

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 9

In the Matter of

CENTER FOR COMPREHENSIVE SERVICES, INC.  
D/B/A NEURORESTORATIVE KENTUCKY <sup>1/</sup>

Employer

and

Case 09-RC-130677

SERVICE EMPLOYEES INTERNATIONAL UNION  
NATIONAL CONFERENCE OF FIREMEN AND OILERS,  
CHAPTER 320 <sup>2/</sup>

Petitioner

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

**I. INTRODUCTION**

The Employer, a limited liability corporation, provides medical therapeutic rehabilitation services at its facilities in Louisville, Kentucky. The Petitioner filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act (the Act) seeking to represent a bargaining unit consisting of all full-time and part-time non-supervisory employees including professional and non-professional employees at the Employer's 4511 Bardstown Road, Louisville, Kentucky facility and its 10 affiliated residential locations. Alternatively, the Petitioner is willing to represent separate units of professional and non-professional employees should the professional employees vote to be excluded from the non-professional unit.

The parties agree, and I find, based on the record that the petitioned-for unit of professional and non-professional employees is appropriate for purposes of collective bargaining. However, the parties disagree on whether doctoral level psychologists counselors (DLPC) employed by the Employer as counselors are supervisors within the meaning of Section 2(11) of the Act. The Employer contends that DLPCs should be excluded from an appropriate unit because they are supervisors. For the reasons set forth below, I conclude that the record evidence does not establish that DLPCs are supervisors within the meaning of the Act. In this regard, the record evidence fails to establish that DLPCs exercise or possess any indicia of supervisory status within the meaning of Section 2(11) of the Act.

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<sup>1/</sup> The name of the Employer appears as amended at the hearing.

<sup>2/</sup> The name of the Petitioner appears as amended at the hearing.

In reaching my determination on this issue, I have carefully considered the record evidence and the arguments of the parties at the hearing and in their post-hearing briefs. In explaining how I came to my determination on this issue, I will first review the regulation of psychology in the Commonwealth of Kentucky, then describe the Employer's operations, discuss the duties of the employees at issue, set forth the applicable legal precedent, and finally analyze the supervisory issue in relation to the record evidence and Board precedent. Before beginning my analysis, I note that there is no history of collective bargaining affecting any of the employees involved in this proceeding. There are approximately 72 employees in the unit that I have found to be appropriate.

## II. FACTUAL OVERVIEW

### A. Relevant Statutory Scheme

The practice of psychology is overseen by the Kentucky Board of Examiners of Psychology (Bd. of Psych.). KRS 319.005 *et seq.* and 201 KAR 26:115 *et seq.* The statute, which I hereby take administrative notice of, requires that masters level psychologists have at least 5 years of "supervision" by a doctoral level psychologist before being allowed to function independently.<sup>3/</sup> Masters level psychologists are included in the petitioned-for professional unit.

When practicing under the "supervision" of a doctoral level psychologist, a masters level psychologist functions under the extended authority of the doctoral level psychologist - essentially, operates under the doctoral level psychologist's license. The requirements of this Bd. of Psych. mandated "supervision" are delineated in 201 KAR 26:171 and includes, among other requirements, weekly individual face-to-face contact between the "supervisor" and "supervisee" for at least the first 2 years of the "supervisee's" practice, with additional "supervision" sessions as needed. The "supervisor" and "supervisee" can thereafter petition the Bd. of Psych. to decrease the number of face-to-face contacts.

Pursuant to 201 KAR 26:171, doctoral level psychologist "supervisors" shall, among other duties, make all reasonable efforts to be assured that each "supervisee's" practice is compliant with Bd. of Psych. Regulations; report to the Bd. of Psych. violations of certain rules of practice set by the Bd. of Psych.; control, direct, or limit the "supervisee's" practice as appropriate to ensure that the "supervisee's" practice of psychology is competent; and, generally "be responsible for" the "supervisee's" practice of psychology. If the masters level psychologist "supervisee" has been practicing for fewer than 4 years, the "supervisor" must read and countersign all psychological assessments. The "supervisor" should also review the "supervisee's" treatment plans, progress notes and correspondence on an as-needed basis to assess the competency of the "supervisee" to render psychological services; establish with the "supervisee" a "supervisory" plan that is then submitted to the Bd. of Psych.; have direct observation of the "supervisee's" work at least once every 2 months; and, limit and control the

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<sup>3/</sup> The term "supervision" in this context does not necessarily refer to supervision as defined by Section 2(11) of the Act. Thus, hereafter, to avoid confusion, when referring to Bd. of Psych. mandated "supervision," "supervisors," or "supervisees," those terms will be in quotes.

“supervisee’s” caseload as appropriate to their level of competence, among other oversight-related duties.

The Bd. of Psych. may take disciplinary action against doctoral level psychologists who fail to provide adequate supervision for certified psychologists, licensed psychological associates, applicants for licensure, or other staff. However, the Bd. of Psych. cannot revoke a doctoral level psychologist’s license for any violations of someone they “supervise” or employ unless the Bd. of Psych. finds that the doctoral level psychologist had knowledge of such violations.

Upon the completion of 5 years of “supervised” practice, the passing of an examination, the submission of letters of endorsement to the Bd. of Psych., including one letter from the masters level psychologist’s current doctoral level psychologist “supervisor,” and the payment of a fee, the masters level psychologist can practice autonomously.

#### B. The Employer’s Operations

The Employer provides therapeutic rehabilitative care for individuals suffering either acquired or traumatic brain injuries at its facilities in Louisville, Kentucky. In support of its mission, the Employer employs a variety of caretakers, including speech therapists, physical therapists, and psychologists. Currently, the Employer’s Bardstown Road location, the only location involved herein, has approximately 55 clients, 30 of whom are residential. The Employer’s psychology-related operations are overseen by the Bd. of Psych.

The Employer has approximately 6 to 8 undisputed statutory supervisors out of a workforce of about 100 employees. On the psychology side of its operation, the Employer employs “counselors.” The counselor positions are held by individuals with either a masters or doctoral degree in psychology.<sup>4/</sup> Regardless of their degree, all counselors provide individual counseling to brain injured individuals in the form of therapy and support services. All counselors have their own office. DLPCs earn about \$17,000 more per year than MLPCs.

The Employer employs two DLPCs and between four and six MLPCs. One DLPC “supervises” two MLPCs, the other DLPC “supervises” at least one MLPC. An additional MLPC is “supervised” by an outside doctoral level psychologist, and another MLPC does not require “supervision.” At least one DLPC also “supervises” a masters level psychologist who is not employed by the Employer.

All counselors report to the Employer’s Clinical Supervisor. The Clinical Supervisor reports to the Program Manager, the head of the Employer’s facility. Counselors report to the Clinical Supervisor for administrative issues such as calling off work, putting in for vacation, and scheduling conflicts, as well as certain clinical issues regarding patient behavior. They report to both the Clinical Supervisor and Program Manager for issues such as reporting unethical behavior by co-workers. The Program Manager prepares quarterly and yearly evaluations for all counselors. The evaluations consist of clinical observation in which the counselors are rated on

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<sup>4/</sup> Hereafter, masters level psychologist counselors employed by the Employer will be referred to as MLPCs. Collectively, DLPCs and MLPCs will be referred to herein as counselors.

their clinical abilities. The Clinical Supervisor and Program Manager are jointly responsible for hiring employees. The Clinical Supervisor assigns patients to counselors based on their schedules.

### C. Counselor Job Duties

Counselors are required by the Program Manager to be productive by spending a minimum of 32 hours each week performing therapy and meeting with patients. The counselors' remaining time is spent writing reports and notes as well as attending clinical case conferences and interdisciplinary team meetings.

DLPCs who also "supervise" a masters level psychologist can request to have their productivity hour requirement reduced by the number of hours they spend "supervising." MLPCs' productivity hour requirements are not reduced by the time they spend being "supervised." The only DLPC who testified noted that she spends about 5 hours "supervising" the Employer's MLPCs per month.

The Employer does not, and cannot require its DLPCs to be "supervisors" to its MLPCs as a condition of the DLPCs' employment. There is no monetary benefit to a DLPC "supervising" a MLPC. If they choose to enter into a "supervisory" relationship, the "supervision" application the **two psychologists** submit is sent to the Bd. of Psych., not the Employer. If no in-house DLPC is willing to "supervise" a MLPC, the MLPC is free to find a doctoral level psychologist not employed by the Employer to supervise him. The Employer will then pay the outside doctorate level psychologist "supervisor" \$100 per hour to "supervise" the MLPC.

Nevertheless, once a DLPC chooses to "supervise" a MLPC psychologist, that DLPC assumes certain duties by virtue of the MLPC practicing under the DLPC's license. One duty that counselors take on as part of their practice is evaluating patients to determine if they would benefit from behavioral interventions. If a counselor determines that the patient would benefit from behavioral hours, that counselor can petition the state to allot the patient a certain amount of behavioral treatment hours. DLPCs can make such determinations on their own. "Supervised" MLPCs work with their DLPC "supervisors" to develop behavioral intervention plans.

When patients are assigned to a particular counselor, they are pre-assigned a certain number of prescribed hours of therapy. Before working with the clients, the counselor first evaluates the clients and creates a treatment plan for them. DLPCs can create such treatment plans independently, but "supervised" MLPCs are expected to "go over" their evaluation with their doctorate-level "supervisor."

Under the Bd. of Psych. "supervision" framework, DLPCs must meet with MLPCs that they supervise at certain scheduled intervals as required by the Bd. of Psych.. At the Employer's facility, this means that "supervising" DLPCs meet with MLPCs they "supervise." At such meetings, the MLPCs may discuss their caseloads, discuss who they are seeing, what intervention mechanisms the MLPCs are using, and how their patients are progressing. Many

times, the meeting amounts to touching base regarding how each patient is doing. Other times, the MLPCs may bring in questions about problem behaviors a client is exhibiting and ask for feedback on what they are doing and how they might improve their practice. The parties may also review behavioral plans and amend them. If a MLPC recommends a treatment plan that is harmful to a client, the “supervising” DLPC has an ethical obligation not to allow it to take place.

DLPCs do not evaluate the MLPCs’ performance in these meetings. Rather, the parties discuss the MLPCs’ clinical caseloads in order to ensure the MLPCs are providing ethical and competent psychological services. The DLPCs document such meetings for Bd. of Psych. purposes, but they do not provide the documentation to the Employer. DLPCs are not required to keep such documentation at the Employer’s facility.

DLPCs who “supervise” MLPCs provide the MLPCs feedback in the form of annual reports that are sent to the Bd. of Psych. These reports are not routinely provided to the Employer, although the Employer may request them through Kentucky’s Freedom of Information Act. DLPCs do not discuss their evaluations of MLPCs with the Employer.

The “supervising” DLPCs are essentially tasked with overseeing the MLPCs’ competence and ethical behavior and correcting such behavior as necessary. However, they are not required to make any internal reports regarding the performance of the MLPCs they “supervise” unless they believe they are ethically obligated to report them. MLPCs are also ethically obligated to report other psychologists, including other MLPCs and DLPCs, who they observe acting unethically.

To date, the Employer has not experienced any significant competence issues with its MLPCs, and no DLPC has ever had occasion to make a recommendation for discipline or other corrective action.<sup>5/</sup> DLPCs do not have the authority to discipline and they do not enforce Employer policies unrelated to the clinical practice of psychology. Thus, they cannot enforce the Employer’s attendance or productivity policies. DLPCs are not involved in the hiring or interview process, although they may suggest candidates. There is no probative evidence that DLPCs can transfer MLPCs or effectively recommend such a transfer, or that they have done so. The DLPCs do not decide who receives promotions, nor do they make recommendations regarding promotions. They have never been told that they have the ability to recommend promotions, rewards, or wage increases. DLPCs do not attend managers’ meetings.

### **III. LEGAL ANALYSIS**

#### **A. The Legal Framework**

Supervisors are specifically excluded from the Act’s definition of “employee” by Section 2(11) of the Act, which defines a “supervisor” as:

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<sup>5/</sup> Absent one instance in which a DLPC discussed with the Program Manager her intention to provide additional training to a MLPC she “supervised.” The record does not reflect that this was done in the scope of her employment duties - rather, the Program Manager was consulted as a “colleague.”

Any individual having the 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.

To meet the definition of a supervisor set forth in Section 2(11) of the Act, a person needs to possess only one of the 12 specific criteria listed, or the authority to effectively recommend such action. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6<sup>th</sup> Cir. 1949), cert. denied, 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000). Thus, the exercise of “supervisory authority” in merely a routine, clerical, perfunctory or sporadic manner does not confer supervisory status. *Chrome Deposit Corp.*, 323 NLRB 961, 963 (1997); *Feralloy West Corp. and Pohng Steel America*, 277 NLRB 1083, 1084 (1985).

Possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory status, even if this authority has not yet been exercised. See, e.g., *Pepsi-Cola Co.*, 327 NLRB 1062, 1063 (1999); *Fred Meyer Alaska*, 334 NLRB 646, 649 at fn. 8 (2001). Although possession of supervisory authority – even without the actual exercise of authority – is sufficient to show supervisory status, “the evidence still must suffice to show that such authority actually exists.” *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006). Thus, the absence of evidence that such authority has been exercised may be probative of whether such authority exists. See, *Michigan Masonic Home*, 332 NLRB 1409, 1410 (2000); *Chevron U.S.A.*, 308 NLRB 59, 61 (1992).

In considering whether the putative supervisors involved here possess any of the supervisory authority set forth in Section 2(11) of the Act, I am mindful that in enacting this section of the Act, Congress emphasized its intention that only supervisory personnel vested with “genuine management prerogatives” should be considered supervisors, and not “straw bosses, leadmen, set-up men and other minor supervisory employees.” *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985). Thus, the ability to give “some instructions or minor orders to other employees” does not confer supervisory status. *Id.* at 1689. Such “minor supervisory duties” do not deprive such individuals of the benefits of the Act. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-281 (1974), quoting Sen. Rep. No. 105, 80<sup>th</sup> Cong. 1<sup>st</sup> Sess., at 4. In this regard, the Board has frequently warned against construing supervisory status too broadly because an individual deemed to be a supervisor loses the protection of the Act. See, e.g., *Oakwood Healthcare, Inc.*, 348 NLRB 686, 688 (2006); *Vencor Hospital – Los Angeles*, 328 NLRB 1136, 1138 (1999); *Bozeman Deaconess Hospital*, 322 NLRB 1107, 1114 (1997).

Proving supervisory status is the burden of the party asserting that such status exists. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-712 (2001); *Arlington Masonry Supply*, 339 NLRB 817, 818 (2003); *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003). As a general matter, I note that for a party to satisfy the burden of proving

supervisory status, it must do so by “a preponderance of the credible evidence.” *Dean & Deluca*, supra at 1047; *Star Trek: The Experience*, 334 NLRB 246, 251 (2001). The preponderance of the evidence standard requires the trier of fact “to believe that the existence of a fact is more probable than its non-existence before [he] may find in favor of the party who has the burden to persuade the [trier] of the fact’s existence.” *In re Winship*, 397 U.S. 358, 371-372 (1970).

Accordingly, any lack of evidence in the record is construed against the party asserting supervisory status. See, *Williamette Industries, Inc.*, 336 NLRB 743 (2001); *Michigan Masonic Home*, 332 NLRB at 1409. Moreover, “[w]henver the evidence is in conflict or otherwise inconclusive on a particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). See also *New York University Medical Center*, 324 NLRB 887, 908 (1997).

The Board requires evidence that the individual “actually possesses” supervisory authority. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). Consequently, mere inferences or conclusionary statements without detailed specific evidence of independent judgment are insufficient to establish supervisory status. *Chevron Shipping Co.*, 317 NLRB 379, 381 fn. 6 (1995); *Sears, Roebuck & Co.*, 304 NLRB 193 (1991). Even a “paper showing” alone – job titles, descriptions, or evaluation forms – is insufficient to prove supervisory status. *Golden Crest* at 731. Further, asserted supervisors will not be found to have such authority if they were not told that they possess it and if they exercised it only sporadically. *Golden Crest* at 730, fn. 9.

The Board revisited the issue of supervisory status in *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), in light of the Supreme Court’s finding in *Kentucky River*. See also, *Croft Metals, Inc.*, 348 NLRB 717 (2006) and *Golden Crest Healthcare Center*, 348 NLRB 727 (2006), issued at the same time as *Oakwood*. In *Oakwood*, the Board addressed the Supreme Court’s rejection of the Board’s interpretation of Section 2(11) in the healthcare industry as being overly narrow and adopted “definitions for the term ‘assign,’ ‘responsibly to direct,’ and ‘independent judgment’ as those terms are used in Section 2(11) of the Act.” *Oakwood*, supra, at 687.

With regard to the Section 2(11) criterion “assign,” the Board considered whether this factor shared with other Section 2(11) criteria the “common trait of affecting a term or condition of employment” and determined to construe the term “assign” “to refer to 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.” *Id.*, at 688. The Board reasoned that, “It follows that the decision or effective recommendation to affect one of these – place, time, or overall tasks – can be a supervisory function.” *Id.* The Board clarified that, “. . . choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers) would not be indicative of exercising the authority to ‘assign.’” *Id.*

In *Oakwood*, the Board explained that, “responsible direction,” in contrast to “assignment,” can involve the delegation of discrete tasks as opposed to overall duties. 348 NLRB at 688-90. The Board reasoned, however that “for direction to be ‘responsible,’ 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 employees are not performed properly.” In clarifying the accountability element for “responsibly to direct” the Board noted that, “to establish accountability for purposes of responsible direction, it must be shown 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.*, at slip op. 7.

Assignment or responsible direction will, as noted above, produce a finding of supervisory status only if the exercise of independent judgment is involved. Independent judgment will be found where the alleged supervisor acts free from the control of others, is required to form an opinion by discerning and comparing data, and makes a decision not dictated by circumstances or company policy. *Id.* at 690-91. Independent judgment requires that the decision “rise above the merely routine or clerical.” *Ibid.*

With respect to “effective recommendation,” the relevant consideration of effective recommendation is control rather than final authority. *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 684 (1980). Circumstances where recommendations concerning discipline or reward are “not shown to be effective or to result in personnel action being taken without resort to individual investigation by higher authority,” must result in a nonsupervisory determination. *Hawaiian Telephone Co.*, 186 NLRB 1 (1970). See also *Mower Lumber Co.*, 276 NLRB 766 (1985). The authority to submit reports on employee conduct that are merely records of instruction or are investigated independently does not establish supervisory status. *Williamette Industries*, 336 NLRB 743 (2001); *Ken-Crest Services*, 335 NLRB 777 (2001); *Tree-Fiber Co.*, 328 NLRB 389 (1991); *Green Acres Country Care Center*, 327 NLRB 257 (1998). The ability to report misconduct to superiors is not tantamount to disciplinary authority. *Los Angeles Water and Power Employees Assoc.*, 340 NLRB 1232, 1234 (2003). Individuals must have been notified of their authority if they are to be supervisors. *Volair Contractors, Inc.*, 341 NLRB 673 (2004).

#### B. Analysis of Supervisory Status

Based on the record evidence and for the reasons that I explain below, I find that the Employer has failed to carry its burden of establishing that DLPCs employed by the Employer are statutory supervisors.

#### Hire, Transfer, Lay Off, Recall, Assignment, Reward, and Adjustment of Grievances

No evidence was produced that DLPCs have the authority to lay off, recall, assign, or reward employees, or to adjust their grievances, or to effectively recommend such action. There was insufficient probative evidence that DLPCs are involved in hiring employees. The record reflects that regular hiring is done by the Program Manager with the assistance of the Clinical Supervisor. While DLPCs can recommend candidates for interviews, this does not amount to effectively recommending hire when the candidates are subsequently interviewed by management, which solely retains hiring authority and there is no record evidence that DLPCs

effectively recommend the hire of anyone. See, e.g. *J.C. Penney Corp., Inc.*, 347, NLRB 127, 129 (2006).

The evidence did not establish that DLPCs have the authority to transfer employees, or effectively recommend their transfer. The only DLPC who testified during the hearing denied having the independent authority to transfer employees or to effectively recommend their transfer. While clients have been transferred between counselors in the past, a DLPC was not involved in making those assignments. Moreover, no evidence was produced that DLPCs have the authority to transfer MLPCs to different job assignments or areas of the facility.

### Promotion

The record reflects that the Program Manager has the authority to promote employees. DLPCs do not have the authority to decide who gets promotions, or effectively recommend an employee's promotion. Nor have DLPCs been told they have the authority to recommend a promotion. In its brief, the Employer maintains that DLPCs have the authority to promote or effectively recommend the promotion of MLPCs because of the DLPCs involvement in the process of MLPCs petitioning to become licensed psychological practitioners under the Bd. of Psych. regulations. KRA 319.053, which I have taken administrative notice of, provides that licensed psychological practitioners may "perform certain functions within the practice of psychology without supervision." However, there was insufficient testimony on what specifically these "certain" functions are, or whether the MLPCs perform those specific functions at the Employer's facility. Because there is insufficient detail in the record regarding how holding the title of a licensed psychological practitioner affects an MLPCs employment with the Employer, it cannot be established that DLPCs can effectively recommend promotion of MLPCs. Furthermore, if the DLPC chooses not to recommend a MLPC that they supervise to become a licensed psychological practitioner, the MLPC is free to find a different "supervisor" who will do so. Moreover, there was no testimony about any DLPC ever actually being involved in the process of a MLPC applying to become a licensed psychological practitioner. Lastly, the record fails to show that the DLPCs make any recommendation regarding MLPCs obtaining a license or how any recommendation by the DLPC effects the MLPCs' employment status.

The Employer also argues that DLPCs effectively recommend promotion because the DLPCs were "responsible for assisting a recently demoted employee to be re-promoted" when one of them agreed to be that employee's doctoral level "supervisor." This does not rise to the level of effective recommendation for a promotion. No evidence was presented that, upon agreeing to "supervise" the employee in question, the DLPC recommended in any way that the employee be "re-promoted" or was otherwise involved in the decision to "re-promote" the employee. Moreover, the employee could have reached that re-promotion by finding an outside doctoral-level "supervisor" or requesting that the Program Manager "supervise" his practice. The Employer did not produce a job description for DLPCs indicating what, if any, their supervisory duties (including duties to promote) are. This lack of evidence is construed against the Employer; the party asserting supervisory status. See, *Willamette Industries, Inc.*, 336 NLRB 743 (2001); *Michigan Masonic Home*, 332 NLRB 1409 (2000). Given the above, I find that the Employer has not proven that DLPCs have the authority to promote or effectively recommend promotion.

### Discipline/Discharge/Suspension

The Employer argues that the DLPCs can effectively recommend discipline, discharge, and/or suspension. However, the record fails to establish that DLPCs can discipline, discharge, or suspend MLPCs or effectively recommend their discipline, discharge, or suspension.

My conclusion that DLPCs do not have the authority to effectively recommend discipline, discharge, or suspension is based on a number of factors. First, with respect to effective recommendation, the record contains numerous conclusionary statements based on leading questions. Such conclusionary statements are insufficient to establish effective recommendation. The record is clear that DLPCs cannot “write up” MLPCs. They are to report ethical breaches or incompetence to the Program Manager or Clinical Supervisor. However, reporting of unethical conduct is imposed upon numerous employees at the Employer’s facility, including MLPCs. Thus, such reports appear to be more in the nature of a report rather than an imposition of discipline, which does not amount to effective recommendation. See, e.g., *Williamette Industries*, supra. In support of its argument that DLPCs exercise independent judgment in reporting ethical breaches or incompetence, the Employer cites *Progressive Transportation Services, Inc.*, 340 NLRB 1044 (2003). That case is distinguishable because in *Progressive*, the alleged supervisor, unlike here, had the independent authority to handle potential discipline issues or to bring them to the next level supervisor. The record in this case does not establish that DLPCs have the independent authority to handle potential discipline issues informally or decide whether to initiate the discipline process by bringing improper conduct to the attention of the Program Manager or Clinical Supervisor. Rather than using independent judgment, the record reflects that in cases of serious ethical breaches, DLPCs are required to make such reports to the Bd. of Psych. The record does not establish that such reports would include any kind of recommendation. Moreover, the Employer has again failed to introduce any supporting documentation, whether in the form of job descriptions or otherwise, indicating that DLPCs have the authority to effectively recommend discipline, discharge, or suspension. This lack of evidence is construed against the Employer, the party asserting supervisory status per *Williamette Industries, Inc.*, supra.

Record evidence establishes that DLPCs are expected to address poor performance with the “supervisee” deemed to have poor performance and do not have to address it with the Employer unless the poor performance is unethical or incompetent. Instead, a DLPC addresses poor performance with the “supervisee,” and, only if the “supervisee’s” practice is unethical or his clinical abilities significantly below par, to the Bd. of Psych. Rather than recommending discipline, suspension or discharge, the DLPC can withdraw as a “supervisor.” The MLPC is not required to practice under any particular DLPC, and if this occurs, the MLPC may find a different doctoral level psychologist to supervise him. There is no record evidence that the Employer or MLPC considers this to be disciplinary.

Once a DLPC reports below par or unethical performance to the Bd. of Psych., the Bd. of Psych. conducts an independent investigation and may determine to suspend the master level psychologist’s license. There is no evidence indicating what such an investigation entails. Thus, there is insufficient evidence that this amounts to a DLPC effectively recommending to the

Employer the discipline, suspension, or discharge of an employee. Finally, the record does not establish that DLPCs recommend to the Employer what, if any, level of discipline to impose upon MLPCs (i.e. that they exercise control in connection with their reports). See *G4S Regulated Security Solutions*, 358 NLRB No. 160 at fn. 5 (2012). Because the Employer's proffered testimony of effective recommendation is based on conclusionary statements in response to leading questions; because DLPCs do not have sufficient control in the disciplinary process; and, because independent investigations by a higher authority occur prior to the imposition of discipline, I conclude that DLPCs cannot effectively recommend discipline, suspension, or discharge.

### Responsible Direction

The record does not establish that DLPCs responsibly direct MLPCs they "supervise." As noted above, in *Oakwood Healthcare*, the Board interpreted the phrase "responsibly to direct" as follows: "If 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,' (as explained below) and carried out with independent judgment." *Oakwood Healthcare*, supra, at 691 (internal quotations omitted). For the direction to be "responsible," the person directing the performance of a task must be accountable for its performance. *Id.* at 690. To establish accountability, "it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It must also be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps." *Id.* at 690. The consequences may be positive, such as merit increase, bonus, or promotion, or negative, such as the denial of one of these (or some other form of counseling or discipline). *Golden Crest*, 348 NLRB 727, 732 fn. 13 (2006).

The DLPCs are not held accountable for the actions of MLPCs they "supervise." The Bd. of Psych. can revoke the license of a DLPC who knowingly allows a MLPC to practice unethically or otherwise in violation of its regulations. Thus, the DLPC is being held accountable for their own action. Further, the DLPC who testified noted that she would report to the Bd. of Psych. any such action, or else remove herself as the MLPC's "supervisor" before such discipline to herself would occur, thus removing a potential for discipline by the Bd. of Psych.. Were the DLPC to remove herself as a MLPC's "supervisor," the Employer would be able to take no action against the DLPC because DLPCs are not required, as a condition of employment, to "supervise" any MLPCs.

There simply is no record evidence that DLPCs are held accountable for the work of the MLPCs. Thus, there is no evidence of any potential for merit raises, bonuses, or promotions, based on DLPC's voluntary "supervision" of MLPCs. Neither is there any evidence of negative consequences resulting for the DLPC's failure to properly "supervise" a MLPC unless that DLPC was removed from the practice of medicine by the Bd. of Psych.. Furthermore, the Employer failed to introduce into evidence any of its policies, job descriptions, and evaluations that would indicate that a DLPC is accountable for MLPCs' conduct.

The Employer asserts that “supervising” DLPCs ensure, among other functions, that the MLPCs conduct the best possible psychology therapy; redirect clinical work of MLPCs; recommend that an assignment of a particular client be changed from one psychological associate to another based on the relationship between the counselor and the client; consult with MLPCs to determine what kind of treatment is needed for each client; and what the treatment goals are; that the DLPCs have authority to amend treatment plans; and, that they may increase how much “supervision” MLPCs require. The Employer also notes that if a DLPC saw a treatment program they disagreed with, they would not allow it to take place. However, the Employer’s examples of independent judgment in these “directions” are lacking in specifics. For example, the record does not reflect how DLPCs redirect the clinical work of MLPCs, what specifically that redirection entails, or how often they do so. The same can be said of treatment plans.

First, I note that there is insufficient detail in the record regarding what the treatment plan is, what it contains, how often a DLPC intervenes in that treatment plan, and to what extent the DLPC does so. In amending treatment plans, it is unclear to what extent DLPCs direct, for example, which part of a treatment plan would occur first. Second, it is the degree of discretion involved in making decisions, not the direction exercised – whether professional, technical, or otherwise – that determines the existence of “independent judgment.”

In these general assertions of direction with independent judgment, the Employer is conflating professional judgment and independent authority. They are not always the same. For example, the Board has previously held that designing a patient treatment plan may involve substantial professional judgment, but may result in wholly routine direction to the staff that implements that plan. *Providence Hospital*, 320 NLRB 717, 728 (1996) (overruled on other grounds).

Given the lack of specificity regarding the independent judgment involved as well as conflicting testimony regarding DLPCs’ ability to recommend reassigning clients from one MLPC to another, I find that the evidence adduced in support of this supervisory indicia does not establish supervisory authority.

### Secondary Indicia

It is 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*, supra at 730 n. 10; *Ken-Crest Services*, 335 NLRB 777, 779 (2001). Regardless, the secondary indicia in this case - the ratio of alleged supervisors to employees, differences in terms and conditions of employment, and attending management meetings – are all supportive of a nonsupervisory determination. The ratio of supervisors to employees when including DLPCs in the unit is 6 to 8 supervisors to about 100 employees. In the case of the psychology/counseling department specifically, the ratio is 2 supervisors (the Program Manager and Clinical Supervisor) to between 6 and 8 supervised employees. This ratio is not so practically unrealistic that it would warrant a determination that DLPCs are supervisors. With respect to terms and conditions of employment, although doctoral level psychologists earn more money than masters level psychologists, this simply reflects the more advanced qualifications

and training of the doctoral level psychologists over the masters level psychologists. Finally, DLPCs do not attend management meetings which take place at the Employer's facility, also weighing against a finding of DLPC supervisory status.

For the foregoing reasons and based on the record as a whole, I conclude that the Employer has failed to meet its burden of proving that doctoral level psychologists employed as counselors by the Employer are supervisors within the meaning of Section 2(11) of the Act. Accordingly, I shall include them in the unit.

#### Exclusion From the Unit

Based on the record, I find that the following persons are supervisors within the meaning of the Act: Gregory E. Nordloh, Program Manager; and Cindy Donner, Clinical Supervisor.

#### **IV. CONCLUSION**

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

1. The hearing officer's rulings made at the hearing 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 in this case.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
4. There is no collective-bargaining agreement covering any of the employees in the unit sought in the petition herein and there is no contract bar to this proceeding.
5. The following units are appropriate bargaining units within the meaning of Section 9(b) of the Act:

#### Voting Group – Unit A (Non-Professional Unit)

Included:

All full time and part time non-professional employees including Life Skills Trainers, Program Support Coordinators, Certified Occupational Therapy Assistants (COTAs), Physical Therapists Assistants, Licensed Practical Nurses and Office Coordinators employed by the Employer at its 4511 Bardstown Road, Louisville, Kentucky facility and the 10 affiliated residential locations.

Excluded:

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

Voting Group – Unit B (Professional Unit)

Included:

All full time and part time professional employees, including Occupational Therapists, Speech and Language Pathologists, Physical Therapists, Counselor/Psychologists, Clinical Evaluators and Case Managers employed by the Employer at its 4511 Bardstown Road, Louisville, Kentucky facility and the 10 affiliated residential locations.

Excluded:

All Registered Nurses, confidential employees, managers, all other employees, guards and supervisors as defined in the Act.

6. In the event the professional employees in Voting Group B vote to be included in the unit with the non-professional employees in Voting Group A, a combined Professional and Non-Professional unit will be an appropriate bargaining unit within the meaning of Section 9(b) of the Act.

**V. DIRECTION OF ELECTION**

Under Board law, professional employees must be provided with an opportunity to vote as to whether they desire to be included in a bargaining unit with the nonprofessional employees or whether they wish to remain unrepresented. E.g. *American Medical Response*, 344 NLRB 1406 (2005). The National Labor Relations Board will conduct a secret ballot election among the employees in the following voting groups:

**VOTING GROUP - UNIT A (NONPROFESSIONAL UNIT):**

Included:

All full time and part time non-professional employees including Life Skills Trainers, Program Support Coordinators, Certified Occupational Therapy Assistants (COTAs), Physical Therapists Assistants, Licensed Practical Nurses and Office Coordinators employed by the Employer at its 4511 Bardstown Road, Louisville, Kentucky facility and the 10 affiliated residential locations,

Excluded:

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

**VOTING GROUP - UNIT B (PROFESSIONAL UNIT):**

Included:

All full time and part time professional employees, including Occupational Therapists, Speech and Language Pathologists, Physical Therapists, Counselors/Psychologists, Clinical Evaluators and Case Managers employed by the Employer at the 4511 Bardstown Road, Louisville, Kentucky facility and the 10 affiliated resident locations.

Excluded:

All Registered Nurses, confidential employees, managers, all other employees, guards and supervisors as defined in the Act.

The professional employees in Unit B will be asked two questions on their ballot to which the answer will be “Yes” or “No.”

- (1) Do you wish to be included with nonprofessional employees in a unit for the purposes of collective bargaining?
- (2) Do you wish to be represented for the purposes of collective bargaining by Service Employees International Union National Conference of Firemen and Oilers, Chapter 320?

If a majority of the professional employees voting in Unit B vote “Yes” to the first question, indicating their desire to be included in a unit with nonprofessional employees, they will be so included, and their votes on the second question will be counted together with the votes of the nonprofessional employees in Unit A to decide the question concerning representation for the overall unit consisting of the employees in Units A and B. If on the other hand, a majority of the professional employees voting in Unit B do not vote “Yes” to the first question, their ballots will be counted separately to decide the question concerning representation in a separate Unit B.

The Unit determination is, therefore, based in part upon the results of the election among the professional employees. Nevertheless, I make the following findings with respect to the appropriate unit:

1. Should a majority of the professional employees vote for inclusion in the overall unit, I find that the following employees constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All full time and part time professional and non-professional employees, including Occupational Therapists, Speech and Language Pathologists, Physical Therapists, Counselors/ Psychologists, Clinical Evaluators and Case Managers, Life Skills Trainers, Program Support Coordinators, Certified

Occupational Therapy Assistants (COTAs), Physical Therapists Assistants, Licensed Practical Nurses and Office Coordinators employed by the Employer at its 4511 Bardstown Road, Louisville, Kentucky facility and the 10 affiliated residential locations, but excluding Registered Nurses, all confidential employees, professional employees, managers, guards and supervisors as defined in the Act.

2. If a majority of the professional employees vote against inclusion in the overall unit, I find that the following employees constitute two units appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

- (1) All full time and part time non-professional employees including Life Skills Trainers, Program Support Coordinators, Certified Occupational Therapy Assistants (COTAs), Physical Therapists Assistants, Licensed Practical Nurses and Office Coordinators employed by the Employer at its 4511 Bardstown Road, Louisville, Kentucky facility and the 10 affiliated residential locations, but excluding all confidential employees, professional employees, managers, guards and supervisors as defined in the Act.

- (2) All full time and part time professional employees, including Occupational Therapists, Speech and Language Pathologists, Physical Therapists, Counselors/Psychologists, Clinical Evaluators and Case Managers employed by the Employer at the 4511 Bardstown Road, Louisville, Kentucky facility and the 10 affiliated residential locations, but excluding all Registered Nurses, confidential employees, managers, all other employees, guards and supervisors as defined in the Act.

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.

## **VI. VOTING ELIGIBILITY**

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, 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.

## VII. 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 separate election eligibility lists, containing the full names and addresses of all the eligible voters in Voting Groups A and B. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). These lists must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the lists should be alphabetized (overall or by department, etc.). The lists may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the lists available to all parties to the election.

To be timely filed, the lists must be received in the Regional Office on or before **July 18, 2014**. No extension of time to file these lists will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file these lists. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The lists may be submitted to the Regional Office by electronic filing through the Agency's website, [www.nlr.gov](http://www.nlr.gov),<sup>6/</sup> by mail, or by facsimile transmission at (513) 684-3946. The burden of establishing the timely filing and receipt of the lists will continue to be placed on the sending party.

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

## VIII. 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

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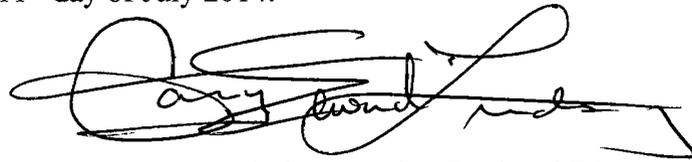
<sup>6/</sup> To file the eligibility list electronically, go to the Agency's website at [www.nlr.gov](http://www.nlr.gov), select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.

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 employers from filing objections based on nonposting of the election notice.

## IX. 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, D.C. 20570-0001. This request must be received by the Board in Washington by **July 25, 2014**. *The request may be filed electronically through the Agency's website, [www.nlr.gov](http://www.nlr.gov),<sup>7/</sup> but may not be filed by facsimile.*

Dated at Cincinnati, Ohio this 11<sup>th</sup> day of July 2014.

A handwritten signature in black ink, appearing to read "Gary E. Lindsay", written over a horizontal line.

Gary E. Lindsay, Acting Regional Director  
Region 9, National Labor Relations Board  
3003 John Weld Peck Federal Building  
550 Main Street  
Cincinnati, Ohio 45202-3271

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<sup>7/</sup> To file the request for review electronically, go to [www.nlr.gov](http://www.nlr.gov), select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.