

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

AUTISM SERVICES, INC.

Employer

and

Case 03-RC-127544

AUTISM SERVICES, INC., EDUCATION ASSOCIATION,
NYSUT, AFT, NEA, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

The Employer provides services to adults and children with autism throughout Western New York. Its operations include a certified education program that provides services to children between the ages of five and twenty-one at two separate locations: Bryant and Stratton Way (BSW) in Williamsville, NY and Elmwood Avenue (Elmwood) in Buffalo, NY. A building principal oversees each location.¹ There are twelve classrooms at BSW and five classrooms at Elmwood. Each classroom has six students, one special education teacher, one teacher assistant (TA) and two Direct Support Professionals (DSP). The Employer's staff also includes DSP floats, physical education teachers, music teachers, art teachers and creative movement teachers.

The Petitioner filed a petition seeking to represent a unit of professional and non-professional employees at the Employer's BSW and Elmwood locations. The parties have stipulated that appropriately included in a non-professional voting group are the following classifications: teacher assistants, direct support professionals, direct support professional floats,

¹ Andrew Shanahan is the principal at the Elmwood location and Autumn Carini is the principal at the BSW location.

and creative movement teachers. The parties have also stipulated that a professional voting group should include: physical education teachers, music teachers, and art teachers.

The sole issue in dispute in this proceeding is whether the special education teachers who would be included in the professional voting group are supervisors under Section 2(11) of the National Labor Relations Act (Act). The Employer seeks to exclude the special education teachers from the unit, claiming that they exercise the following supervisory authority over the TAs and DSPs: assign work, responsibly direct employees, and effectively recommend discipline and rewards. The Petitioner argues that the special education teachers do not possess supervisory authority and should be included in the unit. As discussed below, based on the record and relevant Board law, I find that the special education teachers are not supervisors and they should be included in the professional voting group.

Board Law

Section 2(11) of the Act defines a supervisor as any individual with the authority to hire, transfer, suspend, layoff, 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.

It is well established that the burden of proof rests with the party asserting supervisory status. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006)(citing *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001)). To establish that individuals are supervisors, the asserting party must show: (1) that the purported supervisors have the authority to engage in any one of the twelve enumerated supervisory functions; (2) that their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;” and (3)

that their authority is exercised “in the interest of the employer.” *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 710-713 (2001). Any lack of evidence in the record is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 fn. 8 (1999). The Board has also long recognized that purely conclusory evidence is not sufficient to establish supervisory status. *Community Educations Centers, Inc.*, 360 NLRB No. 17, slip op. at 11 (2014); *Volair Contractors*, 341 NLRB 673, 675 (2004); *G4S Regulated Security*, 358 NLRB No. 160, slip op. at 3-4.

Application of Board Law to this Case

In reaching the conclusion that the special education teachers are not statutory supervisors, I rely on the following analysis and record evidence.

(1) Effectively Recommend Hiring

The Employer contends that the special education teachers are statutory supervisors based on their ability to effectively recommend hiring. Specifically, the Employer asserts that special education teachers participate in interviews and effectively recommend the hiring of TAs and DSPs. The record demonstrates that the Employer hires approximately 25 TAs and DSPs annually. Based on the evidence in the record, I find that the Employer has failed to establish that special education teachers effectively recommend hiring within the meaning of Section 2(11) of the Act.

The Board defines the power to effectively recommend as meaning that the recommended action is taken without independent investigation by superiors. *ITT Corp.*, 265 NLRB 1480, 1481 (1982); *Wesco Electrical Co.*, 232 NLRB 479 (1982). Thus, in order to establish that an alleged supervisor possesses supervisory indicia based on the authority to effectively recommend hiring, the party asserting supervisory status must demonstrate that the

management official made the decision to hire based solely on the recommendation from the alleged supervisor, without further inquiries or investigation. See *Waverly-Cedar Falls Health Care*, 297 NLRB 390, 392 (1989), enfd. 933 F. 2d 626 (8th Cir. 1990). Mere participation in the hiring process, absent the authority to effectively recommend hire, is insufficient to establish 2(11) supervisory authority. *Training School at Vineland*, 332 NLRB 1412, 1417 (2000); *North General Hospital*, 314 NLRB 14, 16 (1994).

The record establishes that special education teachers do not have a role in reviewing applications for employment, determining which applicants receive interviews, or scheduling interviews, but that they generally are invited to attend interviews if they are available and want to participate.² The record demonstrates that the participation of special education teachers in the hiring process is entirely voluntary, principals Andrew Shanahan and Autumn Carini generally participate in the interviews, and that the ultimate hiring decisions are reviewed by human resources.³ The Board has found that where an admitted supervisor also participates in the interview process, it cannot be said that employees whose status is at issue have authority to effectively recommend hiring within the meaning of Section 2(11). *Ryder Truck Rental*, 326 NLRB 1386, 1387-88, fn. 9 (1998).

Although the Employer asserts that special education teachers have interviewed candidates on their own and effectively recommended their hire, the record contains only two instances since 2009 when special education teachers independently conducted interviews. The first example predates Principal Shanahan's employment as an administrator with the Employer, and he testified that he had no knowledge of the circumstances other than what was contained in

² The record demonstrates that not all teachers participated in interviews and at least two who did so were interested in moving into administrative positions.

³ The record demonstrates that human resources performs certain background checks and screenings to ensure that applicants do not have a criminal record. The record does not disclose whether human resources has any other involvement in hiring decisions.

the interview log. Principal Shanahan testified to another situation when the Employer had an abundance of candidates to interview and it resulted in special education teacher Gabrielle Galletta interviewing a candidate alone. However, Principal Shanahan could not recall whether he discussed the candidate with the Galletta before or after the interview, whether there were other candidates for the position, or whether any additional steps were taken by the Employer prior to hiring the candidate. Further, Galletta's recommendation to hire was sent to human resources and the record demonstrates that Education Director Sandy Klimas extended an offer to the applicant.⁴ Any lack of evidence in the record is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 fn. 8 (1999). Finally, I note that special education teacher Galletta testified that her participation in the interview was unplanned, the result of Ms. Klimas becoming unavailable, and that this was an isolated incident. It is well-established that the sporadic exercise of supervisory authority does not confer supervisory status. *Shaw Inc.*, 350 NLRB 354 (2007) (isolated incidents of discipline insufficient to render foremen statutory supervisors); see also *Volair Contractors*, 341 NLRB 673, 675 (2004).

The Employer asserts that it would not hire a candidate over a teacher's objection, but provided no evidence that this had ever occurred. Rather, Principal Shanahan testified about an instance where he and a special education teacher interviewed a candidate and he left the final decision up to the special education teacher, who said she was willing to "give it a shot" because the classroom was understaffed. The Board has declined to find supervisory status in similar circumstances. See *Tree-Free Fiber Co.*, 327 NLRB 389, 391 (1999)(team leaders not supervisors where management "turn[ed] that applicant over to the team leaders...to find out

⁴ The record evidence does not indicate whether human resources or Ms. Klimas conducted any additional investigation before offering the applicant employment.

whether or not they thought that they would make a good employee to work on their teams”). Further, the Board has found that compatibility recommendations by team leaders are insufficient to support a finding of hiring authority with the meaning of Section 2(11) of the Act. *Anamag*, 284 NLRB 621, 623 (1987). Thus, the fact that on a single occasion Principal Shanahan sought input from a special education teacher as to whether a candidate would be a good fit in the classroom is insufficient evidence to show that special education teachers possess the authority to effectively recommend hiring. Accordingly, I find that the Employer’s assertion that it would not hire a candidate over a teacher’s objection is not supported by the evidence, and is not sufficient to establish supervisory status. See *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006).

The record establishes that the Employer has disregarded special education teachers’ recommendations for internal candidates to move into teaching positions on multiple occasions. Special education teacher Laura Martino recommended that the Employer hire Jessica Dippel for the art teacher position. Dippel was not hired. Special education teacher Corinne Brady recommended that the Employer hire Katie Schmandt as a teacher. Schmandt was not hired at that time. Thus, the record fails to establish that the Employer routinely follows the hiring recommendations of special education teachers.

Based on the evidence adduced at the hearing, I find that Employer has failed to meet its burden to demonstrate that special education teachers effectively recommend hire within the meaning of Section 2(11) of the Act. See *Training School at Vineland*, 332 NLRB 1412, 1417 (2000); *North General Hospital*, 314 NLRB 14, 16 (1994).

(2) Effectively Recommend Discipline

It is the Employer's position that the special education teachers effectively recommend discipline. However, the record establishes that special education teachers report performance issues to the attention of their respective principals who are ultimately responsible for disciplinary decisions. For example, the Employer maintains an attendance policy which dictates corrective action based on the number of attendance points accrued. Special education teachers are tasked with tallying attendance points each month for TAs and DSPs pursuant to the Employer's attendance policy. This task requires no discretion, as employees' arrival times are documented in an electronic system that records when each employee enters the building. Once a TA or DSP reaches a certain number of points, the special education teacher reports that information to the site's principal in order to determine what, if any, corrective action should be taken.

The Employer argues that the special education teachers have discretion under the attendance policy because it states that, "the Agency reserves the right to skip steps and deviate from the policy when it is deemed necessary." However, the language of the policy imputes discretion to the Employer, and not specifically to the special education teachers. Further, the Employer provided no examples of a time when a special education teacher has exercised such discretion. Rather, it appears that the discretion has been exercised by the principals.⁵ Based on the record, I find that special education teachers address attendance issues in a routine, clerical and perfunctory manner. See *Screen Guard*, 311 NLRB 109 (1993); *Waterbed World*, 286 NLRB 425 (1987). The Board has held that this type of reportorial authority does not establish supervisory status. *Community Educations Centers, Inc.*, 360 NLRB No. 17, slip op. at

⁵ For example, special education teacher Katie Schmandt learned after an audit that DSP Maureen Kane had far exceeded the attendance point total that would result in termination. When Schmandt reported this discovery to Principal Autumn Carini, she instructed Schmandt to "wipe" Kane's points and start a new card.

13 (2014); *Ken-Crest Services*, 335 NLRB 777, 778 (2001)(program managers were not supervisors because their “limited role in the disciplinary process is nothing more than reportorial”); *Fleming Cos.*, 330 NLRB 277 fn. 1 (1999)(supervisory status not found where employee communicated discipline only pursuant to management's directive; employee's role as a “mere conduit” for management was insufficient evidence of independent judgment); *Feralloy West Co.*, 277 NLRB 1083, 1084 (1985)(employee who recorded employee attendance and brought employee records to management for a decision on whether to reprimand for attendance violations was not a supervisor).

In addition to tracking attendance violations, special education teachers have reported inappropriate behavior by a TA or DSP to site principals, who then determine what, if any, corrective action should be taken.⁶ The record evidence shows that TAs and DSPs are issued discipline under one of two circumstances. In the first, a special education teacher reports to the principal that a TA or DSP has violated an Employer policy. After discussing the incident with the special education teacher, the principal generally asks for a recommendation, and the principal then decides and notifies the special education teacher what level of discipline should be issued. The second circumstance arises when the principal discovers a violation or conducts an independent investigation. In that circumstance, the principal merely relays to the special education teacher the level of discipline that should be issued.

The Employer provided four examples where a TA or DSP was disciplined for inappropriate behavior. In the first example, Principal Shanahan noticed the inappropriate behavior of a DSP and instructed the special education teacher to write a disciplinary memorandum. In the second example, special education teacher Laura Martino recommended

⁶ If the principal wishes to take action at the level of suspension or termination, the corrective action form states that he or she must first contact human resources.

that disciplinary action be taken against a DSP who fled the classroom rather than assisting with an upset student. Principals Shanahan and Autumn Carini disagreed with Martino's recommendation and instead instructed her to have a meeting with all staff in her classroom on the Employer's protocols. The third example involved a DSP losing her temper and swearing in front of students. The special education teacher reported the event to the principal who agreed with the special education teacher that a disciplinary notice, the first level of discipline, was warranted. In the final example, a special education teacher reported the incident to Principal Shanahan. Shanahan conducted his own investigation and determined that a final written warning should be given to a DSP for making an inappropriate comment to a student.

Thus, the record demonstrates that of the four examples in the record, the principal adopted the special education teacher's recommendation on only one occasion. On two occasions, the principal observed or independently investigated the misconduct and determined the appropriate discipline and on one occasion he disregarded a recommendation and ordered that no discipline be issued. Thus, the record demonstrates that the ultimate decision as to whether to discipline or the type of discipline to be administered is solely determined by the principals and the role of special education teachers in the disciplinary process is mainly reportorial. See *Rest Haven Living Center, Inc.*, 322 NLRB 210 (1996)(LPNs whose involvement in the disciplinary process was to report problems to management not 2(11) supervisors).

The record demonstrates that the Employer maintains a written progressive discipline policy, but the evidence adduced at the hearing does not support a finding that the Employer routinely follows this policy. The corrective action notices in the record are insufficient to establish the special education teachers' supervisory status because the Employer has not shown

that the warnings in the record were relied upon for future discipline, wage increases, or promotions. *Ohio Masonic Home*, 295 NLRB 390, 393 (1989); See also *Lucky Cab Company*, 360 NLRB No. 43, slip op. at 4 (2014) (Where Respondent may exercise its discretion in utilizing forms of discipline, the Board found that Respondent did not have a progressive disciplinary system and thus the alleged supervisors' reports were not indicative of supervisory status); *Sanctuary at Mcauley*, 360 NLRB No. 4 (July 10, 2013) ("The issuance of reprimands or warnings – which themselves carry no consequences in terms of loss of hours or pay – are not, without more, evidence of supervisory authority; to be so, they must be the basis of later personnel action *without independent investigation or review*"); *DirectTV*, 357 NLRB No. 149, slip op. at 3 (2011) (citing *Jochims v. NLRB*, 480 F.3d 1161 (D.C. Cir. 2007)). In the absence of evidence that special education teachers issue written warnings or corrective action that forms the basis for further discipline or otherwise impacts TAs' and DSPs' terms and conditions of employment, I find that the record fails to establish that there are "actual consequences" flowing from discipline issued by special education teachers. *DirectTV*, *supra*; see also *Ken-Crest Services*, 355 NLRB 777, 778 (2001).

Based on the foregoing and the record as a whole, I conclude that the Employer has not established that special education teachers possess the authority to effectively recommend discipline.

(3) Assign and Responsibly Direct Work

The Employer asserts that special education teachers assign and responsibly direct work by directing the TAs and DSPs in their classrooms to perform certain tasks throughout the day and by overseeing the TAs and DSPs as they carry out the daily lesson plan.

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

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

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

I find that the Employer has not met its burden to demonstrate that special education teachers assign or responsibly direct TAs and DSPs within the meaning of Section 2(11) of the Act.

Assign Work

The Employer argues that special education teachers exercise independent judgment in assigning work to TAs and DSPs. Specifically, the Employer states in its brief that special education teachers use their professional judgment and education to develop daily lesson plans, to instruct TAs and DSPs on instructional goals, teaching techniques and behavior modifications, and to correct the behavior of TAs and DSPs to insure they are performing appropriately. The Employer also argues in its brief that special education teachers regularly direct TAs and DSPs in which behavior management techniques to use and correct TAs and DSPs who are being inconsistent in their approaches.

The record evidence establishes that special education teachers do not assign TAs or DSPs to their classrooms, set their schedules or determine their overall duties. While teachers prepare lesson plans and implement them with the assistance of TAs and DSPs, the special education teachers work alongside the TAs and DSPs performing the same work. Though the special education teachers may instruct the TAs and DSPs in how to perform a certain lesson or ask for assistance with a certain student, the day-to-day tasks of the classroom are predictable and routine. Further, there is no evidence that special education teachers assign duties based on their assessment of the skills and abilities of the TAs and DSPs. Rather, classroom duties are driven by the specifics of each student's instruction, which is governed by the Individual Education Plan (IEP) created for each student by a team of the Employer's staff in accordance with state regulations and the particular needs of the child.

In *Ten Broeck Commons*, 320 NLRB 806 (1996), the Board found that licensed practical nurses (LPN) who directed certified nursing assistants (CNAs) to attend to a patient's needs or to a job that was not properly done were not supervisors because their direction did not involve the use of independent judgment, but rather was routine in nature because the CNAs performed the same care, in the same manner, for the same people. The Board stated that to some degree, the greater skill and experience of the LPN may be involved as the LPN may more quickly recognize a situation that needs immediate attention, but that the greater skill and experience did not raise the LPN to the level of supervisor. *Id.*; see also *Loyalhanna Health Care Associates*, 352 NLRB 863, slip op. at 2 (2008)(nurse managers who reassigned staff based on resident acuity did not exercise independent judgment where there was no evidence that they considered aides' skill sets and matched those skills to the condition and needs of particular patients).

Similarly herein, the duties of TAs and DSPs, which consist of, inter alia, assisting students, preparing materials, escorting students, responding to behavior incidents, and completing tracking paperwork are repetitive and routine in nature, and any direction by the special education teacher is a result of his or her experience and education. Thus, the assignment and direction of work by the special education teachers to TAs and DSPs does not involve the exercise of independent judgment and thus does not implicate the authority to "assign" as that term is defined in *Oakwood Healthcare, Inc.* because the activity does not constitute the "designation of significant overall duties ... to an employee." *Id.* at 689. See, e.g., *Alternate Concepts, Inc.*, 358 NLRB No. 38 (April 27, 2012)(crew dispatchers and line controllers not supervisors where they made assignments based on the employer's detailed policies, and such assignments were routine in nature).

Responsibly Direct Work

The Board has held that for the direction of others to be “responsible,” the person performing the oversight must be held accountable for the actions of others. “Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct work and the authority to take corrective action, if necessary....and a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.” *Oakwood Healthcare, Inc.* at 692.

In support of its position, the Employer submitted performance improvement plans and discipline notices issued to special education teachers. One special education teacher was disciplined multiple times and ultimately fired for “unsatisfactory or careless or untimely work; failure to meet quality standards; mistakes due to carelessness or failure to get necessary instructions.” Another teacher was placed on a performance improvement plan for failing to complete timely lesson plans. The remaining two special education teachers received “counseling sessions” based on the failure of TAs or DSPs to complete paperwork.

Regarding the discipline for the failure of the TAs and DSPs to complete paperwork, the record establishes that the paperwork requirements are routine tasks dictated by the Employer. The Board has found that the direction of routine tasks that are controlled by the employer’s policies and procedures does not constitute responsible direction. See *Community Education Centers, Inc.*, 360 NLRB No. 17 (January 9, 2014) (supervisors found not to responsibly direct work of counselors even though they received discipline for counselors’ failure to follow clinical schedule and maintain log books because direction of those tasks required no independent judgment). To the extent that special education teachers received discipline for failing to properly manage their classrooms, that discipline was directed at their own performance, and

was not based on the deficient performance of the TAs or DSPs. *Id.*, slip op. at 2 (no accountability where purported supervisor was disciplined for his or her own deficiencies and not the performance of those he or she purportedly supervised). Accordingly, I find that special education teachers do not possess the authority to responsibly direct the work of TAs and DSPs within the meaning of *Oakwood* and Section 2(11) of the Act.

(4) Secondary Indicia⁷

The record demonstrates that the special education teachers' job description designates them as supervisors for the TAs and DSPs, and the job descriptions for the TAs and DSPs lists their classroom teacher as their direct report. However, job descriptions, without more, do not establish actual supervisory authority. *Brusco Tug and Barge, Inc.*, 359 NLRB No. 43 (December 14, 2012).

The Employer also relies in support of its position on the special education teachers' preparation of annual evaluations of the TAs and DSPs in their classroom. The Board in *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 (1999) noted that Section 2(11) does not include the authority to "evaluate" in its enumeration of supervisory functions. Thus, when an evaluation does not, by itself, affect the wages and/or job status of the employee being evaluated, the individual performing such an evaluation is not engaged in a statutory supervisory function. See also *Lucky Cab Company*, 360 NLRB No. 43, slip op. at 4 (2014); *Ten Broeck Commons*, 320 NLRB 806, 813 (1996). In the instant case, the special education teachers prepare evaluations which are reviewed and edited by the site principal prior to being given to the TA or DSP and there is no record evidence that the evaluations effect employees' job retention or

⁷ While secondary indicia can be a factor in establishing statutory supervisory status, it is well established that where, as here, putative supervisors are not shown to possess any of the primary supervisory indicia, secondary indicia alone are insufficient to establish supervisory status. *Golden Crest Healthcare*, supra at 730 n. 10; *Ken-Crest Services*, 335 NLRB 777, 779 (2001).

wages or that they may result in discipline. Thus, the Employer's argument that special education teachers' completion of annual evaluations renders them supervisors is without merit.

The Employer also provided evidence that TAs and DSPs submit requests for time off to the special education teacher in their classroom. The record evidence failed to reveal any instances in which a special education teacher denied a time off request. Rather, the special education teacher merely completes the necessary paperwork to facilitate the time off. Given the routine nature of this task and the lack of exercise of any independent judgment in granting time off, special education teachers' "approval" of time off requests does not establish supervisory status. See *Screen Guard*, 311 NLRB 109, 110 (1993); see also *Loyalhanna Health Care Associates*, 342 NLRB 863, slip op. at 3 (2008) (nurse managers authority to release subordinates early in cases of illness or family emergency did not demonstrate that nurse managers exercised independent judgment); *Shaw, Inc.*, 350 NLRB 354, 357 (2007) (finding authority to allow employees to leave work shortly before the end of their workday insufficient to show independent judgment).

Based on the above and extant Board law, I find that the Employer has not met its burden of showing that the special education teachers are supervisors within the definition of Section 2(11) of the Act and I shall include the special education teachers in the bargaining unit found appropriate herein.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I find and conclude as follows:

1. The hearing officer's rulings are free from prejudicial error and are hereby 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 herein.

3. The Petitioner is a labor organization with the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

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 (combined unit) appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time non-professional employees employed by the Employer at its Bryant and Stratton Way and Elmwood locations, including teacher assistants, direct support professionals, direct support professional floats, and creative movement teachers; and all full-time and part-time professional employees, including special education teachers, physical education teachers, music teachers, and art teachers; but excluding all confidential employees, managers, guards and all supervisors and all other professional employees as defined in the Act.

6. The parties stipulated, and I find, that the special education teachers, physical education teachers, music teachers and art teachers are professional employees under Section 2(12) of the Act who must be accorded a *Sonotone* election to determine whether they wish to be included in a unit with non-professional employees.⁸ I therefore direct an election in the following voting groups, each of which constitute a separate appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act:

Voting Group/Unit A (Professionals)

All full-time and regular part-time professional employees employed by the Employer at its Bryant and Stratton Way and Elmwood locations, including special education teachers, physical education teachers, music teachers and art teachers; but excluding all non-professional employees, confidential employees, managers, guards and all supervisors and all other professional employees as defined in the Act.

Voting Group/Unit B (Non-Professionals)

All full-time and regular part-time non-professional employees employed by the Employer at its Bryant and Stratton Way and Elmwood locations, including teacher assistants, direct support professionals, direct support professional floats, and creative movement teachers; but excluding all

⁸ Sonotone Corporation, 90 NLRB 1236 (1950).

confidential employees, managers, guards and all supervisors and professional employees as defined in the Act.

7. The employees in Voting Group A will be asked the following two questions on their ballots to which the choice for an answer will be “YES” or “NO”:

- 1.) Do you wish to be included in the same unit with nonprofessional employees of the Employer for the purpose of collective bargaining?
- 2.) Do you wish to be represented for purposes of collective bargaining by Autism Services, Inc., Education Association, NYSUT, AFT, NEA, AFL-CIO?

8. If a majority of the professional employees in Voting Group A vote “Yes” to the first question, indicating their wish to be included in a unit with nonprofessional employees, they will be so included in the combined unit, as described above. Their votes on the second question will then be counted together with the votes of the nonprofessional employees in Voting Group B to decide whether (or not) the Petitioner has been selected to represent the combined bargaining unit.

9. If a majority of the professional employees do not vote for inclusion in the same bargaining unit with nonprofessional employees, they will not be included with the nonprofessional employees. Their votes on the second question will be counted to decide whether or not they wish to be represented by the Petitioner in a separate professional unit.

10. The employees in the non-professional Voting Group B will be polled to determine whether or not they wish to be represented for collective bargaining purposes by Autism Services, Inc., Education Association, NYSUT, AFT, NEA, AFL-CIO, to which the choice for an answer will be “YES” or “NO”.

11. In the event that the professional employees vote for separate representation, the separate appropriate units will be described as set forth respectively in Voting Group/Unit A and Voting Group/Unit B above.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the voting groups found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **Autism Services, Inc., Education Association, NYSUT, AFT, NEA, AFL-CIO**. In addition and because this unit includes professional and nonprofessional employees who cannot be joined in a single unit

without the desires of the professional employees being determined in a separate vote, the eligible professional employees will vote whether or not they wish to be included in the same unit with nonprofessional employees of the Employer for the purpose of collective bargaining. The date, time and place of election, will be specified in the Notice of Election which will issue shortly.

A. Voting Eligibility

Eligible to vote in the election are employees in the voting groups 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. Unit employees in the military services of the United States may vote if they appear in person at the polls.

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

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list

of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all 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.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **June 17, 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, by mail, by hand or courier delivery, or by facsimile transmission at 716-551-4972. 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, and follow the detailed instructions. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at

least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed.

Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops an employer from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the National Labor Relations Board's Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001. The request for review must contain a complete statement of the facts and reasons on which it is based.

Procedures for Filing Request for Review: A request for review must be received by the Executive Secretary of the Board in Washington, D.C., by close of business (**5:00 p.m. Eastern Time**) on ***June 24, 2014***, unless filed electronically. If filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Standard Time on *June 24, 2014***. **Consistent with the Agency's E-Government initiative, parties are encouraged, but not required, to file a request for review electronically.** Section 102.114 of the Board's Rules do not permit a request for review to be filed by facsimile transmission. A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with

the requirements of the Board's Rules and Regulations.⁹

Upon good cause shown, the Board may grant special permission for a longer period within which to file a request for review. A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of the time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

DATED at Buffalo, New York this 10th day of June, 2014,

/s/Rhonda P. Ley
RHONDA P. LEY, Regional Director
National Labor Relations Board - Region 3
Niagara Center Building – Suite 630
130 S. Elmwood Avenue
Buffalo, New York 14202

⁹ Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.