

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 24

In the Matter of:

SAINT LUKE'S MEMORIAL HOSPITAL, INC.,  
D/B/A HOSPITAL SAN LUCAS PONCE,

Employer,

and

UNIDAD LABORAL DE ENFERMERAS (OS) Y  
EMPLEADOS DE LA SALUD (ULEES)

Petitioner.

Case No. 24-RC-099271

**REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION  
AND DIRECTION OF ELECTION  
SAINT LUKE'S MEMORIAL HOSPITAL**

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OF REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION**

TO THE HONORABLE BOARD:

COMES NOW, SAINT LUKE'S MEMORIAL HOSPITAL, INC., D/B/A HOSPITAL EPISCOPAL SAN LUCAS PONCE (hereinafter "**Saint Luke's**" or the "**Hospital**"), through the undersigned counsel, and pursuant to Section 102.67 of this Honorable Board's Rules and Regulations, 29 C.F.R. Part 102, Section 102.67, very respectfully requests review of the Decision and Direction of Election (hereinafter the "**Decision**") issued by the Regional Director for Region 24 (hereinafter the "**Regional Director**") of the National Labor Relations Board (hereinafter referred to as the "**Board**" or "**NLRB**") on May 31, 2013.

**I. INTRODUCTION**

The Formal Hearings in the case of caption were held at Region 24 of the National Labor Relations Board, on March 14, 15, 19, 21, 22, 28, and April 1, 2, 3, 4, 5, 8, 2013 (hereinafter the "**Hearing**"), before a Hearing Officer. As a preliminary matter, the Hospital objected to the

determination made by the Hearing Officer limiting the Hospital to only make reference to the offer of proof presented in Case No. 24-RC-099415 as to the issue of a bar to an election in contravention to procedural and due process requirements. Accordingly, the Hospital requested the reopening of the Representation Hearing in order to be able to present evidence in support of its contention that there is a bar to the election. This procedural error impeded the adequate analysis of the Motion to Consolidate Case No. 24-RC-099271 with Case No. 24-RC-099415, which was denied by the Hearing Officer and confirmed by the Regional Director.

That being said, there are two principal questions presented in the case of caption; to wit, (1) whether there is a bar to the election; and (2) whether the Registered Nurses (hereinafter the “RNs” or “RN” for the singular) are Section 2(11) supervisors.

First, the Regional Director erroneously determined that the elections can be held in the case of caption considering the current status quo that has existed for almost four (4) years at the Hospital pursuant to a determination made by her. Specifically, the Regional Director for Region 24 of the NLRB, blocked and held in abeyance the processing of a Petition filed on October 10, 2008, in Case No. 24-RD-000520, finding that proper “laboratory conditions” do not exist to hold the election in that case. It is the Hospital’s position that the election in the case of caption should not be conducted considering the status quo as determined by the Regional Director almost four (4) years ago when she found that there are no laboratory conditions to hold an election.

Second, the Regional Director erroneously concluded that the RNs can make up an appropriate bargaining unit because they allegedly did not meet the definition of supervisors under Section 2(11), 29 U.S.C. § 152(11). Under the National Labor Relations Act (hereinafter the “Act”), employees that are deemed to be supervisors are excluded from the coverage of the

Act. Thus, because during the Hearing the Hospital proved by a preponderance of the evidence that the Hospital RNs are Section 2(11) supervisors, as they (1) have the authority to engage in or effectively recommend assignments, rewards, discipline, transfers, among others Section 2(11) duties; (2) their exercise of such authority or recommendation requires the use of independent judgment; and (3) the authority is in the interest of the Hospital, they cannot be represented by the Petitioner, thus the Petition must be dismissed.

## **II. STATEMENT OF THE ISSUES PRESENTED**

With the present Request for Review the Hospital will show that:

1. The conduct of the Hearing Officer and her rulings made in connection with the proceeding has resulted in prejudicial error and deprivation of the Hospital's rights;
2. The Regional Director's Decision and Direction of Election raises substantial questions of law and policy because its departure from officially reported Board precedent;
3. The Regional Director's decisions on substantial factual and legal issues are clearly erroneous and such error prejudicially affects the right of the Hospital; and,
4. There are immediate and compelling reasons for reconsideration of important Rule and Policies of this Honorable Board.

## **III. SUMMARY OF PROCEEDINGS**

During the Formal Hearing in this case, the Hospital presented as its witnesses Mr. Calvine Túa, Director of Human Resources; Mrs. Iris Quesada Vergne, Manager of the Cardiovascular Intensive Care Unit and Multidisciplinary Intensive Care Unit; Mrs. Delia Rodríguez, Clinical Supervisor at the Department of Medicine D; Mrs. Carmen Echevarría, Clinical Supervisor of the Neonatal Intensive Care Unit (NICU) and the Pediatric Intensive Care

Unit (PICU); Mrs. Aurea Martínez, Director of Nursing; and Mr. Juan A. Segarra<sup>1</sup>, General Supervisor. The Hospital also presented into evidence Employer Exhibits 1-37.<sup>2</sup> On the other hand, the Petitioner did not present any witnesses, and only utilized twenty (20) exhibits in support of its position.

#### IV. FACTS

##### A. General Facts of the Hospital

The Hospital is an Episcopalian tertiary hospital with a religious basis located in Ponce, Puerto Rico, offering acute services, specifically intensive care units for adults, pediatrics, and newborns. Hearing Transcript (hereinafter “**Hearing TR**”), pp. 41:18-25. The Hospital also offers neurosurgery services, heart surgery and has a cardiovascular unit. *Id.* The Hospital has 427 beds. *Id.* It is divided into four buildings designated A, B, C, and the Cardiovascular Tower. Hearing TR, pp. 42:9-12. The Hospital’s Nursing Department, operates 24 hours a day, 7 days a week, with each day divided into five shifts—from 7:00 a.m. to 3:00 p.m.; from 3:00 p.m. to 11:00 p.m.; from 11:00 p.m. to 7:00 a.m.; from 7:00 a.m. to 7:00 p.m.; and from 7:00 p.m. to 7:00 a.m. Hearing TR, pp. 889:14-17; 999:2-6.

The Hospital is serviced by approximately 350 physicians. Hearing TR, pp. 42:11-12. The Hospital employs the services of 9 General Supervisors, 448 Registered Nurses (hereinafter “RNs”), 139 Licensed Practical Nurses (hereinafter “LPNs”), 36 Surgery Technicians, 25 Escorts, and 25 Clinical Assistants. Employer Exhibit 7.

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<sup>1</sup> Mr. Segarra was wrongfully designated throughout the Transcript as Mr. Cegara.

<sup>2</sup> Employer Exhibit 25 was withdrawn and Employer Id. 11 was not submitted into evidence.

**B. Bar to the Election**

On October 10, 2008, a Petition for election was filed in Case No. 24-RD-000520, for the following units of employees:

- Included:      Unit A:      All Registered Nurses employed by the employer in certain areas of the Cardiovascular Tower at the Hospital located in Ponce, PR.
- Unit B:      All Licensed Practical Nurses and Technicians employed by the employer in certain areas of the Cardiovascular Tower at the Hospital located in Ponce, PR.

After receiving the Petition in Case No. 24-RD-000520, the Regional Director informed the Hospital and the Unidad Laboral de Enfermeras(os) y Empleados de la Salud (ULEES) (hereinafter referred to as “**the Petitioner**” or “**the Union**”), in 2009, that, she would hold in abeyance the Petition because adequate “laboratory conditions” were not present to hold a valid election. The Regional Director, to this date has not lifted the stay on that election and Case No. 24-RD-000520 still remains open before the Region. As such, the election in Case No. 24-RD-000520 has not been held, even though the Union no longer holds a majority support in the aforementioned bargaining units.

On February 27, 2013, the Union filed a Petition for Certification in the case of caption, for which during the Formal Hearing the bargaining unit description was stipulated as follows:

- Included:      All full time and regular part time registered nurses employed by the Employer at its’ Hospital facility in Ponce, Puerto Rico.
- Excluded:      All other employees, office clerical employees, confidential employees, guards, supervisors, professional employees as defined in the Act, and those employees located in the cardiovascular department who are represented by the petitioner at the present time

Hearing TR, pp. 289:19-23; 291:20-25; see also, Board Exhibit 1.

It is important to note that the parties that were involved in Case No. 24-RD-000520 and now in the case of caption are one and the same—the Employer, Hospital Episcopal San Lucas Ponce and the Union, the ULEES.

While conducting the Hearing, the Hearing Officer made several reversible procedural errors. Without an objection from the Petitioner, the Hearing Officer *motu proprio* determined that rather than allowing the Hospital a full opportunity to present evidence to support its contention that there is a bar to the election, by calling, examining, and cross-examining witnesses, she stated that there was ample arguments and offer of proof on the record in Case No. 24-RC-099415 and that she would not allow the Hospital to present its case. Hearing TR, pp. 21:5-14. This is in direct contradiction with the fact that the case of caption was not consolidated with Case No. 24-RC-099415. Therefore, the record in the case of caption was left completely devoid of any arguments, evidence, or proof as to the bar to an election notwithstanding the Hospital being ready and willing to present the same. Thereby, the record in this case is limited to a mere reference that the counsel for the Hospital made an offer of proof in Case No. 24-RC-099415, making the record in this case incomplete and flawed.

This important issue was basically brushed aside by the Regional Director, by stating in a footnote “this contention lacks merit for the same reasons that the Region concluded in 24-RC-099415, a Petition filed by the Union to represent the hospital’s licensed practical nurses (LPNs).” Decision, p. 1, footnote #2, a.

**C. Registered Nurses are Section 2(11) Supervisors**

The Nursing Department is supervised by the Director of Nursing, Mrs. Aurea Martínez. Hearing TR, pp. 49:17-50:6. There is a Manager for both the Multidisciplinary Intensive Care Unit and Cardiovascular Intensive Care Unit, Mrs. Iris Quesada. Hearing TR, pp. 238:7-13.

This Unit Manager normally works a schedule of Monday to Friday, 7:00 am to 3:30 pm. Hearing TR, pp. 240:9-11. There are Clinical Supervisors for each unit in the Hospital. Hearing TR, pp. 240:12-15. The Clinical Supervisors have a normal work schedule of Monday to Friday, 7:00 am to 3:30 pm. Hearing TR, pp. 240:21-25. **Neither the Unit Manager nor the Clinical Supervisors are present at the Hospital during the 3:00 pm to 11:00 pm or the 11:00 pm to 7:00 am shifts or any of the shifts on Saturday or Sunday.** Hearing TR, pp. 241:14-23. Also the Unit Manager and the Clinical Supervisors of the different units have to attend approximately three (3) administrative meetings per week while they are at the Hospital. Hearing TR, pp. 242:6-24. In addition, the Hospital is overseen by General Supervisors. Hearing TR, pp. 907:18-19. The General Supervisors are divided into three (3) daily shifts—7:00 am to 3:30 pm, 3:00 pm to 11:00 pm and 11:00 pm to 7:00 am. Hearing TR, pp. 910:7-9. It is uncontested that the Director of Nursing, the General Supervisors, the Unit Manager and the Clinical Supervisors are Section 2(11) supervisors.

Notwithstanding the Unit Manager and the Clinical Supervisors, whether they are present at the Hospital or not, **each shift is directly supervised by an In Charge RN.** Hearing TR, pp. 57:9-11; 553:1-10; 675:16-23; 924:3-7; 964:19-22. Furthermore, even though, there is a General Supervisor at the Hospital during every shift their responsibility does not include running each clinical unit, because it is the In Charge RNs who directly run the clinical units/departments. Hearing TR, 921:3-6; 924:3-4. Further, usually the interaction between the General Supervisors and the In Charge RNs is limited to a three (3) to five (5) minute meeting where the General Supervisors verify that the information given to them in the shift summaries is correct. Hearing TR, pp. 921:3-12.

The importance of an In Charge RN is to give continuity to the care of the patients, supervise the care received by the patients, to have a continuous control of the processes and the conduct of the rest of the personnel in the Hospital, in each unit and during all shifts of work. Without the In Charge RN, the Hospital would not have an efficient control of the care received by patients or the ability to supervise the entire Hospital. Hearing TR, pp. 132:15-21; 623:4-8; 624:15-24; 625:3-9; 926:9-14. As the person directly supervising the Hospital's units the In Charge RN provides that direct connection between the departments and the upper level managers. Hearing TR, pp. 8-25. In fact, the upper level managers and doctors go directly to the In Charge, as the supervisor of a particular shift, to gain overall information as to a given shift. Id.

**Only RNs can perform the duties of an In Charge.** Hearing TR, pp. 248:6-11; 1016:23-24. During every shift at the Hospital there is an In Charge RN to each department or unit. Hearing TR, pp. 381:18-22; 999:7-9. Each RN rotates to occupy the position of In Charge. Hearing TR, pp. 93:17-24. The Hospital accommodates or rotates the RNs so that they perform the duties of the In Charge at least once a week. Hearing TR, pp. 1028:6-23. This means that all RNs at the Hospital perform at least an eight (8) hour shift as an In Charge once a week. Id. In addition, the RNs who work the twelve (12) hour shifts serve as the In Charge at least once in a biweekly period. Hearing TR, pp. 1029:10-14. In other words, **the RNs perform supervisory duties approximately 20% of the time.**

The In Charge RN has to supervise the personnel on each shift when he/she performs the duties of an In Charge Nurse, including but not limited to the assignment of work based on the condition of patients and capabilities of the staff; supervise the tasks that have been assigned to other personnel; and direct the personnel under his/her supervision, including less skilled

personnel like the LPNs. Hearing TR, pp. 417:16-418:8. In fact, the Job Description, Duties and Responsibilities, for the RNs of the different Hospital departments list as an “Essential Job Duty and Responsibility” that he/she “Effectively directs and supervises staff on each shift as the nurse in charge: (a) Produces job assignments taking into consideration the condition of the patient and staff skills[;] (b) Supervises tasks that are assigned to other staff[;] (c) Effectively directs personnel under his/her supervision (BSN, AND, LPN and technicians)”. Employer Exhibit 24, pp. 5-6; Employer Exhibit 26, pp. 5; Employer Exhibit 29, pp. 9; Employer Exhibit 30, pp. 12; Employer Exhibit 32, pp. 4; Employer Exhibit 34, 7-8; Employer Exhibit 36, pp. 5; Petitioner Exhibit 3, pp. 11; Petitioner Exhibit 4, pp. 11. Not only is “Effectively directs and supervises staff on each shift as the nurse in charge: (a) Produces job assignments taking into consideration the condition of the patient and staff skills[;] (b) Supervises tasks that are assigned to other staff[;] (c) Effectively directs personnel under his/her supervision (BSN, AND, LPN and technicians)” an “essential” duty and responsibility of the RNs but they are evaluated on how well they perform these duties and responsibilities. Employer Exhibit 27, pp. 12; Employer Exhibit 28, pp. 10; Employer Exhibit 31, pp. 13; Employer Exhibit 33, pp. 8; Employer Exhibit 35, pp. 9-10; Employer Exhibit 37, pp. 7; Petitioner Exhibit 5, pp. 13; Petitioner Exhibit 14, pp.7.

The In Charge RN has the responsibility of being the leader of the department. Hearing TR, pp. 961:7-13. The In Charge RN directly supervises the different shifts in each clinical department. Id.; 724:21-725:5; 924:3-7. It is important to note that most of time the only supervisors at the clinical units are the In Charge RNs. Hearing TR, pp. 92:8-14; 724:21-725:5. The Director of Human Resources, Mr. Calvine Túa, estimates that the In Charge RNs are the only supervisors at the clinical units approximately 76% of the time. Id. at 92:8-14. The In Charge RN has the responsibility to oversee the entire function of a particular shift. Hearing TR,

pp. 121:25-122:1; 541:18-544:4. The In Charge RNs are responsible for planning, organizing, and directing the care to patients. Hearing TR, pp. 242:12-20; 248:20-249:11. Because the In Charge RN supervises the department it allows the Clinical Supervisors to comply with their administrative duties. Hearing TR, pp. 961:7-13. Once the In Charge RN's shift is over, he/she has to transfer the shift to the next shift's In Charge RN and advises the next In Charge on the status of the shift. Id.; 301:16-24; 745:14-25. The position of In Charge RN is critical to the Hospital and no clinical unit can function without an In Charge RN. Hearing TR, pp. 1002:23-1003:1.

At the Hospital, the LPNs, Technicians, Escorts, Clinical Assistants (Ward Clerks), and maintenance employees are directly supervised by the In Charge RNs and the Clinical Supervisors. Hearing TR, pp. 74:16-75:4; 119:6-19; 924:3-7; 967:4-968:4; 1000:1-6; 1011:1-7; 1016:23-24. Even other RNs report directly to and are supervised by the In Charge RN. Hearing TR, pp. 95:7-10; 127:20-25; 724:21-725:5; 924:3-7; 1011:1-7.

Furthermore, the In Charge RNs are responsible for the distribution of work to the RNs and LPNs, including the distribution of patients during the shifts and controls the functions that the RNs and LPNs will perform. Hearing TR, pp. 122:7-10; 676:1-9; 967:4-968:4; 1000:21-1001:3; 1004:1-9; 1011:8-14. In other words, the In Charge RN utilize their independent critical judgment in their responsibility assign the RNs and LPNs to particular patients. Hearing TR, pp. 245:8-24; 281:4-23; 298:6-14; 307:15-308:1; 320:4-12; 545:17-25; 844:10-13967:4-968:4; 1000:21-1001:3; Employer Exhibit 18, 19, and 20. For example, if there are 17 patients and 8 nurses in the unit, the In Charge RN has to determine how the work is going to be distributed. Hearing TR, pp. 247:2-20. As an example of the redistribution of patients-nurse, Mrs. Delia Rodríguez, Clinical Supervisor of Medicine D, testified in relation to Employer Exhibit 20 and

the distribution of patients made by the In Charge RN, Ms. Griselle Quiñones, on October 24, 2012. Hearing TR, pp. 616:4-617:14; Employer Exhibit 20. Further, in all the Intensive Care Units, based on an In Charge RN's judgment if there is a patient that needs more intensive or individualized care, then the In Charge RN assigns only that patient to one nurse, as opposed to two patients per nurse. Hearing TR, pp. 678:6-24. This is a clear example of critical **independent judgment**.

The assigning of the LPNs and RNs to the particular patients is made by the In Charge RN regardless of whether a Clinical Supervisor is present during a particular shift. Hearing TR, pp. 299:5-7. In making these determinations regarding assignments of work, the In Charge RNs consider the care that the patients need, the status of the patients, the patient volume, and the facilities that are available. Hearing TR, pp. 124:6-10; 678:6-24; 1000:21-1001:3; 1004:1-9. In other words, the In Charge RNs have to analyze the need for service and care and have the authority to make decisions and manage the LPNs, RNs, the maintenance employees and the rest of the employees in the unit accordingly, demonstrating once again their reliance of independent judgment in exercising their authority. Hearing TR, pp. 125:2-5; 242:12-23; 244:1-9; 678:6-24; 970:3-16; 1004:1-19; 1030:3-21.

As Mrs. Aurea Martínez, the Director of Nursing, testified, the In Charge RN has to prepare the work team for each physician based on the knowledge of each person; because, she knows the skills and knowledge of every nurse in her department; and she then assigns them according to their skills and knowledge. Hearing TR, pp. 1000:24-1001:3. The In Charge RN supervises the performance of the RNs and LPNs and makes sure that they have performed the work assigned and that they have done so correctly. Hearing TR, pp. 967:4-968:4; 1012:21-1013:3. For example as for the In Charge RNs in the Emergency Room, Mrs. Martínez testified

that they are responsible for giving follow-up to the medical orders and making sure that the nurse who has been assigned to that patient follows through with those orders. Hearing TR, pp. 967:4-15. In addition, **the In Charge RN has the authority to reassign a particular nurse if there is another nurse better suited to perform a particular task; for example a nurse who is more capable, more knowledgeable, or better trained in a particular aspect.** Hearing TR, pp. 1012:21-1013:23; 1030:3-21.

As an example, Mrs. Martínez testified that if a nurse has been assigned to a patient and that patient has orders for a Foley catheter and the assigned nurse does not feel certain or is not that well prepared to put that Foley catheter, the In Charge RN will make a reassignment and assign a more capable or better trained nurse in the aspect of putting a Foley catheter. *Id.* Moreover, the In Charge RNs assign the work to the maintenance employees, including determining the order in which their tasks are to be done based on the In Charge's judgment and need of the Hospital. Hearing TR, 122:1-6. Accordingly, the In Charge RNs keep order and organize the departments. Hearing TR, pp. 967:4-968:4.

Furthermore, the In Charge RNs analyze the department situation and the need for assigning overtime. Hearing TR, pp. 302:16-24; 308:8-13; 310:2-9; 676:10-17; 901:6-17; 924:3-7. Based on the situation, the In Charge RN determines whether there is a need for additional staff and recommends the assignment of overtime. Hearing TR, pp. 75:5-25; 317:18-318:4; 676:10-677:23; 902:17-24; 924:3-7. For example, Mr. Túa, Director of Human Resources, testified that there might be a need for assigning overtime if a nurse calls to inform that he/she will be late. In those cases, the In Charge RN determines the need and requests an assignment of overtime to cover the time that the nurse is going to be late. Hearing TR, 77:5-9. Mrs. Quesada, Manager of the Multidisciplinary and Cardiovascular Intensive Care Units, testified that the need

for overtime may arise if there are 7 nurses and 18 patients to be attended and 2 patients have a change in condition that may require additional care. In this case, the In Charge RN determines if an additional nurse is needed for that shift. Hearing TR, pp. 310:2-9. The In Charge RNs also have the authority to request and recommend the use of a nurse on a per diem basis in order to meet the needs of the patients. Hearing TR, pp. 337:16-340:7; 924:3-7. As testified by a General Supervisor, Mr. Juan A. Segarra, the In Charge RN notifies the General Supervisor if there is a need for an assignment of overtime or per diem. However, only if the In Charge is not able to make arrangements regarding overtime or per diem does the General Supervisor, based on his knowledge of the entire Hospital, notifies the In Charge RN regarding an availability in another department. Hearing TR, 924:4-23.

Further, the In Charge RNs determine if it is necessary to transfer any other RN, LPN, Technician, Escort, or Clinical Assistants (Ward Clerks) to another department according to the needs of other departments. Hearing TR, pp. 53:6-17; 302:25-304:3; 943:14-23; 951:3-24; 952:18-953:12; 967:4-968:4; 1011:15-23. **This is based on their own evaluation, judgment, and independent criterion.** *Id.* For example, October 3, 2012 the In Charge RN Mrs. Frances Four assigned Mrs. Yesenia Miranda from the department of Medicine D to Intermediate First Floor. Hearing TR, pp. 605:1-10; 608:18-609:13; see also, Employer Exhibit 18. Once the In Charge RN determines that an employee is going to be transferred to another clinical unit, the employee cannot refuse the transfer, or it is considered insubordination. Hearing TR, pp. 946:1-4; 952:2-17.

The In Charge RN is responsible for coordinating the tests and treatment to be conducted during a shift. Hearing TR, pp. 246:1-23. The In Charge RN plans the services that are going to be offered to the patients, for example, wound care, physical therapy, respiratory therapy, and

other pending services for the patient. Id. The In Charge RN based on his/her independent judgment determines the priority in relation to those services to be received by the patient. Id.; 667:4-9. Moreover, it is the In Charge RN who coordinates the movement of patients to and from the Hospital units. Hearing TR, pp. 254:7-15; 304:14-305:3; 306:13-17; 679:22-680:2. The In Charge RN then orders the staff member to move the patient that he/she has been assigned to another unit. Hearing TR, pp. 306:22-307:3. The In Charge RN also assigns which RN is going to be responsible for the narcotics during the shift. Hearing TR, pp. 351:10-14.

At the Hospital, the RNs take turns attending and actively participating in administrative committee meetings, including the fall committee, the ulcer committee, the ad hoc medication committee, the emergency room committee, intensive care unit committee, with unit managers and clinical supervisors to discuss administrative matters and best-practices. Hearing TR, pp. 271:16-273:14; 275:13-276:19; 592:2-18; 594:11-24; 596:11-19, 900:4-901:3; see also, Employer Exhibits 10, 16 and 17. Moreover, the Unit Manager, Clinical Supervisor, and the In Charge RNs are the only personnel that can procure/request medications such as narcotics. Hearing TR, pp. 347:13-349:19. When making a request and approval for a narcotic, the In Charge RN signs the Requisition for Class II Controlled Substances as supervisors. Hearing TR, pp. 551:13-21; 561:2-7; 622:6-11; see also, Employer Exhibit 12.

Along with the Clinical Supervisors and the Unit Manager, the In Charge RNs oversee the conduct of the employees. Hearing TR, pp. 256:7-23. Throughout the Nursing Department, the In Charge RN is the one who performs the initial investigation in disciplinary actions and makes verbal warnings or initial corrective actions without the intervention of the Human Resources Department. Hearing TR, pp. 55:22-56:14; 108:7-109:7; 256:7-23; 304:4-13; 546:1-10; 583:25-584:21; 586:9-14. In fact, on some occasions because of the recommendations made

by RNs, subordinates have been disciplined and even terminated. Hearing TR, pp. 112:19-25; 344:18-345:10; 346:1-18; see also, Employer Exhibits 5, 6, and 15.

The Director of Human Resources, Mr. Túa, testified that based on the report prepared and recommendation by RN Mr. Leonides Pérez, as a result of an incident involving an altercation between, Billy Santos Feliciano, a LPN, and a patient, Mr. Santos was terminated. Hearing TR, pp. 108:19-112:25; see also, Employer Exhibits 5 and 6.

In addition, due to disciplinary action taken by In Charge RNs negative conduct has been modified. Hearing TR, pp. 262:3-10, see also, Employer Exhibit 8. For example, the Manager of the Multidisciplinary and Cardiovascular Intensive Care Units, Mrs. Quesada, testified that the In Charge RNs notify her of conduct problems when she is not at the Hospital. Hearing TR, pp. 257:6-8. Specifically, Mrs. Quesada recalls an incident where a RN, Mrs. Migdalia Beltrán, while acting as an In Charge RN reported that another RN, Mrs. Jacqueline de Jesús, did not want to follow commands, instructions, or the assignments of the shift given by the In Charge RN. Hearing TR, pp. 258:23-259:19; see also, Employer Exhibit 8. After Mrs. Beltrán submitted the report regarding Mrs. De Jesús' conduct no other complaints have been received regarding Mrs. De Jesús. Hearing TR, pp. 262:3-10. Further, Mrs. Quesada testified that she recalls an incident where the In Charge RN Mrs. Glenda Báez, reported that a Clinical Assistant was arriving late and understood and recommended that they call the Assistant's attention. The Assistant received a verbal warning for her tardiness based on the observations of the In Charge RN, Mrs. Báez. Hearing TR, pp. 344:18-345:10.

Further, Mrs. Rodríguez, the Clinical Supervisor of Medicine D, testified that she issued a warning to Mrs. Suski Acosta, a RN, based on another RN's reporting, that Mrs. Acosta did not want to follow orders. Hearing TR, pp. 584:9-17. In addition Mrs. Rodríguez recalls another

situation where based on the report of RN Ms. Griselle Quiñones, LPN Ms. Karla Merley received a written reprimand regarding her conduct for failing to assist a blind patient. Hearing TR, pp. 584:18-585:24; Employer Exhibit 15. The In Charge RNs must also correct improper conduct by the Clinical Assistants. Hearing TR, pp. 121:16-19. The In Charge RN receives complaints from the patients or family members regarding treatment. Hearing TR, pp. 1031:18-25.

Moreover, the In Charge RN acts as a proctor to newly hired nurses during their probationary period. Hearing TR, pp. 340:9-341:20; 581:2-13. As a proctor, she becomes a mentor to the new hire. She observes, trains, and evaluates the new nurses' performance. *Id.* In addition, the RNs play an important role in evaluating other RNs, LPNs, and Technicians. Hearing TR, pp. 115:16-116:20; 885:12-17. It is based on the In Charge RNs' evaluation and recommendations that the Clinical Supervisor determines who passes the probationary period or not. *Id.*; 341:7-343:22; 580:19-581-1; 692:1-4; 706:1-8; 716:3-17; 843:25-844:4; see also, Employer Exhibits 21, 22 and 23.

Mrs. Quesada testified that based on the recommendations of the proctor/mentor RNs assigned to Mrs. Marta Irizzary and Mrs. María Cruz , these two RNs were made permanent employees after the 90 day probationary period. Hearing TR, pp. 341:21-342:22. In addition, Mrs. Carmen Echevarría, the Clinical Supervisor of the Neonatal and Pediatric Intensive Care Units, testified that the In Charge RNs that are the proctors/mentors to the new hires have to sign the Orientation Programs in the areas where they gave the new hires training during the probationary period. Hearing TR, pp. 695:15-696:3; Employer Exhibits 21, 22, and 23. Specifically, Mrs. Echavarría recalled three recent cases involving the probationary periods of three RNs, Sally Maldonado, Xaely Vázquez, and Celis Marrero. *Id.* Mr. Echevarría testified

that based on the recommendations of the In Charge RNs who were the proctors/mentors of Mrs. Xaely Vázquez, she did not pass her probationary period, and thus, was not hired. Hearing TR, pp. 716:7-17.

Further, the RNs have the authority to recommend other nurses for special recognition, such as Employee of the Month, which includes receiving economic benefits, gifts, privilege parking and other awards. Hearing TR, pp. 602:22-603:23; 604:3-10. Specifically, Ms. Delia Rodríguez testified that Mr. Victor Santiago, a LPN, was chosen Employee of the Month based on the recommendation of Ms. Angélica Rosario, a RN. *Id.*

## V. ANALYSIS

### A. **The Regional Director committed reversible errors by affirming the Hearing Officer's violations of the Board's own Rules and Regulations, in clear prejudice of the Hospital's due process rights.**

Section III. B. 8. of the Board's Guide For Hearing Officers In Representation and Section 10(K) Proceedings states the following, in its pertinent part:

An offer of proof is generally a statement made by counsel or a representative setting forth the testimony of a witness if the party called that witness to testify. An offer of proof may be made when the hearing officer has ruled that a party may not examine a witness or offer exhibits **on a topic to which an objection has been sustained.** The party adversely affected by that ruling may ask permission of the hearing officer to make an offer of proof to show the content of the excluded evidence. This enables the reviewer of the record to determine whether it was appropriate to exclude the evidence....

No cross-examination follows the offer of proof. **If the hearing officer determines, based on the proffer, that the testimony should be allowed, the hearing officer can reverse his/her earlier ruling on the objection and allow the party to elicit testimony in the area previously rejected by the hearing officer. However, if the hearing officer believes, based on the proffer, that his/her earlier ruling was correct, i.e., that the testimony was properly excluded to begin with, the hearing officer can receive the offer of proof, but state that "the evidence proffered is rejected."** The matter is then in the record for the reviewing authority to decide if the hearing officer's ruling was proper.

(Emphasis added)

As mentioned above, the Hearing Officer committed a reversible error in determining *motu proprio* that she would not allow the presentation of live testimony on the issue of whether there is a bar to an election. Instead, she incorporated by reference the arguments and the offer of proof she received from the Hospital in Case No. 24-RC-099415, notwithstanding the fact that the Regional Director denied the Motion to Consolidate Case. No. 24-RC-099415 with the case at bar. There was no objection on the record from the Petitioner regarding the Hospital's willingness to present witnesses and evidence as to the bar of an election.

Even if the arguments and the offer of proof made in Case No. 24-RC-099415 are made part of this case's record by mere reference of the Hearing Officer or if she takes administrative notice of the limited and incomplete record of Case No. 24-RC-099415, the Hearing Officer committed a reversible error by only allowing an offer of proof to be made. Under the Board's Guide for Hearing Officers (hereinafter the "**Guide**"), an offer of proof is **only** made and proper when an objection is presented by an interested party at the Representation Hearing regarding the presentation of testimony and/or evidence on a particular issue and the Hearing Officer sustains that objection, not allowing the testimony and/or evidence to be introduced. Guide, Section III. B. 8., see also, NLRB Casehandling Manual, Part Two, Representation Proceedings, § 11226 ("When the hearing officer rejects proffered testimony or refuses to allow a line of testimony, it may be appropriate to suggest that the party adversely affected make an offer of proof."). At which time, an offer of proof is made by the non-objecting party in order for the Hearing Officer to determine whether or not to allow the introduction of the testimony and/or evidence being offered by the non-objecting party. Id. Procedurally, after an offer of proof is made the Hearing Officer is obligated to rule on whether or not to allow the testimony and/or evidence to be

presented. Id., see also, Casehandling Manual, Part Two, § 11226 (“If after reviewing the offer of proof, the hearing officer continues to reject the testimony or line of inquiry, a brief record of the rejected material is present in the record for later review.”).

It is the Hospital’s position that the above detailed procedure was not followed; and thus, the Hospital was denied its due process rights under the law. The NLRB’s Rules and Regulations provide that:

Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, **and any party** and the hearing officer **shall have power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence.** Witnesses shall be examined orally under oath.

Sec. 102.66 (a) (emphasis added).

Therefore, under the NLRB Rules and Regulations the Hospital had a right during the Formal Hearing to call and examine witnesses necessary to establish that a bar to elections exists. With the Hospital ready to present testimony to the effect that there is a bar to the election petitioned for by the Union, and without the Union presenting an objection to any testimony, the Hearing Officer determined that “there is ample argument and offer of proof on the record [in Case No. 24-RC-099415]. In that regard, I will instruct the parties to start with the testimony concerning the issue of supervisory status.” Hearing TR, pp. 21:11-14. Notwithstanding the fact that in Case No. 24-RC-099415 she only allowed the Hospital “rather than receiving testimony, to make an offer of proof”. Case No. 24-RC-099415 Hearing TR, pp. 26:21-23. Thereby, as recognized by the Region, limiting the record to “arguments by Counsel”. See, Order Denying Extension, issued March 19, 2013 in Case No. 24-RC-099415.

At no point in time, before the ruling by the Hearing Officer, or during any part of the Hearing, did the representative for the Union present an objection to the Hospital’s intention to

present testimony. Therefore, the Hospital had a right to call and examine witnesses and present evidence as to the bar to the election. Notwithstanding, the Hearing Officer contrary to all rules, regulations, or guidelines of the Board, ruled, and the Regional Director affirmed, that the Hospital did not have a right to call said witnesses but instead, only make reference to the offer of proof presented in Case No. 24-RC-099415. Notwithstanding the fact that contrary to all rules, regulations, and guidelines of the Board after the Hospital made its offer of proof, the Hearing Officer failed to rule as to whether she would allow the proffered testimony by only stating that “the positions of the parties are noted, and I have allowed both parties to present argument, and so if that’s all that the parties have to present as to this hearing, the hearing ... will be closed....” Case No. 24-RC-099415 Hearing TR, pp. 51:20-23. The Hearing Officer never ruled to the effect that “the evidence proffered is rejected.” Guide Section III. B. 8. As the Hearing procedures were not followed by the Hearing Officer, a reviewing authority, the Regional Director or the Board does not have the elements in place “to decide if the hearing officer’s ruling was proper.” *Id.* By affirming these actions, the Regional Director committed a reversible error, because said actions were clearly prejudicial and deprived the Hospital of its due process rights.

Further, in an obvious attempt to undermine this clear rule by the Board, on March 14, 2013, the Union filed a Request to Proceed in the case of caption. Petitioner Exhibit 1. For nearly four (4) years, the Union has maintained that an election in Case No. 24-RD-000520 cannot be held but it is only after they file the Petition for Representation in the case of caption and in Case No. 24-RC-099415 that the Union thinks that elections can be held at the Hospital. This being said, as held by the Board over 60 years ago in General Shoe Corp., 77 NLRB 124, 127 (1948), it is for the Regional Director to determine whether the adequate laboratory

conditions are present or “the circumstances permit a free choice of representation” not for the Union. To make matters worse, the Hearing Officer admitted the Request to Proceed, which goes directly to whether there is a bar to an election, while at the same time not allowing the Hospital to introduce evidence or testimony on the same issue. Hearing TR, pp. 29:5-17.

For the above reasons, the record in the case was incomplete and flawed. This is especially critical when as recognized by the Region there are “questions concerning representation” that need to be resolved. See, Order Denying Extension, issued March 19, 2013 in Case No. 24-RC-099415. Therefore, the Hospital respectfully submits that by affirming said actions, the Regional Director violated the Board’s own rules, thereby denying the Hospital its due process right to demonstrate that adequate conditions were not present to move forward with the petition for re-certification filed by the Union.

**B. The Regional Director committed reversible error by concluding that adequate conditions existed to affirm the Union’s petition for re-certification, when it had previously denied the Hospital’s petition for decertification under the same conditions**

Even though the Regional Director erroneously affirmed the determination that the record in the case of caption was complete and correct, the undisputed facts of this case provide a bar to an election. As asserted above, after the Petition was filed in Case No. 24-RD-000520 on October 10, 2008, the Regional Director informed the Hospital and the Union that the processing of the Petition would be stayed because proper “laboratory” conditions were not in place to hold a valid election. It has long been the standard and rule of the NLRB that:

In election proceedings, it is the Board’s function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions, it is also our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault or

that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again.

General Shoe Corp., 77 NLRB at 127 (emphasis added).

Furthermore, it is a general policy of the Board to “hold the processing of a representation petition in abeyance if there are concurrent unfair labor practice charges that allege conduct which, if proven, would interfere with employee free choice if an election were to be held.” Mark Burnett Productions, 349 NLRB 706 (2007) (citing NLRB Casehandling Manual, Part Two, Representation Proceedings, §§ 11730, *et seq.*). “The Board’s policy of holding the petition in abeyance ... is designed to preserve the laboratory conditions **that the Board requires for all elections** and to ensure that a **free and fair election can be held in an atmosphere free of any type of coercive behavior.**” *Id.* (“[T]he blocking charge policy is premised solely on the Agency’s intention **to protect the free choice of employees** in the election process.”) (emphasis added)).

The Board has not departed from the standard and rule it set out in General Shoe Corp., or Mark Burnett and it should not do so in the case at bar. As made clear by the Board, all determinations regarding the holding of elections, whether to certify or decertify, must take into consideration the free choice of the employees. *Id.* Inclusive, in Mark Burnett, the Board affirmed the Regional Director’s determination to hold an election petition in abeyance in a case where the Board “recognize[d] that the showing of interest supporting the employees’ disaffection petition was secured prior to the Employer’s alleged unfair labor practices and that there is no allegation that the petition is ‘tainted’ by the alleged unfair labor practices.” *Id.* The Board’s main concern was that “[i]f proven, the Employer’s conduct would have a tendency to undermine the Union in the eyes of the employees, **in effect ‘polluting’ the election**

**atmosphere.”** Id. at 707 (emphasis added). Therefore, holding that even a mere “possibility” or “tendency” to undermine or pollute the election atmosphere would be enough to eliminate “the ‘free and fair’ election atmosphere in which the Board prefers to conduct representation elections.” Id. Due to the Board’s strong desire to protect the “will” of the employees the Board’s rule as to holding in abeyance an election is as follows:

We agree with our dissenting colleague that the employees have a right to and an interest in an expeditious vote on their preference regarding their representation. But, employees also have the right to an election that reflects their untrammelled views. In order to effectuate this right, the Board’s blocking charge procedures fulfill its longstanding policy that elections should be conducted in an atmosphere free of *any* type of coercive behavior that **could** affect employee free choice sufficiently to sway the outcome of the election. **Postponing a decertification election** until the election atmosphere is free and fair **does not violate the employees’ statutory right to an election**, but instead provides them an opportunity to participate in an election reflecting their true—and uncoerced—views.

Id., (emphasis added).

The Regional Director or the Board cannot pervert this clear mandamus by focusing on a union’s chance to gain or maintain a bargaining unit over the very same employees’ free will. The Regional Director’s goal is to “further the purposes of the Act” and one of the purposes of the Act is to provide **“free and fair election[s] [that are] held in an atmosphere free of *any* type of coercive behavior”**. Id. at 706 (emphasis added). For these same reasons, the Regional Director held in 2009 that the laboratory conditions were not present to hold elections at the Hospital, and has not yet lifted that stay. Thus, the Union’s Petition for elections in the case of caption cannot be held.

As the General Shoe Corp., Board recognized, once a determination by a Regional Director is made to bar an election because of inadequate laboratory conditions, it is for the Regional Director to advise the Board and the parties “that the circumstances [have changed]

permit[ting] a free choice of representatives”. 77 NLRB at 127. Almost four (4) years have passed since the Regional Director determined that the elections in Case No. 24-RD-000520 were to be stayed because the adequate laboratory conditions are not present. As of this same date, the status quo as to the laboratory conditions at the Hospital remains the same as the Regional Director has not held otherwise. Therefore, the burden of proof is on the party that seeks to change the status quo, which is that laboratory conditions are currently not adequate as determined by the Regional Director, or in this case it is for the Union to prove that elections can be had because there is no “possibility” or “tendency” to undermine or pollute the “election atmosphere”. See, Mark Burnett, 349 NLRB at 707.

The conclusion by the Regional Director that proper laboratory conditions exist for an election in this case but not for an election in Case No. 24-RD-000520 clearly violated the equal protection and due process rights of the employees and the parties to this petition, while at the same time being an arbitrary exercise of the Regional Director’s power. Simply stated, this double standard should not be condoned.

It is well established, that an agency has a responsibility to explain its failure to follow established precedent. Atchison, Topeka & Santa Fe Ry. v. Wichita Bd. of Trade, 412 U.S. 800, 807-09 (1973); King Broadcasting Co. v. FCC, 860 F.2d 465, 470 (D.C. Cir. 1988). The “requirement that the Board provide analysis and findings serves as a prophylaxis against an arbitrary exercise of the Board’s power.” NLRB v. Armcor Industries, 535 F.2d 239, 245 (3<sup>rd</sup> Cir. 1976) (quoting Walgreen Co. v. NLRB, 509 F.2d 1014, 1018 (7<sup>th</sup> Cir. 1975)). Nearly all Circuit Court of Appeals have consistently ruled, that an agency’s order, including an order from the NLRB, that fails to follow or repudiates its prior holdings or rulings is arbitrary and capricious and in violation of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A).

Section 706(2)(A) of the APA provides that a reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). See, Comcast Corp. v. FCC, 526 F.3d 763, 769 (D.C. Cir. 2008); Serv. Employees Int’l Union, Local 32BJ v. NLRB, 647 F.3d 435, 442 (2<sup>nd</sup> Cir. 2011); Shaw’s Supermarkets, Inc. v. NLRB, 884 F.2d 34, 36 (1<sup>st</sup> Cir. 1989) (the NLRB cannot have “significant departure from its own prior precedent” “without explicitly recognizing that it is doing so and explaining why.”); NLRB v. International Union of Operating Engineers, Local 925, 460 F.2d 589, 604 (5<sup>th</sup> Cir.1972) (““there may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright in a specific case.’ “[A]n inadequately explained departure solely for purposes of a particular case ... is not to be tolerated.””) (internal citations omitted).

Therefore, as the status quo and the ruling by the Regional Director that the laboratory conditions are not present to hold a “free and fair” election in Case No. 24-RD-000520 the Regional Director committed a reversible error, by not making a formal determination that the conditions have changed for which the Union has the burden of proof of demonstrating such change, a certification election to take place. As detailed above, under the Board’s current standard and rule, the Regional Director cannot determine that a “free and fair” election atmosphere exists when there is a “possibility” or “tendency” of polluting the election atmosphere.

In this case, as claimed in the offer of proof made by the Hospital, there are at least twelve (12) employees that formed part of the Cardiovascular Tower Department of the Hospital and bargaining unit that on October 10, 2008, sought to hold an election as to exclusive representative, that have been transferred to other parts of the Hospital and form part of the

employees which the Union would like to represent. Case No. 24-RC-099415 Hearing TR, pp. 29-34. Moreover, at least fifty (50) Hospital employees because of their positions, duties and responsibilities must interact, have direct contact, work side-by-side, and mingle with employees who are currently represented by the Union and also with those who are not represented by the Union but who are related directly with the Petitions for Decertification filed by the Union. Case No. 24-RC-099415 Hearing TR, pp. 38:5 – 48:18. If these employees’ desires are “undermined” or “polluted” in relation to the election in Case No. 24-RD-000520, they cannot be “free of *any* type of coercive behavior” in relation to the elections in the case of caption and in Case No. 24-RC-099415. Mark Burnett, 349 NLRB at 706. Under the facts of this case, there would be no explanation to a group of employees who have requested an election in 2008 but have been denied their right to vote for almost four (4) years, and their fellow worker, including some of the same that have been denied the right to vote, who filed their petition within the last month will have an immediate chance to vote in an election seeking to certify the Union. As the Board has ruled:

Postponing a[n] ... election until the election atmosphere is free and fair does not violate the employees’ statutory right to an election, but instead provides them an opportunity to participate in an election reflecting their true—and uncoerced—views.

Id. at 707.

How can the Board explain to a group of employees who requested an election in Case No. 24-RD-000520 nearly four (4) years ago that they do not have the right to vote, but, at the same time, tell another group of employees, which contains some of the very same employees that have been denied the right to vote for or against the same Union for almost four (4) years, and who filed their petition just last month that they will have an immediate chance to vote?

The Regional Director's Decision does not answer this question. To the contrary, it reflects a double standard which undermines the employees' rights, and the Act itself. If protecting the will of the employees is what the Act seeks, then why is the only thing being protected with this erroneous Decision is the Union's interests?

**C. The Registered Nurses are Section 2(11) Supervisors within the Meaning of the Act**

**1. Legal Standard**

The Act expressly defines Section 2(11) "supervisors" 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 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).

Based on this definition the U.S. Supreme Court and the Board apply a three-part test in determining whether an employee qualifies as a supervisor. "Employees are statutory supervisors if (1) they hold the authority to engage in **any** 1 of the 12 listed supervisory functions, (2) their 'exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,'" and (3) their authority is held "in the interest of the employer.'" N.L.R.B. v. Kentucky River Cmty. Care, Inc., 532 U.S. 706, 713 (2001) (quoting NLRB v. Health Care & Retirement Corp. of America, 511 U.S. 571, 573–574 (1994)) (emphasis added); see also, In Re Oakwood Healthcare, Inc., 348 NLRB 686, 687 (2006). In other words, "[i]f the individual has authority to exercise (or effectively recommend the exercise of) **at least one of those functions**, 2(11) supervisory status exists, provided that the authority is held in the interest of the employer and is exercised neither routinely nor in a clerical fashion but with

independent judgment.” Oakwood, 348 NLRB at 688 (emphasis added). As the Board has ruled, “[s]upervisory status may be shown if the putative supervisor has the authority either **to perform a supervisory function or to effectively recommend** the same.” Id. at 687 (emphasis added). Thus, a Section 2(11) supervisor does not need to actually perform the functions but can still be a supervisor if he/she effectively recommends that any ONE of the 12 functions be done. Id. This standard was recognized by the Regional Director, **but not followed**. Decision, p. 2 and 8.

According to the Board “[p]ossession of the authority to engage in (or effectively recommend) **any one of the 12 supervisory functions** listed in Section 2(11) is necessary to establish supervisory status.” Oakwood, 348 NLRB at 688 (emphasis added). As listed by Section 2(11) the following are the 12 supervisory functions:

- Hire
- Transfer
- Suspend
- Lay off
- Recall
- Promote
- Discharge
- Assign
- Reward
- Discipline
- Responsibly to direct
- Adjust grievances

## 2. **Authority to assign**

The Board has interpreted the term “assign” as “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, 348 NLRB at 689. Most relevant to the case of caption is the Board’s holding that, “[i]n the health care setting, the term ‘assign’ encompasses the charge nurses’ responsibility to assign nurses and aides to particular patients.” Id. Therefore, in a Hospital setting the authority to decide the location or to which patients a particular employee will care for qualifies as “assigning” within Section 2(11). Id. “To illustrate [this] point in the health care setting, if a

charge nurse designates an LPN to be the person who will regularly administer medications to a patient or a group of patients, the giving of that overall duty to the LPN is an assignment.” Id. Therefore, the act of assigning an employee to a patient is considered by the Board as authority to assign under Section 2(11). Id. at 696.

The Regional Director committed a reversible error by applying an incorrect standard in its conclusion that the In Charge RN’s authority to assign does not meet the threshold established in Oakwood Healthcare. Specifically, the Regional Director erroneously commingled the In Charge RN’s clear authority to assign work, with the standards used to determine if they engage in “responsible direction”. Decision, p. 9-12. However, as the Supreme Court clearly clarified in NLRB v. Kentucky River, 532 U.S. 706, 713 (2001), “Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions”. The Regional Director, in her analysis, treated both supervisory functions as one by concluding that since they allegedly do not engage in responsible direction, then automatically they do not assign work with independent judgment in the interest of the employer. Decision, p. 9-12

By doing this, the Regional Director set aside all the ample evidence in the record that proves, without a doubt, that just as in Oakwood, in the present case the In Charge RNs have the authority and utilize independent judgment when assigning work to other employees.

The uncontested material facts clearly reflect that at the Hospital, the In Charge RN has to direct and supervise the personnel during each shift, including but not limited to the assignment of work based on the condition of the patients and the capabilities of the staff and supervise the tasks that have been assigned to other employees. Hearing TR, pp. 417:16-418:8; see also, Petitioner Exhibit 3, pp. 11. The LPNs, Technicians, Escorts, Clinical Assistants (Ward Clerks), and maintenance employees are directly supervised by the In Charge RN. Hearing TR, pp.

74:16-75:4; 119:6-19; 924:3-7; 967:4-968:4; 1000:1-6; 1011:1-7; 1016:23-24. Even other RNs report directly to and are supervised by the In Charge RN. Hearing TR, pp. 95:7-10; 127:20-25; 724:21-725:5; 924:3-7; 1011:1-7.

The In Charge is responsible for the distribution of work to the RNs and LPNs, including the distribution of patients during the shifts and controls the functions that the RNs and LPNs will perform. Hearing TR, pp. 122:7-10; 676:1-9; 967:4-968:4; 1000:21-1001:3; 1004:1-9; 1011:8-14. In other words, the In Charge RN is responsible for assigning the RNs and LPNs to particular patients. Hearing TR, pp. 245:8-24; 281:4-23; 298:6-14; 307:15-308:1; 320:4-12; 545:17-25; 844:10-13; 967:4-968:4; 1000:21-1001:3; Employer Exhibits 18, 19, and 20. For example, if there are 17 patients and 8 nurses in the unit the In Charge RN has to determine how the work is going to be distributed. Hearing TR, pp. 247:2-20. As an example of the redistribution of patients-nurse, Mrs. Rodríguez testified in relations to Employer Exhibit 20 and the distribution of patients made by the In Charge RN, Ms. Griselle Quiñones, on October 24, 2012. Hearing TR, pp. 616:4-617:14; Employer Exhibit 20.

Further, as testified by Mrs. Quesada and Mrs. Echevarría, in the Hospital's Intensive Care Units, based on the In Charge RN's judgment if there is a patient that needs more intensive or individualized care, then the In Charge RNs assign a specific nurse to only care for that patient. Hearing TR, pp. 245:8-24; 678:6-24. Thereafter, the In Charge RN supervises the performance of the RNs and LPNs to make sure that they have performed the tasks assigned and that they have done so correctly. Hearing TR, pp. 967:4-968:4; 1012:21-1013:3. For example, describing the work of the In Charge RNs in the Emergency Room, the Director of Nursing Mrs. Martínez, testified that they are responsible for giving follow-up to the medical orders and

making sure that the nurse who has been assigned to that patient follows through with those orders. Hearing TR, pp. 967:4-15.

Additionally, the In Charge RNs analyze the department's situation and the need for assignment of overtime. Hearing TR, pp. 302:16-24; 308:8-13; 310:2-9; 901:6-17; 676:10-17; 924:3-7. Based on the situation, the In Charge RN determines whether there is a need for additional staff and recommends the assignment of overtime. Hearing TR, pp. 75:5-25; 317:18-318:4; 676:10-677:23; 902:17-24; 924:3-7. For example, Mr. Túa testified that there might be a need for assigning overtime if a nurse calls and informs that he/she will be late, in those cases, the In Charge RN determines the need and requests an assignment of overtime to cover the time that the nurse is going to be late. Hearing TR, 77:5-9. Mrs. Quesada testified that the need for overtime may arise if there are 7 nurses and 18 patients to be attended and 2 patients have a change in condition that may require additional care. In this case, the In Charge RN determines if an additional nurse is needed for that shift. Hearing TR, pp. 310:2-9.

The In Charge RNs also have the authority to request and recommend the use of a nurse on a per diem basis in order to meet the needs of the patients. Hearing TR, pp. 337:16-340:7; 924:3-7. As testified by a General Supervisor, Mr. Segarra, the In Charge RN notifies the General Supervisor if there is a need for an assignment of overtime or per diem. However, only if the In Charge is not able to make arrangements regarding overtime or per diem does the General Supervisor, based on his knowledge of the entire Hospital, notifies the In Charge RN regarding an availability in another department. Hearing TR, 924:4-23.<sup>3</sup>

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<sup>3</sup> The only persons in the Hospital authorized to approve an overtime request are the Executive Director, Mr. Pedro Barez, Mr. Calvine Túa, and the official on Administrative Watch at the Hospital. Hearing TR, pp. 75:5-25; 167:3-1; 901:6-17.

Further, the In Charge RN determines if there is the need to transfer any other RN, LPN, Technician, Escort, or Clinical Assistants (Ward Clerks) to another department according to the need of other departments. Hearing TR, pp. 53:6-17; 302:25-304:3; 943:14-23; 951:3-24; 952:18-953:12; 967:4-968:4; 1011:15-23. For example, October 3, 2012 the In Charge RN Mrs. Frances Four assigned Mrs. Yesenia Miranda from the department of Medicine D to Intermediate First Floor. Hearing TR, pp. 605:1-10; 608:18-609:13; see also, Employer Exhibit 18. Once the In Charge RN determines that an employee is going to be transferred to another clinical unit, the employee cannot refuse the transfer, or it is considered insubordination. Hearing TR, pp. 946:1-4; 952:2-17.

At the Hospital, the In Charge RN is responsible for coordinating the tests and treatment to be conducted during the shift. Hearing TR, pp. 246:1-23. The In Charge RN plans the services that are going to be offered to the patients, for example, wound care, physical therapy, respiratory therapy, and the pending services for the patient. Id. Based on his/her independent judgment determines the priority in relation to those services to be received by the patient. Id.; 667:4-9. Moreover, it is the In Charge RN who coordinates the movement of patients to and from the Hospital units. Hearing TR, pp. 254:7-15; 304:14-305:3; 306:13-17; 679:22-680:2. The In Charge RN then orders an employee to move the patient that he/she has been assigned to another unit. Hearing TR, pp. 306:22-307:3. The In Charge RNs also assign which RN is going to be responsible for the narcotics during the shift. Hearing TR, pp. 351:10-14. As stipulated by the Parties, all RNs request controlled substances by using the Requisition of Controlled Substances Class II form. Hearing TR, pp. 622-6-11. It is important to note that the RNs sign in the area of the form where it states "SUPERVISOR OF NURSES OR REPRESENTATIVE".

Employer Exhibits 12 and 13. This fact further proves that the RNs are supervisors and the Hospital also considers them as such. See, Id.

In spite of the aforementioned evidence to the contrary, the Regional Director concluded that said authority to assign work does not meet the criteria necessary to have the In Charge RNs be considered supervisors as defined by the Act. Specifically, the Regional Director stated that “the acuity level of the residents on the floor and reassign staff accordingly, such as by assigning more than one aid to a particular patient, to be merely conclusionary and hence, insufficient to establish independent judgment.” Decision, p. 13. However, the evidence showed that said assignments were both tailored to patient conditions and needs, and the RNs capability in performing the assignment, and to do this, independent judgment was essential.

Specifically, during the Hearing it was proven that the In Charge has the authority to reassign a particular nurse if there is another nurse better suited to handle a particular patient, for example a nurse who is more capable, more knowledgeable, or better trained in a particular area of medicine. Hearing TR, pp. 1012:21-1013:23; 1030:3-21. As an example, Mrs. Martínez, testified that if a nurse has been assigned to a patient and that patient has orders for a Foley catheter and the assigned nurse does not feel certain or is not that well prepared to put that Foley catheter, the In Charge RN will make a reassignment and assign a more capable or better trained nurse in the aspect putting a Foley catheter. Id. Further, the In Charge RN assigns the work to the maintenance employees, including determining the order in which their tasks are to be done, for example which room to clean first because the In Charge RN has assigned a particular room to a patient.

This evidence clearly shows that the Regional Director’s conclusion that “the NIC’s limited authority to assign patients to other RNs is based on the use of conditions or criteria for

which specific points are added to protocols and equalizing work load among available registered nurses” is patently wrong. Decision, p. 13. It is respectfully submitted that critical judgment is necessary to be able to evaluate and/or choose which nurse is better suited to the particular needs of a patient and a medical situation, just like the evidence reflects the Hospital’s In Charge have the authority to do. Things being as such, it is clear that the In Charge assigning authority meets the required criteria to be considered a supervisor under the Act.

**3. Authority to Discipline, Hire, and Reward**

The Regional Director also erroneously concluded that the In Charge RNs lack the authority to discipline, hire and reward.

During the Hearing it was shown that it is the responsibility of the In Charge RN to oversee the conduct of the employees. Hearing TR, pp. 256:7-23. Throughout the Nursing Department, the In Charge RN performs the initial investigation into disciplinary actions and makes verbal warnings or initial corrective actions without intervention of the Human Resources Department. Hearing TR, pp. 55:22-56:14; 108:7-109:7; 256:7-23; 304:4-13; 546:1-10; 583:25-584:21; 586:9-14. In fact, in some occasions based on the recommendations made by In Charge RNs, subordinates have been disciplined and even terminated. Hearing TR, pp. 112:19-25; 344:18-345:10; 346:1-18; see also, Employer Exhibits 5, 6, and 15.

The Director of Human Resources, Mr. Túa, testified that based on the incident report prepared and recommendation by an RN, Mr. Leonides Pérez, as a result of an incident involving a physical altercation between LPN, Mr. Billy Santos Feliciano, and a patient, Mr. Santos was terminated from employment. Hearing TR, pp. 108:19-112:25; see also, Employer Exhibits 5 and 6. In addition, due to disciplinary action taken by In Charge RNs, negative conduct has been modified. Hearing TR, pp. 262:3-10, see also, Employer Exhibit 8. For example, the Manager

of the Multidisciplinary and Cardiovascular Intensive Care Units, Mrs. Quesada, testified that the In Charge RNs notify her of conduct problems when she is not at the Hospital. Hearing TR, pp. 257:6-8. Specifically, Mrs. Quesada recalls an incident where a RN, Mrs. Migdalia Beltrán, while acting as an In Charge RN reported that another RN, Mrs. Jacqueline de Jesús, did not want to follow commands, instructions, or the assignments of the shift given by the In Charge RN. Hearing TR, pp. 258:23-259:19; see also, Employer Exhibit 8. After Mrs. Beltrán submitted the report regarding Mrs. De Jesús' conduct no other complaints have been received regarding Mrs. De Jesús. Hearing TR, pp. 262:3-10.

Further, Mrs. Quesada testified that she recalls an incident where the In Charge RN at the time of the incident, Mrs. Glenda Báez, reported that a Clinical Assistant was arriving late and understood and recommended that they call the Assistant's attention. The Assistant received a verbal warning for her tardiness based on the observations of the In Charge RN, Mrs. Báez. Hearing TR, pp. 344:18-345:10.

In addition, Mrs. Rodríguez, the Clinical Supervisor of Medicine D, testified that she issued a warning to Mrs. Suski Acosta, a RN, based on another RNs reporting that Mrs. Acosta did not want to follow orders. Hearing TR, pp. 584:9-17. In addition Mrs. Rodríguez recalls another situation where based on the report of RN Ms. Griselle Quiñones, LPN Ms. Karla Merley received a written reprimand for failing to properly attended to a blind patient. Hearing TR, pp. 584:18-585:24; see also, Employer Exhibit 15. The In Charge RNs must also correct any improper conduct by the Clinical Assistants. Hearing TR, pp. 121:16-19.

Moreover, the In Charge RN also serves as a proctor to mentor new nurses during their probationary period. Hearing TR, pp. 340:9-341:20; 581:2-13. During this period, the In Charge RN who is acting as the proctor or mentor, observes, trains, and evaluates the performance of the

new hire. Id. It is based on the In Charge RNs' evaluation and recommendations that the Clinical Supervisor determines who passes the probationary period or not. Id.; 341:7-343:22; 580:19-581-1; 692:1-4; 706:1-8; 716:3-17; 843:25-844:4; see also, Employer Exhibits 21, 22 and 23. In addition, the RNs play an important role in evaluating other RNs, LPNs, and Technicians. Hearing TR, pp. 115:16-116:20; 885:12-17.

Mrs. Quesada testified that based on the recommendations of the proctor/mentor RNs assigned to Mrs. Marta Irizzary and Mrs. María Cruz , these two RNs were made permanent after the 90 day probationary period. Hearing TR, pp. 341:21-342:22. In addition, Mrs. Carmen Echevarría, the Clinical Supervisor of the Neonatal and Pediatric Intensive Care Units, testified that the In Charge RNs that are the proctors/mentors to the new hires have to sign the Orientation Programs in the areas they gave the new hires orientation during the probationary period. Hearing TR, pp. 695:15-696:3; see also, Employer Exhibits 21, 22, and 23. Specifically, Mrs. Echavarría recalled three (3) recent cases involving the probationary periods of three RNs, Sally Maldonado, Xaely Vázquez, and Celis Marrero. Id. As Employer Exhibits 21, 22, and 23 reflect, the RNs acting as proctors, sign in the area identified as proctor/supervisor. These Exhibits further prove that the RNs view themselves; the new hires see them; and the Hospital considers them supervisors. Id.

Further, the In Charge RNs have the authority to recommend other nurses for special recognition, such as Employee of the Month, which includes receiving economic benefits, gifts, privilege parking and other awards. Hearing TR, pp. 602:22-603:23; 604:3-10. Specifically, Ms. Delia Rodríguez testified that Mr. Victor Santiago, a LPN, was chosen Employee of the Month based on the recommendation of Ms. Angélica Rosario, a RN. Id.

As the Board has held, the Section 2(11) functions have a common trait of affecting a term or condition of employment of other employees. See, Oakwood, 348 NLRB at 689. It cannot be disputed that the In Charge RNs have the authority to conduct the initial investigation regarding disciplinary actions and have the authority to recommend that disciplinary action be taken against an employee. In fact, as detailed above, and due to the investigations and recommendations made by In Charge RNs, employees have been disciplined and even terminated.

In addition, the In Charge RNs have to report on the progress of new employees and recommend whether a new employee passes the probationary period or not. Lastly, the In Charge RNs can recommend recognitions be awarded to other employees. All these actions by the In Charge RNs affect the terms or conditions of employment of the employees they supervise. See, Oakwood, 348 NLRB at 689. Therefore, the In Charge RNs have the “authority to perform” or “effectively recommend” the supervisory functions of discipline, hire, and reward.

In this regard, the Regional Director’s conclusion to the contrary, should be overturned.

#### **4. Independent Judgment**

Having shown that the In Charge RNs hold the authority to engage in at least four (4) of the supervisory functions, or effectively recommend the same, the next prong to be proven by the Hospital is whether the In Charge RNs use independent judgment in the exercise of such authority or recommendation of the same.

The Board has found “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.” Oakwood, 348

NLRB at 693. However, “the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices.” Id.

The Board’s examples of independent judgment are relevant to the case of caption. In a medical setting, the Board used as an example of independent judgment “a registered nurse who makes the ‘professional judgment’ that a catheter needs to be changed ... [and] responsibly directs a nursing assistant in the performance of that work.” Id. at 692. Another example given by the Board is “a registered nurse, when exercising his/her authority to recommend a person for hire, may be called upon to assess the applicants’ experience, ability, attitude, and character references, among other factors. If so, the nurse’s hiring recommendations likely involve the exercise of independent judgment.” Id. at 693. Lastly, “if the registered nurse weighs the individualized condition and needs of a patient against the skills or special training of available nursing personnel, the nurse’s assignment involves the exercise of independent judgment.” Id.

Under the current state of the Board’s law there can be no question that the Hospital’s In Charge RNs use independent judgment when exercising the above mentioned Section 2(11) supervisory functions.

As mentioned before, the record is clear that the assignment of the LPNs and RNs to the particular patients is made by the In Charge RNs regardless of whether there is a clinical supervisor present at the Hospital during a particular shift. Hearing TR, pp. 299:5-7. In making these determinations regarding assignments of work, the In Charge RNs consider the care the patients need, the status of the patients, the patient volume, the facilities available and their judgment. Hearing TR, pp. 124:6-10; 678:6-24; 1000:21-1001:3; 1004:1-9. In other words, the In Charge RNs have to analyze the care of the patients and make a decision and manage the LPNs and RNs, the maintenance employees and the rest of the employees in the unit in

accordance with the patients' needs. Hearing TR, pp. 125:2-5; 242:12-23; 244:1-9; 678:6-24; 970:3-16; 1004:1-19; 1030:3-21. As the Director of Nursing testified, the In Charge RN has to prepare the work team for each physician based on the knowledge of each person in her personnel, because she knows the skills and knowledge of every nurse in her personnel, and she then assigns them according to their skills and knowledge. Hearing TR, pp. 1000:24-1001:3.

The assignment of nurses to patients is based on an In Charge RNs' judgment. At the beginning of a shift if there are 17 patients and 8 nurses in the unit, it is the In Charge RN that determines how the patients are going to be distributed. Hearing TR, pp. 247:2-20. Further, in the Intensive Care Units, based on the In Charge RN's judgment if there is a patient that needs more intensive or individualized care the In Charge RN can assign a specific nurse to only care for that patient. Hearing TR, pp. 245:8-24; 678:6-24. Additionally, the In Charge RN has the authority to reassign a particular nurse to a particular patient if there is another nurse that is better suited to perform a particular task, for example a nurse who is more capable, more knowledgeable, or better trained in a particular aspect of care that a patient needs. Hearing TR, pp. 1012:21-1013:23; 1030:3-21. As an example, the Director of Nursing, Mrs. Martínez, testified that if a nurse has been assigned to a patient and that patient has orders for a Foley catheter and the assigned nurse does not feel certain or is not that well prepared to put that Foley catheter, the In Charge RN will have to make a reassignment and assign a more capable or better trained nurse in the aspect putting a Foley catheter. *Id.* Inclusive, the In Charge RNs, based on their judgment and need of the Hospital, determines the order in which the maintenance employees' tasks are to be done, for example which room to clean first because the In Charge RN has assigned a particular room to a patient. Hearing TR, pp. 121:23-122:6.

Furthermore, when assigning overtime or the use of a nurse on per diem basis, the In Charge RN has to consider the need for additional staff for a particular shift due to the volume of patients or the care that is necessary for the patients and recommends the assignment of overtime or per diem. Hearing TR, pp. 75:5-25; 317:18-318:4; 337:16-340:7; 676:10-677:23; 902:17-24; 924:3-7. Further, based on their own evaluation, judgment, independent criterion and according to the need of other departments, the In Charge RN determines if it is necessary to transfer any other RN, LPN, Technician, Escort, or Clinical Assistants (Ward Clerks) to another department. Hearing TR, pp. 53:6-17; 302:25-304:3; 943:14-23; 951:3-24; 952:18-953:12; 967:4-968:4; 1011:15-23.

In addition, during their shift, the In Charge RN is responsible for coordinating the tests and treatment to be conducted. Hearing TR, pp. 246:1-23. The In Charge RN plans the services that are going to be offered to the patients, for example, wound care, physical therapy, respiratory therapy, all the services pending for the patient. *Id.* Then based on his/her independent judgment determines the priority in relation to those services to be received by the patient. *Id.*; 667:4-9.

The Oakwood Board ruled, with regards to independent judgment, that:

In the health care context, choosing among the available staff frequently requires a meaningful exercise of discretion. Matching a nurse with a patient may have life and death consequences. Nurses are professionals, not widgets, and may possess different levels of training and specialized skills. Similarly, patients are not identical and may require highly particularized care. A charge nurse's 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, involves a degree of discretion markedly different than the assignment decisions exercised by most leadmen.

Oakwood, 348 NLRB at 695.

Under this Board standard there is no doubt that the Hospital's In Charge RNs use their independent judgment when exercising the Section 2(11) function of assigning. Just as in

Oakwood, the In Charge RNs “are required to make informed judgments about their patients and staff in order to make patient care assignments.” Id., at 696. Further as in Oakwood, the Hospital does not have a written document “that would tell a[n In Charge RN] which particular staff to assign to which patients on any given day.” Id. Moreover, there is ample testimony on the record that the In Charge RNs “consider specific patient conditions and needs, staff’s special training or certifications, the continuity of care ... in making assignments. Id.; see, Hearing TR, pp. 125:2-5; 242:12-23; 244:1-9; 678:6-24; 970:3-16; 1004:1-19; 1030:3-21 (the In Charge RNs have to analyze the need of care of the patients and make a decision and manage the LPNs and RNs, the maintenance employees and the rest of the nurses in the unit in accordance with the patients’ needs.).

As in Oakwood, the Hospital “[w]itnesses repeatedly testified that the [In Charge RNs’] assignments are based on ‘informed judgments’ about the patients and staff”, Id., at 697; thus, the Hospital more than met its burden of establishing that In Charge RNs use their independent judgment when exercising the Section 2(11) functions.

The Regional Director’s conclusion runs contrary to the clear precedent established by the Board in Oakwood. Thus, having established with a preponderance of the evidence that the In Charge RNs utilize independent judgment in their supervisory duties, it becomes clear that the Regional Director’s Decision should be overturned.

##### **5. In the interest of the Hospital**

All the Hospital’s witnesses testified regarding the importance of the In Charge RNs to the Hospital. The importance of an In Charge RN is to give continuity to the care of the patients, supervise the care received by the patients, to have a continuous control of the processes and the conduct of the rest of the personnel in the Hospital, in each unit and during all shifts of work.

Without the In Charge RN, the Hospital would not have an efficient control of the care received by patients or the ability to supervise the entire Hospital. Hearing TR, pp. 132:15-21; 623:4-8; 624:15-24; 625:3-9; 926:9-14. As the person directly supervising the Hospital's units, the In Charge RN provides that direct connection between the departments and the upper level managers. Hearing TR, pp. 8-25. In fact, the upper level managers and doctors go directly to the In Charge, as the supervisor of a particular shift, to gain overall information as to a given shift. Id.

#### **6. Time Spent as In Charge RNs**

The Hospital witnesses established during their testimony that the RNs rotate among themselves the In Charge RN position. As such, at the Hospital there are no permanent In Charge RNs. The Hospital's Nursing Department, operates 24 hours a day, 7 days a week, with each day divided into five shifts—from 7:00 a.m. to 3:00 p.m.; from 3:00 p.m. to 11:00 p.m.; from 11:00 p.m. to 7:00 a.m.; from 7:00 a.m. to 7:00 p.m.; and from 7:00 p.m. to 7:00 a.m. Hearing TR, pp. 889:14-17; 999:2-6. Each shift in each of the clinical units is directly supervised by an In Charge RN. Hearing TR, pp. 57:9-11; 381:18-22; 553:1-10; 675:16-23; 924:3-7; 964:19-22; 999:7-9. The Hospital accommodates or rotates the RNs so that they perform the duties of the In Charge one shift a week. Hearing TR, pp. 1028:6-1029:9. In other words, the RNs at the Hospital perform at least an eight (8) hour shift as an In Charge RN once a week. Id. In addition, the RNs who work the twelve (12) hour shifts serve as the In Charge RN once in a biweekly period. Hearing TR, pp. 1029:10-14.

When determining whether a rotating supervisor meets supervisory status, “the legal standard for a supervisory determination is whether the individual spends a regular and substantial portion of his/her work time performing supervisory functions.” Oakwood, 348

NLRB at 694 (citing Brown & Root, Inc., 314 NLRB 19, 21 (1994); Gaines Electric Co., 309 NLRB 1077, 1078 (1992), and Aladdin Hotel, 270 NLRB 838 (1984)). The Board takes “regular” to mean “according to a pattern or schedule”. Id. at 694; see, Rhode Island Hospital, 313 NLRB 343, 349 (1993) (employee serving as supervisor every fourth weekend is a supervisor). Even though “not adopt[ing] a strict numerical definition of substantiality [the Board ] has found supervisory status where the individuals have served in a supervisory role for at least 10-15 percent of their total work time.” Id. at 694; see, Archer Mills, Inc., 115 NLRB 674, 676 (1956) (10 percent working time each week is sufficient); Swift & Co., 129 NLRB 1391 (1961) (15 percent of worktime is sufficient).

In the case of caption the record is clear. Mrs. Martínez, the Director of Nursing, testified that the Hospital accommodates or rotates the RNs so that they perform the In Charge RN duties at least one shift a week. Hearing TR, pp. 1028:6-1029:9. In other words, the RNs at the Hospital perform the duties of an In Charge RN at least twenty percent (20%) of their working time a week.<sup>4</sup> In addition, the RNs who work the twelve (12) hour shifts serve as the In Charge once in a biweekly period. Hearing TR, pp. 1029:10-14. In other words, the RNs on the twelve (12) hour shifts work as an In Charge at least fifteen percent (15%) of their working time in a biweekly period.<sup>5</sup> Thus, the uncontroverted record reveals that the RNs have an established pattern and predictable schedule for when and how often the RNs take turns in working as In Charge RNs. Based on the evidence presented during the Hearing the RNs meet and exceed the regular and substantial definition as set by the Board.

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<sup>4</sup> An RN’s normal work week consists of 40 hours. If an RN is the In Charge RN for one eight (8) hour shift during his or her workweek then he or she serves as an In Charge RN 20% of his or her workweek. Eight (8) hours (one shift) divided by 40 hours (workweek) is equal to 20%.

<sup>5</sup> If an RN is the In Charge RN for one twelve (12) hour shift during a biweekly period then he or she serves as an In Charge RN 15% of that period. Twelve (12) hours (one shift) divided by 80 hours (biweekly period) is equal to 15%.

With all of the above being said, the record shows that the RNs, when performing the function of an In Charge RN, meet the definition of a Section 2(11) supervisor.

## **VI. CONCLUSION**

The Hospital, under the NLRB's Rules and Regulations, has a right during a Representation Hearing to call and examine witnesses necessary to establish a bar to an election and such right was unduly denied by the Hearing Officer, and said decision was affirmed by the Regional Director, in clear violation of the Hospital's due process rights. As such, the Regional Director's Decision should be overturned and the Hearing must be reopen with direct orders allowing the Hospital a full opportunity to present its position and present evidence in support of its assertion that there is a bar to the election sought by the Petitioner.

Notwithstanding said clear due process violation, the undisputed facts of this case provide a bar to the election sought by the Petitioner. It is the Board's duty to require that *all* elections be free and fair of any type of coercive behavior. Four (4) years after the filing of the Petition in Case No. 24-RD-000520, the Regional Director has not allowed the elections to proceed. The Hospital is not suggesting that the employees are polluted as to the election process nor it is saying that they were polluted in 2009, it is asserting that if pollution has been found to exist from 2009 to 2013 by the Regional Director as to Case No. 24-RD-000520, it must be found to exist as to the case of caption. No such double standards should be allowed, especially since said actions violate the Hospital's and the employees' equal protection rights.

Accordingly, the Hospital submits that "what is good for the goose is good for the gander". In other words, if the conditions are not right to hold an election in Case No. 24-RD-000520, they cannot be right in the case of caption.

Furthermore, as detailed above, the record is full of examples that the In Charge RNs perform the functions of Section 2(11) supervisors. Specifically, that each shift is supervised by an In Charge RN. The record is clear that the RN has to supervise the personnel on each shift when he/she performs the duties of an In Charge Nurse. The In Charge RN has the responsibility of being the leader of the department. The In Charge RNs distribute the work to the RNs, LPNs, Technicians, Escorts, Clinical Assistants (Ward Clerks), and maintenance employees; analyze the department situation and the need for assignment of overtime or use a nurse on a per diem basis; handle or recommend disciplinary actions; play an important role in evaluating other RNs, LPNs, and Technicians; train, evaluate and make recommendations in determining who passes the probationary period; and have the authority to recommend other nurses for special recognition or awards.

The record, further, shows that the In Charge RNs use their independent judgment when exercising the above mentioned Section 2(11) supervisory functions. When exercising the above mentioned Section 2(11) supervisory functions, the In Charge RNs consider the care that the patients need, the status of the patients, the patient volume, and the facilities available.

As the Hospital's witnesses testified, the In Charge RNs play an important role in the Hospital as they give continuity to and supervise the care of the patients and allow for continuous control of the processes and the conduct of the rest of the personnel in the Hospital in each unit and during all shifts of work. Without the In Charge RN the Hospital would not have an efficient control of the care of the patients or the ability to supervise the entire Hospital. As the person directly supervising the Hospital's units the In Charge RN provides that direct connection between the departments and the higher level supervisors.

**WHEREFORE**, the Hospital very respectfully requests that the Board overturn the Regional Director's Decision and order of elections. The Hospital further requests that the Board finds that the record is incomplete and flawed and order the reopening of the Representation Hearing, with strict directives to the Region allowing the Hospital full opportunity to present all necessary witnesses and evidence in support of its assertion that laboratory conditions do not exist to hold an election. Moreover, or in the alternative, the Hospital requests the Board hold that the Regional Director's determination in 2009 to hold in abeyance the election in Case No. 24-RD-009520 bars the election sought in the case of caption.

Lastly, the Hospital respectfully requests that the Board conclude and rule that the RNs at the Hospital are Section 2(11) statutory supervisors and, therefore, dismiss the Petition in the case of caption.

**RESPECTFULLY SUBMITTED.**

**CERTIFICATE OF SERVICE:** I hereby certify that a true copy of this document has been filed through the NLRB E-filing System, which shall a copy of the same to the Regional Director. In addition a true copy of this document shall be sent to the Petitioner's representative, Harold E. Hopkins, Esq., by email [snikpohh@yahoo.com](mailto:snikpohh@yahoo.com).

In San Juan, Puerto Rico, this 24<sup>th</sup> day of june, 2013.

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