

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 7**

DENTAL DREAMS, PLLC

Employer

and

Case 07-RC-120504

**SEIU HEALTHCARE MICHIGAN, SERVICE
EMPLOYEES INTERNATIONAL UNION,
CHANGE TO WIN¹**

Petitioner

APPEARANCES:

Adam C. Wit, David Christlieb, and Kathryn Siegel, Attorneys,
of Chicago, Illinois, for the Employer.
Norma Kersting, of Detroit, Michigan for the Petitioner.

DECISION AND DIRECTION OF ELECTION

The Employer provides general dentistry services and treatment at various locations throughout the country, including a facility in Muskegon, Michigan. Petitioner seeks to represent a unit consisting of eight dental assistants, one lead dental assistant, and six receptionists employed out of the Muskegon location. The Employer opposes the inclusion in the unit of the lead dental assistant, asserting that the lead dental assistant is a supervisor under Section 2(11) of the Act because the lead dental assistant has the authority to hire, discharge, or discipline the dental assistants, or effectively recommend the same; assign and responsibly direct the dental assistants, using independent judgment; and further, possesses secondary indicia of supervisory status.

As discussed below, based on the record and relevant Board law, I conclude that the Employer has not satisfied its burden to prove that the lead dental assistant is a statutory supervisor.

¹ The name of the Petitioner appears as amended at hearing.

I. OVERVIEW

The Employer's headquarters are located in Chicago, Illinois.² It operates three offices in Michigan, including Flint, Saginaw, and Muskegon. The Muskegon office is the only facility involved in this petition. In addition to the petitioned-for unit of dental assistants (DA), lead dental assistants (lead DA), and receptionists, the Muskegon office employs four dentists and one office manager. The DAs and the lead DA report to the office manager, Maggie Vasquez.³ Vasquez reports to Regional Manager Victoria Hunter, who oversees the three Michigan facilities, including the Muskegon office. The dentists report to both Vasquez and Hunter.

Hunter is generally responsible for monitoring the production and financials of each office and training new managers. She spends approximately three days per week working at the Muskegon location, and one day a week at each of the Saginaw and Flint locations. Hunter spends more time at the Muskegon location because it is a newer office, and it has a relatively new staff, doctors, and office manager.⁴

The Muskegon office is open Monday through Friday from 10:00 a.m. to 6:00 p.m., and on Saturdays from 9:00 a.m. to 1:00 p.m. Vasquez creates the schedule for all employees, including the DAs and lead DA. Vasquez has the authority to discipline employees, evaluate employees, hire and fire employees, and approve sick leave and vacation requests. Vasquez is onsite during most of the Employer's operational hours.⁵

DAs are responsible for assisting the dentists in performing treatments on patients; retrieving necessary supplies; bringing patients back to see the dentists; giving patients general instructions based on what the dentists tell them; and walking patients out after treatment. DAs are paid between \$8 and \$10 per hour. In addition, DAs can earn up to a \$200 bonus per month if they meet their goals.⁶

The current lead DA previously worked as a DA, and was promoted to the lead DA position on about June 1, 2013. She initially earned about \$11 per hour, and currently earns \$12 per hour. She is eligible for a bonus of \$300 per month. In addition to the higher pay and bonus, the lead DA does not work on Saturdays. The lead DA spends the majority of her work time performing the same tasks as the DAs, but she also has other responsibilities, including ordering supplies, training new hires, and making sure the other DAs are "on task," each of which additional responsibility is discussed below.

² The record identifies the owner as "Dr. Hussain," who works out of Chicago. No further information regarding the owner or Dr. Hussain is contained in the record.

³ Vasquez became the office manager at some point on or before August 27, 2013. At least through July 16, 2013, the office manager position was held by Renee Heise. Neither Vasquez or Heise testified at the hearing.

⁴ Although the record does not contain a stipulation as to the Section 2(11) status of Regional Manager Victoria Hunter, I find that she is a manager and supervisor within the meaning of Section 2(11) of the Act.

⁵ Although the record does not contain a stipulation as to the Section 2(11) status of office manager Maggie Vasquez, I find that she is a manager and supervisor within the meaning of Section 2(11) of the Act.

⁶ The record reflects that goals are set by "Tiamur," the owner's brother, who comes into the Muskegon office about once a month. The record does not provide Tiamur's full name or position, or any further information regarding this person or the process of setting the goals, or what constitutes the goals.

II. ANALYSIS

A. Board Law

Section 2(3) of the Act excludes from the definition of the term “employee” “any individual employed as a supervisor.” Section 2(11) of the Act defines a “supervisor” as: Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

Individuals are “statutory supervisors if: (1) they hold the authority to engage in any one of the 12 listed supervisory functions, (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment, and (3) their authority is held in the interest of the employer.” *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001). Supervisory status may be shown if the putative supervisor has the authority either to perform a supervisory function or to effectively recommend the same.

Consistent with *Kentucky River*, the *Oakwood Healthcare* Board adopted an interpretation of “independent judgment” that applies to any supervisory function at issue “without regard to whether the judgment is exercised using professional or technical expertise.” The Board explained that “professional or technical judgments involving the use of independent judgment are supervisory if they involve one of the 12 supervisory functions of Section 2(11).” *Oakwood Healthcare*, 348 NLRB 686, 692 (2006). “[A]ctions form a spectrum between the extremes of completely free actions and completely controlled ones, and the degree of independence necessary to constitute a judgment as ‘independent’ under the Act lies somewhere in between these extremes.” *Id.* at 693. The Board instructed that the relevant test for supervisory status utilizing independent judgment is that “an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” *Id.* Further, the judgment must involve a degree of discretion that rises above the “routine or clerical.” *Id.*

The burden to prove supervisory authority is on the party asserting it. *Id.* at 687; *Kentucky River*, *supra*, at 711-712. Purely conclusionary evidence is not sufficient to establish supervisory status. The Board requires evidence that the individual actually possesses supervisory authority. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006); *Chevron Shipping Co.*, 317 NLRB 379, 381 fn. 6 (1995) (conclusionary statements without specific explanation are not enough). Evidence in conflict or otherwise inconclusive will not be grounds for a supervisory finding. *New York University Medical Center*, 324 NLRB 887, 908 (1997), *enfd.* in relevant part 156 F. Ed 405 (2nd Cir. 1998); *The Door*, 297 NLRB 601 n.5 (1990); *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). See also, *Frenchtown Acquisition Co., Inc. v. NLRB*, 683 F.3d 298, 305 (6th Cir. 2012) *enfg.* 356 NLRB No. 94 (2011).

Although the Act demands only the possession of Section 2(11) authority, not its exercise, the evidence still must be persuasive that such authority exists. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006). Job titles, job descriptions, or similar documents are not given controlling weight and will be rejected as mere paper, absent independent evidence of the possession of the described authority. *Id.*; *Golden Crest*, supra at 731, citing *Training School at Vineland*, 332 NLRB 1412, 1416 (2000); *Frenchtown Acquisition*, supra at 308.

B. Application of Board Law to this Case

In reaching the conclusion that the lead DA is not a supervisor within the meaning of the Act, I rely on the following analysis and record evidence.

1. Assignments

In *Oakwood Healthcare*, supra at 689, the Board clarified that the authority to assign under Section 2(11) means 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 an employee significant overall duties. Ad hoc instruction to perform a discrete task is not assignment, *id.*, and is discussed here below in connection with the function of responsible direction.

The Employer identified three situations where it contends the lead DA assigns employees: (1) assigning DAs to work with particular doctors, and deciding how many work on particular shifts; (2) assigning tasks to DAs during slow times; and (3) assigning breaks. Assuming *arguendo* that the lead DA has some impact or control over such, I am guided by the principle that any assignment must be done with independent judgment before it is considered to be supervisory under Section 2(11). Thus, the question is whether the Employer has met its burden of proving by a preponderance of evidence that the lead DA makes judgments when making assignments AND that any such judgments are free of the control of others and not controlled by detailed instructions. Mere inferences or conclusory statements without supporting evidence are insufficient to establish supervisory status. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991). I find that the Employer has failed to establish that the lead DA exercises independent judgment with respect to assignments of DAs to dentists, with respect to the assignments of job tasks, and with respect to breaks.

With respect to the lead DA's involvement in the assignment of DAs to particular doctors, the evidence clearly established that all scheduling is performed by Vasquez. The Employer contends that the lead DA provides input which Vasquez relies on when formulating the schedule. However, Vasquez did not testify at the hearing, and thus the extent to which she relies on input from the lead DA is unknown. It is unclear whether Vasquez receives suggestions from other sources, such as the doctors or the DAs, coupled with her own knowledge, when deciding how to schedule the DAs, or whether she exclusively relies on the lead DA's assessments. Although the lead DA may reassign or move DAs during a shift, it appears that this is based on doctors' requests or needs, or DAs' requests, as opposed to the lead DA's independent judgment. Further, the lead DA's testimony that she asks the dentists or DAs to

confirm the reassignment with the office manager is undisputed, because no one else testified who was involved in any such conversations.

Although the lead DA may assign cleaning and other such tasks to the DAs, these tasks are ministerial and routine in nature. The tasks, such as sweeping floors, dusting cabinets and similar housekeeping activities, are contained on a list of nightly closing duties maintained at the office.⁷ If the tasks are not completed during down time while the office is open, they are completed at closing, without the lead DA assigning any employee any particular task. The employees perform as a group to complete the list. It does not appear that the lead DA utilizes independent judgment as defined in *Oakwood Healthcare*, supra, when assigning employees these cleaning duties.

Finally, the record evidence does not establish that the lead DA assigns breaks to employees. There are no assigned break times; rather, employees request to take a break or simply take a break on their own when there is adequate coverage. The lead DA has some responsibility to ensure that there is adequate floor coverage for breaks, but there is no evidence in the record that she can order or has ordered an employee to take a break at a particular time. On one recent occasion, the lead DA attempted to prevent an employee from taking a break at a time when the office was busy. The office manager overrode the lead DA and allowed the employee to take the break. The Employer contends that Hunter counseled the office manager that she should not override such decisions by the lead DA. However, the handling of this matter by Hunter after the fact is not enough to establish that the lead DA currently, and indisputably, has the authority to assign breaks using independent discretion and judgment. As the Board noted in *Golden Crest*, it is well established “that the party seeking to establish supervisory authority must show that the putative supervisor has the ability to require that a certain action be taken; supervisory authority is not established where the putative supervisor has the authority merely to request that a certain action be taken.” Id. at 728. See also, *Entergy Mississippi, Inc.*, 357 NLRB No. 178, p. 2 (2011). The lead DA does not have the authority to approve vacation requests or sick leave.

I am not persuaded that the lead DA exercises independent judgment and I do not find the Employer’s arguments persuasive. I conclude that the lead DA does not assign employees as set forth in *Oakwood Healthcare*, supra.

2. *Responsibly Direct*

For direction to be responsible, the person directing must have oversight of another’s work and be accountable for the other’s performance. To establish accountability, it must be shown that the putative supervisor is empowered to take corrective action, and is at risk of adverse consequences for others’ deficiencies. *Oakwood Healthcare*, supra at 691- 692. As with all of the supervisory indicia enumerated in Section 2(11), responsible direction must entail independent judgment. Thus, the responsible direction must be (a) independent, free of the control of others; (b) involve a judgment, that is, require forming an opinion or evaluation by discerning and comparing data, and (c) involve a degree of discretion that rises above the routine or clerical. *Oakwood Healthcare*, supra at 692-693.

⁷ There is no list in the record.

The first question is whether the Employer has established that the lead DA *directs* other employees within the meaning of Section 2(11). The Employer identified several situations supporting the lead DA's authority to direct employees, including her authority to train new hires; to ensure OSHA compliance; and to make sure the DAs are "on task."

Regarding training, it appears the lead DA follows a handbook provided to her by Hunter, and in turn provides the handbook to the new hires. The training primarily involves new hires "shadowing," or following the lead DA as she performs her work. It does not appear that the lead DA is using any "judgment" involving a degree of discretion rising above the level of a routine decision, when she trains new hires. See, e.g., *Sears, Roebuck & Co.*, 292 NLRB 753 (1989) (without evidence of independent judgment, a senior employee training newer workers does not establish supervisory status). The lead DA does not train current employees regarding policy changes. Employees are informed of any such changes by Vasquez or Hunter, usually at an employee meeting.

The lead DA ensures employees are OSHA-compliant by walking around and observing the DAs while they work to determine for example, that they are wearing their safety glasses and protective gown. The record does not reflect what action the lead DA takes, if any, if employees are not OSHA-compliant. Nor does the record indicate the frequency of deviation from OSHA standards. There is also a weekly test performed on the sterilizers, which may be done by the lead DA or someone else.

The lead DA's responsibility that employees are "on task," involves making sure that patients are seated when their chart comes up, and rooms are cleaned after the patient leaves in preparation for the next patient. Again, the record provides little detail regarding what the lead DA does to make sure the DAs are "on task." There is no indication that any level of discretion or independent judgment is required to make sure the pace of the office is maintained. Instead, this appears to be rather routine.

The evidence as a whole with respect to any of the above is insufficient to establish that the lead DA "directs" the DAs within the meaning of the definition set forth in *Oakwood Healthcare. Golden Crest Healthcare Center*, supra at 731. See also *Frenchtown Acquisition*, supra at 311, 312.

In the alternative, assuming for the sake of discussion that the foregoing establishes that the lead DA directs employees, the next question is whether the Employer has established that the lead DA is *accountable* for her actions in directing the DAs. I find that the Employer has not met its burden.

The Employer relies on a recent evaluation of the lead DA in support of its argument that the lead DA responsibly directs the DAs. The Employer issued the evaluation on about January 24, 2014.⁸ The only additional listed categories for the lead DA's evaluation which are not

⁸ The evaluation was presented to the lead DA on this date, but was prepared on January 6, 2014, prior to the filing of the instant petition. There is no evidence in the record of any previous written evaluations of the current lead DA, or for her predecessor.

included in the DAs' evaluation are training staff, monitoring and managing the dental assistants, and ordering supplies.⁹ The evaluation states that the lead DA has been "... diligently working on her management skills." It further states "...[w]e will work with [the lead DA] on managing the dental assistants to ensure the highest productivity and patient satisfaction are achieved[,]" and that she "needs to work on being consistent in her monitoring the back staff and her expectations she sets forth." The lead DA received a \$1 per hour raise in connection with this evaluation.

The evaluation provides no specificity regarding how the lead DA is expected to "manage" employees, or how she is expected to monitor the staff. The use of the term "manage" in the evaluation is undefined. It is not clear from the use of the term that the lead DA is expected to "manage" or "monitor" employees with independent authority and discretion. The evaluation provides no specific examples of behavior of DAs that the lead DA has adequately or inadequately handled. Hunter testified at the hearing regarding her thought process when preparing the evaluation, and contended that some of the comments were related to inadequate training or monitoring of DAs based on OSHA issues and/or concerns raised directly by the DAs. This testimony is self-serving and cannot be independently established. There is no suggestion in the written evaluation that the comments in it, or the \$1 raise, were the result of the performance of the DAs as opposed to the lead DA's performance of her own duties. The record contains no evidence that the lead DA has been disciplined for failure to oversee or correct a DA, or as a result of a DA's failure to adequately perform her/his duties.

In furtherance of its argument that the lead DA is accountable and thus a statutory supervisory, the Employer relies on a series of emails between the then office manager Renee Heise and Hunter, discussing the DA's promotion to lead DA. In a July 8, 2013 email, Hunter advised Heise to make sure the lead DA was "comfortable with the different aspects of her position which she was not responsible for previously (i.e. – ordering, budget, disciplinary recommendations, coaching, etc.)." Further, Hunter advised Heise to make sure that the lead DA did not interact with the staff on a "friend basis," as it would make it difficult for her to "manage/coach and train them as needed." In a subsequent July 12 email, Hunter advised Heise that the lead DA would be responsible for "all DA training, evaluations, as well as assist in the scheduling process, doctor assignments, lunch scheduling, and any disciplinary action involving DA duties or expectations." In a July 16 email from Hunter to Heise, Hunter advised Heise to make sure the lead DA "completely understands the disciplinary process, verbal, written, etc., as this is something I expect to be documented consistently and properly."

The record does not establish that any of the above email messages were conveyed to the lead DA, or that any training or instruction was provided directly to the lead DA aside from how to order supplies and perform new employee training. Hunter testified that when the current lead DA began working in the position, Hunter advised her that she would be seen as a leader, and would be responsible for monitoring employees and ensuring that their duties were completed.

⁹ Once a month, the lead DA orders supplies. She performs an inventory, and then prepares the order using a formula provided to her by the doctors (dentists). The formula is based on how many items were purchased the previous month, and how many were used. The lead DA uses Vasquez's office, computer, and computer password to order the supplies. She may not order supplies outside of this formula without approval from the owner. If the owner thinks the lead DA is ordering too much of a particular item, the owner will reduce the quantity.

Hunter asserts that she has had several conversations with the lead DA since that time about her job responsibilities. However, no further specificities of such conversations are contained in the record. The lead DA denied receiving any specific instructions regarding her job duties aside from training or ordering supplies. The lead DA's expected ability to manage/coach DAs, and her involvement in the disciplinary and scheduling process, are vague and not clearly defined in the emails, nor does Hunter's testimony establish that she orally conveyed clear standards to the lead DA. The record evidence is not enough to establish that the lead DA has the actual authority to perform tasks that would meet the definition of a supervisor as defined under Section 2(11) of the Act. Regardless, assuming the intent was to give the lead DA position a supervisory function, there is no indication in the record that this intent was ever carried out.

The Board has long cautioned that evidence of actual authority trumps mere paper authority. *Avante at Wilson*, supra at 1057; *Golden Crest Healthcare*, supra at 731; *Valley Slurry Seal Co.*, 343 NLRB233, 245 (2004); *Franklin Home Health Agency*, 337 NLRB 826, 829 (2002); *Training School at Vineland*, supra at 1416.; *Chevron U.S.A., Inc.* 309 NLRB 59, 69 (1992). I conclude that the emails sent between Hunter and Heise regarding the expected job responsibilities of the lead DA are mere paper conveyances that do not impart actual supervisory authority.

Based on the foregoing, I find that the Employer has not carried its burden of establishing that the lead DA responsibly directs DAs within the meaning of Section 2(11) of the Act.¹⁰

3. Discipline / Effective Recommendation to Discharge

The Employer contends that the lead DA has the authority to make effective recommendations leading to discipline. Based on the record evidence, I do not reach this conclusion.

The lead DA does not issue disciplines to employees and does not have the apparent authority to do so. The record does not reflect that the lead DA has access to employee personnel files, or that she has been trained in disciplining employees. While the record shows that the lead DA is responsible to correct deficient DA job performance or report it to the office manager if it cannot be corrected, there is no substantive evidence that she routinely recommends that discipline or any consequence result from the deficient performance, or that she is required to do so. There is no evidence that in the event she does suggest discipline, it is routinely issued by the office manager without any further investigation into the matter. The authority to "point out and correct differences in the job performance of other employees does not establish the authority to discipline." *Regal Health and Rehab Center, Inc.*, 354 NLRB 466, 473 (2009), citing *Franklin Hospital Medical Center*, 337 NLRB 826, 830 (2002); *Crittenton Hospital*, 320 NLRB 879 (1999), citing *Passavant Health Center*, 284 NLRB 887, 889 (1987).

¹⁰ Additionally, the Employer's reliance on *Community Education Centers, Inc.*, 360 NLRB No. 17 slip op (2014) is misplaced. While the Board found that the putative supervisors had the authority to take corrective action with regard to other employees, the Board also affirmed the underlying acting regional director's decision in finding that they were not statutory supervisors because the evidence failed to establish that the putative supervisors were held accountable, or that the putative supervisors exercised independent judgment in directing the employees, much like the evidentiary record herein. Id. at 1-2.

The record contains three situations where the Employer contends that the lead DA effectively recommended disciplinary action. In the first situation, the lead DA complained to the Employer about an employee's poor attitude. Specifically, the DA did not want to take x-rays. That employee was subsequently discharged on September 20, 2013, after only ten days of employment. The document entitled "employee separation form" is signed by Vasquez, states that the employee in question called in sick once and left early, and was "not willing to take x-rays, which is a required job function as a dental assistant." There is conflicting evidence in the record as to whether the lead DA suggested that this employee be terminated in connection with reporting her poor behavior. Regardless, the record does not establish whether such recommendation, if it occurred, effectively led to the termination of the employee. Vasquez did not testify, and as such, the record does not reflect what she ultimately relied upon when making her decision. It has not been established whether Vasquez performed any additional investigation into the lead DA's purported statements before terminating the employee. It is not indicated in the record how Vasquez was aware that the employee had called in and left early, factors also listed on the disciplinary action. There is no indication in the record to suggest that the lead DA reported the employee's absence to Vasquez or raised such as a concern.

The second situation involves another new hire with no prior dental experience and who was not learning the Employer's processes quickly enough. Hunter testified that the lead DA recommended that this employee "not continue as a dental assistant." Hunter stated that after this employee was coached, she did not show up for work for three shifts and subsequently she voluntarily resigned. The record does not establish who provided the coaching, or what the coaching involved. It is not clear if the coaching was in writing. When the employee came in to get her final pay check, she signed an "employee separation form" agreeing to voluntarily separate after failing to report to work. The form is signed by office manager Vasquez, who did not testify.

The third document in the record, entitled "Discipline and/or Attendance Notice," concerns a DA's "lack of productivity." Hunter testified that the lead DA recommended that this employee be terminated, but Vasquez decided to give the employee another opportunity. Vasquez, who made the decision to issue the discipline, did not testify, and Hunter admitted to having no direct knowledge as to the decision process underlying the issuance of the discipline. There is no dispositive evidence in the record of any involvement by the lead DA with respect to this discipline. It is signed only by Vasquez, and notes that "doctors are concerned and having issues" regarding the employee not being able to keep up with their (the doctors') pace. The discipline notes that the employee is subject to discharge if there is no improvement within the next week, based on feedback from the doctors. Assuming arguendo that the lead DA did recommend that this new employee be terminated, the fact that Vasquez did not follow the lead DA's recommendation undercuts the Employer's argument that the lead DA effectively recommends discipline without the underlying incident being subject to independent investigation and determination by management.

4. *Effective Recommendation to Hire*

The Employer contends that the lead DA makes effective recommendations leading to hiring.¹¹ I do not agree. The record is clear that the lead DA does not participate in the interview process or review employee applications. The record is clear that all final hiring decisions are made by Vasquez and/or her superior(s). There is no evidence in the record that the lead DA has ever made a recommendation of hire. On one occasion, the lead DA notified a friend that the Employer was accepting applications, and the friend applied and was hired. There is no evidence in the record that the lead DA had any role in this person being hired by the Employer, and there is no reason to believe that other employees have not suggested that friends apply for open positions.

5. *Secondary Indicia*

The Employer has presented evidence of some secondary indicia of supervisory authority. The lead DA has a higher pay rate, is entitled to a higher bonus, and has computer access which is not routinely provided to the other employees. The existence of secondary indicia, such as title and higher pay, standing alone, is insufficient to demonstrate supervisory status. *Shen Automotive Dealership Group*, 321 NLRB 586, 594 (1996); *Billows Electric Supply*, 311 NLRB 878 fn.2 (1993). The record is conflicting regarding the percentage of time that Vasquez is not present when DAs and the lead DA are still working, or whether the lead DA has the authority to make decisions in Vasquez's absence, without consulting Vasquez or Hunter. The record does not describe any situation where the lead DA has ever carried out any supervisory authority or made decisions in the absence of Vasquez and/or Hunter. It is further well established that where, as here, putative supervisors are not shown to possess any of the primary supervisory indicia, secondary indicia are insufficient to establish supervisory status. *Golden Crest Healthcare*, supra at 730 n. 10; *Ken-Crest Services*, 335 NLRB 777, 770 (2001).

CONCLUSIONS AND FINDINGS

Based on the foregoing discussion and on the entire record,¹² I find and conclude as follows:

1. The hearing officer's rulings are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.
3. The labor organization involved claims to represent certain employees of the Employer.

¹¹ Although this issue was raised by the Employer at the hearing, it was not argued in the Employer's brief.

¹² The Employer timely filed a brief, which was carefully considered. The Petitioner's brief was filed untimely and therefore was not considered.

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

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time dental assistants, lead dental assistants, and receptionists employed by the Employer at 1725 Sherman Road, Muskegon, Michigan; but excluding all dentists, managers, and guards and supervisors as defined in the Act.

Dated at Detroit, Michigan, this 26th day of February 2014.

/s/ Terry Morgan

Terry Morgan, Regional Director
National Labor Relations Board, Region 7
Patrick V. McNamara Federal Building
477 Michigan Avenue, Room 300
Detroit, Michigan 48226

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the voting group found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by **SEIU Healthcare Michigan, Service Employees International Union, Change to Win**. 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.

A. Voting Eligibility

Eligible to vote in the election are those in the voting group 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, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Voting Group employees in the military services of the United States may vote if they appear in person at the polls.

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

B. Employer to Submit List of Eligible Voters

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

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all 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.). I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **March 5, 2014**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website, www.nlr.gov,¹³ by mail, or by facsimile transmission at **313-226-2090**. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

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

C. Posting of Election Notices

Section 103.20 of the Board's Rules and Regulations states:

a. Employers shall post copies of the Board's official Notice of Election on conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the

¹³ To file the eligibility list electronically, go to the Agency's website at www.nlr.gov, select **File Case Documents**, enter the NLRB Case Number, select the option to file documents with the **Regional Office**, and follow the detailed instructions.

ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.

b. The term “working day” shall mean an entire 24-hour period excluding Saturday, Sunday, and holidays.

c. A party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 days prior to the commencement of the election that it has not received copies of the election notice. [This section is interpreted as requiring an employer to notify the Regional Office at least 5 full working days prior to 12:01 a.m. of the day of the election that it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995).]

d. Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Section 102.69(a).

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board’s Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001**. This request must be received by the Board in Washington by **March 12, 2014**. The request may be filed electronically through the Agency’s website, www.nlr.gov,¹⁴ but may **not** be filed by facsimile.

¹⁴ To file a Request for Review electronically, go to the Agency’s website at www.nlr.gov, select **File Case Documents**, enter the NLRB Case Number, select the option to file documents with the **Board/Office of the Executive Secretary** and follow the detailed instructions.