

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

**ASTOR SERVICES FOR CHILDREN
& FAMILIES¹**

Employer

and

Case 03-RC-098696

**ASTOR RESIDENTIAL STAFF ASSOCIATION,
NYSUT, NEA, AFT, AFL-CIO**

Petitioner

DECISION AND DIRECTION OF ELECTION

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

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

Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated that Astor Services for Children & Families, hereinafter referred to as the Employer, is a New York State not-for-profit corporation with multiple locations throughout Dutchess County, New York, where it is operates Head Start facilities providing early childhood development services to youth and their families. During the past calendar year, a representative period, the Employer, in performing its services, received gross revenues in

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

excess of \$250,000 and purchased and received at its Dutchess County, New York facilities, combined goods, materials and supplies valued in excess of \$5,000 directly from points located outside the State of New York.

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

3. The parties stipulated, and I find, that Astor Residential Staff Association, NYSUT, NEA, AFT, AFL-CIO, hereinafter referred to as the Petitioner, is a labor organization within the meaning of Section 2(5) of the Act.

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

5. The parties stipulated that all permanent full-time and part-time employees who work in the following classifications at the Astor Residential Treatment Facility/Center are non-professional employees: activity specialists, administrative assistants, assistant childcare supervisor-nights,² childcare workers, childcare workers I, II and III, childcare workers I, II and III nights, cooks, family assistants, health clinic assistants, housekeepers, housekeepers II, intake coordinator (admissions), licensed practical nurses, maintenance specialist, maintenance worker, maintenance worker II, master childcare workers, Medicaid compliance analyst, receptionist, recreation specialists, residential family advocates, senior therapeutic support counselor (senior

² The parties entered into a post-hearing stipulation that the assistant childcare supervisors – nights (also referred to during the hearing as assistant on-call supervisor or assistant on-call/floater) be included in the bargaining unit. The parties did not indicate whether these employees should be included in the professional or non-professional voting group. I find that the assistant childcare supervisors – nights should be included in non-professional Voting Group B, inasmuch as no party contends or has provided facts during the hearing which would support a finding that the assistant childcare supervisors meet the definition of a professional employee as defined in Section 2(12) of the Act.

support worker), senior childcare workers I, II and III, senior childcare workers I, II and III nights, spiritual development coordinators, and therapeutic support counselors (support worker).

The parties also stipulated that all permanent full-time and part-time employees who work in the following classifications at the Astor Residential Treatment Facility/Center, are professional employees as defined in Section 2(12) of the Act: clinical specialists, crisis prevention specialists, expressive arts therapist, registered nurses, social workers and the transitional coordinator. In view of the statutory requirement that the Board may not join professional and non-professional employees in a single unit without the desires of the professional employees being determined in a separate vote, I shall, pursuant to the Board's decision in *Sonotone Corp.*,³ direct separate elections in Voting Groups A (professional) and B (non-professional).

The parties further stipulated to exclude from the bargaining unit(s) found appropriate herein, all per diem employees, central administration/business office administrative staff, managers, confidential employees, those employees currently working solely at the Astor Learning Center who are currently represented for purposes of collective bargaining,⁴ and all guards and supervisors as defined in the Act.

Finally, the parties entered into a post-hearing stipulation to exclude the on-call supervisors and childcare supervisors – nights from the bargaining unit(s) found appropriate herein, because they are supervisors as defined in Section 2(11) of the Act.

³ 90 NLRB 1236 (1950). The appropriateness of the *Sonotone* procedure was reaffirmed by the Board in *Pratt & Whitney*, 327 NLRB 1213, 1217-18 (1999).

⁴ The record does not identify the bargaining representative of the employees at the Astor Learning Center or the location of the Astor Learning Center.

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

The sole issue is whether the six assistant childcare team leaders (“ACTLs” herein) are supervisors as defined in Section 2(11) of the Act. The Employer seeks to exclude the ACTLs from the bargaining unit(s) because they exercise the supervisory authority over childcare workers, master childcare workers, and activity specialists to: discipline, effectively recommend hiring and discipline, adjust grievances, responsibly direct employees, and because they use independent judgment when assigning work. No party asserts that ACTLs have the authority to transfer, lay off, recall, promote, discharge, or reward employees. The Petitioner argues that the ACTLs do not possess supervisory authority and should be included in the bargaining unit(s) found appropriate herein.

Based on the evidence adduced at the hearing and the relevant case law, I find that the Employer has not met its burden of establishing that ACTLs are statutory supervisors within the meaning of Section 2(11) of the Act. No party asserts, nor is there evidence in the record to support a finding, that the ACTLs are professional employees as defined in Section 2(12) of the Act. Accordingly, I shall include the ACTLs with the non-professional employees (Voting Group B), set forth below.

FACTS

The Employer’s Astor Residential Treatment Facility/Center is a 64-bed residential treatment facility/center located in Rhinebeck, New York⁵ which provides shelter, food, clothing,

⁵ The Petitioner seeks to represent only those employees in the petitioned-for unit(s) who are employed at the Astor Residential Treatment Facility/ Center. The Employer operates other Head Start facilities in Dutchess County, New York. The record does not specifically identify the facilities or their locations. No party contends that employees at any of the other facilities should be included in the unit(s) found appropriate herein.

education, therapy services and recreational activities to children with emotional needs or who experience problems in the home, community or school. Dr. Sheila Doherty is the Employer's assistant executive director. The record discloses that the petitioned-for employees work in the residential treatment center ("RTC" herein) and the residential treatment facility ("RTF" herein). The New York State Office of Family & Children oversees the RTC, which is managed by residential treatment team leaders Dr. Jody Popple and Dr. Kathy Mills. Both Popple and Mills manage two units each in the RTC. The New York State Office of Mental Health oversees the residential treatment facility ("RTF" herein), which is managed by residential treatment team leader Dr. Ellie Carleton. Carleton manages the two units in the RTF. Popple, Mills and Carleton report directly to Doherty.

There are three childcare team leaders ("CTLs" herein) who report directly to the residential treatment team leaders. Each CTL is responsible for two of the six units. The CTLs are Brian Day, Danielle McClinton and Barbara Horkan. The six ACTLs at issue, Shawn Kessler Alvin Bell, Michael Mills, Roy Burgess, Elvin Selman and Marjorie James-Boykin report to the CTL assigned to their respective units.

Within each unit there is usually an ACTL, and either two childcare workers or one childcare worker and an activity specialist working on the day and evening shift. There are fewer staff on the night shift, when the children are sleeping. Not every day and evening shift has an ACTL present and typically no ACTLs work the night shift. Each unit has eight or nine residents. There are approximately 42 childcare workers, master childcare workers and direct activity specialists. In addition, there are supervisors and other direct care support, health care and quality support teams present who interact with the residents and assist when a unit has an emergency.

The ACTL position was created in April 2012 when the Employer restructured and changed the job titles and duties of certain classifications within its organization and required employees to apply for the newly-created positions. CTL Day testified that after the restructuring, the CTL position was more of an oversight role and the ACTLs were responsible for on-the-floor coaching, mentoring and providing feedback. Day testified that each ACTL was given a copy of a job description during the interview process and was informed of these duties. The ACTL job description is not part of the record. Master childcare worker Adam Miller, who applied for the ACTL position in April 2012, testified that he was told by John Kelly, assistant executive director at the time, that the ACTL would be a leader on the floor and a liaison between the CTL and the childcare workers. Miller further testified that Kelly told him that the ACTLs would not be completing “supervision” forms,⁶ making the schedule or performing employee evaluations.⁷

Each ACTL, as well as the other childcare workers, master childcare worker and activities specialists, are assigned to a unit at the time of hire and report to their assigned unit on a daily basis. The CTL prepares the schedule and the ACTLs, childcare workers, master childcare worker and activities specialists generally are scheduled to work the same hours each week.

ACTL Elvin Selman,⁸ master childcare worker Adam Miller, and childcare worker II Christian Sandy, testified that their workdays are fairly routine. They are responsible for assisting residents with completing tasks of daily living, such as personal hygiene, cleaning their rooms, eating meals, getting to school on time and participating in recreational activities, as well

⁶ The supervision forms are discussed below.

⁷ Employees are evaluated in writing biannually. The record fails to disclose, and the Employer does not contend, that the ACTLs have any role in the employee evaluations.

⁸ Selman was the only ACTL to testify. He has 12 years’ experience working at the Employer’s facility.

as taking children on day trips. Each day has a set schedule which includes meals, school during the weekdays, activities, showers and bedtime, which all generally occur at the same time each weekday. The weekend and holiday schedule varies somewhat because there is no school. ACTL Selman testified that 100 percent of his day is spent performing direct care alongside the childcare workers and activities specialists.

CTL Day testified that ACTLs work on the floor providing the same direct care as the childcare workers on a daily basis and are responsible for the daily running of the unit. Day testified that one day per week ACTLs do other work; however, he provided no specifics as to what the other work entails and no other witness testified regarding ACTLs spending time performing “other work.” CTL Horkan testified that the ACTLs’ duties include deciding which children can go on trips, reminding the staff to follow the Employer’s transportation list, ensuring that staff bring booster seats for the children that need them, filling out the trip proposal form and turning the form in to the on-call supervisor. CTL Horkan further testified that, in the absence of an ACTL on the shift, a senior employee will perform these duties. Horkan testified that there always has to be a senior employee on duty. The record fails to disclose that the ACTLs have fewer direct care duties because of any additional functions they perform as an ACTL.

At the time of the Employer’s restructuring, ACTLs Mills, Selman, Bell, and Burgess were part of a group together with higher-ranking individuals, including the assistant executive director, residential treatment team leaders and CTLs, who conducted interviews of applicants for six activities specialist positions. CTL Horkan testified that residential treatment team leader Popple, ACTL Mills, and she prepared questions to ask, met after the interviews and collaboratively decided on a candidate to hire. Horkan also summarily testified that the

candidate that ACT Mills recommended was the candidate who was selected for hire. The record fails to disclose whether Popple and Horkan also recommended the same candidate, whether there was any disagreement, or the identity of the ultimate decision maker, if there was one.⁹

ACTLs Miller and Selman also participated in the group interviews with CTL McClinton. McClinton summarily testified that ACTL Selman asked questions of the candidates during the interviews, gave feedback, recommended a candidate and that candidate was selected. ACTL Selman testified that he asked one and the same question of all the applicants. The record fails to disclose whether Mills and McClinton also recommended the same candidate or whether there was disagreement. McClinton testified that she made the ultimate hiring decision.

Residential treatment team leader Dr. Carleton, CTL Day and ACTL Bell also participated in the group interviews. CTL Day testified that Bell and he were in favor of hiring one candidate and Dr. Carleton was in favor of another. The candidate that Day and Bell favored was hired.

CTL Day testified that ACTL Bell interviewed Noel English, a former employee, for a childcare worker position and recommended to Day that English be hired. Although Day testified that he left the hiring decision to Bell, he also testified that he did not need to speak to any other supervisor about English's work performance because he was familiar with it, as he was the acting director of childcare at the time English previously worked for the Employer. Day further testified that he is the ultimate decision-maker concerning hires and that he completes the necessary paperwork that is submitted to human resources when a hiring decision is made in his units.

⁹ Horkan also testified that ACTL Burgess was involved in the interview process for activities specialist but provided no specifics other than that he asked the candidates questions.

CTL Horkan testified that ACTL Mills interviewed two candidates for two childcare worker positions, after Horkan had interviewed them and determined they were “good fits.” Mills and Horkan met before Mills interviewed the candidates and collectively decided the questions that Mills would be asking them. Horkan testified that after the interviews, Mills gave feedback and a recommendation to Horkan to hire the two candidates. Horkan testified that she accepted Mills’ recommendation. Horkan further testified that if Mills recommended against hiring one of the candidates, she would have “really listened” to Mills and probably not hired the individual.

After an applicant for employment completes a successful interview, the candidate is invited back for an “observation.” The ACTLs observe how the candidate is interacting with the children and if they are comfortable working in this environment. CTL Selman testified it is also an opportunity for the candidate to observe what the job entails and ask questions. The ACTLs provide feedback to the CTL regarding his/her positive and/or negative observations. CTL McClinton testified that after CTL Horkan and she had interviewed an applicant and determined the applicant was a good candidate, the candidate spent some time in the unit being observed by ACTLs Selman and James-Boykin.

ACTL Selman testified that he observed one candidate since becoming an ACTL and reported to CTL McClinton that he thought the candidate was a nice person and a good fit for the team. Selman testified, without elaboration, that the observation may play a part in the hiring process. The candidate was ultimately hired by McClinton. The record contains no specific testimony regarding the observations performed by James-Boykin.

CTL Horkan testified that ACTL Mills performed observations for two candidates for two childcare worker positions who had been previously interviewed by Horkan, and who

Horkan had already determined were “good fits.” As stated above, Horkan testified that Mills conducted his own interview and then showed the candidates around the unit, explained the program and the job duties, and why things were done a certain way. Horkan testified that prior to the observation, Mills told her what he was going to ask the candidates, including what they thought about doing activities with the children and their experience. After the observation, Mills reported to Horkan that the candidates were “a good fit,” that they didn’t have any experience, but that was okay because they all started with no experience. Horkan testified that she made the ultimate decision to hire the two childcare workers and that she was responsible for completing the paperwork with regard to their hire.

Some of the ACTLs complete “supervision forms,” which the Employer contends are part of its disciplinary system, and that the rest of the ACTLs will be expected to complete them in the future once the CTL decides to designate this task to the ACTL. In addition, the Employer asserts that ACTLs give verbal and written warnings, and can effectively recommend more serious discipline.

CTL Day testified that the Employer’s progressive discipline policy consists of a verbal warning, a “supervision” form, a memo, and then a corrective action, which provides for further disciplinary action if the corrective action is not met.¹⁰ The record fails to reveal whether the Employer’s progressive discipline policy is in writing. There was significant testimony regarding the supervision forms. The record reveals conflicting testimony as to whether the supervision form is part of the Employer’s progressive discipline system. The record is clear that the supervision forms are not kept in the employee’s personnel file, which is maintained by

¹⁰ The record discloses no evidence that an ACTL has issued, or effectively recommended the issuance of, a written memo or a corrective action.

human resources. CTL Day testified that written disciplines, such as lateness, are maintained in the employee's personnel file.

The record testimony establishes that the CTLs decide whether to assign their ACTLs to complete the supervision forms. Only ACTLs Mills, Burgess and James-Boykin have completed supervision forms. Although the Employer's witnesses testified that the supervision forms are done on a monthly basis, the documentary evidence in the record consists of only five supervision forms completed by ACTLs – two completed by Burgess in October 2012 and three completed by Mills in February 2013.¹¹

CTL Horkan testified that the ACTLs in her unit (Mills and Burgess) complete supervision forms, which are not necessarily used for discipline, but are used to review the different things that are going on and to talk about the positives that a staff member is exhibiting. Horkan also testified that she initiates issues of attendance or punctuality by asking ACTL Burgess to address them in the supervision form. One of the supervision forms prepared by ACTL Burgess states under "Areas of Growth" that the employee should report to work in a timely manner. Horkan testified that she had reviewed the employee's KRONOS report (timekeeping)¹² and issued, separate from the supervision form, a disciplinary memo to the employee regarding her tardiness.

Master childcare worker Adam Miller testified that he had two meetings with ACTL Mills in which Mills reviewed completed supervision forms with him. The first such meeting was on February 8, 2013, and the second one was on February 28, 2013. At the February 28 meeting, Mills presented him with a supervision form and asked him to sign a separate sheet acknowledging that he had seen his KRONOS sheet which indicated that he was a total of 17

¹¹ Mills just recently began completing the supervision forms in February 2013.

¹² The CTLs monitor tardiness through the Employer's KRONOS system.

minutes late within a two-week period.¹³ Miller testified that he assumed that either CTL Horkan or ACTL Mills would inform him if he was doing something wrong.¹⁴

CTL Day testified that neither of the ACTLs who report to him (Bell and Kessler) complete supervision forms. Day testified that the purpose of the supervision form is to show communication between the supervisor and the employee, discuss best practices, refer to policies and procedures, provide reminders, and to discuss disciplinary issues if need be. Day testified regarding one instance where ACTL Bell reported to him that he had spoken to an employee on more than one occasion about the employee's use of a cell phone while on duty and that Bell requested that the cell phone incident be documented. Day testified that he issued a supervision form to the employee regarding the cell phone usage. The supervision form is not a part of the record.

CTL McClinton testified that the ACTLs under her supervision (Selman and James-Boykin) have done supervisions. ACTL Selman testified that he has never written a supervision but was told by McClinton in January 2013 that he would have to start doing them within the next month. The record contains no documentary evidence that Selman or James-Boykin have completed supervision forms.

The Employer contends that ACTL Selman participated in a "non-disciplinary" suspension of an employee who was physically unable to perform all of her job duties. CTL McClinton, in the presence of Kate Bagshaw, head of human resources, asked Selman his

¹³ The Employer contends in its post-hearing brief that ACTL Mills has the authority to adjust grievances. The Employer bases this contention on Miller's testimony in response to Employer's counsel's asking him if he could appeal to ACTL Mills if there was something which he disagreed with on his supervision form. Miller's response was "I guess I could." There is no record evidence that Miller or any other employee has done so.

¹⁴ Mills also gave two supervision forms to childcare worker Michael Ryan on February 26, 2013. One of the supervision forms states that Ryan gives activity specialist Marcus a couple of activities for the recreation schedule and will spend 30 minutes a week with his advocate and stay on top of his/her closet. The other supervision form states that CTL Horkan and ACTL Mills feel that Ryan possesses the professional judgment to be fully cleared to do holds.

opinion about an employee's physical limitations. Selman expressed his concern that the employee was not as strong as she was before her injury. Thereafter, he attended a meeting wherein Bagshaw and McClinton informed the employee that she could not return to work until she was cleared by a doctor. Selman testified that he did not say anything during the meeting with the employee, nor did he make any recommendations as to how the situation should be handled. Selman testified that he did not know if this meeting was disciplinary in nature.

CTL Day testified that ACTLs can intervene if a childcare worker is ineffectively dealing with a child in crisis, followed by mentoring, coaching and feedback to the childcare worker. Day further testified that the majority of the ACTLs have been employed by the Employer for a long time, have good relationships with the children and good intervention skills. ACTL Selman testified that ACTLs are responsible for guiding, correcting and training the childcare workers. Selman further testified that he was told he had the authority to correct and speak to childcare workers if they were engaged in inappropriate response to a situation, such as yelling at a child. There is no record evidence that the ACTLs have been told they have the authority to discipline employees.

ACTL Selman testified that he reports to CTL McClinton as to how the children in the unit are doing, which staff handled any incidents, and which staff is doing the required behavior incident report. Selman also provides feedback on new employees to McClinton. For example, he informed McClinton that one new employee was interacting well with the children, that she kept good control and was doing a great job.

CTL Day testified that ACTLs have the most input into assessing new employees during their six-month probationary period. Day testified that the ACTL considers the employee's physical capabilities, their "de-escalation techniques," and their ability to form relationships with

the children. CTL McClinton testified regarding two examples where ACTLs Selman and James-Boykin, on one occasion each, provided feedback to her concerning a probationary employee's performance during the six-month probationary period and recommended that the employee pass his/her probationary period. McClinton testified that she makes the final decision.¹⁵ McClinton testified that she relies heavily on the ACTL's assistance, observation and feedback regarding an employee's probationary period because the ACTL works directly on the floor.

The Employer asserts that ACTLs use independent judgment when assigning childcare workers to perform certain tasks. CTL Day testified that ACTLs assign employees to oversee showers, dinner and recreational activities or to take a trip with the children. He testified that the childcare workers do not perform the same tasks each time they work. As stated above, however, ACTL Selman, master childcare worker Miller, and childcare worker II Sandy, testified that their work days are fairly routine. As noted above, there are only three employees in each unit performing these duties, including the ACTL.

Childcare worker II Sandy testified that CTL McClinton completes the childcare workers' hours-of-work schedule and the on-call supervisor or someone in administration completes the transport schedule. A transport occurs when a childcare worker uses an Employer vehicle to transport the kids who are going home for the weekend. The transport could appear on Sandy's work schedule or he could be told by the on-call supervisor that he has to do a transport. Sandy testified that CTL Selman informs him where the kids need to be and what activities need to occur. Sometimes ACTL Selman asks Sandy to take the children on short trips to Kmart or the mall and sometimes Sandy initiates the trips. Sandy testified that he never refuses Selman's

¹⁵ CTL McClinton testified that, in the example involving ACTL Selman, Selman and she made a "team decision." The record does not disclose any information concerning ACTL James-Boykin's involvement in the other example provided by McClinton.

request to take the children on a trip and Selman never has told him that he cannot take a trip. Sandy further testified that CTL McClinton assigned him the duties of completing food and supply requisitions for the unit.

The Employer contends that ACTLs use independent judgment in making an assignment to a staff member who is filling in for an absent employee. Day gave an example where an ACTL, for safety reasons, might decide not to assign the staff member, who came from another unit to fill in for an absent staff member, to go to the gym to do an activity with four children with whom the substitute employee may be unfamiliar.

CTL Day testified that an ACTL can assign a childcare worker to perform a one-on-one interaction with a child who is having a bad day. Day testified that the ACTL makes the assignment based on the staff member's relationship with the child, and the staff member's intervention styles and skills which are commonly known by the childcare staff.

The Employer also contends that the supervision forms completed by the ACTLs illustrate that the ACTLs provide responsible direction to the childcare workers. For example, one supervision form written by ACTL Burgess states that the employee should complete his documentation before the end of shift and use his time wisely to complete recreational scheduling. On another employee's supervision form, Burgess stated that clothes need to be put away, she should continue with morning routines, and to discuss painting and hanging pictures in the unit with the maintenance department. On Adam Miller's supervision form, ACTL Mills stated that "Adam will spend 30 minutes a week of 1:1 time with his advocates and stay on top of their closet organization." Miller testified that although he was already doing the 30 minutes

of “1:1” time,¹⁶ Mills told him he “had to find something to write on the supervision form” and that he should just continue to do his 30 minutes per week of “1:1.” CTL Horkan testified that Miller is expected to follow ACTL Mills’ direction or discipline could result. Miller testified that he assumed that Mills had the authority to bar certain activities with a child because Mills leads the shift.

On one of childcare worker Michael Ryan’s supervision forms, discussed above, ACTL Mills stated that Ryan will give Marcus, activity specialist, a couple of activities for the recreation schedule and will spend 30 minutes a week with his advocate and stay on top of his/her closet. A second supervision form prepared by Mills for Ryan states that Horkan and Mills feel that Ryan possesses the professional judgment to be fully cleared to do holds.

ACTL Selman testified that he does not have to direct the work of the childcare workers in his unit because they know the routine and the activity schedule. There is no record evidence that ACTLs are held responsible for the work performance of the childcare workers.

CTL Day testified that the on-call supervisor has the final decision to approve the trips the children take with the childcare workers. There is a vehicle usage sheet that is used to authorize the trips and for use of an Employer vehicle for the trips. The vehicle usage sheet contains spaces for the on-call supervisor’s and the group supervisor’s signatures. . Both CTLs and ACTLs have signed the sheet authorizing the trips. Childcare worker II Sandy testified that ACTL Selman approves the trip and the on-call supervisor approves the vehicle usage. Sandy further testified that CTL McClinton approves major trips, such as trips to New York City. Master childcare worker Miller testified that he asks ACTL Mills if he can take the children on

¹⁶ Childcare workers are assigned to act as an advocate for one or more children. Horkan testified that an advocate spends extra time with the child, is in charge of keeping their closets organized, and may have more contact with the child’s family. The record is not clear as to who makes the assignment and whether ACTLs are assigned to be advocates.

trips and for money from a lockbox to do so. If Mills or CTL Horkan are not in the building, he texts one of them to get permission to take the trip.

Miller testified that on one occasion he was scheduled to take a trip with but was concerned about bringing one of the children on the trip. Miller texted ACTL Mills to inform Mills that he didn't know if he was going to bring the child on the trip, after the child had run from the facility that day. Mills told him to use his best judgment. Miller decided that he felt more comfortable taking the child on the trip than leaving her behind because the coworker who was staying behind was pregnant and he felt that might be unsafe. Miller testified that if Mills had told him not to bring the child, he probably would not have taken the trip.

Childcare workers may, on occasion, be asked to move to another unit if their unit is overstaffed and another unit is understaffed due to call-ins or vacations. Master childcare worker Miller testified that, generally, only the on-call supervisor or the CTL can move an employee out of the employee's unit. There have been occasions when neither the on-call supervisor nor the CTL is present and the ACTL will ask those present in the unit for a volunteer to move to another unit for the shift. Miller also testified that the on-call supervisor has told him, on those occasions when he is the senior employee on the shift and the CTL and ACTL are not present, to decide which employee will move. The record is clear that the final decision rests with the on-call supervisor as to who will move because it the on-call supervisor's responsibility to secure coverage on the shift.

The ACTLs do not schedule hours of work, approve vacations or overtime, or grant time off. There are occasions when the ACTL contacts employees to ask them to come into work due to another employee's absence. The ACTL cannot require an employee to come to work because the Employer's policy is to not mandate employees to fill other shifts.

All team leaders, including the residential treatment team leaders and CTLs, are salaried employees. The ACTLs are paid hourly, as are the childcare workers and activity specialists. There was no record evidence regarding employees' benefits.

CTL Day testified that ACTLs do not attend leadership day, which is attended by all supervisors. The ACTLs attend "debriefing training," as do other non-supervisory employees, which involves a discussion among the staff concerning the way in which an incident or situation involving a child was handled.

ANALYSIS

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

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

The party asserting that an individual has supervisory authority has the burden of proof. *Dean & Deluca New York, Inc.*, 338 NLRB 1046 (2003); *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 713 (2001). "[W]henver the evidence is in conflict or otherwise inconclusive on particular indicia or supervisory authority, [the Board] will find that supervisory

status has not been established, at least on the basis of those indicia.” Phelps Community Medical Center, 295 NLRB 486, 490 (1989). Purely conclusory evidence is not sufficient to establish supervisory status; rather, the party must present evidence that the employee actually possesses the Section 2(11) authority at issue. Golden Crest Healthcare Center, 348 NLRB 727, 731 (2006). A “paper showing” or testimony merely asserting generally that individuals exercised certain supervisory duties is not sufficient to meet the burden of proof. Rather, the testimony must include specific details or circumstances demonstrating the existence of supervisory authority. Avante at Wilson, Inc., 348 NLRB 1056, 1057 (2006). Any lack of evidence in the record is construed against the party asserting supervisory status. Elmhurst Extended Care Facilities, 329 NLRB 535, 536 fn. 8 (1999).

EFFECTIVELY RECOMMEND HIRING

The Employer does not contend that the ACTLs hire employees, but does contend that they effectively recommend hiring. Based on the evidence in the record, I find that the Employer has failed to establish that the ACTLs effectively recommend hiring.

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

authority. *Training School at Vineland*, 332 NLRB 1412, 1417 (2000); *North General Hospital*, 314 NLRB 14, 16 (1994).

The Employer asserts that ACTLs participate in interviews and effectively recommend the hiring of activity specialists and childcare workers. The record fails to disclose whether ACTLs have a role in reviewing applications for employment and whether all applicants are granted an interview. With regard to the hiring of the activity specialists during the reorganization process, the record does not conclusively disclose that the ACTLs' recommendations directly resulted in the individuals being hired. The CTLs who testified about certain instances wherein the ACTLs made recommendations to hire, also summarily testified that the ACTLs' recommendations were followed. The record fails to establish that the recommended action was taken with no independent investigation by superiors. *ITT Corp.*, 265 NLRB at 1481. Rather, the record establishes that the assistant executive director, the residential treatment team leader, and the CTL, who is the ultimate decision maker, also participated in the interviews. The Board has found that where an admitted supervisor also participates in the interview process, it cannot be said that employees whose status is at issue have authority to effectively recommend hiring within the meaning of Section 2(11). *Ryder Truck Rental*, 326 NLRB 1386, 1387-1388, fn. 9 (1998).

There is no record testimony in the instant matter regarding a situation where the ACTL's recommendation conflicted with the CTLs. Thus, it is unknown what would happen in those circumstances. Any lack of evidence in the record is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 fn. 8 (1999). Purely conclusory evidence is not sufficient to establish supervisory status. See *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006).

The record testimony regarding the remaining instances in which an ACTL participated in the hiring process for childcare workers, also involved the initial vetting of the candidate for hire by the CTL, or the CTL's familiarity with the candidate, prior to the time the ACTL conducted the interview. CTL Day testified that ACTL Bell interviewed a candidate for a childcare worker opening, who had previously worked for the Employer, and recommended to Day that the individual be hired. Day testified that he left it up to Bell as to whether the individual would be hired and that he accepted Bell's recommendation. Day also testified, however, that he had previously worked with the applicant at the Employer's facility and was familiar with his work performance. If Day did not think that the applicant was an acceptable candidate, it is unlikely that he would have arranged for Bell to conduct an interview with him. In addition, CTL Day, not ACTL Bell, was responsible for completing the paperwork with regard to the hiring of the applicant and submitting it to human resources.

CTL Horkan testified that she interviewed applicants for a childcare worker position and determined that two of them were "good fits" for the unit. She subsequently asked them to return so that ACTL Mills could interview them and conduct an observation. In the instant matter, after the vetting process, Mills conducted the interview with questions that were reviewed by, or suggested by, Horkan and recommended that they be hired. Similar to the situation in which CTL Day was familiar with the former employee who applied for a childcare worker opening, CTL Horkan had already determined that the applicants were "good fits" at the time the ACTL conducted the interviews. Similarly, in *Tree-Free Fiber Co.*, 328 NLRB 389, 391 (1999), the team leaders did not even consider an applicant until that person passed two levels of evaluation by the core hiring team--the review of the application and the initial interview--and was recommended for hire. Thereafter, management "turn(ed) that applicant over

to the team leaders...to find out whether or not they thought that they would make a good employee to work on their teams.” The Board found that team leaders did not possess the authority to effectively recommend hiring under these circumstances. Further, the Board has found that compatibility recommendations by team leaders are insufficient to support a finding of hiring authority within the meaning of Section 2(11). *Anamag*, 284 NLRB 621, 623 (1987). Thus, the fact that the CTLs sought confirmation from the ACTLs that the candidates were “good fits” for the unit is insufficient evidence that the ACTLs possess the authority to effectively recommend hiring.

With regard to the observations by ACTLs of candidates for childcare worker positions, the record reveals that three of the six¹⁷ ACTLs observe the candidates’ interactions with the children for a few hours and make recommendations to CTLs as to whether an individual should be offered employment. The candidates are only invited back for an “observation” if the CTL has already determined that they are a “good fit” for the unit. All of the record testimony involved observations where the ACTL made a positive recommendation, but only after a successful interview conducted by the CTL. There is no record testimony involving an instance where the ACTL recommended, based on an observation, that a candidate not be hired. Further, the only record testimony consists of conclusory testimony by CTL Horkan that if an ACTL made a negative recommendation after conducting an observation, she would seriously consider this input. This conclusory and hypothetical evidence is insufficient to establish supervisory status. *Golden Crest Healthcare Center*, supra. The lack of record evidence is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities*, supra. Accordingly, the record evidence is insufficient to conclude that the ACTLs effectively recommend hiring based on observations made during the hiring process.

¹⁷ There was no testimony regarding Bell, Kessler or Burgess performing observations.

The Employer, in its brief, relies on W. Horace Williams Co., 130 NLRB 223 (1961). I find this case inapposite. The Board in that case found a carpenter foreman to be a supervisor because the record revealed that upon the hiring of additional carpenters, he would have the authority to hire and discharge them. In addition, he possessed the authority to discharge laborers assigned to work with him. In contrast, the record in the instant case does not demonstrate that the ACTLs have the authority to hire or fire employees.

Based on the above and record evidence as whole, I conclude that the Employer has failed to establish that the ACTLs effectively recommend hiring.

EFFECTIVELY RECOMMEND DISCIPLINE

It is the Employer's position that the ACTLs effectively recommend discipline. The record discloses only one instance since the creation of the ACTL position in April 2012, where an ACTL (Bell) recommended to his CTL (Day) that it be "documented" that an employee continued to use his cell phone during work hours after the ACTL requested he put it away. The record fails to demonstrate that Bell made a specific recommendation for disciplinary action. A request to document an incident could mean to document that an employee was verbally warned, or to issue a written warning, or to add it to the employee's supervision form. Not all of these "documentations" end up in the employee's personnel file. CTL Day testified that he decided to address the issue in the employee's supervision form which he, not the ACTL, completed. The supervision form is not part of the record and supervision forms are not part of the employee's personnel file kept in human resources. There is no record evidence linking the employee's supervision form to further disciplinary action. Moreover, even if I were to determine that this incident constituted an effective recommendation of discipline, it is the only instance in which any of the six ACTLs recommended such action during an 11-month period. Based on the

record evidence, I find that Bell's recommendation is ambiguous and is insufficient to establish that the ACTLs effectively recommend discipline.¹⁸

While CTL Day stated that the Employer has a progressive disciplinary policy, it is unclear whether the Employer has a written progressive discipline policy and there is no evidence in the record demonstrating how the progressive discipline system works. Specifically, there is no evidence of an employee receiving a written memo, after having received a verbal warning and a supervision form. Concerning the use of supervision forms, the record contains conflicting testimony as to whether the supervision forms are part of the Employer's progressive discipline policy, or are documented communications between the CTL or ACTL and the employee regarding the Employer's best practices, the employee's compliance with training requirements, or the employee's progress and recommended goals. In addition, the documentary evidence in the record establishes that only two of the six ACTLs have completed supervision forms, and one of them just began doing so in February 2013.

The record establishes that issues involving employee tardiness are addressed by the CTL in documents presented to the employees, separate from the supervision forms. ACTLs have been told by CTLs to reference instances involving timeliness in the supervision form. The record discloses that references to timeliness appear in the "Areas of Growth" section of the form. The supervision forms in evidence contain no reference to discipline or potential discipline. ACTLs are not responsible for monitoring the Employer's timekeeping system. Inasmuch as the record evidence regarding the issuance of supervision forms as part of the Employer's disciplinary policy is in conflict or otherwise inconclusive, I find that the completion

¹⁸ In *Shaw, Inc.*, 350 NLRB 354 (2007), the Board declined to find supervisory status in circumstances where the putative supervisor participated in the decision to suspend two employees for a disciplinary violation but there was no other evidence of his exercise of disciplinary authority. The Board held that, "this isolated incident—the only instance on this record in which any foreman exercised such authority—is insufficient to establish that the foremen were statutory supervisors." Id. at 356.

of supervision forms is insufficient to establish that ACTLs effectively recommending discipline. See Phelps Community Medical Center, 295 NLRB 486, 490 (1989).

ACTL Selman testified that he was told that he can speak to childcare workers regarding inappropriate behavior when interacting with a child.¹⁹ He also testified that his role is to guide, correct and train childcare workers. The Board has held that verbal warnings, coachings and reprimands are only forms of discipline if they lay a foundation for future disciplinary action against the employee. See Oak Park Nursing Care Center, 351 NLRB 27, 28 (2007); Promedica Health Systems, 343 NLRB 1351, 1351 (2004), enfd. in pertinent part 206 Fed. Appx. 405 (6th Cir. 2006), cert denied 127 S.Ct. 2033 (2007); Progressive Transportation Services, 340 NLRB 1044, 1046 fn. 7 (2003). The warnings, coachings and reprimands must also be the basis of later personnel action without independent investigation or review by supervisors. Phelps Community Medical Center, 295 NLRB 486, 490 (1989), quoting Passavant Health Center, 284 NLRB 887, 888-889 (1987).

In Ken-Crest Services, 335 NLRB 777, 778 (2001), the Board found that the employer had failed to establish that the program managers were statutory supervisors because they could issue oral warnings, in part, because there were no written warnings in evidence that referred back to previous verbal warnings issued by the putative supervisors. Likewise, there is no specific record evidence in the instant case which demonstrates that a written warning or corrective action references previously-issued verbal warnings or supervision forms issued by an ACTL. Based on the record evidence in the instant case, I conclude that the Employer has failed to establish that the counselings or the completion of supervision forms by the ACTLs lay the foundation for future discipline.

¹⁹ The record does not reflect who told Selman he had this authority.

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

ASSIGN AND RESPONSIBLY DIRECT WORK

I find that the Employer has failed to meet its burden in demonstrating that ACTLs exercise independent judgment in assigning work to the childcare workers and activity specialists or that ACTLs responsibly direct employees.

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

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

Finally, the Board has stated that in order to exercise independent judgment, the direction “must be independent [free from the control of others], it must involve a judgment [forming an opinion or evaluation by discerning and comparing data], and the judgment must involve a degree of discretion that rises above the ‘routine or clerical.’” *Oakwood Healthcare, Inc.*, supra, at 693.

The Employer argues that ACTLs exercise independent judgment in assigning work to employees. Specifically, the Employer argues in its brief that ACTLs assign childcare workers and activity specialists to perform certain tasks that could include handling the residents’ showers, overseeing dinner, engaging residents in a recreational activity or taking them on a trip out of the facility. The Employer also argues in its brief that the ACTLs use independent judgment in determining whether a certain staff members’ presence would be unsafe or who should handle a “1:1” interaction with a child who is having a difficult day.

The ACTLs do not assign childcare workers and activity specialists to their unit, set their schedules or determine their overall duties. The ACTLs work alongside the childcare workers and activity specialists performing the same work. The ACTLs may instruct the childcare workers and activity specialists to perform discrete tasks, such as, assisting with showers, overseeing dinner or an activity. The ACTLs occasionally switch tasks among employees assigned to their unit in order to accomplish the daily tasks, but the record does not disclose the frequency with which that occurs. Moreover, the record is largely devoid of testimony concerning the factors, if any, taken into account by the ACTLs in reallocating work in such circumstances. The ACTLs do not have the authority to mandate that employees come to work when the Employer is short-staffed.

In *Ten Broeck Commons*, 320 NLRB 806 (1996), the Board found that licensed practical nurses, who directed certified nursing assistants to attend to a patient's needs or to a job that was not properly done, were not supervisors. The Board found that the LPNs' direction did not involve the use of independent judgment but rather, was routine in nature because the certified nursing assistants performed the same care, in the same manner, for the same people. The Board stated that to some degree, the greater skill and experience of the LPN may be involved as the LPN may more quickly recognize a situation that needs immediate attention. In other situations, the problems are usually quite obvious (resident is wet or needs to be dressed, etc.).

The facts in the instant case are similar to those in *Ten Broeck*, supra, in that the duties of the childcare workers and activity specialists, such as cleaning residents' rooms, changing soiled clothes and linens, or assisting residents with showers, are repetitive and routine in nature and the assignment and direction of their work by the ACTLs does not involve the exercise of independent judgment. The occasional switching of tasks by the ACTLs does not implicate the authority to "assign" as that term is described in *Oakwood Healthcare* because the activity does not constitute the "designation of significant overall duties ... to an employee." Id. at 689. Sporadic rotation of different tasks by the ACTLs more closely resembles an "ad hoc instruction that the employee perform a discrete task" during the shift and as such is insufficient to confer supervisory status on the lead persons pursuant to Section 2(11) under *Oakwood Healthcare*. Id. See also *Croft Metals, Inc.*, 348 NLRB 717, 722 (2006).

The ACTLs do not provide guidance regarding prioritization of work to childcare workers because there is a set schedule that is usually followed each day, i.e., assist with morning hygiene, serve breakfast, get children ready for school, serve lunch, participate in recreational activities, serve dinner, assist with showers, and get children ready for bed. The

Employer argues in its brief that an ACTL can decide what time a childcare worker accompanies children for recess while the other childcare worker is overseeing lunch. Choosing the order in which an employee will perform discrete tasks within their assignments is not indicative of the authority to assign work as contemplated by the Board. See Oakwood Healthcare Inc., supra, at 689.

All childcare workers are advocates for one or two children and assigned to perform weekly “1:1” with them. In addition to the weekly 1:1, CTL Day testified that an ACTL may instruct a childcare worker to conduct a 1:1 with a child who is having a difficult day and, in doing so, the ACTL would consider the staff members’ relationship with the child and their intervention styles and skills, which are common knowledge among the staff. The Board has found that work assignments based on assessment of employees’ skills, when the differences in skills are well known, are routine functions and do not require the exercise of independent judgment. See Providence Hospital, 320 NLRB 717, 722 (1996); Clark Machine Corporation, 308 NLRB 555, 556 (1992). Moreover, the record does not contain specific details as to the particular intervention style or skill the ACTL assesses or how they are contemplated in determining who will perform the 1:1 with a child who is having a difficult day. Avante at Wilson, Inc., 348 NLRB 1056, 1057 (2006). Conclusionary testimony is insufficient to establish independent judgment. Golden Crest Healthcare Center, 348 NLRB 727 (2006).

Concerning the situation in which an ACTL decided not to assign an employee who was filling in from another unit to go to the gym with three or four children because it would have created an unsafe situation simply due to the employee’s unfamiliarity with the children, I find that that such a decision is routine and does not require the exercise of independent judgment.

Based on the foregoing, I find that the Employer has failed to establish that ACTLs use independent judgment when assigning tasks.

The ACTLs approve trips that childcare workers and activity specialists request to take with the children, and can determine if a child will go on a trip or if a trip will be cancelled. However, the record fails to conclusively disclose the circumstances which cause an ACTL to cancel a trip or approve an unscheduled trip. On one occasion, discussed above, the ACTL left it to the childcare worker's discretion whether that individual felt comfortable taking the child with him on the trip. The record evidence is insufficient to establish that ACTLs make assignments that are both tailored to the child's needs and a particular employee's skill sets. See Oakwood Healthcare, Inc., supra at 695. Accordingly, I find that the record evidence is insufficient to conclude that the ACTLs make assignments using independent judgment.

The Board has held that for direction to be responsible, the person performing the oversight must be held accountable for the actions of others. "Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct work and the authority to take corrective action, if necessary....and a prospect of adverse consequences for the putative supervisor if he/she does not take these steps." Oakwood Healthcare, Inc., supra, at 692. There is no record evidence that ACTLs are held accountable for the childcare workers' or activity specialists' work performance. Accordingly, I find that ACTLs do not possess the authority to responsibly direct.

SECONDARY INDICIA

The record discloses two instances in which an ACTL provided a CTL with an assessment of a probationary employee's work performance and a recommendation concerning whether the employee had successfully completed his/her probationary period. However, the

CTL involved in both instances testified that she makes the final decision as to whether an employee passes the probationary period.

The Board, in Elmhurst Extended Care Facilities, 329 NLRB 535, 536 (1999), noted that Section 2(11) does not include the authority to “evaluate” in its enumeration of supervisory functions. Thus, when an evaluation does not, by itself, affect the wages and/or job status of the employee being evaluated, the individual performing such an evaluation will not be found to be performing a statutory supervisory function. See also Ten Broeck Commons, 320 NLRB 806, 813 (1996).

In Coventry Health Center, 332 NLRB 52 (2000), the Board found that the charge nurses role in completing probationary evaluations did not establish that they possess supervisory authority. The Board held that the record contained no evidence that the charges nurses’ role involved “any more than the more experienced employee, i.e., the charge nurse, assessing (or expressing an opinion as to) the aide's knowledge of the requirements of the job; the quality and productivity of the aide's work; the dependability or degree to which an aide can be relied upon to complete a job; the aide's initiative in seeking out new assignments and in assuming new responsibilities; the aide's independence in performing his or her work; and the degree to which the aide follows the Employer's rules, including attendance.” *Id.* at 53-54. Further, the Board noted that in evaluating employees the essential question is whether the putative supervisor effectively recommends a reward or other personnel action concerning other employees. If the answer to this question is that they do not, they are not statutory supervisors. *Id.* at 54. See also Elmhurst Extended Care, *supra*, at 536, fn. 8.

There is no evidence in the instant case that the ACTLs effectively recommend rewards or other personnel action. Further, in the instant case, there is no evidence that any probationary

employee was terminated or that any employee's probationary period was extended as a result of the ACTL's input. See *Harborside Healthcare*, 330 NLRB 1334, 1335 (2000). Even assuming, based on the one instance in the record, that there may be a collaborative effort ("team decision") between the ACTL and the CTL in assessing whether an employee should pass the probationary period, it is clear that the CTL is the final decision maker. Thus, the record fails to demonstrate that the ACTL's recommended action was taken with no independent investigation or determination by superiors, as opposed to simply that the recommendation ultimately was followed. *ITT Corp.*, 265 NLRB at 1481; *Wesco Electrical Co.*, 232 NLRB 479 (1982).

Finally, it is well settled that secondary indicia, i.e., indicators of supervisory status not specifically enumerated in Section 2(11), are considered only if there are one or more 2(11) indicia present. See, e.g., *Starwood Hotels & Resorts Worldwide, Inc., d/b/a Sheraton Universal Hotel*, 350 NLRB 1114, 1118 (2007); *Central Plumbing Specialties*, 337 NLRB 973, 975 (2002). Here, because there is insufficient evidence of any of the statutory 2(11) criteria, the evidence of secondary indicia is irrelevant.

Based on the above and Board case law, I find that the Employer has failed to meet its burden of showing that the ACTLs are supervisors within the definition of Section 2(11) of the Act and I shall include the ACTLs in the bargaining unit(s) found appropriate herein.²⁰

PART-TIME EMPLOYEES

The parties stipulated that all part-time employees should be included in the bargaining unit(s) found appropriate herein. In *Arlington Masonry Supply, Inc.*, 339 NLRB 817 (2003), the Board described its policy for determining part-time eligibility:

²⁰ With regard to the Employer's contention that ACTLs have the authority to adjust grievances, the sole record evidence consists of an employee's supposition that an ACTL could address an issue regarding tardiness if the employee had a valid excuse for being late. There is no record evidence that the ACTLs possess the authority to adjust grievances or have actually done so. The lack of evidence in the record is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 fn. 8 (1999).

The test to determine whether one is a regular part-time employee versus a casual employee “takes into consideration such factors as regularity and continuity of employment, tenure of employment, similarity of work duties, and similarity of wages, benefits, and other working conditions.” Muncie Newspapers, Inc., 246 NLRB 1088, 1089 (1979). “In short, the individual’s relationship to the job must be examined to determine whether the employee performs unit work with sufficient regularity to demonstrate a community of interest with remaining employees in the bargaining unit.” Pat’s Blue Ribbons, 286 NLRB 918 (1987).

The standard frequently used by the Board to determine the regularity of part-time employment is to examine whether the employee worked an average of 4 or more hours a week in the calendar quarter preceding the eligibility date. See Arlington Masonry Supply, supra at 819, citing Davison-Paxon Co., 185 NLRB 21 (1970). Accordingly, I shall include all regular part-time employees in the bargaining unit(s) found appropriate herein.

DIRECTION OF ELECTION

I find that the following employees constitute appropriate voting groups for collective bargaining within the meaning of Section 9(b) of the Act:

Voting Group A

All full-time and regular part-time professional employees employed at the Astor Residential Treatment Facility/Center including clinical specialists, crisis prevention specialists, expressive art therapist, registered nurses, social workers and transitional coordinator; excluding all non-professional employees, per diem employees, central administration/business office administrative staff, managers, on-call supervisors, childcare supervisors – nights, confidential employees, all employees working solely at the Astor Learning Center currently represented for purposes of collective-bargaining, and all guards and supervisors as defined in the Act.

Voting Group B

All non-professional full-time and regular part-time employees employed at the Astor Residential Treatment Facility/Center including: activity specialists, administrative assistants, assistant childcare supervisor-nights, assistant childcare team leaders, childcare workers, childcare workers I, II and III, childcare workers I, II and III nights, cooks, family assistants, health clinic assistants, housekeepers, housekeepers II, intake coordinator (admissions), licensed practical nurses, maintenance specialist, maintenance

worker, maintenance worker II, master childcare workers, Medicaid compliance analyst, receptionist, recreation specialists, residential family advocates, senior therapeutic support counselor (senior support worker), senior childcare workers I, II and III, senior childcare workers I, II and III nights, spiritual development coordinators, and therapeutic support counselors (support worker); excluding all professional employees, per diem employees, central administration/business office administrative staff, managers, on-call supervisors and childcare supervisors – nights, confidential employees, all employees working solely at the Astor Learning Center currently represented for purposes of collective-bargaining, and all guards and supervisors as defined in the Act.

There are approximately 103 employees in the unit.

The employees in Voting Group A, the professional employees, will be asked the following two questions on their ballots:

1. Do you desire to be included in the same unit as non-professional employees employed by the Employer for the purposes of collective bargaining?
2. Do you desire to be represented for the purposes of collective bargaining by ***ASTOR RESIDENTIAL STAFF ASSOCIATION, NYSUT, NEA, AFT, AFL-CIO?***

If a majority of the professional employees in Voting Group A vote yes to the first question, indicating their desire to be included in a unit with non-professional employees, they will be so included. Their vote on the second question will then be counted with the votes of the non-professional employees in Voting Group B to decide the representative for the combined bargaining unit. If, on the other hand, a majority of the professional employees in Voting Group B do not vote for inclusion, they will not be included with the non-professional employees and their votes on the second question will be separately counted to decide whether or not they wish to be represented by the Petitioner in a separate professional unit.

The ultimate determination as to the appropriate unit(s) is based upon the result of the election. However, I make the following findings with regard to the appropriate unit:

1. If a majority of the professional employees in Voting Group A vote for inclusion in a unit with the non-professional employees in Voting Group B, I find that the following employees will constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time clinical specialists, crisis prevention specialists, expressive arts therapist, registered nurses, social workers and transitional coordinator, activity specialists, administrative assistants, assistant childcare supervisors – nights, assistant childcare team leaders, childcare workers, childcare workers I, II and III, childcare workers I, II and III nights, cooks, family assistants, health clinic assistants, housekeepers, housekeepers II, intake coordinator (admissions), licensed practical nurses, maintenance specialist, maintenance worker, maintenance worker II, master childcare workers, Medicaid compliance analyst, receptionist, recreation specialists, residential family advocates, senior therapeutic support counselor (senior support worker), senior childcare workers I, II and III, senior childcare workers I, II and III nights, spiritual development coordinators, and therapeutic support counselors (support worker); excluding all per diem employees, central administration/business office administrative staff, managers, on-call supervisors and childcare supervisors – nights, confidential employees, all employees working solely at the Astor Learning Center currently represented for purposes of collective-bargaining, and all guards and supervisors as defined in the Act.

An election by secret ballot shall be conducted by the undersigned among the employees in the voting groups found appropriate, as described above, at the time and place set forth in the notices of election to be issued subsequently, subject to the Board's Rules and Regulations.

A. Voting Eligibility

Eligible to vote in the election are those in the Voting Groups who were employed during the payroll period immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who

have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

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

B. Employer to Submit List of Eligible Voters

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

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

To be timely filed, the list must be received in the Regional Office on or before **APRIL 10, 2013**. No extension of time to file this list will be granted except in extraordinary

circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website www.nlr.gov,²¹ by mail, by hand or courier delivery, or by facsimile transmission at (716) 551-4972. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

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

C. Notice of Posting Obligation

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

²¹ To file the eligibility list electronically, go to www.nlr.gov and select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party. Further guidance for electronic filing can be found under the E-Gov heading on the Agency's website. Since the list will be made available to all parties to the election, please furnish a total of 2 copies, unless the list is submitted by facsimile or electronic filing, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington, DC by 5 p.m. EDT **APRIL 17, 2013**.

The request may be filed electronically through the Agency's web site, www.nlr.gov,²² but may not be filed by facsimile.

DATED at Buffalo, New York this 3rd day of April, 2013.

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

²² Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.