its burden of showing that RN charge nurses have authority to assign or recommend assignments as defined under the Act. Instead, substantial evidence in the record and this Court’s precedent in *Frenchtown* strongly support the Board’s ruling that RN charge nurses do not exercise the statutory authority to assign.

3. RN Charge Nurses Do Not Direct CNAs Using Independent Judgment, or with the Requisite Accountability

The Board also reasonably held that the Center failed to show that RN charge nurses direct CNAs using independent judgment. (DDE 11 (Apx. 11).) Indeed, the record demonstrates that CNAs have “routine patient care responsibilities which require little instruction or oversight by the charge nurse.” (DDE 6 (Apx. 6).) Moreover, there is no specific evidence that charge nurses are

held accountable in the few cases where they direct CNAs to complete certain tasks. The Center's reliance on generalized testimony does nothing to refute the Board's determination.

To exercise responsible direction under Section 2(11), an individual must possess the authority to oversee others and to decide "what job shall be undertaken next or who shall do it," and must exercise this authority "responsibly" and with independent judgment. *Oakwood Healthcare*, 348 NLRB at 691. For direction to be "responsible," moreover, "the person directing and 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 by the employee are not performed properly." *Id.* at 691-92. *Accord Frenchtown*, 683 F.3d at 313-14 (finding the Board's definition of "responsible" both reasonable and consistent with Sixth Circuit precedent in *Ohio Power Co. v. NLRB*, 176 F.2d 385, 387 (6th Cir. 1949)).

RN charge nurses seldom direct CNAs to accomplish specific tasks, and there is no evidence that they use independent judgment when they do. Rather, as shown *supra* p. 8, CNAs follow a set routine and have little interaction with charge nurses apart from reporting the residents' vital signs. (DDE 6-7 (Apx. 6-7); Tr. 65, 81-82, 88-89, 93-94 (Apx. 88, 104-05, 111-12, 116-17).) Moreover, due to the routine and repetitive nature of their duties, CNAs seldom require instruction on

how to do their job. (DDE 6 (Apx. 6); Tr. 81-82, 88-89, 93-94 (Apx. 104-05, 111-12, 116-17).) Therefore, charge nurses rarely instruct CNAs to complete specific tasks, and when they do, it is little more than having a CNA shower a patient out of turn or deliver vital signs earlier in the shift. (DDE 7, 10 (Apx. 7, 10); Tr. 120-21 (Apx. 143-44).) Furthermore, there is no evidence that these minor, temporary directives require the exercise of independent judgment as is necessary to establish supervisory status under the Act. (DDE 12 (Apx. 12).)

Nor is there evidence that RN charge nurses are held accountable for the job performance of CNAs. In an effort to show accountability, the Center cites to the job description forms that RNs and CNAs sign upon hiring. (Br. 7-8.) Absent specific evidence, however, “[t]heoretical or paper power does not a supervisor make.” *Frenchtown*, 683 F.3d at 308 (quoting *N.Y. Univ. Med. Ctr.*, 156 F.3d at 414) (alteration in *Frenchtown*). The Center also offers a generic and conclusory statement to show that charge nurses are accountable for CNA performance (Br. 40-41 (quoting Tr. 116 (Apx. 139))), but it omits the same witness’s testimony that charge nurses are not disciplined for CNAs’ failure to perform (Tr. 102 (Apx. 125)). In any case, generalized testimony cannot satisfy the Center’s burden of proof unless accompanied by specific evidence. *Frenchtown*, 683 F.3d at 305 (citing *Dole Fresh Vegetables*, 334 F.3d at 489). Moreover, the full exchange shows that if CNAs do not accomplish their duties properly, charge nurses simply

write-up the incident, but do not themselves incur discipline. (Tr. 116-17 (Apx. 139-40).)

In short, the Center does not provide any example of an RN charge nurse either using independent judgment to direct a CNA or facing adverse consequences for a CNA's poor performance. Instead, the record supports the Board's conclusion that RN charge nurses do not responsibly direct other employees.

4. The Center Errs in Relying on Secondary Indicia of Supervisory Status

The Center claims that RN charge nurses are statutory supervisors because they occasionally fill out evaluations of the CNAs' work performance and they are at times the highest-ranked employees on duty. However, these attributes are merely secondary indicia of supervisory status, as they are not included among the 12 "primary indicia" listed in Section 2(11) of the Act. *See Williamette Indus., Inc.*, 336 NLRB 743, 743 (2001). As such, they are insufficient to establish supervisory status unless the evidence supports finding at least one of the primary indicia as well. *Frenchtown*, 683 F.3d at 315; *see also Dole Fresh Vegetables*, 334 F.3d at 487-88 (citing cases). Since the Center fails to show that RN charge nurses possess any primary supervisory authority, the secondary indicia on which it relies cannot satisfy its burden. In any event, these secondary indicia do not support finding RN charge nurses to be supervisors.

a. RN Charge Nurses do not evaluate CNAs using independent judgment and evaluations do not affect CNA wages or conditions of employment

Consistent Board precedent holds that an individual who evaluates the performance of other employees qualifies as a supervisor only if the evaluation is shown to, “by itself, affect the wages and/or job status of the employee being evaluated.” *Willamette Indus.*, 336 NLRB at 743. *See Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260, 265 (2d Cir. 2000); *NLRB v. Hilliard Dev. Corp.*, 187 F.3d 133, 145 (1st Cir. 1999); *Beverly Enters. v. NLRB*, 148 F.3d 1042, 1047 (8th Cir. 1998); *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 (1999); *Ten Broeck Commons*, 320 NLRB 806, 813 (1996); *Northcrest Nursing Home*, 313 NLRB at 498 & nn.36-37.

The Board reasonably found that RN charge nurses have not been responsible for evaluating the CNAs’ job performance since approximately November 2010,¹⁷ and that evaluations prior to that date did not affect the wages or conditions of employment of evaluated employees. (DDE 7-8, 15-16 (Apx. 7-8, 15-16).) This finding is fully supported by the record, which establishes that, while evaluations used to be done by charge nurses, they are now handled by RN Misty Wilmot, who is not a charge nurse. (DDE 7-8, 15-16 (Apx. 7-8, 15-16); Tr.

¹⁷ In his Decision and Direction of Election dated November 30, 2011, the Regional Director found: “Charge nurses . . . prepared annual performance appraisals for CNAs prior to the past year or so.” (DDE 7 (Apx. 7).)

70-72, 84-86, 105-06 (Apx. 93-95, 107-09, 128-29).) Although it is unclear when this change occurred, two charge nurses testified that they had not done evaluations “in a long time,” perhaps as long as 3 years, except on specific occasions when Wilmot needed assistance. (*Id.*) And on those rare occasions when Wilmot needed help, she gave specific instructions to complete the forms so as to reflect that “everybody is on plan.” (*Id.*)

The record clearly rebuts the Center’s claim that RN charge nurses continue to evaluate CNAs. (Br. 42.) The Center quotes RN Vicki Jones’s testimony that she helped Wilmot fill out evaluation forms sometime in February or March 2011 (Tr. 71-72 (Apx. 94-95)), but omits Jones’s statement that charge nurses ceased doing evaluations “a long time” before this incident (Tr. 105-06 (Apx. 128-29)), and also ignores similar testimony by another witness (Tr. 86 (Apx. 109)). In addition, of the 10 evaluation forms the Center submitted into evidence, 6 were completed in June or July 2010. (Ex. 13 (Apx. 285-311).) The other four are dated April 2011 (Exs. 14-15 (Apx. 312-40)), but only two concern CNAs¹⁸ (Ex. 14 (Apx. 312-25)). One of these CNA evaluations is signed by Jones; it states that

¹⁸ It is likely that RN Jones was referring to these April 2011 evaluations when she testified about helping Misty Wilmot fill out a stack of forms. Jones did not remember exactly when this incident occurred, but guessed that it was “in February or March.” (Tr. 71 (Apx. 94).)

the named employee is “on plan,” with few additional comments.¹⁹ (Ex. 14 (Apx. 312-18).) This evaluation corroborates Jones’s testimony that Wilmot occasionally asked for help and that, when she did, Wilmot instructed Jones on how to fill out the evaluations. Given this evidence, it was reasonable for the Board to find that charge nurses do not currently evaluate CNA performance, and have not had this responsibility since approximately November 2010. (DDE 7-8, 15-16 (Apx. 7-8, 15-16).)

The evidence also negates the Center’s claim that charge nurses exercised independent judgment when they did evaluate CNAs. (Br. 41.) The April 2011 CNA evaluations corroborate testimony that Wilmot gave charge nurses specific instructions about what to write on the forms. (Tr. 72, 85 (Apx. 95, 108).) Moreover, even before Wilmot became responsible for evaluating CNAs, one charge nurse recalled being told to redo her evaluations because the administration “didn’t agree with them, they were too high.” (Tr. 86 (Apx. 109).) *See Ten Broeck Commons*, 320 NLRB at 813 (finding no supervisory status where nurses’ evaluations of other employees were reviewed, and often altered, by supervisors). This unchallenged testimony demonstrates that even if charge nurses evaluate CNAs, they do not exercise independent judgment when doing so. *See Oakwood*

¹⁹ The other CNA evaluation from April 2011 is signed by Misty Wilmot. (Ex. 14 (Apx. 319-25).) It also indicates that the CNA is “on plan.”

Healthcare, 348 NLRB at 693 (“judgment is not independent if it is dictated or controlled by detailed instructions”).

Finally, the facts also belie the Center’s assertion that evaluations played “a significant role” in determining wages. (Br. 43.) Two charge nurses testified that they did not recommend raises and did not know whether evaluations have any effect on wages. (DDE 8 (Apx. 8); Tr. 72, 85-86, 93, 95, 107-08 (Apx. 95, 108-09, 116, 118, 130-31).) In addition, the Center’s human resources manager testified that other factors can trump evaluations when setting employee wages. (DDE 16 (Apx. 16).) For instance, in 2011, employees who were paid less than the prevailing wage in their local job market received raises even if their evaluations did not justify the increase. (DDE 16 (Apx. 16); Tr. 59-60 (Apx. 82-83).) Other evidence suggests that evaluations had no impact on wages in either 2011 or 2010. Specifically, the fact that all CNAs were graded identically in 2011 negates any effect that evaluations could have had on wages. And in 2010, evaluations were completed *after* annual wage adjustments became effective,²⁰ proving that evaluations had no role in determining wages that year. (Tr. 95-96 (Apx. 118-19).)

The Center is unable to show that performance evaluations written by charge nurses had even a marginal effect on employee wages, and offers no evidence that

²⁰ Annual wage adjustments became effective on July 1, 2010. (Ex. 18 at 2 (Apx. 348).) Of the six evaluations submitted by the Center for 2010, five were filed in mid-July. (Ex. 13 at 1-21 (Apx. 285-306).) One was completed on June 13, 2010, but signed by ADON Price on July 14. (Ex. 13 at 27 (Apx. 311).)

these evaluations affected conditions of employment in any other way. Therefore, substantial evidence supports the Board's finding that evaluations were not "effective recommendations to reward, promote[,] discipline or likewise affect the evaluated employee's job status." (DDE 16 (Apx. 16) (citations omitted).)

b. RN Charge Nurses are not supervisors during nights and weekends because top managers are always on call

The Center repeatedly states that charge nurses are often the highest-ranking employees present at night and on weekends. (Br. 6, 17, 35, 44.) This does not, on its own, establish supervisory status. *Frenchtown*, 683 F.3d at 315; *see also Dole Fresh Vegetables*, 334 F.3d at 489 ("[T]he highest-ranking employees on-site at a given time are not 'ipso facto' made into supervisors simply because of their presence." (quoting *Highland Superstores*, 927 F.2d at 923)). In fact, the record establishes that the Center's top managers, *i.e.*, the Executive Director, the DON and the ADONs, are on call 24 hours per day, 7 days a week. (DDE 3 (Apx. 3); Tr. 134-35 (Apx. 157-58).) Moreover, it is plainly evident from the charge nurses' testimony that managers remain the ultimate authority at night and on weekends. For instance, if a CNA calls in sick, the charge nurses must obtain the DON's permission to find a replacement and instructions about whom to call. (Tr. 67, 87-88 (Apx. 90, 110-11).) Even CNAs seeking to leave early must call the DON *directly* for permission. (Tr. 88 (Apx. 111).) This evidence substantially supports the Board's conclusion that, even when RN charge nurses are the highest-ranking

employees on duty, true supervisory authority remains vested in the Center's undisputed managers. See *Frenchtown*, 683 F.3d at 315 (finding no supervisory status where at least one manager was always on call and charge nurses “[could], and d[id], seek managers’ guidance and permission in supervisory matters”); *Dole Fresh Vegetables*, 334 F.3d at 488-89 (finding no supervisory status where highest-ranking employees did not perform any supervisory task during their shift).

CONCLUSION

The Board reasonably found that the Center's RN charge nurses are not statutory supervisors and that the Center violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union. Accordingly, the Board requests that this Court deny the petition for review and enforce the Board's Order in full.

Respectfully submitted,

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September 2012

**UNITED STATES COURT OF APPEALS
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)	
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)	26-RC-067840
Respondent/Cross-Petitioner)	
)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 10,660 words of proportionally-spaced, 14-point type, and the word-processing system used was Microsoft Word 2007.

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Dated at Washington, D.C.
this 10th day of September , 2012

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)	

CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I certify further that the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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this 10th day of September, 2012