

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 15**

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VCNCL, LLC, d//b/a VINEYARD COURT	*	
NURSING AND REHABILITATION CENTER	*	
	*	
Employer	*	
	*	
and	*	Case 15-RC-114384
	*	
RETAIL WHOLESALE AND DEPARTMENT	*	
STORE UNION	*	
	*	
Petitioner	*	
	*	

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DECISION AND DIRECTION OF ELECTION

Upon a Petition filed under Section 9(c) of the National Labor Relations Act (Act), as amended, a hearing was held before a Hearing Officer of the National Labor Relations Board (Board) in Columbus, Mississippi, on October 31, 2013. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

I. Summary of Findings

The Retail, Wholesale and Department Store Union (Petitioner) filed a petition seeking to represent certain employees of VCNCL, LLC, d/b/a Vineyard Court Nursing and Rehabilitation Center (Employer), including Certified Nurse Assistants (CNA), Laundry employees, Dietary employees, and Housekeeping employees. The Employer, on the other hand, claims the only appropriate unit must also include all employees who provide care or service to the residents: Registered Nurses (RN), Licensed Practical Nurses (LPN), Activity employees,

Maintenance employees, Social Services Director, certain “specialty nurses,” and the Business Office Manager.

As explained more fully below, I find that the only appropriate unit encompassing the job classifications named in the petition is a service and maintenance unit as described below. However, I also find that the RNs, the LPNs, the specialty nurses, and the Business Office Manager do not share such an overwhelming community of interest with the job classifications in the proposed unit that they must be included. Because the Petitioner expressed a desire to proceed to an election with any unit found appropriate, I am directing an election for a service and maintenance unit, as described below:

Included: All full time and regular part-time service and maintenance employees, including the CNAs, Dietary employees, Housekeeping employees, Laundry employees, Maintenance employees, Activity employees, and Social Services Director; Excluded: all Registered Nurses, Licensed Practical Nurses, MDS Coordinator, Treatment Nurse, QAPI Coordinator,¹ Medical Records Nurse, professional employees, office clerical employees, guards and supervisors as defined by the Act.

II. Preliminary Findings²

A. Stipulations

The parties have stipulated, and I hereby find:

The Employer, a Mississippi Corporation, with a facility in Columbus, Mississippi, the only facility involved herein, is engaged in the operation of nursing homes providing long-term residential healthcare. Annually, the Employer, in the course and conduct of its business operations, has gross revenues in excess of \$100,000, and purchases and receives goods valued

¹ The acronym QAPI is not defined in the record.

² The Hearing Officer’s rulings made at the hearing are free from prejudicial error and are hereby affirmed.

in excess of \$50,000 at its Columbus, Mississippi location, shipped to it directly from points located outside the State of Mississippi.

The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

Excluded from the proposed bargaining unit, because they are supervisors under Section 2(11) of the Act, are the following job classifications: Administrator, Director of Nursing (DON), Registered Nurse Supervisors, Dietary Department Head, and Housekeeping/Laundry Supervisor. Also excluded from the proposed bargaining unit are guards.

B. Other Findings

The Employer is an employer within the meaning of Section 2(2) of the Act. The Employer is engaged in commerce and affects commerce within the meaning of Section 2(6) of the Act. There is no contract bar or any other bar to an election.

III. Issue

The only issue before me is the appropriateness of the proposed bargaining unit.

A. Summary of the Petitioner's Positions³

The Petitioner seeks a unit of CNAs along with other non-nursing job classifications. In the petition, the Petitioner described the desired unit as follows:

Included: Full/Part Time CNAs, Dietary Employees, Laundry Employees and Housekeeping Employees; Excluded: LPNs, RNs, PRNs, Activity Directors, all professional, technical office/clerical associates, guards and supervisors as defined by the Act.

During the hearing the Petitioner indicated a desire to include other job classifications (Activity Assistant and Maintenance Assistant) but the petition was not formally amended.

³ As taken from statements made during the hearing; the Petitioner did not file a brief.

B. Summary of the Employer's Position

The Employer claims the petitioned-for unit is not an appropriate unit. According to the Employer, the petitioned-for unit is made up of a balkanized *ad hoc* grouping of disparate employees that do not make up a craft, department or plant. Further, the Employer argues that the employees in the petitioned-for unit do not share an identifiable community of interest but, if they do, that interest is inextricably intertwined with other employees not named in the petition. These employees include: the RNs, the LPNs, the Maintenance employees, the Activity employees, the Social Services Director, the Business Office Manager and certain specialty nurses as described more fully below. The gist of the Employer's argument is that if the Petitioner is going to seek a unit with classifications as diverse as CNAs and laundry employees, whom the Employer contends have little to no contact with the CNAs, then the proposed unit must also include the other employees (a "wall-to-wall" unit).

IV. Facts

A. The Employer's Business

The facility in question, Vineyard Court Nursing and Rehabilitation Center, is owned and operated by Briar Hill Management, LLC. Vineyard Court is a non-acute care retirement and assisted living facility. Briar Hill owns and operates eight nursing facilities - six, including Vineyard Court (the only facility at issue), are in Mississippi; the other two facilities are in Arkansas.

B. The Employer's Facility

The Columbus facility's main building has two entrances, one in the front and one in the rear. The largest area in the building is the resident area. At the center of the resident area is a nurse's station. Radiating out from the nurse's station are the hallways leading to the residents' rooms. The building also has a kitchen, dining room, whirlpool room, administrative offices and other miscellaneous common spaces. Next to the main building is the laundry building, separated by a breezeway about 20 to 30 feet long.

There are beds for 54 residents. At the time of the hearing, there were approximately 45 residents.

C. The Employer's Organizational Structure⁴

The Director of Operations, the only witness called by the Employer, oversees all eight of Briar Hill's facilities. Her office is at the company's headquarters in Ridgeland, Mississippi. She does not work at any one facility but visits them often; she visits each facility on a monthly or bimonthly basis, staying one or two days. Although she is not there on a daily or weekly basis, she testified that she is familiar with company policies in place at the facility and that the Administrator, who is in direct charge of the facility, reports to her.

The Dietary Manager, the DON, the Maintenance Supervisor, and the Housekeeping/Laundry Supervisor all report to the Administrator. The Administrator also supervises the Social Services Director, the Director of Human Resources, the Business Office Manager and the Activity Director.

The Dietary Manager supervises two Cooks and a number of Dietary Aides. The Housekeeping/Laundry Supervisor supervises the three Housekeepers, the floor technician, and three laundry employees. The Activity Director has an Activity Assistant and the Maintenance

⁴ An organizational chart was provided by the Employer and is Employer's Exhibit 1.

Supervisor has a Maintenance Assistant (though the position was vacant at the time of the hearing).

Working under the DON are four RNs, fifteen LPNs, approximately 30 CNAs, the Medical Records Nurse, the MDS Coordinator, the Treatment Nurse, and the QAPI Coordinator.⁵

D. The Employees

1. General Terms and Conditions of Employment

All of the unit-eligible employees are paid hourly and record their time on a time clock and are eligible to be paid overtime. All employees at the facility have the same benefits (insurance, vacation, discounted meal purchase plan, etc.). All employees may use the facility's dining room as a break room when it is not being used by the residents for meals.

Those employees involved directly in the care of resident's follow a Plan of Care for each resident. The Plan of Care is developed with the participation of the DON, RNs, LPNs, CNAs, Social Services Director, the MDS Nurse and the Dietary Manager. Individual employees do not have the authority to change the Plan of Care but may make suggestions based on observations of the resident.

While all employees have a role in providing services for residents, there is a dispute about whether one particular aspect of that service is performed by all employees. Residents have a call button that activates a light outside of their rooms. The call button may be used for any need the resident has and is not just for emergencies. A Housekeeping employee testified that anyone who sees the call light must respond to determine what the resident wants and alert the appropriate person because the light must be responded to as soon as possible. On the other

⁵ The latter four positions, all LPNs, are hereinafter referred to collectively as the Specialty Nurses.

hand, the Director of Operations testified that only nursing staff must (or may) respond to a call light.

Employees working during the morning shift have lunch from 10:45am to 11:15am or 11:15am to 11:45am. Employees get one 30-minute lunch period and two paid 15-minute breaks. All employees are eligible for a reduced price lunch.

All classifications of employees attend meetings together on occasion. For example, if the meeting covered a new employee benefit, all employees would attend the meeting.⁶ Some of the employees (RNs, LPNs and CNAs) attend occasional “in-service education” meetings together (described as training).

CNAs and LPNs work one of three rotating shifts: the morning shift, 7:00am to 3:30pm, the afternoon shift, 3:00pm to 11:30pm, or the night shift, 11:00pm to 7:30am. LPNs and CNAs on the oncoming shift consult with those on the outgoing shift to be informed about any ongoing issues. Other than the Dietary and Laundry employees, the rest of the employees work only one shift during the day. The Laundry employees work one of two overlapping shifts during the day; the Dietary employees work one of two overlapping shifts during the day, the first beginning at 5:00am.

2. Certified Nursing Assistants

The Certified Nursing Assistants are primarily responsible for helping residents in their daily living needs. They spend most of their time in direct contact with residents. During their day, CNAs perform services for residents such as bathing, bringing meals and feeding (if necessary), exercising, transporting them to other parts of the facility and taking them to activities, as well as to the bathroom. CNAs also change bed linens and perform other miscellaneous tasks necessary for the residents’ daily living needs. CNAs do not administer

⁶ The record was silent as to whether there are any regularly occurring meetings.

medication. CNAs know which residents to care for based on weekly hall assignments and CNAs tend to be assigned to the same hall. They know what care a resident needs based on the written Plan of Care.

CNAs may also interact with residents' family members, however, they generally do not consult with Physicians. Even in an emergency, the CNAs would consult immediately with an LPN or an RN instead of taking action on their own.

The CNAs work on one of the three shifts and receive a shift differential, if appropriate.

There was testimony from the Director of Operations that the CNAs' base of operations was the nurse's station but there was also testimony from CNAs that the LPNs and RNs discourage this and that the CNAs perform their charting duties in the hall using a hospital type bedside table. Similarly, the Director of Operations testified that CNAs, like the LPNs and RNs, may use lockers behind the nurse's station to store personal belongings but, again, the CNAs testified this was discouraged by the RNs and LPNs.

Between four and eight CNAs work during each of the three shifts, depending on the number of residents and the shift; more CNAs work during the day shifts than the night shift.

3. Licensed Practical Nurses

The primary responsibility of the Licensed Practical Nurses is patient care. LPNs order prescribed medication from the pharmacy and administer it to the residents, however, LPNs do not prescribe medication and do not have the authority to alter or deviate from a prescription. Additionally, LPNs observe residents and keep records of their care or treatment. Like the CNAs, LPNs interact with family members.

LPNs are based at the nurse's station. There are approximately 15 LPNs, with two LPNs working per shift. During the night shift, the highest ranking employees at the facility are the

two LPNs though neither one is designated as a lead LPN or given any other authoritative designation. Regardless of the shift, LPNs are not allowed to act outside of their authority; if circumstances arise that require a decision or action beyond their authority, they contact the appropriate person, such as the Administrator, DON, or Physician.

If necessary, LPNs assist CNAs in performing their duties. Also, LPNs direct CNAs to perform certain tasks, such as weighing a patient or taking a resident's vital signs. LPNs spend between four and six hours per day in direct interaction with residents and may consult with a Physician, if necessary. At the end of the shift, LPNs review the CNAs' charts and Activities Daily Log (ADL).

There was testimony from two CNAs that the CNAs view the LPNs as supervisors. This is based, explained by the witnesses, on the Employer's assertion to the CNAs that the LPNs are above the CNAs in the chain of command and that they are to follow the instructions of the LPNs.

However, there is no evidence that LPNs have the authority to hire, fire, promote, demote, transfer, suspend, lay off or recall employees, or to effectively recommend such action; or that they have the authority to address grievances, grant wage increases, alter work schedules, evaluate other employees, schedule overtime, grant time off or excuse absences. On the other hand, a CNA testified that, on at least one occasion, an LPN issued discipline to her. She also testified she was, on occasion, issued discipline by the DON. Another witness testified she witnessed a CNA receive a reprimand from the Treatment Nurse (an LPN).

4. Registered Nurses

There are four Registered Nurses working at the facility. The primary responsibility of the RNs is to direct the care of the residents. The RNs' work is based at the nurse's station. One

RN works on each of the two day shifts but there is no RN on duty during the night shift. They may also make assignments in that they assign CNAs to care for residents whose rooms are located on particular hallways but, generally, the employees know where they are working from week to week. Additionally, there was testimony that work assignments are made by the DON.

Otherwise, neither party presented any evidence concerning RNs' authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward, or discipline other employees, or to responsibly direct them, adjust their grievances, or to effectively recommend such action.

5. Dietary Employees

Dietary employees work in the kitchen. Dietary employees work one of two shifts. There are two Cooks (one per shift) and an unknown number of Dietary Aids (generally two per shift). The Cooks are responsible for cooking the meals while the Dietary Aids assist the Cook and perform preparation and cleanup work in the kitchen. The Dietary employees are responsible for preparing three meals and three snacks per day. The Dietary employees report to the Dietary Manager.

For residents who eat in the dining room, a Dietary Aid passes the tray through a window to a CNA who gives the tray to the resident to be taken to the dining room. For residents who eat in their rooms, the meals are placed on a cart and brought to the nurse's station for distribution by the CNAs. The LPNs take a meal list to the kitchen listing the residents who will be eating in their rooms. Also, the LPNs provide the Dietary employees with any dietary restrictions the residents may have. The Dietary employees generally do not venture out of the kitchen area except to bring food carts or snack carts to the nurse's station for distribution by the CNAs.

Occasionally, a resident may approach the kitchen window and ask for a cup of coffee and a Dietary Aid will bring it to the resident in the dining room. However, other than the Dietary Manager, dietary employees are not allowed direct contact with residents.

6. Laundry Employees

There are three laundry employees, two who work primarily during the morning and one who works into the afternoon. The laundry employees report to the Laundry/Housekeeping Supervisor.

Laundry employees perform most of their work in the laundry room, which is in a different building than the main building (separated by a breezeway). Laundry employees wash linens owned by the facility (such as towels and bed linens) as well as resident clothing. Soiled linen is collected by CNAs and brought to a collection point in the resident area, from which Laundry employees collect it and bring it to the laundry room. They then return the clean linen to a linen closet or cart in the resident area. Soiled resident clothing is collected from the resident rooms by the Laundry employees and, after cleaning, returned to the resident rooms by a Laundry employee. There was testimony that, if a resident asks a Laundry employee to, for example, hand the resident a tissue while the Laundry employee is in the room, the Laundry employee may do so but, otherwise, Laundry employees are not allowed direct contact with the residents.

7. Housekeeping Employees

Housekeeping employees are responsible for cleaning the facility. They clean the residents' rooms, the hallways and other common areas. There are three housekeepers and a floor technician. Like the Laundry employees, the Housekeeping employees report to the Laundry/Housekeeping Supervisor. A Housekeeper testified that, if a resident asks a Housekeeper to, for example, hand the resident a tissue while the Housekeeper is in the room,

the Housekeeper may do so but, otherwise, Housekeepers are not allowed direct contact with the residents. Housekeeping employees work on only one shift: 7:00am to 3:30pm.

8. Activity Employees

Two employees are primarily responsible for coordinating activities for the residents: the Activity Director and the Activity Assistant. Activities are considered part of caring for the residents. Activities can be activities at the facility, such as Bingo and holiday parties, or a field trip such as a trip to Wal-Mart. One field trip was described as an annual breast cancer walk and included employees, residents, family members and members of the public.

While the Activity Director is in charge of arranging the activities, the Activity Assistant's responsibility is to assist the Activity Director. The Assistant's contributions include, but are not limited to, doing paperwork, transporting residents, or directing an activity. When necessary, other employees, such as LPNs and CNAs, assist the residents during the activities (the Activity Director solicits volunteers).

The Activity Director does not have the authority to hire, fire, transfer, suspend, lay off, recall, promote, discipline employees; she does not have the authority to grant wage increases, adjust grievances, or excuse absences.

9. Maintenance Employees

There is a Maintenance Supervisor and a Maintenance Assistant (though the Maintenance Assistant position was vacant at the time of the hearing). The Maintenance employees are responsible for maintaining the facilities and equipment and repairing any part of the facility or equipment that needs repairing if the work is within the capabilities of the employees. If outside repair technicians must be called or equipment purchased, either the Administrator or the DON is responsible for doing so, depending on the nature of the need. If any employee notices that a

piece of equipment is broken, it is expected that the employee will take the piece of equipment out of service and report this to the Maintenance employees.

There was no evidence in the record that the Maintenance Supervisor has the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or to responsibly direct them, adjust their grievances, or effectively to recommend such action.

10. Social Services Director

The Social Services Director is responsible for meeting the psycho-social needs of the residents. She is involved in the initial assessment of a resident in determining whether the person is eligible to live at the facility. The Social Services Director is the employee who conducts the initial interview of the prospective resident. She also plays a role in determining each resident's Plan of Care and conducts regular assessments of the residents. In conducting these assessments, she also collects information from other employees (LPNs, CNAs, Dietary, etc.) She talks to residents and meets with family members, and may also arrange visits with clergy or others.

There was no evidence in the record that she has the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or to responsibly direct them, adjust their grievances, or effectively to recommend such action.

11. Business Office Manager

The Business Office Manager is responsible for, among other things, the accounts payable and receivable of the facility. Pertinent to possible inclusion in the proposed unit, the Business Office Manager interacts with residents in that she maintains a trust account for residents and disburses funds when requested. The funds must be disbursed directly to the

resident. She is located directly under the Administrator on the organizational chart. Nothing else about her was described in the record.

12. The Specialty Nurses

Also working at the facility, and reporting directly to the Administrator, are the Specialty Nurses: the Medical Records Nurse, the MDS Coordinator, the Treatment Nurse and the QAPI Coordinator.⁷ All of these positions are occupied by LPNs. The MDS Coordinator's primary responsibility is assessing individuals for eligibility to live in the facility based on criteria set by the United States Government's Center for Medicare and Medicaid Services. The Treatment Nurse is responsible for treating minor wounds the residents receive. The QAPI Coordinator is responsible for auditing the facilities' records of patient care. The Specialty Nurses are paid hourly and they work Monday through Friday, either 7:00am to 3:30pm, or 8:00am to 4:30pm.

There was no evidence in the record that the Specialty Nurses have the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, or reward other employees, or to responsibly direct them, adjust their grievances, or effectively to recommend such action.

13. Interchange Among Employees

The only example of interchange among employees in the record was a part-time Dietary Aid who decided to become a full-time Housekeeper. When she changed jobs, she had to go through another 90-day probationary period.

⁷ MDS stands for "minimum data set".

V. Analysis and Findings

A. The Appropriate Unit

I find that the petitioned for unit is not appropriate. Instead, I find that the only appropriate unit encompassing the employees described in the petition is a service and maintenance unit.

A proposed bargaining unit must be an appropriate unit, but need not be the most appropriate unit. *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011) (all internal citations below omitted). In other words, more than one appropriate bargaining unit logically can be defined in any particular factual setting. *Id.* In making the determination of whether the proposed unit is an appropriate unit, the Board's focus is on whether the employees share a community of interest. *Id.* In determining whether employees in a proposed unit share a community of interest, the Board examines:

[W]hether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised. *Id.* at *13.

Procedurally, the Board examines the petitioned-for unit first; if that unit is an appropriate unit, the analysis is finished. *Id.* The burden falls on the employer to establish that the proposed unit is inappropriate because other employees have an overwhelming community of interest with those in the petitioned-for unit. *Id.* Using a Venn diagram to illustrate, two groups

have an overwhelming community of interest when the community-of-interest factors “overlap almost completely.” *Id.*

Finally, Section 9(b) of the Act directs the Board to make appropriate unit determinations which will “assure to employees the fullest freedom in exercising rights guaranteed by this Act.” The Board has historically honored this statutory command by holding that the petitioner’s desire concerning the unit is always a relevant consideration. *Id.* While Section 9(c)(5) of the Act provides that “the extent to which the employees have organized shall not be controlling,” the Supreme Court has made clear that the extent of organization may be considered as one factor in determining if the proposed unit is an appropriate unit. *Id.* However, taking due consideration of the Petitioner’s desires, I find that the petitioned-for unit is not appropriate without the inclusion of other employees to make up an appropriate service and maintenance unit.

The evidence shows the petitioned-for unit is not an identifiable group separate from other employees. It appears, as the Employer asserts, to be an *ad hoc* grouping of employees. While it is true the CNAs share a number of terms and conditions of employment with the other job classifications in the petitioned-for unit, I note that most, if not all, of the employees at the facility have those same terms and conditions of employment in common. Otherwise, there is no attribute of the CNAs that is shared with, and only with, all, or even most, of the other job classifications named in the petition.

In sum, I agree with the Employer’s analysis, but not its ultimate conclusion. Given the disparity of job classifications the Petitioner seeks, the proposed unit is not appropriate without the inclusion of other classifications such that the unit is composed of an appropriate unit of service and maintenance employees. However, it is not necessary to include all of the job classifications the Employer seeks to add to create a service and maintenance unit.

The Employer correctly points out that the LPNs and CNAs spend some part of their day assisting each other in their duties, however, while this is a significant factor, other factors persuade me that, nevertheless, the LPNs do not share an overwhelming community of interest with the CNAs. First, I note that LPNs are, generally, considered technical employees and it is not unusual for technical employees to be organized separately from service and maintenance employees if the Petitioner so desires.

Second, the LPNs and CNAs do not perform the same duties despite the fact that they occasionally assist each other. Third, the CNAs regard the LPNs as their supervisors even if they are not supervisors as defined by the Act. Finally, I note that, while it appears the official policy is that the CNAs work out of the nurse's station and may use the lockers behind the nurse's station to store personal belongings, it also appears that the LPNs and RNs discourage this.

Given the differences in their work, and the manner in which they view each other, I cannot find that the CNAs and the LPNs share such an overwhelming community of interest with a service and maintenance unit such that there is no legitimate basis to exclude them. Further, what is true for the CNAs and LPNs is even truer for the CNAs and the RNs. Moreover, RNs are generally considered to be professional employees and, as such, are not included in a unit with non-professional employees without their consent. It should be noted, however, I am not basing my determination on a finding that the RNs in this matter are professional employees. My determination is based on my finding that, for the reasons noted above pertaining to the LPNs, the RNs do not share an overwhelming community of interest with the CNAs. My observation about RNs generally being considered professional employees is merely supportive of that determination.

Finally, as for the Business Office Manager, I find that she is not a service and maintenance employee. Given her responsibilities for managing the facility's accounts payable and receivable, she is an office clerical employee. While she occasionally interacts with residents to disburse funds to them, this is nothing more than an inconsequential offshoot of her office clerical responsibilities.

As for the other employees put forth by the Employer as necessary to make the proposed unit appropriate, I am going to allow them to vote subject to challenge. The record evidence is inconclusive as to whether these employees are properly included in the service and maintenance unit. These employees, the Activity employees, Maintenance employees, and the Social Services Director, number only five, which is less than ten percent of the proposed unit. Consequently, exercising my discretion in the interest of proceeding to an election as expeditiously as possible, I am allowing these employees to vote subject to challenge.

B. Supervisory Status

At the beginning of the hearing, the Petitioner claimed the Activity Director, as well as certain other employees, should be excluded from the unit because they “work directly with management, and they are looked at as pro-management.” At the end of the hearing, the Petitioner contended that the Maintenance Supervisor and Activity Director should not be included in the unit, but did not articulate a reason why. I find that the Activity Director and the Maintenance Supervisor are not supervisors within the meaning of Section 2(11) of the Act.

Section 2(11) of the Act provides that a supervisor is one who possesses “authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or to responsibly direct them, or to adjust their grievances, or effectively 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.”

It is well settled that in order to be a statutory supervisor, an individual must have the authority to effectuate or effectively recommend at least one of the supervisory indicia enumerated in Section 2(11) of the Act, using independent judgment in the interest of the employer. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). The Board construes a lack of evidence on any of the elements necessary to establish supervisory status against the party asserting that status. *Brusco Tug and Barge*, 359 NLRB No. 43 (2012). Supervisory status is not proven when the record evidence “is in conflict or otherwise inconclusive.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). “Mere inferences or conclusionary statements, without detailed, specific evidence, are insufficient to establish supervisory authority.” *Alternate Concepts, Inc.*, 358 NLRB No. 38 (2012). Finally, “general testimony asserting that employees have supervisory responsibilities is not sufficient to satisfy the burden of proof when there is no specific evidence supporting the testimony. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006).

In the current matter, the evidence fails to establish that the Activity Director and Maintenance Supervisor are supervisors as defined by Section 2(11) of the Act. Other than the assertions made by the Petitioner (which is not evidence), the record is bereft of any evidence supporting a finding that the employees in question exercise any supervisory authority. Consequently, I find that the Activity Director and Maintenance Supervisor are not supervisors within the meaning of Section 2(11) of the Act.

Conclusion

I find that the petitioned-for unit is not a unit appropriate for purposes of collective bargaining purposes. Instead, I find that the only appropriate unit encompassing the employees named in the petition is an overall service and maintenance unit. I also find that the LPNs, RNs, and Business Office Manager do not share such an overwhelming community of interest that they must be included in the unit. However, as for the Maintenance employees, Activity employees and Social Services Director, I am allowing them to vote subject to challenge. Consequently, because the Petitioner indicated a willingness to proceed to an election with any unit found appropriate, I will direct an election in the following unit:

Included: All full time and regular part-time service and maintenance employees, including the CNAs, Dietary employees, Housekeeping employees, Laundry employees, Maintenance employees, Activity employees, and Social Services Director; Excluded: all Registered Nurses, Licensed Practical Nurses, MDS Coordinator, Treatment Nurse, QAPI Coordinator, Medical Records Nurse, professional employees, office clerical employees, guards and supervisors as defined by the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the Retail Wholesale and Department Store Union. The date, time and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

Eligibility to Vote

Eligible to vote in the election are those in the unit who were employed during the payroll period ending 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, employees engaged in an economic strike which commenced less than 12 months before the election date, who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote.

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.

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 US 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 the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of 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.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **December 12, 2013**. No extension of time to file the 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 by facsimile transmission to 504-589-4069. Since the list will be made available to all parties to the election, please furnish a total of two copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

Posting Obligations

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 a minimum of three (3) working days prior to the date 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 five (5) full working days prior to 12:01am 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.

RIGHT TO REQUEST REVIEW

Under the provision 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

ATTACHMENT

There is attached hereto a Waiver (Form NLRB-4480). This waiver is enclosed for the convenience of the parties who wish to waive their right to request a review. Receipt of a waiver from all parties will enable this office to schedule an election at an early date. In the event any party does not wish to waive, and intends to request review of this decision, they are hereby advised that they must file a request for review with the Board in Washington, D. C., within 14 calendar days from the receipt of this decision. See 102.67 of the Board's Rules and Regulations.

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

WAIVER

IN THE MATTER OF _____
(Name of Case) *(Number of Case)*

PURSUANT TO SECTION 102.67 AND 102.69 OF THE RULES AND REGULATIONS OF THE NATIONAL LABOR RELATIONS BOARD, THE UNDERSIGNED PARTY WAIVES ITS RIGHT TO REQUEST REVIEW OF OR FILE EXCEPTIONS TO THE REGIONAL DIRECTOR'S AND/OR HEARING OFFICER'S

_____ IN THE ABOVE-
(Name of document or applicable documents)

CAPTIONED MATTER _____ OR CHECK IF DOCUMENT NOT YET ISSUED
(Date of document)

(Name of Party)

BY _____
(Name of Representative)

(Title)

DATE _____