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CNAs. The Regional Director chose to ignore or minimize this evidence, but because the existence of any *one* of these indicia alone, without regard to frequency of performance or even actual performance, supports a finding of supervisory status, the Regional Director should have properly concluded that all of its Charge Nurses are supervisors.

Instead of reaching the proper result, the Regional Director erroneously concluded that there is insufficient evidence in the record to conclude that Charge Nurses assign work to CNAs, even though he found that the Charge Nurses do in fact direct CNAs. To work around his finding that the Charge Nurses direct CNAs, he incredibly found they do so without exercising independent judgment in delegating and overseeing those tasks. The Regional Director could not be more wrong. Westport is a nursing facility caring for residents that are critically ill, and in some cases, recovering from life threatening surgeries. A resident's condition can change in the blink of an eye, mandating that Charge Nurses take immediate and certainly not pre-prescribed action. These actions undoubtedly include the authority to assign and direct a CNA to assist in responding to a medical emergency. Further, Charge Nurses have a broad scope of authority to assign other task to CNAs, including redirecting their work to another more critical task, changing lunch or breaks, and assigning CNAs to different rooms, residents, or units, depending on staffing and resident needs. These decisions are made on a daily basis and without the aid of guidance or a manual. Accordingly, the Regional Director's determinations that Charge Nurses do not assign CNAs, and that when they direct CNAs they do so without independent judgment, defy logic.

Furthermore, the Regional Director erroneously concluded that Westport has failed to demonstrate that Charge Nurses are held accountable for the work of their CNAs and face the prospect of consequences in regard to how they supervise their CNAs. A showing of

accountability requires only a showing of “a *prospect* of consequences,” and not a showing of actual consequences as erroneously mandated by the Regional Director. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). Westport’s evidence clearly established that a Charge Nurse who fails to perform her supervisory duties over CNAs could be subject to discipline. In fact, the Employer presented evidence demonstrating that Charge Nurses have been disciplined and counseled for not properly supervising their CNAs or for assigning improper tasks to their CNAs. In addition, the job description for Charge Nurses clearly shows the employees are accountable for the performance of their assigned CNAs. The Employer has more than satisfied the burden required by Board precedent and by the recent decision of the United States Court of Appeals for the Eleventh Circuit in *Lakeland Health Care Associates, LLC v. NLRB*, 696 F.3d 1332, 1343-45 (11th Cir. 2012) (finding that charge nurses are held “responsibly direct” nursing assistants even where “there is no evidence establishing that a LPN has ever been disciplined or discharged because of his or her failure to supervise CNAs.”). Thus, the *undisputed* record evidence clearly demonstrates that Charge Nurses face actual consequences and certainly the “prospect of consequences” for failing to properly supervise their subordinate employees. Accordingly, the Regional Director’s Decision contradicts controlling Board precedent and warrants review.

The Regional Director also made erroneous conclusions and departed from controlling Board precedent in reaching determinations regarding the role played by Charge Nurses in evaluating and disciplining employees. The *undisputed* record evidence clearly demonstrates that Charge Nurses are involved in all performance-related aspects of a CNA’s employment at Westport and that they can and do affect the job status of CNAs through their recommendations. Charge Nurses evaluate CNAs and make recommendations regarding a CNA’s employment

during orientation and probationary periods. Charge Nurses also evaluate CNA work performance through written performance evaluations. In addition, Charge Nurses are involved in CNA discipline. As the record demonstrates, Charge Nurses use independent judgment and discretion in affecting the employment status of Westport CNAs. Furthermore, the record is clear that the Charge Nurses may take one of several actions upon observing misconduct on the part of a CNA. Such discretionary authority to choose from among several remedial measures to discipline CNAs is demonstrative of supervisory status under the Act. *Extendicare Health Services v. NLRB*, 182 Fed. Appx. 412, 417 (6th Cir. 2006).

As described in further detail below, compelling reasons exist for granting this Request for Review based on the following grounds: (1) the Regional Director's Decision reached clearly erroneous conclusions on material factual issues that were contradicted by the record, and such error prejudicially affected the rights of the Employer; and (2) substantial questions of law and policy were raised because of the Regional Director's departure from Board precedent. For these reasons, discussed below, the NLRB should grant the Employer's Request for Review.

II. RELEVANT PROCEDURAL HISTORY

On October 17, 2013, the New England Health Care Employees Union, District 1199, SEIU (the "Union") filed a Petition seeking to represent a bargaining unit consisting of all full-time, part-time, and per-diem Licensed Practical Nurses ("LPNs"), but excluding all other employees, including supervisors, as defined in the Act.² (Bd. Ex. 1) On October 29 and October 30, 2013, a hearing was held on the Petition before a Hearing Officer of the National Labor Relations Board (the "Hearing"). During the Hearing, the parties: (1) acknowledged that the petitioned-for unit consisted of Westport's 23 or 24 full-time and regular part-time LPNs who

² Citations to the Hearing transcript will be denoted as "Tr. ___". Citations to Employer Exhibits will be denoted as "Er. Ex. ___," citations to Union Exhibits will be denoted as "U. Ex. ___," and citations to Board Exhibits will be denoted as "Bd. Ex. ___".

had worked an average of four or more hours per week in the 13 weeks preceding the filing of the Petition; (2) agreed that any LPN employed by Westport in the MDS Department, which handles medical record issues, (such as Debbie Baker) is a statutory supervisor and therefore excluded from the petitioned-for unit; and (3) disagreed as to whether or not the LPNs employed by Westport as Charge nurses were statutory supervisors. (Tr. 15-17) Evidence was taken on this last issue.

On December 11, 2013, the Regional Director issued the Decision. The Regional Director found that the Employer failed to demonstrate that LPNs are statutory supervisors. By subsequent notice, the Regional Director directed an election to occur on January 8, 2013, from 6:30 a.m. to 7:30 a.m. and from 2:30 p.m. to 3:30 p.m. in the first floor conference room at Westport. The Employer now files this Request for Review of the Decision and Direction of Election and Request to Stay the Election.

III. STATEMENT OF FACTS

A. Background

Westport Health Care Center is a 120-bed skilling nursing and long-term care facility in Westport, Connecticut. (Tr. 26) Westport respectfully disagrees with the Regional Director's Decision and maintains that all LPN Charge Nurses in the petitioned-for unit are statutory supervisors and consequently, the Regional Director's Decision is erroneous.

B. Westport's Organizational Structure

Westport is housed in a three-story building that includes four nursing units. (Tr. 28-29) On the first floor, there are various offices including the Business Office and offices for the Nursing Department, Rehabilitation Department, and the Administrator. Laundry and Dietary are also on the first floor. (Tr. 28) The four nursing units are located on the second and third floors. There are two nursing units on the second floor – the Riverside unit and the Woodside

unit. (Tr. 28-29) The Riverside unit is a short-term rehabilitation unit for patients who are discharged from the hospital and who need transitional therapy before they are able to return home. (Tr. 29) The Woodside unit provides long-term care to residents. (Tr. 29) Similarly, there are two nursing units on the third floor that provide long-term care to residents – the Fairfield unit and the Saugatuck unit. (Tr. 29-30) Each of the four nursing units can accommodate approximately 30 residents or patients. (Tr. 28)

Marion Najamy is the Administrator of Westport Health Care Center. (Tr. 27) As the Administrator, Ms. Najamy is responsible for overall operations at Westport. (Tr. 28) Westport is organized into several departments, including Nursing, Rehabilitation, Dietary, Environmental Services (which includes Housekeeping, Laundry, and Maintenance), Administrative, Social Services, and Recreation. (Tr. 27) There is a department head responsible for each department, including the Director of Nursing Services (“DNS”), all of whom report to Administrator Najamy. (Tr. 27-28)

C. The Nursing Department

1. Structure and Organization

The Nursing Department is comprised of the DNS, the Assistant Director of Nursing Services (“ADNS”), Registered Nurses (“RNs”) who work as House Supervisors, RNs and LPNs who work as Charge Nurses, and Certified Nursing Assistants (“CNAs”). (Tr. 30) With approximately 100-110 employees, the Nursing Department is the largest department at Westport. (Tr. 27) The Nursing Department operates on three shifts – 7 a.m. to 3 p.m., 3 p.m. to 11 p.m., and 11 p.m. to 7 a.m. (Tr. 36-37) The Director of Nursing Services, Loretta Tepper, who is an RN, is responsible for overseeing the Nursing Department. (Tr. 24) DNS Tepper generally works Monday through Friday during the day shift. (Tr. 25, 35-36) Betty Boe is the ADNS and she also works generally Monday through Friday during the day shift. (Tr. 36)

There are six RNs who work as House Supervisors who report directly to the DNS and ADNS. (Tr. 36) These House Supervisors are responsible for the Nursing Department when the DNS and ADNS are not present in the building. (Tr. 36) House Supervisors are always RNs, because State regulations mandate that nursing home centers have an RN in the building 24-hours a day. (Tr. 36) House Supervisors are responsible for overseeing the entire facility and providing clinical support for the Charge Nurses. (Tr. 37) While there are six RNs who work as House Supervisors, only one such House Supervisor is assigned to work on any given shift. (Tr. 37) DNS Tepper explained that Westport uses this staffing structure because it employs Charge Nurses to directly supervise the nursing units.³ (Tr. 37) House Supervisors are not considered nursing shift supervisors. (Tr. 205)

The Center employs approximately 24 LPNs and 12 RNs as Charge Nurses.⁴ (Tr. 35) It is *undisputed* that Charge Nurses are responsible for their assigned unit and ultimately the care that residents receive on their unit during the Charge Nurse's shift, including supervising, assigning, and directing all of the CNAs who work on that unit. (Tr. 30-31, 40) DNS Tepper and other department heads consider Charge Nurses to be supervisors. (Tr. 31, 34-35) Notably, DNS Tepper testified that unlike other nursing homes she is familiar with where LPNs are currently unionized, there is no intermediary Unit Manager position at Westport. (Tr. 31-32) DNS Tepper explained that Charge Nurses at Westport perform the supervisory duties that are performed by Unit Managers at other similar-situated nursing centers she is familiar with. (Tr. 34, 52) Thus, the Charge Nurses who are LPNs at Westport have supervisory responsibility unlike LPNs who are employed in facilities that have Unit Managers. (Tr. 34, 52)

³ In addition, Connecticut State Regulation §19-13-D8t(m) requires chronic and convalescent nursing homes to have one licensed nurse on duty on each patient-occupied floor at all times.

⁴ RNs and LPNs who are assigned as Charge Nurses have "identical" duties and responsibilities regardless of nursing license. (Tr. 35, 302)

It is *undisputed* that at new-hire orientation, Charge Nurses are instructed that they are the direct supervisor of the CNAs working on their units and that they have responsibility to direct, assign, and evaluate CNAs to ensure residents receive the highest quality care. (Tr. 60-61) DNS Tepper explained:

Part of the reason that a charge nurse would be hired is to be in charge of their unit. That has a big significance in regards to their supervisory duties, because they are the nurse on the unit and they are told that they will have certified nursing assistants working on the unit that report to them. They have a working relationship to the CNAs. They must provide direct guidance and supervision to those CNAs. It starts from the very moment that everyone arrives on the shift. So they are told that they do have a supervisory role and that they do supervise CNAs. (Tr. 61)

It is also *undisputed* that during orientation Charge Nurses receive a written description of their job duties and responsibilities entitled “CHARGE NURSE DUTIES” that describes the position’s supervisory responsibilities. (Tr. 45; Er. Ex. 1) Significantly, this written description of the Charge Nurses’ duties and responsibilities also has been distributed to Charge Nurses from time-to-time by the House Supervisor for informal training and counseling purposes (Tr. 48-49), and DNS Tepper distributed it to Charge Nurses as a refresher in July 2012 when the CNAs went on strike and again in March 2013 when the CNAs returned from their strike. (Tr. 256-57) While Union witness Judith Francois incredibly claimed she never received a copy of this document, she acknowledged that she performs all 27 items listed in it. (Tr. 344-46) In addition, the current job description describes how Charge Nurses direct the day-to-day functions of CNAs. (Er. Ex. 2) LPN Charge Nurses earn between \$27 and \$36.21 per hour, which is considerably higher than the hourly wage rates for CNAs, who start at \$13.30 per hour. (Tr. 385, 387)

The CNAs report directly to the Charge Nurses. (Tr. 67) CNAs are responsible for

providing direct resident care. (Tr. 62; Er. Ex. 3) These duties include assisting residents with bathing, toileting, dressing, grooming, changing, repositioning, feeding, and providing whatever other personal care residents need for daily living. (Tr. 62-63; Er. Ex. 3) During their orientation, CNAs are given a copy of their job description and told that Charge Nurses are their supervisors. (Tr. 64-65, 165)

D. Duties of Charge Nurses

1. Job Descriptions Establish the Nursing Department's Reporting Hierarchy, Including the Charge Nurses' Supervisory Duties

Westport's job descriptions establish the hierarchy and "chain of command" in the Nursing Department. The CNA job description states that a CNA "[d]irectly reports to the Charge Nurse of assigned unit" and that the CNA is to report all changes in resident condition promptly to the Charge Nurse. (Er. Ex. 3 at 1-2) In addition to identifying various daily tasks required of CNAs, the CNA job description states that CNAs "follow work assignments" and "work schedules in completing and performing ... assigned tasks" as provided by their supervisor. (Er. Ex. 3 at p. 4) The CNA job description also states that CNAs will "[m]eet with [their] shift's nursing personnel, on a daily basis, to assist in identifying and correcting problem areas, and/or the improvement of services." (Er. Ex. 4 at p. 4) Likewise, the Charge Nurse job description shows that Charge Nurses are responsible for supervising the CNAs and that among other things, Charge Nurses "direct day-to-day functions of the nursing assistants." (Er. Ex. 2 at p. 3) While the LPN job description references both Charge Nurse and Supervisor, DNS Tepper testified without contradiction that the two "positions" are the same at Westport and that the terms are used interchangeably.⁵ (Tr. 51-52) The LPN job description also contemplates

⁵ There is a separate job description for House Supervisors. (Tr. 301)

situations where a Charge Nurse would supervise a medication and/or treatment nurse.⁶ (Er. Ex. 2)

Union Witness Judith Francois was questioned about the Charge Nurse job description that is in her personnel file. (Tr. 352-53) Although Charge Nurse Francois did not specifically recall receiving this job description, she did not deny receiving it when she was first hired at Westport. (Tr. 353) That particular job description informed Charge Nurse Francois that “[t]he primary purpose of [her] job position is to provide direct nursing care to the residents, and to supervise the day-to-day nursing activities performed by nursing assistants.” (Er. Ex. 19) That job description also informed Charge Nurse Francois that “[a]s **Charge Nurse** [she is] delegated the administrative authority, responsibility, and accountability necessary for carrying out [her] assigned duties.” (Er. Ex. 19) (emphasis in original) The following representative duties and responsibilities are identified verbatim in that job description that is in Charge Nurse Francois’ personnel file:

- Direct the day-to-day functions of the nursing assistants in accordance with current rules, regulations, and guidelines that govern the long-term care facility.
- Ensure that all nursing personnel assigned to you comply with the written policies and procedures established by this facility.
- Meet with your assigned nursing staff, as well as support personnel, in planning the shifts’ services, programs, and activities.
- Make written and oral reports/recommendations concerning the activities of your shift as required.
- Participate in employee performance evaluations, determining your shift’s staffing requirements, and making recommendations to the Nurse Supervisor concerning employee dismissals, transfers, etc.
- Review and evaluate your department’s work force and make recommendations

⁶ DNS Tepper explained that when resident census reaches 110 or 112 residents, a second nurse may be assigned to the Riverside unit. (Tr. 51) In that situation, the second nurse works as a medication/treatment nurse and reports to the Charge Nurse. (Tr. 50-51)

to the Nurse Supervisor.

- Provide leadership to nursing personnel assigned to your unit/shifts.
- Make daily rounds of your unit/shift to ensure that nursing service personnel are performing their work assignments in accordance with acceptable nursing standards.
- Meet with your shift's nursing personnel, on a regularly scheduled basis, to assist in identifying and correcting problem areas, and/or to improve services.

(Er. Ex. 19) As described below, Charge Nurses complete all of these supervisory functions as the sole supervisor directly responsible for their assigned nursing unit.

2. Charge Nurses Regularly Assign, Reassign, and Responsibly Direct the Work of Certified Nursing Assistants

At the beginning of each shift, the Charge Nurses receive reports from the prior shift's Charge Nurse concerning the status of residents on their respective units. (Tr. 357) Charge Nurses need this information to direct the care provided by CNAs to the residents. Regardless of the shift, no other Westport supervisor other than the Charge Nurse is directly responsible for their assigned unit. (Tr. 38) Likewise, regardless of the shift, no Westport employee other than the Charge Nurse is directly responsible for the supervision of the CNAs assigned to their unit. (Tr. 38) Union witness Charge Nurse Francois confirmed this fact, stating that "I supervise on the floor." (Tr. 347)

Charge Nurses meet with their CNAs at the start of each shift to provide their daily work assignments and other instructions. (Tr. 71, 93) An assignment sheet memorializes the shift's daily work assignments for the CNAs and is completed by the Charge Nurse. Not only does the Charge Nurse decide how the residents are to be grouped together for assignment purposes, but "[t]he charge nurse has complete discretion to make the work assignments on his or her units utilizing independent judgment in all factors that affect that unit." (Tr. 72)

The Medical Records clerk types the resident names on the pre-printed assignment sheets based on direction provided by the Charge Nurses⁷ (Tr. p. 79) The typed names of residents change from time-to-time based on resident turnover, but Charge Nurses make the ultimate decision in instructing the Medical Records clerk on how residents should be grouped for assignment purposes. (Tr. 79-80) Through daily handwritten changes, Charge Nurses are responsible for completing the assignment sheets on which the Charge Nurses assign CNAs to particular residents and resident groupings, for identifying particular tasks for their CNAs to complete, and for making necessary adjustments to CNA room assignments based on the CNAs' skill levels, resident care requirements, and workload. (Tr. 71-72, 297-98, 380) For example, the Charge Nurses will assign a CNA to a particular resident group by writing the CNA's name on top of the applicable resident column. (Er. Ex. 4A) Charge Nurse also provide specific instructions to the CNAs through handwritten comments on the assignment sheets, such as which residents need showers, one-to-one care, or need to be weighed. Charge Nurses also adjust the CNAs daily work assignments by moving residents from one CNA to another CNA. They do this by crossing out one or more resident names from one of the resident grouping columns on the pre-printed assignment sheets and handwriting those resident names in another resident grouping column. Charge Nurses makes these changes to the CNA daily work assignments based on their individual determination as to what is required to provide proper patient care in light of resident needs and CNA "workload." (Tr. 71-72) It is *undisputed* that Charge Nurses are not required to obtain the approval of anyone else – including the Housing Supervisor,

⁷ The Medical Records clerk has been typing resident names on the assignment sheets for about a year. (Tr. 106-107) Prior to that time, Charge Nurses would handwrite the resident names onto the sheet each day. While Charge Nurses are still responsible for the final resident groupings on their shift each day based on their own discretion and judgment, the Medical Records clerk now types the assignments sheets in order to reduce the workload for the Charge Nurses. (Tr. 106-107) The Medical Record clerk does not, however, change resident groupings without consulting with the Charge Nurse because it is "not within her capacity to make that kind of determination." (Tr. 95)

ADNS, or DNS – before making any of these changes to the CNA daily work assignments. (Tr. 72-74)

Employer Exhibits 4A, 4B, 4C, and 4D provide illustrative examples of how Charge Nurses make and change the CNAs daily work assignments on their units. These assignment sheets are for the 7am to 3pm shift for the Woodside Unit for October 21, 22 and 23, 2013. They are representative of assignment sheets from other units. (Tr. 76, 90) Exhibit 4D is an assignment sheet that Charge Nurse Paul-Telo Alta completed for October 21, 2013. This assignment sheet demonstrates how Charge Nurse Alta assigned the three CNAs he supervised to resident groupings #1, #2, and #3. (Er. Ex. 4D) Since Charge Nurse Alta did not have a “split” CNA working on this shift, he also had to decided which residents to reassign from resident group #4 to the three other resident groupings.⁸ (Er. Ex. 4D) This assignment sheet also shows that Charge Nurse Alta identified which residents required showers and which residents needed one-to-one care. (Er. Ex. 4D)

Similarly, Employer Exhibit 4C is the first assignment sheet created by Charge Nurse Judith Francois for October 22, 2013. However, because of a CNA staffing change, Charge Nurse Francois crossed out that assignment sheet and made up a second assignment sheet for that same day with different CNA assignments from the first assignment sheet. (Er. Exs. 4B and 4C) This second revised assignment sheet for October 22 shows how Charge Nurse Francois made different CNA staffing decisions for the same unit than did Charge Nurse Alta the prior day. For example, Charge Nurse Francois assigned CNA Cooper to resident grouping #1, whereas Charge Nurse Alta assigned Cooper to resident grouping #3. Charge Nurse Francois likewise reassigned

⁸ This is shown by the fact that Charge Nurse Alta crossed out all the resident names in the fourth column of the assignment sheet and handwrote those resident names in the assignment groupings for the other CNAs. Thus, Charge Nurse Alta reassigned one additional resident to CNA Pauline and four additional residents to CNA Vince. (Er. Ex. 4D)

residents differently among the four CNAs assigned to the unit than did Charge Nurse Alta. Charge Nurse Francois also indicated on the assignment sheet that the CNAs were to complete weight measurements, and she identified which residents needed showers and one-to-one supervision. (compare Er. Ex. 4B and Er. Ex. 4D)

Employer Exhibit 4A shows how Charge Nurse Judith Scott made different CNA staffing decisions on October 23, 2013. In doing so, Charge Nurse Scott reassigned residents from one CNA to another CNA based on her judgment of how best to staff her unit. (Er. Ex. 4A) For example, Charge Nurse Scott reassigned resident “I. B.” from CNA Pauline to CNA Yvonne, she reassigned resident “E. A.” from CNA Jennifer to CNA Yvonne, and she reassigned residents “Z. P.” and “B. M.” from CNA Jennifer to CNA Cooper. (Er. Ex. 4A) As DNS Tepper explained, these reassignments “mean[] that the charge nurse has made a determination based on ... her own firsthand knowledge of the unit to make an adjustment to the assignment[s].” (Tr. 86)

While the Charge Nurses give the CNAs their initial work assignments at the start of the shift, assignments often are changed mid-shift by the Charge Nurse. (Tr. 73) CNA rest and meal breaks are prescheduled and listed on the unit assignment sheets. In the course of a shift, however, it may be necessary for the Charge Nurse to postpone or reschedule a CNA break based on an emergency or other resident care situation. (Tr. 91-92) Charge Nurses have the authority to reschedule or postpone CNA rest or meal breaks when the Charge Nurse determines such action is necessary – which occurs nearly every day. (Tr. 91) The Charge Nurse does not consult with anyone first before they can postpone CNA breaks.⁹ (Tr. 91-92)

Charge Nurses also have full authority, using their own independent judgment, to instruct their CNAs to stop performing their assigned duties and to do something else. (Tr. 371) A

⁹ If a Charge Nurse requires a CNA to skip a meal break or rest period, the net effect may be overtime for the CNA.

Charge Nurse also can redirect their CNAs to perform other tasks that the Charge Nurse deems to be higher priority, such as an emergency situation. (Tr. 371) For example, if the electronic call bell system goes down, Charge Nurses will “adjust [CNA] work flow in a manner that they make rounds every 15 minutes to check on the residents, to make sure that their needs are being met.” (Tr. 162) Charge Nurses are required to constantly assess a resident’s condition, and using their own independent judgment, to evaluate and decide on what care needs to be provided. In such situations, the Charge Nurse then instructs the CNA accordingly and follows up throughout the shift to ensure the CNAs have complied with her directives. (Tr. 72; Er. Exs. 1-2)

After assigning the CNA their duties for the shift, Charge Nurses pass medications and complete their “rounds” on their respective units. (Tr. 311) Charge Nurses provide treatment to residents, pass medications, assess resident conditions, and at all times monitor the care provided to residents by their CNAs. (Er. Exs. 1-2) Charge Nurses must determine, based on their observations of the residents, whether additional or different care is required, and whether the care being provided by the CNAs is sufficient. (Tr. 71-72, Er. Ex. 1) While performing rounds and giving treatments, Charge Nurses redirect the CNAs to perform additional or different tasks, as warranted, including identifying and addressing work improperly performed by their CNAs or providing additional care to residents. (Er. Ex. 1-2) Charge Nurses have complete authority to assign, reassign and direct the work of their CNAs without the approval of anyone. (Tr. 72, 74) In fact, Charge Nurses are obligated to monitor and ensure that the care provided by their CNAs meets certain standards, because it is the Charge Nurses who are responsible and accountable for all care provided to the residents on their units. (Tr. 108-109; Exs. 1-2) Charge Nurses who fail to adequately supervise their CNAs are subject to discipline. (Tr. 109)

Charge Nurses are responsible for securing and maintaining proper CNA staffing on their

units. (Tr. 98) If there is a shortage of CNAs assigned to a unit, the Charge Nurse has a “variety of options” to consider. (Tr. 98) The Charge Nurse can contact the House Supervisor, ADNS or DNS to request more CNAs, or the Charge Nurse can redistribute the workload among the CNAs who are on their unit. (Tr. 98-100) Charge Nurses also can coordinate with other Charge Nurses on other units to share CNAs between two units. (Tr. 98-100) Charge Nurses also can have CNAs called into work, and have done exactly that. (Tr. 228)

DNS Tepper provided two recent examples of how Charge Nurses use their own independent judgment and discretion regarding CNA staffing decisions. In one situation, a Charge Nurse named Margaret had a CNA whom “she felt could be utilized better elsewhere” because she noticed, based on her review of another unit’s work schedule, that the other unit was short-handed. (Tr. 100) Accordingly, Margaret called the Charge Nurse on the other unit and they worked out an arrangement whereby the two units shared a CNA who was originally assigned to Margaret’s unit. (Tr. 100) Likewise, on October 25, 2013, CNA Marie Jean was assigned to work as a “split” on the Woodside unit and Riverside unit. (Tr. 101-03) However, based on workload concerns on the Woodside unit, Charge Nurse Clara Tamba called the Charge Nurse on the Riverside unit and the two Charge Nurses worked out an arrangement whereby CNA Marie Jean would work only on the Woodside unit for the entire shift and not “split” with the Riverside unit. (Tr. 101-03) Accordingly, Charge Nurse Tamba changed the assignment sheet for Woodside to reflect that CNA Marie Jean was no longer on a split assignment. (Er. Ex. 5A and 5B) Thus, Charge Nurses have the authority on their own to create or eliminate “split” assignments to address CNA workloads and staffing shortages.

3. Charge Nurses Are Held Accountable for their Supervisory Duties

Charge Nurses are held accountable for the supervision and performance of their CNAs. (Tr. 108-09) As DNS Tepper explained, Charge Nurses who fail to properly supervise their

CNAs are subject to discipline. (Tr. 109) In fact, ADNS Boe recently issued disciplinary notices to Charge Nurses Judith Scott and Carlos Alvarez after a quality review audit in early October 2013 showed that these Charge Nurses failed to document resident weight information on the treatment cardex. (Er. Exs. 6 and 7) DNS Tepper explained that there was no information for these two Charge Nurses to document because their CNAs had failed to weigh residents as required, and that it was the responsibility of the Charge Nurses to make sure that their CNAs performed this work. (Tr. 110-18)

Likewise, the record demonstrates that Charge Nurses Clara Tamba and Franklin Fequiere received disciplinary notices for failing to supervise their assigned CNAs in regard to resident care. (Er. Exs. 8 and 9) ADNS Boe disciplined these two Charge Nurses for failing to ensure that their CNAs distributed evening snacks to residents on their respective units. (Er. Exs. 8 and 9) While these Charge Nurses were not required to deliver resident snacks themselves, it was their responsibility to make sure that their CNAs complete this task. (Tr. 122, 125-26) DNS Tepper testified that these Charge Nurses were disciplined for “not properly supervising staff to make sure that the snacks were distributed.” (Tr. 126) In another example, DNS Tepper explained how Charge Nurse Cashaya Sanchez was terminated in October 2012 for, among other things, giving improper instructions to a CNA and for making derogatory statements about the ADNS and DNS. (Tr. 128-29; Er. Ex. 10) Charge Nurse Tamba had brought these derogatory statements to the attention of the DNS and Tamba recommended that Ms. Sanchez be terminated. (Tr. 289)

The record also clearly establishes that Charge Nurses are held accountable through performance evaluations. For example, Charge Nurse Judith Francois received a performance evaluation on July 13, 2013, from the House Supervisor stating “[w]eakness is she needs to be a

little stronger to staff [at] times and to accomplish tasks in a more timely manner.” (Er. Ex. 20) Thus, Charge Nurses are held responsible for the performance of their CNAs and for “responsibly” directing their CNAs.

4. Charge Nurses Prepare and Issue Performance Evaluations for Certified Nursing Assistants

Charge Nurses prepare written performance evaluations for CNAs.¹⁰ (Tr. 133) In fact, Charge Nurse Francois acknowledged that she has completed performance evaluations on her CNAs, and the record includes various samples of CNA performance evaluations completed by Charge Nurses in 2011 and 2012. (Tr. 369; Er. Exs. 11, 12, 13A, 13B, 13C, 13D, 13E, and 13F). The CNA job evaluation is a written document where Charge Nurses evaluate their CNAs on job knowledge, quality, productivity, attendance, teamwork, and customer service. (Er. Ex. 1) In addition, Charge Nurses comment on their CNA’s strength/areas of improvement and weaknesses/areas for immediate improvement. While Charge Nurses’ evaluations of their CNAs are reviewed by a manager, the reviewing manager does not have any authority to change the content of a performance evaluation completed by a Charge Nurse. (Tr. 139)

5. Charge Nurses Make Recommendations Regarding the Employment Status of Certified Nursing Assistants

Charge Nurses are involved in all performance-related decisions regarding a CNA’s employment status with Westport. When CNAs are first hired they go through an orientation process that includes two weeks on a nursing unit under the direct supervision and evaluation of the Charge Nurses. (Tr. 167) The Charge Nurses evaluate the “orientee” CNA and make recommendations at the end of the orientation period to the House Supervisor, ADNS and DNS

¹⁰ If a Charge Nurse is unable to complete a CNA’s performance evaluation based on time constraints, the House Supervisor or the ADNS will do the evaluation. (Tr. 133-34) However, in those situations, the House Supervisor or ADNS will fill in the CNA’s performance evaluation based on information provided to them by the Charge Nurse. (Tr. 134) The House Supervisor and/or ADNS requires input from the Charge Nurse because “[t]hey are the ones who are working with the CNAs on a daily basis ... [and] [t]hey are the one who supervise them and know what their performance is like.” (Tr. 134)

regarding the CNA's continued employment. (Tr. 167) Based on the Charge Nurse's recommendation, nursing management will make a decision whether to terminate the CNA or retain the CNA and provide additional training. (Tr. 167-70) For example, the DNS and ADNS relied heavily on feedback provided by several Charge Nurses concerning CNA Seabury, whose orientation period was extended for "retraining" and "reorientation" based on recommendations provided by the Charge Nurses. (Tr. 170)

CNAs also must complete a probationary period after fulfilling their orientation requirements. (Tr. 171) This probationary period is 60 days for full-time CNAs and somewhat longer for part-time CNAs. (Tr. 171) At the end of the probationary period, the DNS and Administrator decide whether to retain the CNA for continued employment. (Tr. 171) The DNS and Administrator "rely heavily on the charge nurse's input" in making this decision. (Tr. 172) For example, the DNS and Administrator did not retain CNA Latoya Pettway based on recommendations they received from several Charge Nurses. (Tr. 172-73) Likewise, the DNS and ADNS extended the probationary period of CNA Seabury based on recommendations provided by Charge Nurses. (Tr. 170)

Charge Nurses also are involved in disciplinary matters. (Tr. 173-89) As DNS Tepper confirmed, Charge Nurses "have the authority to discipline for CNAs failing to do what they are told to do." (Tr. 173) As such, it is *undisputed* that Charge Nurses often give their CNAs verbal warnings and counseling regarding performance concerns, both of which are steps on the progressive discipline path. (Tr. 174)

CNAs have received formal discipline for being insubordinate to Charge Nurses. DNS Tepper suspended CNA Aragbada in July 2012 because "[s]he refused her assignments and tried to change her assignment without any involvement by her charge nurse." (Tr. 175; Er. Ex. 16)

As DNS Tepper explained, this situation was escalated to the House Supervisor because the CNA ignored verbal counseling provided by Charge Nurse Adele Pular DelRossi and because the CNA made threats against Charge Nurse DelRossi. (Tr. 176, 199) Notably, not only does this situation clearly show that CNAs must abide by the work assignments that their Charge Nurses create and give them, but also this situation provides a detailed example of the different factors and discretion that Charge Nurses use in making their CNA work assignments.¹¹ Charge Nurse DelRossi's written statement outlines the dispute as follows:

On 7/28/12 @ around 11:30 p.m. after getting report from the (3-11) nurse, I wrote the names of the CNAs on the assignment sheet that was already printed and that I've used before when there were 3 CNAs. **I have made a small adjustment by switching two residents between assignments #2 and #3 to make it manageable for a newly hired CNA working (11-7) for the first time on the floor. I've also added one resident to assignment #1 from assignment #3.** (Er. Ex. 18) (emphasis added)

Accordingly, Charge Nurse DelRossi gave CNA Aragbada a heavier work load that evening because she was the more experienced CNA.¹² (Tr. 197-98) Thus, given that the Charge Nurse had an experienced CNA (Aragbada) and a new CNA orientee on the unit that evening, she reassigned residents "so that the distribution of number of residents given to each [CNA] would not be equal but it would be equal to what their capabilities were." (Tr. 198) This staffing decision is a clear example of the independent judgment and discretion that all Charge Nurses possess and exercise.

CNA Joan Henry was suspended from work without pay in May 2012 pending an investigation after a Charge Nurse reported that Henry refused to provide care to residents

¹¹ Because of the supervisory authority possessed and exercised by Charge Nurses in relation to their CNAs, there is simply no community of interest between the two positions.

¹² This clear and undisputed example of the type of independent judgment and discretion that Charge Nurses exercise in reassigning work between two CNAs directly contradicts Union Witness Judith Francois' testimony that she does her CNA assignments simply "[f]irst come, first serve." (Tr. 323)

assigned to her by the Charge Nurse. (Tr. 179-80; Er. Ex. 17) Significantly, it is *undisputed* that DNS Tepper immediately suspended CNA Henry, without investigation, based solely on what was reported to her by the Charge Nurse. (Tr. 182-83, 248) DNS Tepper explained that she relied on the Charge Nurse's report because the Charge Nurse "is responsible for what happens on that unit." (Tr. 183) The disciplinary notice for CNA Henry noted that the CNA "[d]oes not always accept direction of the charge nurse without a discussion." (Er. Ex. 17)

6. Charge Nurses Direct the Work Performed by Non-Nursing Department Employees

It is *undisputed* that Charge Nurses often provide assignments and directions to employees outside of the Nursing Department. Charge Nurses have this discretion and authority because they are the sole person directly responsible for their nursing unit. (Tr. 157) As DNS Tepper explained:

Because the charge nurse - - again, the charge nurse is the person who is in control of that unit. And it has to function as efficiently as possible. So if there is something that needs attention, whether it is from the dietary department, or housekeeping department, or maintenance department, that charge nurse is the controller of the unit that need to utilize discretion and make it flow. So the other departments know that when the charge nurses says I need this or I need that, I need you do to this, they do it. And there is no question asked. (Tr. 157)

Charge Nurses direct dietary employees to bring different meals to the unit based on resident preferences or a resident's medical condition. (Tr. 149-53) In fact, "[t]he dietary staff does not take orders from the CNA staff to bring food up until directed from the charge nurse." (Tr. 150) Charge Nurses do not check with the dietary manager before giving assignments to dietary employees. (Tr. 151) Similarly, Charge Nurses have "full discretion" to call maintenance employees to the unit as needed and maintenance employees are "expected to go." (Tr. 151) Charge Nurses also provide direction and assignment to employees in the Rehabilitation Department. Where there is a concern regarding a resident's physical condition,

“[t]he charge nurse has the right and ability to call and make the request of the therapy department to come up and intervene, and make some evaluations.” (Tr. 153-54) Charge Nurses do not need approval of any supervisor or department head before providing assignments to rehabilitation aides. (Tr. 154-55)

Charge Nurses provide also “daily” assignments and tasks to housekeeping employees. (Tr. 156) Charge Nurses often reassign housekeepers from one specific task on a unit to another task on a unit. (Tr. 156) For example:

If somebody goes home unexpectedly or if there is an unexpected admission, the charge nurse has the full authority to say to housekeeping, you know, I need you to stop what you’re doing, I need to get this room ready, or I need this room to be addressed, and the housekeeper does have to respond to that charge nurse’s directive to, to do whatever it is that they are asking them to do in regards to the discharge or admission. (Tr. 156-57)

Charge Nurses do not seek approval from the department manager before providing assignments or directions to housekeeping staff. (Tr. 157)

Westport also has written policies in place that provide Charge Nurses with direct responsibility for supervising alternate or non-nursing personnel. (Tr. 157-58) For example, Westport has a policy to deal with staffing shortages that may result from an influenza pandemic that provides “[t]he unit charge nurses will be in charge of supervision of alternative employees.” (Er. Ex. 14 at p. 1) This policy also provides that employees from Housekeeping, Food Service, Maintenance, Counseling, and Administrative may be used to “perform basic patient care with supervision.” (Er. Ex. at p. 2) While Westport has not experienced an influenza pandemic, DNS Tepper explained that Westport has used this same staffing policy in other emergency situations where the Nursing Department required assistance from alternative employees as set forth in the policy. (Tr. 158-61) Specifically, it is *undisputed* that Charge Nurses have used and supervised non-nursing department employees to provide direct resident care during “Hurricane Irene,

Hurricane Sandy, the blizzard, the Frankenstorm.” (Tr. 159-60)

IV. ARGUMENT

A. Legal Standard

The NLRB may grant review of a Regional Director’s unit determination in certain circumstances. Specifically, review may be granted where:

1. a substantial question of law or policy is raised because of: (i) the absence of; or (ii) departure from, officially reported Board precedent;
2. the Regional Director’s decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the right of a party;
3. the conduct of a hearing or any ruling made in connection with the proceeding has resulted in prejudicial error; or
4. there are compelling reasons for reconsideration of an important Board rule or policy.

See NLRB Rules and Regulations § 102.67(c). The Employer’s Request for Review in this case is premised on the first two grounds: (1) substantial questions of law are raised because of the Regional Director’s departure from officially reported Board precedent; and (2) the Regional Director’s decisions on substantial factual issues are clearly erroneous on the record, and such errors prejudicially affect the rights of the Employer.

B. The Regional Director’s Conclusion that Licensed Practical Nurses Are Not Statutory Supervisors Is Clearly Erroneous in Light of the Overwhelming Evidence Presented at the Hearing

The Regional Director erroneously determined that the LPN Charge Nurses should be included in the proposed bargaining unit because the Employer failed to demonstrate by a preponderance of the evidence that the Charge Nurses exercise supervisory authority as defined by the Act. In doing so, the Regional Director blatantly ignored or mischaracterized the ability

and discretion of Charge Nurses to assign and direct the work of CNAs. Further, the Regional Director improperly mischaracterized the testimony of the Employer's witness – Westport's Director of Nursing Services – and the record evidence in an effort to minimize the scope and breadth of the LPNs independent supervisory authority. For these reasons, the Employer requests review be granted.

Section 2(11) of the Act defines the term “supervisor” in the following manner:

The term "supervisor" means 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.

The Board consistently has held that because “the statutory indicia set forth in Section 2(11) . . . (are) stated in the disjunctive ... **only one need exist** to confer supervisory status” *Albany Medical Center Hosp.*, 273 NLRB 485, 486 (1984) (emphasis added); *see also Oakwood Healthcare, Inc.*, 348 NLRB 686, 688 (2006) (“If the individual has authority to exercise ... at least one of those functions, 2(11) supervisory status exists”).

The party claiming an employee is a supervisor bears the burden of proving the employee's supervisory status under the Act. *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 711-712 (2001). When analyzing whether an employee possesses supervisory authority, the focus is on whether the employer has vested in the individual the authority to undertake any of the supervisory responsibilities, **not on how frequently the individual exercises the authority, or if it is exercised at all.** *Barstow Community Hospital*, 352 NLRB No. 125, slip op. at 2 (August 18, 2008) (“Section 2(11) requires only possession of authority to carry out an enumerated supervisory function, not its actual exercise”).

Westport presented considerable testimony and documentation that fully establishes the

supervisory responsibilities of its Charge Nurses, including their authority to assign, reassign, responsibly direct, discipline, and to effectively recommend the suspension and dismissal of CNAs. Because the existence of any *one* of these indicia alone, without regard to frequency of performance or even actual performance, will support a finding of supervisory status, Westport maintains that all of its Charge Nurses are supervisors.

In *Kentucky River*, the Supreme Court allowed that “the statutory term ‘independent judgment’ is ambiguous with respect to the degree [not what kind] of discretion required for supervisory status.” *Id.* at 713. Subsequently, the Board clarified the meaning of “independent judgment” in *Oakwood Healthcare*. There, the Board provided that, at a minimum, a person must “act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” *Id.* at 693. However, judgments are not independent if the judgment is “dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” *Id.* (citing *Dynamic Science, Inc.*, 334 NLRB 391, 391 (2001); *Beverly Enterprises v. NLRB*, 148 F.3d 1042, 1047 (8th Cir. 1998); *NLRB v. Meenan Oil Co.*, 139 F.3d 311, 321 (2d Cir. 1998)). The Board explained that “the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices.” *Oakwood Healthcare*, 348 NLRB at 693 (citing *NLRB v. Quinnipiac College*, 256 F.3d 68, 78 (2d Cir. 2001); *Glenmark Associates, Inc. v. NLRB*, 147 F.3d 333, 341 (4th Cir. 1998); *B&B Insulation, Inc.*, 272 NLRB 1215 fn. 1 (1984)).

Supervisors exercise independent judgment when they exercise discretion that is more than merely routine or clerical. *Id.* (citing *J.C. Brock Corp.*, 314 NLRB 157, 158 (1994) (quoting *Bowne of Houston*, 280 NLRB 1222, 1223 (1986) (“[T]he exercise of some supervisory

authority in a merely routine, clerical, perfunctory, or sporadic manner does not confer supervisory status”). For example, if there is only one obvious choice or if an assignment is based solely on the need to equalize workloads, independent discretion is not exercised because the assignment is routine or clerical. *Oakwood Healthcare*, 348 NLRB at 693. Again, the existence of applicable policies does not necessarily preclude the exercise of independent judgment so long as the policies allow room for discretionary choices by the supervisor and the “degree of discretion exercised rises to the requisite level[.]” *Barstow Community Hospital*, 352 NLRB No. 125, slip op. at 2 (citing *Oakwood Healthcare*, 348 NLRB at 693).

Charge Nurses who perform similar duties to the Westport Charge Nurses have been found to be statutory supervisors. *See Oakwood Healthcare*, 348 NLRB at 694 (finding that some Charge Nurses were statutory supervisors because they exercised independent judgment in assigning staff to patients); *Oak Park Nursing Care Center*, 351 NLRB No. 9, slip op. at 2-3 (September 26, 2007) (finding that LPNs were statutory supervisors because they had the authority to exercise independent judgment in whether to initiate the progressive disciplinary process).

Westport urges the Board to review the Regional Director’s Decision, stay the election and follow the aforementioned Board decisions to find that the Charge Nurses at Westport are statutory supervisors.

C. Contrary to the Decision, Westport’s Charge Nurses Possess and Exercise, Using Independent Judgment, Multiple Indicia of Supervisory Authority

The *undisputed* record evidence demonstrates that the LPN Charge Nurses at Westport regularly exercise supervisory authority using independent judgment in the interest of Westport.

1. Westport’s Charge Nurses Exercise Independent Judgment When They Assign and Reassign the Work of CNAs

The Regional Director improperly determined that Westport Charge Nurses do not

exercise independent discretion and judgment when they assign and reassign CNAs. Assignment references “the act of designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or overtime period) or giving significant overall duties, i.e. tasks to an employee.” *Oakwood Healthcare*, 348 NLRB at 689. “In the health care setting, the term ‘assign’ encompasses the charge nurses’ responsibility to assign nurses and aides to particular patients.” *Id.* There can be no dispute based on the record evidence that Westport Charge Nurses decide how to assign CNAs to particular patients.

The Regional Director disagreed with the Employer’s evidence that Charge Nurses are statutory supervisors by virtue of their authority to assign CNAs to care for specific residents and to decide among themselves to reassign a CNA to another unit. Specifically, the Regional Director alleged that there was conflicting testimony and that the Employer’s “evidence about the charge nurses’ actual practice consists solely of hearsay.” (D&DE 11) As a result, the Regional Director determined that Charge Nurses do not engage in the assignment of CNAs using independent discretion and judgment to confer supervisory status. But in reaching this determination, the Regional Director ignored evidence that was not controverted by the Union and likewise ignored evidence that was based the Employer’s business records and/or DNS Tepper’s personal knowledge.

Moreover, Union witness Judith Francois’ testimony concerning CNA assignments is simply illogical when reviewing her testimony as a whole and when reviewing the multitude of changes she made to her CNA assignment sheets on October 22, 2013. (Er. Exs. 4B & 4C) In fact, her testimony and marked-up assignment sheets demonstrate that Union witness Francois made a considerable number of staffing decisions on the above date based on her assessment of the available staff and resident needs. While Union witness Francois testified that her CNAs

receive the same assignments every day, the *undisputed* record evidence does not support her testimony in anyway whatsoever.¹³ (Er. Exs. 4B & 4C)

It cannot be disputed that Westport Charge Nurses assign CNAs to specific residents or patients on a daily basis through the use of assignment sheets that are created and distributed by the Charge Nurses. There is also no dispute that Westport Charge Nurses assign daily tasks to CNAs. In fact, Union witness Francois acknowledged that she performs all 27 duties listed in the written description of a Charge Nurse's duties. (Tr. 346) This means that Union witness Francois performs the following supervisory duties, among others, identified in the Charge Nurse job description:

- Prepare nursing assistants' assignments and explain all pertinent resident care to nursing assistants;
- Supervise breakfast service to assure proper diet is served and residents are assisted as necessary;
- Make rounds as necessary and assess unstable residents;
- Supervise application and removal of all restraints;
- Supervise distribution of nourishments;
- Supervise prompt response to residents' call lights;
- Supervise all resident care and assist with direct resident care as necessary;
- Supervise noon meal service to assure proper diet is served and residents are assisted as necessary; and
- Supervise afternoon meal nourishment;

(Er. Ex. 1) Indeed, Union witness Francois acknowledged that she "supervise[s] on the floor."

¹³ The Regional Director stated also that if Union witness Francois "is short a CNA, she divides the residents up in a manner that equalizes the workload." (D&DE 11). While Union witness Francois testified to that alleged practice, the assignment sheet she completed for October 22, 2013 demonstrates that she in fact assigned CNAs to unequal workloads. (Er. Ex. 4B). In fact, Union witness Francois acknowledged later in her testimony that she assigned six residents to one CNA and assigned eight residents to another CNA based on several factors, and that she did not equalize the workload by assigning seven residents to each CAN that day. (Tr. 363-67).

None of these undisputed admissions by Union witness Francois are mentioned anywhere in the Regional Director's Decision.

Charge Nurses assign additional tasks to CNAs that are not part of the pre-assigned duties set forth in the unit assignment sheets. When Charge Nurses assign additional tasks to CNAs, they consider the number of CNAs available, their relative skill levels, the number of residents to whom care is to be provided, the residents' acuity levels, CNA preferences and personalities, and resident preferences. For instance, as detailed above, Charge Nurse DelRossi assigned additional duties to CNA Aragbada based on her greater experience and in order to accommodate an orientee CNA who was working the 11 a.m. to 7 a.m. shift for the first time. (Tr. 197-98; Er. Ex. 18) Likewise, as the Woodside unit assignment sheet for October 21, 2013, clearly demonstrates, Charge Nurse Alta assigned four additional residents to CNA Vince and one additional resident to CNA Pauline based on the fact that there were only three, and not the usual four, CNAs assigned to that unit for the 7 a.m. to 3 p.m. shift that day. (Er. Ex. 4D) The assignment of these additional duties or tasks by the Charge Nurse affects "what will be required work for the employee during the shift." *Oakwood Healthcare*, 348 NLRB at 695. As such, when a Charge Nurse assigns additional or different tasks to a CNA, the Charge Nurse takes an action that has a "material effect on the employee's terms and conditions of employment." *Id.* While the Regional Director alleged "differing versions" of testimony, he failed to note that since Union witness Francois did not reference the above assignment changes in her testimony, there is no conflicting testimony. Moreover, the above-referenced assignments and reassignments are all documented in the Employer's business records – which were admitted into evidence without objection at the Hearing, and thus they are clearly not hearsay. (Er. Exs. 4A, 4B, 4C, 4D, & 16)

Further, as detailed above, it is *undisputed* in the record that Westport Charge Nurses

have the authority and ability to change a CNA's resident assignment, unit assignment, or the number of residents for whom a CNA is responsible without the approval of any other supervisor. *See Caremore v. NLRB*, 129 F.3d 365, 369 (6th Cir. 1997) (holding that LPNs have the authority to "assign" and "responsibly to direct" the work of nursing aides where the "LPNS assign aides to particular wings or even particular patients in the event of a staffing imbalance or staffing shortage.") For instance, after CNA Jean Marie began her split shift between the Woodside and Riverside units on October 25, 2013, the respective Charge Nurses for those two units decided to eliminate CNA Jean Marie's split shift and reassigned her solely to the Woodside unit for the entirety of her shift. (Tr. 101-03) Thus, instead of providing resident care services to residents on two different units, this CNA was directed by Charge Nurse Tamba to remain on the Woodside unit to alleviate a staff shortage. (Tr. 101-03) While the Regional Director discounted this reassignment entirely because Union witness Francois gave a different version of events, Union witness Francois testified that she *did not* hear the staffing conversation between the two Charge Nurses. (Tr. 369) Based on that fact, the Regional Director clearly erred in disregarding evidence concerning the reassignment decision made by these two Charge Nurses.

In any event, a day earlier, Charge Nurse Margaret decided that one of her CNAs "could be better utilized elsewhere" because another unit was short-handed. (Tr. 100) Margaret called the Charge Nurse responsible for the other unit and negotiated an arrangement where the two units shared a CNA who was originally assigned to Margaret's unit. (Tr. 100) Union witness Francois did not mention this other clear evidence of Charge Nurses making reassignments in her testimony, and presumably she was not present for the discussion between those Charge Nurses. As such, there was no basis for the Regional Director to exclude this reassignment evidence from

his determination.

In another example, CNA Cooper was assigned to the Woodside unit on October 21, 22, and 23, 2013. The assignment sheets for those particular days, however, clearly demonstrate that CNA Cooper was reassigned each of those three days by the Charge Nurses in charge of that unit to completely different resident groups! (Er. Exs. 4A, 4B, and 4D) These are exactly the types of assignments the NLRB contemplated would qualify under Section 2(11) when it issued its decision in *Oakwood Healthcare* because these assignments affect the work day of the CNAs. *Oakwood Healthcare*, 348 NLRB at 689 (“Certainly, in the health care context, the assignment of a nurse’s aide to patients with illnesses requiring more care rather than to patients with less demanding needs will make all the difference in the work day of that employee.”) Indeed, the undisputed evidence of CNA Cooper’s varying assignments on the Woodside Unit totally contradicts Union witness Francois’s testimony that CNAs receive same assignments every day.

The Regional Director also improperly determined that many of the Charge Nurses’ CNA assignments are mechanical or do not involve the exercise of independent judgment because Charge Nurses – according to Union witness Francois – simply take available CNAs and assign them to the residents who needs additional care. As all of the above examples clearly demonstrate (particularly Charge Nurse DelRossi who made a staffing decision based on the comparative experience of two CNAs, and CNA Cooper who received three different work assignments from three different Charges Nurses over three different days on the same unit), this is simply not true. Accordingly, even if CNAs were assigned to the exact same group of residents for every shift – which is clearly not the case – there is still considerable room for the Charge Nurse to exercise discretion and adjust those work assignments.

Charge Nurses are directly responsible for resident care on their units. Charge Nurses are

further responsible for ensuring that CNAs provide residents the best care possible. To do this, Charge Nurses are sometimes faced with the need to reassign a CNA from one resident to another, or to assign a CNA additional tasks, or to assign a group of residents to different CNAs than those to whom the residents were originally assigned. When making these assignments or reassignments, a Charge Nurse “weighs the individualized condition and needs of a patient against the skills or special training of available nursing personnel.” *Oakwood Healthcare*, 348 NLRB at 693.

While the Regional Director relied overwhelmingly on Union Witness Francois’ testimony, there is undisputed evidence in the record that her assignment practice differs significantly from how other Charge Nurses assign their CNAs. The Decision summarized DNS Tepper’s testimony as follows:

Tepper testified that Francois’ method of making assignments is not acceptable practice. She testified that charge nurses are expected to consider resident acuity and the skill set of particular CNAs when they make assignments, that all of the other charge nurses do so, and that several charge nurses have told her that they consider resident acuity levels and CNA abilities when they make assignments. For example, in a written statement supplied by a charge nurse with respect to a disciplinary matter after an argument with a CAN about her assignment, the charge nurse wrote that she made a small adjustment to the assignments by switching two residents between Assignment #2 and Assignment #3 to make it manageable for newly-hired CNA working for the first time on the floor.

(D&DE at 5) However, the Regional Director provided no weight to the above testimony by the Employer’s Director of Nursing Services. Nor did the Regional Director consider the fact the Union did not have Judith Francois or the other two Charge Nurses, who were present at the Hearing as potential Union witnesses, rebut DNS Tepper’s testimony regarding how Charge Nurses make assignments. The Union had every opportunity to attempt to rebut this testimony,

yet declined to do. As such, DNS Tepper's testimony stands uncontroverted.

Overall, the record evidence more than established that Charge Nurses assign daily tasks to CNAs that are not routine – they are medical in nature – and can change at any point depending upon the resident's individual medical needs and any emergencies that arise. It is important to note that Westport is a healthcare facility, not an industrial assembly line, and residents' needs are not static. Indeed, DNS Tepper and Charge Nurse Francois acknowledged that Charge Nurses assign additional duties to CNAs that are not part of the pre-assigned duties set out in the daily assignment sheets, depending on a resident's needs. For the above reasons, the Regional Director's conclusions warrant review.

2. Westport Charge Nurses Exercise Independent Judgment When They Direct CNAs and Their Direction is Responsible

The Regional Director acknowledged that Charge Nurses direct CNAs, in that they delegate tasks to CNAs, but erroneously concluded that “the Employer has failed to adduce evidence demonstrating that the charge nurses exercise independent judgment in delegating and overseeing those tasks.” (D&DE 12) Specifically, the Regional Director held that “the Employer presented no evidence about the types of judgments that the charge nurses make in directing CNAs to feed, dress, or toilet residents, or to stop performing one task to perform another task that is more critical, and there is no evidence to suggest that any such directions are more than routine.” (D&DE 12) The Regional Director's determination is contrary to the record evidence and represents a departure from Board precedent.

Under Section 2(11) of the Act, responsible direction exists “[i]f a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both ‘responsible’ and carried out with independent judgment.” *Golden Crest Healthcare Center*, 348 NLRB 727, 730

(2006) (quoting *Oakwood Healthcare*, 348 NLRB at 691). In *Golden Crest*, the Board found that the nurses at issue had the authority to direct CNAs because the nurses oversaw the job performance of the CNAs, acted to correct the CNAs when CNA were not providing adequate care, and directed the CNAs to perform certain tasks when the nurse determined that such tasks are necessary. *Id.* at 730.

Westport Charge Nurses similarly direct and correct CNAs. As the DNS testified without contradiction, Charge Nurses direct and correct CNA performance. Charge Nurses instruct CNAs to do tasks the Charge Nurse deems necessary, such as turn residents, weigh residents, bathe residents, or assist in an emergency. Additionally, Charge Nurses require CNAs to perform tasks the Charge Nurse deems a higher priority than the task the CNA is currently performing in cases of need or emergency.

It is *undisputed* that Charge Nurses reschedule CNA meal and lunch breaks based on resident needs, which happens on a daily basis. As the DNS testified, Charge Nurses can stop a CNA from taking her break if a resident is in need of assistance. The Charge Nurse's responsibility is to make sure the resident receives the proper treatment. To ensure such treatment, the Charge Nurse may require the CNA to delay her break or may assign a different CNA to stay with the resident so that the CNA break schedule is not disturbed. Charge Nurses do this without seeking approval from any other supervisors or upper management. If the break is not taken, the Charge Nurse has, in essence, authorized the CNA to work overtime.

Charge Nurses are responsible for the care the residents receive. Charge Nurses make decisions about whether their CNAs are performing their work improperly based on the Charge Nurses' knowledge of how the tasks should be performed. Charge Nurses instruct the CNAs about what additional tasks the CNAs need to do based on the Charge Nurses' knowledge of

necessary tasks and resident needs. In prioritizing work, Charge Nurses direct the work of their CNAs based on the Charge Nurses' knowledge and independent judgment and assessment of the type of care that must be provided to each resident, how severe the residents' need are for such care, and the skills and abilities of the CNAs to provide such care.

Charge Nurses direct and inspect the work of their CNAs on a daily basis. In doing so, Charge Nurses make professional judgments about whether or not the appropriate level of resident care is being provided. As such, Westport Charge Nurses exercise independent judgment in directing the work of the CNAs. *See Oakwood Healthcare*, 348 NLRB at 692 (“for example, a registered nurse who makes the ‘professional judgment’ that a catheter needs to be changed may be performing a supervisory function when he/she responsibly directs a nursing assistant in the performance of that work.”) The record shows that Charge Nurses at Westport make these types of decisions daily; therefore, Charge Nurses perform the supervisory function of directing work. For these reasons, the Regional Director’s conclusions warrant review.

3. Charge Nurses Are Responsible for Work Performed by Certified Nursing Assistants

The Regional Director erroneously concluded that Charge Nurses are not statutory supervisors because “the Employer had failed to demonstrate that LPN charge nurses are held accountable for the work of their CNAs and face the prospect of a reward or punishment as a consequence of the manner in which CNAs on their unit perform.” (D&DE 13) In reaching his conclusion, the Regional Director improperly disregarded all evidence of discipline that occurred after the Union’s demand for recognition. In addition, the Regional Director’s determination misconstrued Board precedent and disregarded applicable evidence presented by the Employer.

Responsible direction requires that “the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some

adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly.” *Oakwood Healthcare*, 348 NLRB at 692. To establish accountability, Westport was simply required to demonstrate “that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a *prospect* of adverse consequences for the putative supervisor if he/she does not take these steps.” *Id.* The Regional Director improperly determined that the Employer failed to demonstrate there is a *prospect* of adverse consequences because it did not present evidence of *actual* consequences that occurred prior to when the Union demanded recognition and filed its Petition.

A showing of accountability requires only a showing of “a *prospect* of consequences,” and not a showing of actual consequences as erroneously mandated by the Regional Director. *Golden Crest*, 348 NLRB at 731 (citing *Oakwood Healthcare*, 348 NLRB at 692) (emphasis in original). The Employer’s evidence clearly established that a Charge Nurse who fails to perform her supervisory duties over CNAs could be subject to discipline. Indeed, DNS Tepper testified that if a Charge Nurse failed to properly supervise her CNA, she could face disciplinary action. (Tr. 108-09) Likewise, Charge Nurse Judith Francois received a performance evaluation on July 13, 2013, from the House Supervisor stating “[w]eakness is she needs to be a little stronger to staff [at] times and to accomplish tasks in a more timely manner.” (Er. Ex. 20) Thus, the Employer met its burden in proving that Charge Nurses face a “prospect of consequences” in regard to their required supervision of CNAs.

Further, in addition to the “prospect of consequences,” the Employer presented evidence that Charge Nurses have in fact been disciplined for failing to properly supervise their CNAs. For example, Charge Nurses Scott and Alvarez were disciplined for failing to ensure that CNAs

weighed residents as required. (Tr. 110-18; Er. Exs. 6 and 7) Charge Nurses Tamba and Fequiere were disciplined for failing to ensure that their CNAs distributed evening snacks to residents on their respective units. (Tr. 122, 125-26; Er. Ex. 7 and 8) Charge Nurse Sanchez was even terminated, in part, for providing improper instructions to a CNA. (Tr. 128-29; Er. Ex. 10)

While the Regional Director disregarded most of this evidence because the majority of these discipline examples occurred after the Union demanded recognition and filed its Petition, this clear disciplinary evidence is relevant because it is consistent with the written job description for Charge Nurses. The job description for Charge Nurses clearly shows the employees are accountable for the performance of their assigned CNAs. For example, in the section describing “Essential Duties and Responsibilities,” the job description outlines that the primary purpose of the Charge Nurse position is to “direct nursing care to assigned residents” and to “[d]irect[] day to day functions of ... Certified Nursing Assistants.” (Er. Ex. 2 at p. 2) Likewise, the “CHARGE NURSE DUTIES” document states that Charge Nurses “[p]repare nursing assistants’ assignments and explain all pertinent resident care to nursing assistants,” “[m]akes rounds as necessary,” “[s]upervise distribution of nourishments,” and “[s]upervise all resident care and assist with direct resident care as necessary.” (Er. Ex. 1) (emphasis added) In fact, two Charges Nurses were disciplined for this exact infraction – failing to ensure that their CNAs distributed nourishments to residents consistent with the applicable job description. When they were disciplined is simply irrelevant in determining their supervisory status.

The Board is obligated to consider job description evidence in its analysis of responsible direction. In fact, the United States Court of Appeals for the Eleventh Circuit recently criticized the Board for not considering job descriptions in deciding whether Charge Nurses responsibly

direct CNAs:

To begin with, Lakeland’s written job description for LPNs strongly indicates that they are accountable for the performance of the CNAs. Under the heading “Leadership,” the job description explicitly provides that the LPNs supervise CNAs. Further, the job description explains that the “primary purpose” of LPNs is to “provide direct nursing care to the residents, and to supervise the day-to-day nursing activities performed by nursing assistants.” To this end, the job description provides that the “essential duties” of LPNs are, among other things, to “[d]irect the day-to-day functions of the nursing assistants in accordance with current rules, regulations, and guidelines that govern the long-term care facility,” “[e]nsure that all assigned nursing personnel comply with the written policies and procedures established by the facility,” “[e]nsure that all nursing service personnel are in compliance with their respective job descriptions,” and “[m]ake daily rounds of [their] unit/shift to ensure that nursing service personnel are performing their work assignments in accordance with acceptable nursing standards” (emphasis added). This evidence, while generally noted in the background section of the Board’s decision, was not considered in its analysis of responsible direction.

Lakeland Health Care Associates, LLC v. NLRB, 696 F.3d 1332, 1345 (11th Cir. 2012).

Although “paper” evidence may be insufficient standing alone to support a finding of supervisory status, “written policies, job descriptions, performance evaluations, and the like, when corroborated by live testimony or other evidence, are obviously relevant to the issue of responsible direction.” *Id.* at 1345. There is no indication that the Regional Director considered any of this evidence in his analysis of responsible direction.

In this case, Westport has presented far more than a “paper showing” of responsible direction, including specific examples of Charge Nurses who were actually disciplined for failing to properly supervise their CNAs. Further, Charge Nurse Francois confirmed that she performs all 27 enumerated duties in the CHARGE NURSE DUTIES document, which necessarily includes primary duties related to the supervision and direction of CNAs. (Tr. 344-46; Er. Ex. 1) Thus, the *undisputed* record evidence clearly demonstrates that Charge Nurses face actual

consequences and the “prospect of consequences” for failing to properly supervise their subordinate employees. Accordingly, the Regional Director’s Decision contradicts Board precedent and warrants review.

4. Charge Nurses Exercise Independent Judgment When They Evaluate, Counsel, Discipline, and Recommend Action Concerning the Employment Status of Certified Nursing Assistants

The Regional Director erroneously determined that the role played by Charge Nurses in evaluating CNAs does not confer supervisory status on Charge Nurses because there is no evidence that the evaluations affect CNA wages or that DNS Tepper has relied exclusively on Charge Nurse recommendations in deciding whether to retain newly-hired CNAs. Likewise, the Regional Director held that Charge Nurses are not statutory supervisors because there is no evidence that Charge Nurses have ever issued discipline to CNAs. The Regional Director provided no weight to DNS Tepper’s *undisputed* testimony that Charge Nurses have the vested authority to issue verbal warnings and counseling sessions to CNAs and that they do so on a regular basis. The Regional Director’s determination is contrary to the record evidence and represents a departure from Board precedent.

Under established Board precedent, there is no requirement that performance evaluations or employment-based recommendations by a Charge Nurse be linked solely to wage increases in order to qualify as indicia of supervisory status. Rather, the Board considers also whether such evaluations and recommendations can affect the job status of the supervised employees. *See Williamette Industries, Inc.* 336 NLRB 743 (2001) (recognizing that evaluations and recommendations are indicative of supervisory status when there is evidence that the employer took action in response to recommendations and/or evaluations). In addition, whether Charge Nurses at Westport have actually disciplined CNAs is not the relevant standard for determining supervisory status. When analyzing whether an employee possesses supervisory authority, the

focus is on whether the employer has vested in the individual the authority to undertake any of the supervisory responsibilities, not on how frequently the individual exercises the authority, or if it is exercised at all. *Barstow Community Hospital*, 352 NLRB No. 125, slip op. at 2 (August 18, 2008) (“Section 2(11) requires only possession of authority to carry out an enumerated supervisory function, not its actual exercise ...”).

Here, the *undisputed* record evidence clearly demonstrates that Charge Nurses are involved in all performance-related aspects of a CNA’s employment at Westport and that they can affect the job status of CNAs through their recommendations. Charge Nurses evaluate CNAs and make recommendations regarding a CNA’s employment during orientation and probationary periods. Charge Nurses also evaluate CNA work performance through written performance evaluations. In addition, Charge Nurses are involved in CNA discipline. As the record demonstrates, Charge Nurses use independent judgment and discretion in affecting the employment status of Westport CNAs. Furthermore, the record is clear that the Charge Nurses may take one of several actions upon observing misconduct on the part of a CNA.

The record is *undisputed* that Charge Nurses evaluate CNAs during their orientation and probationary periods. Charge Nurses evaluate “orientee” CNAs and make recommendations at the end of a CNA’s orientation period to nursing management. For instance, it is *undisputed* that the DNS and ADNS relied on Charge Nurses’ recommendations when they decided to extend the orientation period for CNA Seabury for “retraining” and “reorientation.” (Tr. 170) Charge Nurses also evaluate and make recommendations concerning CNAs at the end of their probationary periods, and in one example, it is *undisputed* that the DNS and Administrator relied on such a recommendation when they decided not to retain CNA Pettway for continued employment. (Tr. 172-73) Any evaluation or recommendation by a Charge Nurse necessarily

requires independent judgment and discretion because a Charge Nurse is the sole person directly responsible for CNA supervision.

Likewise, the fact that Charge Nurses complete performance evaluations is another indication of supervisory status. *See Caremore, Inc.*, 129 F.3d at 369-70. For example, in *Caremore*, the Court found LPNs to be statutory supervisors under the Act where, among other things, the LPNs filled out forms with numerical performance ratings of their nursing aides and submitted the forms to the Director of Nursing for inclusion in the aides' personnel files. *Id.* at 367. Here, Westport presented similar and *undisputed* evidence that Charge Nurses complete performance evaluations for their CNAs, and they give the House Supervisor the information to include in CNA performance evaluations in the event they are unable to fill out the CNA evaluation forms themselves. (Tr. 133-34; Er. Exs. 11, 12, 13A-13F) Indeed, Union witness Francois acknowledged that she also has completed performance evaluations for her CNAs. (Tr. 369) As explained above, and similar to the process in *Caremore*, Charge Nurses evaluate their CNAs performance numerically on several different categories (knowledge, quality, productivity, attendance teamwork, and customer service) and they have unfettered discretion to provide their comments on areas that require improvement. (Er. Exs. 11, 12, 13A-13F)

Charge Nurses also have the authority to discipline CNAs for insubordination and failure to perform their duties. (Tr. 173) Even though Charge Nurses may prefer to counsel CNAs through verbal discussions and teaching moments, ultimately Charge Nurses can elect to discipline CNAs for performance-related issues or they can use independent judgment and discretion in deciding which matters to escalate to the House Supervisor, ADNS, or DNS. (Tr. 173-74, 176) “The frequency with which an employee exercises disciplinary authority – authority that, in an ideal workplace, will be exercised infrequently or sparingly – cannot be

determinative of the existence of supervisor authority.” See *Lakeland Health Care Associates*, 696 F.3d at 1338 (citing *Caremore, Inc. v. NLRB*, 129 F.3d at 369). Likewise, such discretionary authority to choose from among several remedial measures, only one of which may result in discipline, demonstrates supervisory status under the Act. *Extendicare Health Services v. NLRB*, 182 Fed. Appx. 412, 416-17 (6th Cir. 2006). Further, DNS Tepper testified without contradiction that Charge Nurses have in fact disciplined CNAs through verbal warnings and counseling, and the record evidence shows that CNAs have been suspended for insubordination when Charge Nurses have escalated disciplinary matters outside of their unit to the House Supervisor, ADNS, or DNS. (Tr. 173-76, 179-80); see *Extendicare Health Services*, 182 Fed. Appx. at 416-17 (holding that nurses use independent discretion when deciding whether “a nursing assistant’s misconduct is severe enough to warrant disciplinary proceedings.”). For instance, CNAs Aragbada and Henry were suspended from Westport based on recommendations made by Charge Nurses. In fact, DNS Tepper immediately suspended CNA Henry without pay based solely on what was reported and recommended by the Charge Nurse. (Tr. 183) Based on this record, there is clear, *undisputed* evidence that Charge Nurses use independent judgment and discretion in counseling CNAs, initiating discipline, and deciding which matters to escalate for further redress. For these reasons, the Regional Director’s conclusions warrant review.

5. Other Indicia Support a Finding that Charge Nurses are Supervisors within the meaning of Section 2(11) of the Act

The Regional Director did not fully analyze secondary indicia of supervisory status because he concluded that the Charge Nurses do not possess any of the primary indicia of supervisory status. (D&DE 15-16).

The record, however, establishes that there other significant differences between Charge Nurses and the CNAs they supervise. For instance, unlike CNAs, Charge Nurses attend

quarterly supervisory meetings with the DNS to discuss nursing management matters. (Tr. 183) There also is a considerable difference between the two positions in terms of their compensation and job qualifications. LPN Charge Nurses start at a minimum of \$27 per hour, while CNAs start at \$13.30 per hour. (Tr. 385, 387) *See Caremore, Inc.*, 129 F. 3d at 367 (considering difference in hourly rate between LPNs and nursing aides as a factor in deciding supervisor status of LPNs). Likewise, LPNs are required to complete one to four years of nursing school, to pass a licensing examination and clinical proficiencies, and attend continuing education classes. (Tr. 38) CNAs, on the other hand, simply need a 10th grade education or GED and a certification class that can be completed in a week. (Tr. 62; Er. Ex. 3) *See Caremore, Inc.*, 129 F. 3d at 367 (noting differences in job qualification requirements for LPNs and nursing aides).

Charge Nurses also regularly direct and assign tasks to employees outside the Nursing Department. As detailed above, it is *undisputed* that Charge Nurses regularly provide assignments and direction to Dietary, Maintenance, Rehabilitation, and Housekeeping employees, and can do so without seeking any approval from any other supervisors or managers. The record also is unchallenged regarding the fact that Charge Nurses are responsible for supervising non-Nursing Department employees in emergency situations to ensure that proper care is provided to Westport's residents. Such responsibilities are inseparable from the exercise of independent judgment, especially in the health care context where staffing decisions can have such an important impact on patient health and well-being. *See Glenmark*, 147 F.3d at 339 (“An emergency decision regarding the appropriate staff level to accommodate ill patients requires a fact-specific individualized analysis of not only the patient’s condition and the appropriate care, but also of the special skills of particular staff members.”).

The Regional Director brushed aside all of this *undisputed* evidence stating that “[t]here

is no evidence that such emergencies occur with any frequency.” However, the Regional Director failed to cite the applicable standard. When analyzing whether an employee possesses supervisory authority, the focus is on whether the employer has vested in the individual the authority to undertake any of the supervisory responsibilities, not how frequently the individual exercises the authority. *Barstow Community Hospital*, 352 NLRB No. 125, slip op. at 2 (“Section 2(11) requires only possession of authority to carry out an enumerated supervisory function, not its actual exercise.”). Further, contrary to the Regional Director’s statement that there is no evidence that such emergencies occur with any frequency, DNS Tepper provided four specific examples of actual emergencies that have occurred in recent history – Hurricane Irene, Hurricane Sandy, the blizzard, the Frankenstorm – that required Charge Nurses to supervise and direct the work of non-nursing department employees. For these reasons, the Regional Director’s conclusions warrant review.

V. THE BOARD SHOULD STAY FURTHER PROCESSING OF THE PETITION AND REFRAIN FROM HOLDING THE ELECTION UNTIL IT GRANTS THE EMPLOYER’S REQUEST FOR REVIEW AND DETERMINES THAT THE REGIONAL DIRECTOR’S DECISION WAS ERRONEOUS

An analysis of the record evidence under Board precedent compels the conclusion that the Regional Director wrongfully determined that LPN Charge Nurses are statutory employees for purposes of the Act. It is thus imperative that the Board stay the further processing of the Petition and refrain from holding the election until the Board grants the Employer’s Request for Review and determines that the Regional Director’s Decision was inaccurately decided. A stay would prevent the waste of time and money of both the Union and the Employer until this issue is resolved. Therefore, for all the foregoing reasons, the election should be stayed. *See Piscataway Assocs.*, 220 NLRB 730 (1975) (Board granted Employer’s request for review and stayed the election pending decision on review after Regional Director issued Decision and

Direction of Election finding that six building superintendents were not supervisors within the meaning of the Act); *Angelica Healthcare Servs. Group*, 315 NLRB 1320 (1995) (Board granted Union's request for review and stayed the election).

VI. CONCLUSION

As set forth above, review of the Regional Director's Decision is clearly warranted. The *undisputed* record evidence clearly establishes that all of the LPN Charge Nurses at Westport Health Care Center have the authority to exercise one or more of the indicia of supervisory status in Section 2(11) of the Act, using independent judgment, in the interest of Westport. For the reasons described above, the Employer respectfully requests that the Board grant its Request for Review of the Regional Director's Decision and Direction of Election. The Employer further respectfully requests that the Board grant its Request to Stay the Election pending consideration of the Employer's Request.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the Employer's Request for Review has been served by electronic mail this 26th day of December 26, 2013, to the following party of record:

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