

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

UNITED CEREBRAL PALSY,
NEW YORK CITY, INC.¹

Employer

and

Case No. 29-RC-9679

UNITED FEDERATION OF TEACHERS,
LOCAL 2, AMERICAN FEDERATION OF
TEACHERS, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Peter Pepper, a Hearing Officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.
2. The record indicates that United Cerebral Palsy, New York City, Inc., herein called the Employer, UCP, or the agency, is a New York not-for-profit

corporation, with its principal office and place of business located at 80 Maiden Lane, New York, New York, and with other facilities at various other locations in Manhattan, Brooklyn, Bronx, and Staten Island, all in the City of New York, where it provides services to individuals with developmental disabilities and their families. The parties stipulated that during the past calendar year, which period was representative of its annual operations generally, the Employer, in the course and conduct of its business operations, derived gross annual revenues in excess of \$500,000, and received at its New York facilities, goods valued in excess of \$5,000, directly from points outside the State of New York.

Based on the stipulation of the parties, and on the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved herein 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 Sections 2(6) and (7) of the Act.

5. The United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO, herein called the Petitioner or the Union, seeks to represent a unit of all full-time and regular part-time Senior Residential Program Specialists (“Senior RPSs”), Residential Program Specialists (“RPSs”), Cooks, Housekeepers, Nurses²

¹ The Employer’s name appears as amended at the hearing. (See Board Exhibit 2.)

² At the hearing, the Petitioner clarified that the term “nurses” refers to Registered Nurses (RNs).

("RNs"), Licensed Practical Nurses ("LPNs"), Social Workers, Administrative Assistants, Physical Therapist Assistants, Psychologists, Recreation Specialists, Doctors, Occupational Therapists, and Speech Therapists,³ but excluding all Supervisors, Managerial Employees, Confidential Employees, and Guards as defined by the Act, employed by the Employer at all of its residential sites, including but not limited to the following:⁴ (1) Overnight Respite, 1709 East Delow Avenue, Bronx, New York 10469; (2) Michelangelo, 245 East 149th Street, Bronx, New York, and 235 East 149th Street, Apt. 7H, Bronx, New York; (3) Ardsley, 185 Ardsley Loop, Brooklyn, New York 11239; (4) Vandalia, 225 Vandalia Avenue, Brooklyn, New York 11239; (5) Belsky, 140 Lawrence Avenue,⁵ Brooklyn, New York 11230; (6) Landings, 596-598 Louisiana Avenue, Brooklyn, New York 11239; (7) Lake Street, 121 Lake Street, Brooklyn, New York 11239; (8) Tanya Towers,⁶ 620 East 13th Street, New York, New York; (9) Waterside, 10 Waterside Plaza, Apts. 2C and 8F, New York, New York 10010; (10) Castleton,⁷ 165 St. Marks Place, Apartments 1-AB and 2-AB, and 185 St. Marks Place, Apartments 1-LM and 2-LM, Staten Island, New York 10302; (11) 61 Lexington

³ The original petition filed on May 29, 2001, sought a unit of Senior Residential Program Specialists, Residential Program Specialists, Cooks, Housekeepers, Nurses, Licensed Practical Nurses, Social Workers, and Administrative Assistants. In a stipulation signed by the parties on July 12, 2001, after the hearing had closed, and received into evidence as Board Exhibit 4, the parties agreed that the Psychologists, Recreation Specialists, Doctors, Occupational Therapists, and Speech Therapist (or Therapists) should be included in the petitioned-for unit as part of the professional voting group, and that the Physical Therapist Assistant (or Assistants) should be included in the petitioned-for unit as part of the non-professional voting group.

⁴ A few of the addresses supplied by the Employer lack apartment numbers, zip codes, and/or street numbers.

⁵ The Employer has 10 residential facilities in this 72-apartment building.

⁶ The name of this site appears as amended at the hearing. Tanya Towers includes several apartments.

⁷ There is one additional facility at Castleton; the address is not in the record. 281 Port Richmond Avenue, the address attributed to Castleton in the original petition, is a day program site which does not include a residential facility.

Avenue,⁸ New York, New York; (12) 2741 Paulding Avenue, Bronx, New York; (13) 175 Willoughby Avenue, Apt 6N, Brooklyn, New York⁹; (14) 122 Ashland Place, Brooklyn, New York; and (15) 131st Street,¹⁰ Bronx, New York.¹¹

The Petitioner takes the position that the unit it seeks to represent, consisting of all employees at all of the Employer's residential facilities, is an appropriate unit. The Employer's position is that it would be inappropriate to combine all residential facilities in one bargaining unit. Instead, the Employer argues, each residential site¹² must constitute a separate bargaining unit. In addition, the Employer contends that members of the following job classifications are supervisors, and must be excluded from the bargaining unit: RNs, LPNs, and Senior RPSs. Furthermore, the Employer posits that the on-call Residential Program Specialists, herein called RPSs, must be excluded from the unit because their employment is so "casual and sporadic" that they cannot be considered regular part-time employees. The Employer also asserts that Administrative Assistants must be excluded because they are business office clericals and do not share a community of interest with the other petitioned-for employees. Finally, the Employer claims that LPNs are professional employees; the Union argues to the contrary. The

⁸ This site includes four supportive apartments.

⁹ There is one additional residential facility at this address.

¹⁰ The street number of the 131st Street facility is not in the record.

¹¹ The addresses of Overnight Respite, Michelangelo, Landings, and Castleton appear as amended at the hearing. In addition, the petition was amended to add the following facilities, which are more fully set forth above: 61 Lexington Avenue; 235 149th Street; 2741 Paulding Avenue; 175 Willoughby Avenue; 122 Ashland Place; and 131st Street. The Employer also supplied the apartment numbers of several facilities located at sites set forth in the original petition.

¹² The Employer explained that a single residential "site," usually an apartment building or a cluster of neighboring apartment buildings, may be comprised of multiple "residences," or apartment units, all within the same site. The Employer's position is that the employees at each site (not each residence) should be treated as a separate bargaining unit.

Union stated that it would agree to an election in any bargaining unit or units found appropriate, including a separate unit of Administrative Assistants.

As its witnesses, the Employer called Linda Laul, the Employer's Assistant Executive Director in charge of residential services, adult services, and clinical services; Kathy Kelly, the Director of Clinical Services; and Sibernie Dalloo, the Residential Program Director at the Employer's Waterside site. The Unions called as its witness John Francis, an RPS at UCP's Tanya Towers, Manhattan, site. Francis was hired as an on-call RPS in June 1997, and became a permanent employee on September 1, 1997. There was no testimony by employees in the disputed job categories.

Background

Linda Laul testified that UCP provides residential services, education, an adult day program, health services and family support services for individuals with developmental disabilities. The Employer operates several types of residential facilities, tailored to the needs of the clients, herein also referred to as consumers, residents or patients. Sometimes a single residential site may include various types of residential facilities. Intermediate care facilities, known as "ICFs," are for the clients with the most severe physical disabilities and mental retardation. The ICFs provide the most intensive services, including medical, nursing, social work, psychological, occupational, speech and physical therapy, recreational, and nutritional services.¹³ Individualized residential alternatives, known as "IRAs," are for consumers with milder physical disabilities and mental retardation, and are oriented towards teaching them to live independently. One facility, Overnight Respite, provides up to two weeks per year of "respite" for clients who

live primarily at home. In addition, the Employer's witnesses testified about the existence of "supportive apartments," without elucidating their nature and function.

UCP's witnesses testified that the Employer's residential facilities employ approximately four LPNs, nine RNs, six or seven Cooks, six or seven Housekeepers, five to ten Social Workers, seven Administrative Assistants, 500 full-time Residential Program Specialists ("RPSs"), 200 or 300 on-call RPS employees, and "fewer than 100" Senior Residence Program Specialists. In addition, the parties stipulated subsequent to the hearing that the residential facilities employ five Psychologists, three Recreation Specialists, three or four Doctors, two Occupational Therapists, one Speech Therapist, and one Physical Therapist Assistant. There is no dispute that all or most residential sites employ three managers who are not statutory employees, the Residence Program Director, Residence Manager and Case Manager.

Multi-location vs. Single Location Unit

In making unit determinations, "the Board first considers the union's petition and whether that unit is appropriate." *P.J. Dick Contracting*, 290 NLRB 150, 151 (1988). If it is "not appropriate, the Board may consider an alternative proposal for an appropriate unit" or units." *P.J. Dick*, 290 NLRB at 151. However, "there is nothing in the statute which requires that the unit for bargaining be the *only* appropriate unit, or the *ultimate* unit, or the *most* appropriate unit; the Act only requires that the unit be 'appropriate.'" *Morand Brothers Beverage Co.*, 91 NLRB 409, 418 (1950)(emphasis in original), *enf'd on other grounds*, 190 F.2d 576 (7th Cir. 1951). The Board does not compel a petitioner to seek the narrowest appropriate unit, the most comprehensive appropriate unit, or any

¹³ If the nutritional services are provided by diet technicians, they are technical employees and should vote

particular preferred appropriate unit. *Overnite Transportation Co.*, 322 NLRB 723, 723-24 (1996); *see also Sav-On Drugs*, 138 NLRB 1032, 1033-35 (1962)(although existing Board policy had favored certifying large administrative subdivisions of retail chains, the Board concluded that a single retail store constituted an appropriate unit).

In deciding whether a petitioned-for unit is appropriate, the Board starts with the premise that “the plain language of [Section 9(b) of] the act clearly indicates that the same employees of an employer may be grouped together for purposes of collective bargaining in more than one appropriate unit.” *See Overnite Transportation Co.*, 322 NLRB 723 (1996). Section 9(b) provides that the Board “shall decide in each case whether...the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.” Since both single-plant units and employer-wide units are specifically set forth in Section 9(b), both are presumptively appropriate. *See Montgomery County Opportunity Board*, 249 NLRB 880, 881 (1980)(an employer-wide unit was presumptively appropriate, despite the possibility that “smaller, program-limited units” also would have been appropriate); *Owens-Illinois Glass Company*, 136 NLRB 389 (1962)(an employer-wide unit of tugboat employees was held presumptively appropriate, even if single vessel units also might have been appropriate); *Rental Uniform Service, Inc.*, 330 NLRB No. 44 (1999)(the single facility presumption was not rebutted); *Waste Management of Washington, Inc.*, 331 NLRB No. 51 (2000)(the single facility presumption *was* rebutted). However, “the presumptive appropriateness of a single-facility unit is inapplicable where...the petitioner seeks to represent a multifacility unit.” *Capital Coors Co.*, 309 NLRB 322, 322 n.1 (1992)(citing

with the non-professional voting group. *Hallandale Rehabilitation Center*, 313 NLRB 835 (1994).

NLRB v. First Cable TV, 795 F.2d 879, 886-887 (9th Cir. 1986)(citing *NLRB v. First Union Management*, 77 F.2d 330, 334 (6th Cir. 1985))). If the petition is for a multi-facility unit, then any “[c]ases cited by the Employer which involve petitions seeking single-facility units...are, therefore, inapposite.”¹⁴ *Capital Coors*, 309 NLRB at 322 n.1.

In resolving unit issues pertaining to multilocation employers, the Board considers the geographical relationship among the facilities involved; the functional integration of operations; the degree of employee interchange; the similarity of employee skills, functions, working conditions, and benefits; shared supervision; the extent of local autonomy, balanced against the extent of centralized control over daily operations, personnel and labor relations; bargaining history, if any exists; and the extent of organization. *See, e.g., Novato Disposal Services, Inc.*, 328 NLRB No. 118 (1999); *R & D Trucking*, 327 NLRB 531 (1999); *Passavant Retirement and Health Center*, 313 NLRB 1216 (1994); *Globe Furniture Rentals, Inc.*, 298 NLRB 288 (1990); *Twenty-First Century Restaurant of Nostrand Avenue, Licensee of McDonald’s Corporation*, 192 NLRB 881 (1971); *Davis Cafeteria*, 160 NLRB 1141 (1966); *Sav-On Drugs, Inc.*, 138 NLRB 1033 (1962); *Barber-Colman Company*, 130 NLRB 478 (1961). These criteria are interrelated; for example, there is a higher likelihood of employee interchange or shared supervision among facilities that are close to one another, and a higher likelihood of uniform benefits and working conditions in a company whose labor relations functions are centralized. If these factors are present, (i.e., employee interchange, centralized labor relations and the like) the feasibility of multi-location bargaining is enhanced. *See, e.g., Montgomery County Opportunity Board*, 249 NLRB at 881.

¹⁴ In the instant case, the Employer’s brief relies on a number of such cases, which are inapposite.

In the instant case, the Petitioner seeks to represent an employer-wide, wall-to-wall unit consisting of all of the Employer's residential program employees. An employer-wide unit is presumptively appropriate, and the evidence adduced at the hearing does not rebut that presumption. An examination of the factors weighed by the Board in resolving multi-location unit issues does not support the Employer's argument that the petitioned-for unit is inappropriate.

Geographical Relationship Among Sites

Linda Laul, the Employer's Assistant Executive Director, testified that UCP's residential facilities, located in New York City in the boroughs of Manhattan, Brooklyn, Bronx, and Staten Island, "cover approximately a 50 mile radius" (the approximate distance between New York City's northernmost and southernmost points). Although the evidence proffered by the Employer regarding the geographical distances among the various sites was ruled inadmissible, it appears that the three Manhattan locations, at 61 Lexington Avenue, Waterside and 620 East 13th Street (Tanya Towers) are within one mile of one another. There are seven residential sites in the borough of Brooklyn, which is approximately 16 miles from one end to another. More importantly, the record reflects that the sites are sufficiently close to one another to allow for some employee interchange and shared supervision, and a number of centralized management functions, although the separate sites are autonomous in some respects.

Autonomy of Separate Sites

Linda Laul testified that the day to day management of each residential site is under the control of the local Residence Program Directors and Residence Managers, who hire and recruit their own staff. Waterside Program Director Dalloo confirmed that

each site is responsible for its own hiring decisions, disciplinary decisions, discharge decisions, and performance appraisals, and that each residence within a site has its own work schedules, vacation schedules and work assignments. According to Dalloo, employees' personnel files are maintained in her office. There was testimony that each residence within each site also has its own budget and its own petty cash.

Without providing specifics, Dalloo agreed that "the level of care that's needed affect[s] the staffing of each residence," and that there are "different skills or functions of employees from site to site." The record demonstrates that clients in ICFs need more intensive care-giving services than those in IRAs, but does not set forth the precise staffing differences among the sites.

In its brief, the Employer claims that "It is the responsibility of the Program Director to tailor any Agency-wide policy to his or her specific Site and create residence-specific policies."¹⁵ However, when Dalloo was asked what type of policies she creates, the example she supplied related to medical procedures for catheterizing patients. There is no evidence that different facilities follow different catheterization procedures, or that such differences would create unbridgeable gaps among the residential sites with respect to employees' terms and conditions of employment.

Centralized Management and Integration of Operations

Although the agency's Residential Program Directors are autonomous in some respects, the record contains detailed testimony by the Employer's witnesses indicating that the Employer has a centralized management structure. Thus, the evidence is undisputed that the Residential Program Directors at the various sites report to the

Employer's Coordinators of Operations, whose offices are at 122 East 23rd Street in Manhattan. Although the Program Directors draw up their individual budgets, their proposed budgets are reviewed, modified and combined into an overall agency budget by a string of higher managers, first the Coordinators of Operations, then Assistant Executive Director Linda Laul, and finally the Budget Director. Eventually, the individual Residential Program Directors receive reports through their Coordinators of Operations which apprise them of the final monetary allocations to their particular sites.

Laul, who reports directly to the agency's Executive Director, oversees all of the Employer's residential services, adult services, and clinical services. She testified that her job includes ensuring compliance with government regulations, fundraising, developing new programs for consumers, and setting policies and procedures for staff recruitment, retention and training for the agency as a whole. Laul is also responsible for disciplinary investigations when serious infractions are committed, such as assaulting clients. Such incidents are reported to the Residence Program Directors, who report them to their Coordinators of Operations, who then inform Laul.

Laul supervises several managers who, like herself, have agency-wide responsibilities. They include the Employer's aforementioned Coordinators of Residential Operations, the Coordinator for Day Treatment Operations, the Coordinator for Day Habilitation Operations, the Director of Administrative Support, the Residential Social Service Coordinator, the Coordinator of Site Development, and the managers for Vocational Services and Supported Employment. In addition, Laul supervises Kathy Kelly, the Employer's Director of Clinical Services. Kelly's position entails overseeing

¹⁵ Employer's Brief, p. 4.

all of the Employer's clinical titles, including the Registered Nurses, and ensuring that the Employer complies with Department of Health regulations. The RNs and LPNs report to the nursing supervisors, who in turn report to Kelly. There is a single residential nursing supervisor for all of Brooklyn and Staten Island whose office, like Kelly's, is at 122 East 23rd Street. No specifics were provided regarding other nursing supervisors. The LPNs and RNs make a request directly to Kelly if they need "highly specialized equipment" at the residential facilities. Otherwise, both the RNs and LPNs order day-to-day medical supplies directly from the Employer's centralized Purchasing Department, at 80 Maiden Lane in Manhattan.

The record further discloses that the Employer conducts monthly meetings for all the Residential Program Directors at the various sites. The meetings also include the Coordinators of Residential Operations and sometimes, Kathy Kelly and/or Linda Laul. At the meetings, participants discuss general policies applicable to UCP sites throughout New York City. For example, the meetings apprise the Residential Program Directors of annual training requirements mandated by the New York State Office of Mental Retardation and Developmental Disabilities. Dalloo testified that most training is conducted by the individual sites. However, the Employer conducts AMAP (Approved Medical Administration Personnel) training by borough, to enable the RPSs to administer medication to the clients.

The Employer's facility at 122 East 23rd Street, in Manhattan, houses administrative offices a clinic, a vocational program, a day treatment program, and the Employer's Family Support Division. Employees from the Employer's other facilities come to East 23rd Street to escort consumers to the clinic. In addition, some of the clients

at the Employer's residential sites attend the vocational program at East 23rd Street. Also at East 23rd Street is the Employer's Technology Resource Center, which includes a library used by UCP's employees, among others.

Centralized Control over Personnel and Labor Relations

The Employer's Human Resources and Payroll departments are located at 80 Maiden Lane in Manhattan. Job openings are advertised on the UCP web site, and are also posted within the agency on bulletin boards in the general communal areas of the residential facilities. Dalloo testified that on one occasion, she saw an employment advertisement in the New York Times which provided Kathy Kelly's contact address.

Dalloo testified that Program Directors check job applicants' references, but that the Human Resources Department conducts criminal checks. If an employment application reflects prior work experience with UCP, a reference check is done within the agency. Kelly stated that letters officially offering employment to a job applicant are issued by 80 Maiden Lane, and are signed by the Human Resources Director. John Francis, a Residence Program Specialist, testified that when he applied for a position in 1997, he submitted his initial job application to the residential site where he was applying, but was told it would have to be approved by UCP's main office before he could be hired.

The record reflects that the Human Resources Department is also responsible for issuing a single standard job description for each position within the agency. Human Resources then provides these job descriptions to the Program Directors and other managers, who supply copies to their employees. In addition, the job descriptions are posted on the Employer's web site.

The Payroll Department issues payroll checks to all of UCP's employees, and handles any related problems.

Similarity of Employee Skills, Functions, Wages and Benefits

The record reflects that several of the petitioned-for job categories only exist in the residential facilities. These include the Cooks, Housekeepers, Senior RPSs and RPSs. Other employees in the proposed unit, such as the RNs, LPNs and Administrative Assistants, perform similar functions at multiple residential sites. Although the Employer contends that the various medical conditions of the clients call for varied skills among the employees assigned to the facilities, there is insufficient evidence to support this contention. For example, the Employer's testimony that each residential facility has an RN assigned to it does not illuminate the staffing differences among the facilities. The Employer did not submit evidence identifying the job titles and number of employees at each facility, other than testimony by Kathy Kelly regarding the RNs and LPNs only.

With regard to wages and benefits, the Employer's witnesses testified that the salary range and vacation time allotment for each job category are consistent throughout the agency. The holiday schedule and sick leave benefits are uniform as well, and the Human Resources Department offers a pension plan to all employees. There is no evidence as to whether all employees are offered the same health insurance benefits.

Shared Supervision and Employee Interchange

Kelly testified that the same Residential Program Director covers the Landings, Belsky, and Willoughby sites in Brooklyn. In the Bronx, the Paulding Avenue and Respite sites share a single Residential Program Director, and there is one Program Director in charge of the 61 Lexington Avenue and Tanya Towers sites in Manhattan.

RPS John Francis testified that an on-call Director, who normally manages a Bronx residential site, check ups on the Tanya Towers site in Manhattan during the weekends, when the regular Program Director there is off.

A document submitted by the Employer¹⁶ shows that many of the on-call RPS employees work at more than one residential site. The Employer's witnesses acknowledged that this occurs. In addition, they disclosed that nurses sometimes respond to medical emergencies at locations other than where they normally work, and that three nurses regularly work at multiple residential sites. The Employer's three Manhattan residences, at Tanya Towers, Waterside, and 61 Lexington Ave, are covered by one LPN. One RN works at both the Paulding Avenue and Respite sites in the Bronx, and a second RN works at the Landings and Belsky sites in Brooklyn, as well as "three scattered apartments in that borough."¹⁷

There was no testimony as to whether other supervisors, or employees in other job categories, also work at multiple sites. The Employer's witnesses testified that there are 15 residential sites in total, but the record reflects that the residential program employs only seven Administrative Assistants, six or seven Cooks, six or seven Housekeepers, five Psychologists, three Recreation Specialists, three or four Doctors, two Occupational Therapists, one Speech Therapist, and one Physical Therapist Assistant. There is no record evidence identifying the sites where any of these employees work, or explaining why there are fewer employees in certain categories than there are sites.

¹⁶ See *infra*, p. 23-24.

¹⁷ The record does not reveal the location of the "three scattered apartments."

The Employer's witnesses testified that permanent transfers between residential sites are rare. However, they acknowledged that openings within the agency are posted on bulletin boards, and salaried employees may apply for positions at other locations. Unit employee John Francis identified one RPS who had been an on-call employee at a different site, who was subsequently hired at Tanya Towers on a permanent, full-time basis.

Bargaining History; Conclusion

The Employer takes the position that since Region 29 previously certified a bargaining unit composed of the employees at one location of UCP, any subsequent representation petition must also be for a single-location unit. However, the Employer does not cite any case law in support of this theory. In the instant case, the fact that the Employer's personnel, labor relations and management functions are centralized, and that employees in the same job title have uniform wage ranges and benefits, would make it far more practicable for the Employer to negotiate with a single bargaining unit representing all of the residential employees, rather than up to 15 separate bargaining units which all contain a similar complement of employees. Moreover, with respect to the employees who work at more than one location, it would be difficult to determine which of up to 15 separate collective bargaining agreements should cover those employees. Based on the above analysis of the various criteria considered by the Board in making multi-location unit determinations, I conclude that the Employer has not rebutted the presumption that an Employer-wide unit, composed of all residential program employees, is appropriate.

Administrative Assistants

Since employer-wide units are presumptively appropriate, the Board does not typically conduct an exhaustive community of interest analysis to determine whether each and every employee interacts with each and every other employee, or whether all of the employees share the same skills, functions and working conditions, where the unit sought is employer-wide. Nevertheless, in its brief, the Employer argues that administrative assistants employed at the Employer's residential facilities should not be included in the bargaining unit because they are business office clericals. In support of this position, the Employer quotes the following language from the Hearing Officer's Report in *Ansted Center* (which was not adopted by the Board): "[a]s a general rule, business office clerical employees are excluded from customary service and maintenance units." *Genesis Health Ventures of West Virginia, L.P., d/b/a Ansted Center*, 326 NLRB 1208, 211 (1998)(citing *Rhode Island Hospital*, 313 NLRB 343, 359 (1993); *Mercy Hospitals of Sacramento*, 217 NLRB 765, 770 (1975)). However, the paragraph cited by the Employer also states that clerical employees "have been included in health care service and maintenance units where they do not perform distinct business office duties such as handling finances, billing and extensive personnel functions." *Ansted*, 326 NLRB at 211 (citing *Lincoln Park Nursing & Convalescent Home*, 318 NLRB 1160, 1164 (1994); *Charter Hospital of Orlando South*, 313 NLRB 951 (1994)).

In *Lincoln Park*, for example, the Board concluded that nursing department secretaries, payroll clerks, and receptionists employed by a nursing home and intermediate care center should be included in a service and maintenance unit. *Lincoln Park*, 318 NLRB at 1163-65. In reaching this conclusion, the Board relied on its own

rulemaking proceedings and prior cases, in which it had “distinguished between business office clericals and other clericals, consistently including the latter in service and maintenance units in hospitals where they have contact with the service and maintenance unit.” *Lincoln Park*, 318 NLRB at 1164 (citations omitted). The Board noted that “business office clericals perform distinct functions: handling finances and billing, and dealing with Medicare, Medicaid, and other reimbursement systems. Business office clericals are generally supervised separately in business office clerical departments; this separation has resulted from the almost universal centralization of business office functions.” *Lincoln Park*, 318 NLRB at 1164. Since the employees in the disputed job categories did not conform to this definition, they “therefore fit within the ‘other types of clericals’ classifications,” even though they had “limited or no interaction with the service and maintenance employees.” *Lincoln Park*, 318 NLRB at 1164, 1165.

Similarly, in *Rhode Island Hospital*, 313 NLRB 343 (1993), the Board observed that in a hospital setting, “clerical employees who are located geographically throughout the Hospital, within various departments composed of other service and maintenance employees, are included in overall nonprofessional units.” *Rhode Island Hospital*, 313 NLRB at 359. Consequently, the Board included the following job classifications within the overall nonprofessional unit: medical records clerks who worked in an area near other service and maintenance groups, and who received “continuous requests for information from employees dealing directly with patients”; a billing specialist who worked closely with physicians, and whose clerical and administrative functions were unconnected with the main business office; and clerical employees in the emergency department and the pediatric department, who did not work in the main business office. *Rhode Island*

Hospital, 313 NLRB at 362-63. It should also be noted that *Rhode Island Hospital* is an acute care hospital to which different rules apply. Board's Other Rules, 29 CFR Part 103, Subpart 103.30.

In the instant case, Laul testified that there are about seven administrative assistants working in the residential facilities agency-wide. According to Kelly, they are utilized by the staff at each separate site. Their job duties include typing reports and correspondence for the RNs and LPNs.¹⁸ In addition, RPS employee Francis testified that the administrative assistant at the Tanya Towers site attends staff meetings with the other employees at that site. At Waterside, according to Dalloo, there is one administrative assistant, who answers the telephone, takes messages, and submits payroll and human resources documentation. Dalloo emphasized that the administrative assistant, whose office adjacent to Dalloo's, does not provide any care to consumers or perform any manual work

Although not voluminous, this testimony establishes that the petitioned-for administrative assistants are not business office clericals as alleged by the Employer. They work at the residential sites, and not in the Employer's central offices. They interact with other employees in the petitioned-for bargaining unit, to the extent that they type reports and correspondence for the RNs and LPNs. Other tasks they perform, such as recording telephone messages and handling payroll and human resources documentation, are likely to involve some communication with other unit employees. At

¹⁸ Kelly also provided testimony regarding the job duties and working hours of administrative assistants at the clinics, as well as one administrative assistant who works for Kelly at the East 23rd Street office in Manhattan. However, neither the Petitioner nor the Employer has taken the position that these employees should be included in the same bargaining unit as the petitioned-for administrative assistants at the residential facilities.

the Tanya Towers site (and possibly, other sites), they attend staff meetings with other employees in the unit. Since there are only seven administrative assistants, for nearly double that number of residential sites, they are likely come into contact with the employees at more than one site. Although there was testimony that administrative assistants do not provide care to consumers or perform manual work, the Board does not require that all employees in an employer-wide unit perform the same tasks. In the instant case, there is no evidence that cooks or housekeepers, whose inclusion in the unit is uncontested, care for consumers or perform manual work resembling that performed by LPNs or RPSs. Finally, there is no evidence that the administrative assistants handle such business office clerical functions as finances or billing, Medicare, Medicaid, or other reimbursement systems. Accordingly, I find that administrative assistants should be included in the petitioned-for bargaining unit.

On-Call Employees

The Employer argues that on-call RPSs should be excluded from the bargaining unit under *Doran Nut Sales Company*, 102 NLRB 1437, 1446 (1953), which held that an on-call employee whose employment was “casual and sporadic” lacked sufficient interest in the terms and conditions of employment to be included in the bargaining unit. The Board applied this same reasoning in *Piggly Wiggly el Dorado Co.*, 154 NLRB 445 (1965), finding that on-call employees who had worked between 0 and 4 of the preceding 10 payroll periods should be excluded from the bargaining unit because their employment was “sporadic and casual.” *Piggly*, 154 NLRB at 451.

However, in *Davison-Paxon Company*, 185 NLRB 21, 24 (1970), the Board concluded that employees who worked on an irregular basis, but performed the same work as regular employees, under the same supervision, had “a sufficient community of interest for inclusion in the unit” if they “regularly average[d] 4 hours or more per week for the last quarter prior to the eligibility date.” Similarly, in *Newton-Wellesley Hospital*, 219 NLRB 699 (1975), the Board found that on-call nurses had a sufficient community of interest with full-time RNs to include them in the same bargaining unit. *Newton-Wellesley Hospital*, 219 NLRB at 703. In *Newton-Wellesley*, the on-call nurses worked “throughout all of the various hospital units within the division of nursing services and performed the same functions, in the same manner, and under the same working conditions and supervision as the other staff nurses.” *Newton-Wellesley Hospital*, 219 NLRB at 703. During the previous quarter, a substantial number of on-call nurses worked regularly during most pay periods. *Newton-Wellesley Hospital*, 219 NLRB at 703. Other than the fact that on-call nurses did not work pursuant to a prearranged schedule, worked less hours and less regularly than full-time staff nurses, and did not share in the Employer’s fringe benefit program, the Board found, there were no differences between them and their full-time counterparts. *Newton-Wellesley Hospital*, 219 NLRB at 703. Moreover, the few existing differences were of the type that had previously been found insufficient to warrant the exclusion of part-time employees who would otherwise be included in the unit. *Newton-Wellesley Hospital*, 219 NLRB at 703 (citing *Anne Arundel General Hospital, Inc.*, 217 NLRB No. 148 (1975); *Quigley Industries, Inc.*, 180 NLRB 486 (1969); *Scoa, Inc.*, 140 NLRB 1379 (1963)).

In the instant case, the evidence fails to establish that the employment of the on-call employees is “casual and sporadic.” Rather, the record demonstrates that the on-call RPS employees averaging over 4 hours’ work per week share a community of interest with the regular, full-time, salaried RPSs, as illustrated by hours worked, nearly identical job duties, and overlapping working conditions.

Employee John Francis testified, without contradiction, that when he was an on-call employee, during the period from June until September 1, 1997, he was working 40 hours per week nearly every week. By contrast, the Employer’s witnesses were unable to approximate either the average weekly hours worked by on-call employees, or the average length of time that on-call employees are assigned to work at a particular facility. Furthermore, the documentation provided by UCP regarding the on-call employees does not support the Employer’s position.

At several points during the hearing, the Hearing Officer asked the Employer for payroll records “for the last three to four months” (i.e., 13 to 17 weeks) for both the on-call and regular Residential Program Specialists. In making this request, the Hearing Officer reminded the Employer of its assertion that it maintained a separate set of payroll records for the on-call employees. Inexplicably, the Employer failed to comply with the Hearing Officer’s request. Instead, it produced a six-page summary list entitled, “On-Call Substitutes for Residential Program Specialists who Received Payment during the Period 4/6/01 thru 6/15/01” (a ten-week period), which was entered into evidence as Board Exhibit 3. It does not contain any information on the regular full-time RPS employees. At the foot of each page is the date the document was offered into evidence, June 20, 2001, which appears to indicate that the report was generated that same day.

The summary list does not include the names of the on-call employees, only the last 4 digits of their Social Security numbers. It does not include the number of hours worked each week, or any wage information. Instead, it displays the total hours worked during the ten-week period. The information is arranged under 14 subheadings. The subheadings have been redacted, and most are illegible, but the names of several of the Employer's residential sites can be deciphered beneath the redaction. Since many of the on-call employees worked at multiple job sites during the ten-week period, computing the total hours worked by any one employee involves searching all 14 sub-sections of the report for the last four digits of the employee's Social Security number. There is no evidence as to how or why Board Exhibit 3 was prepared, by whom, or the source of the information.

Of the 55 on-call employees whose partial Social Security numbers are displayed on the first two pages of the report, 50 averaged over 4 hours of work per week during the 10-week period covered by the document. Thirty averaged over 15 hours per week, and eight of the 55 averaged more than 35 hours per week. Of the 25 employees on the first page of the document, eight worked at multiple locations. The document provides no means of ascertaining how the total hours were distributed among the ten weeks, or whether any of the on-call employees were hired in the middle of the 10-week period (if they worked fewer than 10 weeks, their average hours would be higher), or whether any of the on-call employees moved into the ranks of the regular full-time RPS employees during those ten weeks. For those employees who worked at multiple locations, the redaction of the location headings makes it impossible to determine whether the facilities where they worked were close to one another and/or were administered by the same

Program Director, as alleged by the Employer in its brief. Despite these limitations, the evidence contained in Board Exhibit 3 is sufficient to establish that it would be inappropriate to exclude all on-call employees from the bargaining unit based on their average hours worked. In addition, the exhibit establishes that a significant number of on-call employees work at more than one location.

Moreover, the Employer's witnesses admitted that that the job duties of the on-call and regular employees are nearly identical, including the day-to-day care of clients, recreation with clients and housekeeping duties. Since on-call employees serve as substitutes for regular full-time RPSs, they are given the Employer's standard written RPS job description as a guide. The documentation provided by the Employer demonstrates that the on-call RPS employees work in all of the Employer's residential facilities. The Employer did not deny that the on-call and regular RPS employees come into contact with one another. In this respect, the instant case resembles *Newton-Wellesley Hospital*.

However, the Employer's witnesses claimed that aside from the common requirement of possessing a high school diploma, the on-call RPSs are less qualified than regular full-time RPSs. On-call employees are not required to have New York State driver's licenses, or to undergo a 40-hour training course known as AMAP (Approved Medical Administration Personnel), which is a prerequisite for the administration of medication by non-professionals. Consequently, the on-call employees may not have the ability to drive vans or administer medications. However, the job listings on the Employer's we-site indicate that full-time RPS employees need not complete their AMAP training until six months after their hire. RPS John Francis indicated that he did

not become AMAP-certified until 1998, although his promotion from on-call to regular RPS occurred in September, 1997. At the time of his promotion, there was no change to his daily routine, which still includes such tasks as helping the residents to dress, use the bathroom, shower, climb stairs, play games, make shopping lists and shop. After Francis completed his AMAP certification training, the only additional responsibilities he assumed were the administration of medication once a week, and occasionally, minor first aid. Currently, according to Francis, there are regular full-time RPSs on his shift who are not yet AMAP-certified. Accordingly, I find that whatever the differences in the job duties of on-call and permanent RPS employees, they are insufficient to justify excluding the on-call employees from the bargaining unit.

Furthermore, the Employer revealed that on-call employees are “typically” offered permanent positions, although such offers may be rejected by employees because of scheduling conflicts. Francis recalled that between June and September, 1997, when he became a full-time employee, several other RPSs at Tanya Towers were also promoted from on-call to full-time status.¹⁹ More recently, a former on-call employee was transferred to Tanya Towers and hired on a full-time basis, according to Francis. Dalloo knew of one full-time salaried RPS who had told Dalloo that she started at Waterside as an on-call employee. The availability of opportunities for permanent employment is a further factor evidencing the on-call employees’ interest in the bargaining unit’s terms and conditions of employment, similar to the “reasonable expectation of future employment” factor in cases involving seasonal employees. *E.g., SFOG Acquisition*

¹⁹ Francis was not asked about the period from September 1, 1997, to date.

Company, LLC, 333 NLRB No. 78 (2001), *Macy's East*, 327 NLRB 73 (1998); *Maine Apple Growers, Inc.*, 254 NLRB 501, 502 (1981).

The on-call RPS employees are subject to some of the same terms and conditions of employment as the full-time RPSs, although other terms and conditions differ. Thus, there are three eight-hour round-the-clock shifts covered by employees in both categories. There is no dispute that the hourly wage rate for on-call employees is the same as the starting wage rate for new full-time RPSs. However, the regular RPSs receive raises, whereas the on-call employees do not. Regular RPS employees are paid a salary, and on-call employees are paid on an hourly basis. The on-call employees do not have personal days, vacation days, sick days, medical insurance coverage or other benefits enjoyed by the regular RPS employees. On-call employees, unlike full-time employees, may sometimes work partial shifts. They are free to reject work when it is offered, they are not given performance appraisals and they are not subjected to progressive discipline. If their supervisors are unhappy with them, they are merely not recalled to work. The Employer also stressed that the on-call and full-time RPS employees sign in on separate sheets within the same sign-in book, and follow different procedures with respect to time and attendance forms. Permanent employees have ID cards, and the on-call employees do not. Nonetheless, these differences in working conditions are similar to those found nondeterminative in *Newton-Wellesley Hospital*, 219 NLRB 699, 703 (1975), and are insufficient to warrant the exclusion of the on-call employees from the bargaining unit.

With respect to the issue of supervision, there was some confusion among the Employer's witnesses. Laul testified that the on-call employees are "supervised by the same supervisors" as the other Residential Program Specialists. However, Dalloo

testified that the on-call RPSs are supervised directly by the Senior RPSs, while the salaried full-time RPSs are supervised “on a monthly basis” or on an “as needed basis” by Dalloo herself. This confusion was never cleared up, and may have resulted from witnesses’ varying, personalized definitions of “supervisor.” Therefore, I am unable to conclude that any differences in supervision would justify excluding the on-call RPS employees from the bargaining unit.

Based on the foregoing, I find that all regular part-time RPS employees, including all on-call RPSs who averaged four or more hours per week during the 13 weeks immediately preceding the eligibility date, should be included in the bargaining unit.²⁰

Supervisory Issue

Case Law

The burden of proving that an employee is a statutory supervisor is on the party alleging such status. *Kentucky River Community Care, Inc.*, 232 NLRB No. 209 (1997), *enf. den. in part and granted in part*, 193 F.3d 444, 162 LRRM 2449 (6th Cir. 1999), *cert. granted*, 530 U.S. 1304, 121 S.Ct. 27 (2000), *aff’d in part and rev’d in part*, 121 S.Ct. 1861, 167 LRRM 2164 (May 29, 2001). In light of the exclusion of supervisors from the protection of the Act, this burden is a heavy one. *See Chicago Metallic*, 273 NLRB 1677, 1688, 1689 (1985); *see also Boston Medical Center Corporation*, 330 NLRB No. 30 at 83 (1999). It can not be satisfied merely by making “general, conclusory claims” that an

²⁰ *See Five Hospital Homebound Elderly Program*, 323 NLRB 441, 441 n. 7 (1997)(in applying the Davison-Paxon eligibility formula, where the calendar quarter immediately before the eligibility date is too remote in time from the eligibility date, the 13 weeks immediately preceding the eligibility date may be used as the relevant period).

alleged supervisor assigns, directs or disciplines employees. *Crittenton Hospital*, 328 NLRB No. 120 at 1 (1999). In addition, “paper authority” is insufficient proof of supervisory status. *Crittenton*, 328 NLRB No. 120 at 1 (citations omitted)(written job description; state nurse practice laws which require nurses to “supervise” employees with lesser skills, but “do not purport to in any way track the NLRA’s definition” of the term “supervise”); *see also Brusco Tug and Barge Co.*, 247 F.3d 273, 276 (D.C. Cir. 2001). Moreover, since “the issue of supervisory status is heavily fact-dependent and job duties vary, per se rules designating certain classes of jobs as always or never supervisory are generally inappropriate.” *Brusco*, 247 F.3d at 276 (citing *Kentucky River*, 193 F.3d at 453).

Section 2(11) of the Act provides:

The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In enacting Section 2(11) of the Act, “Congress distinguished between true supervisors who are vested with ‘genuine management prerogatives,’ and ‘straw bosses, lead men, and set-up men’ who are protected by the Act even though they perform ‘minor supervisory duties.’” *S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947)*, quoted in *Providence Hospital*, 320 NLRB 717, 725 (1996). Accordingly, the Board will not find an employee to be a supervisor solely because he or she occasionally assigns work to other employees on an emergency basis, even if the assignment is made without consulting with management. *See Quadrex*, 308 NLRB 101 (1992)(emergency

assignment of overtime). The power to “point out and correct deficiencies” in the job performance of other employees “does not establish the authority to discipline.”

Crittenton Hospital, 328 NLRB No. 120 at 2 (citing *Passavant Health Center*, 284 NLRB 887, 889 (1987)). Writing reports on incidents of employee misconduct is not a supervisory function if the reports do not always lead to discipline, and do not contain disciplinary recommendations. *Schnurmacher*, 214 F.3d at 265 (citing *Meenan Oil Co.*, 139 F.3d 311 (2nd Cir. 1998); *Ten Broeck Commons*, 320 NLRB 806, 812 (1996); *Illinois Veterans Home at Anna L.P.*, 323 NLRB 890 (1997); *but see Beverly Enterprises, Virginia, Incorporated, d/b/a Carter Hall Nursing Home*, 165 F.3d 290, 297 (4th Cir. 1999)(nurses empowered to send employees home or effectively recommend their suspension or discharge were supervisors); *Health Care & Retirement Corp. d/b/a Heartland of Beckley*, 328 NLRB No. 156 (1999)(nurses with the discretion to determine when and why to issue disciplinary warnings were supervisors).

The Board and federal courts have observed that the statutory definition set forth in Section 2(11) “sets forth a three-part test for determining supervisory status. Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their ‘exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,’ and (3) their authority is held ‘in the interest of the employer.’” *E.g., Kentucky River*, 121 S.Ct. at 1867. The exercise of “some supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner,” or through giving “some instructions or minor orders to other employees,” does not establish supervisory status. *Chicago Metallic*, 273 NLRB at 1689. Thus, in determining whether the authority to “assign” employees is

supervisory, the Board must assess whether it “requires the use of independent judgment.” The assignment of tasks in accordance with an Employer’s set practice, pattern or parameters, or based on such obvious factors as whether an employee’s workload is light, does not require a sufficient exercise of independent judgment to satisfy the statutory definition. See *Express Messenger Systems*, 301 NLRB 651, 654 (1991); *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1075 (1985). Similarly, the Board has classified as “merely routine or clerical” such dispatching duties as making up employees’ schedules, giving them the schedules, posting the schedules and granting time off. *National Livery Service*, 281 NLRB 698, 702 (1986).

Proof of independent judgment in the assignment of employees entails the submission of concrete evidence showing how assignment decisions are made. For example, in *Crittenton Hospital*, 328 NLRB No. 120 (1999), the Employer argued that charge nurses were supervisors because they had the power to make mandatory overtime assignments or call in substitutes, based on their assessment of whether staffing was adequate. However, there was “no evidence showing how mandatory overtime or additional staffing needs are determined, or the process by which employees are selected for overtime or call-in. Thus, the Employer...failed to demonstrate that RNs utilize independent judgment.” *Crittenton*, 328 NLRB No. 120 at 1. In a comparable case, *Harborside Healthcare, Inc.*, 330 NLRB No. 191 (2000), charge nurses were not given any set order to follow in offering overtime to potential replacement employees. Nonetheless, the nurses’ call-in authority was not supervisory in the absence of evidence disclosing how they decided which employees to call. *Harborside*, 330 NLRB No. 191 at 3. The degree of independent judgment exercised by the nurses was further

diminished by the fact that mandatory staffing levels were dictated by the state and the Employer. *See Harborside*, 330 NLRB No. 191 at 3; *see also Illinois Veterans Home at Anna L.P.*, 323 NLRB 890, 891 (1997). Moreover, the nurses' reliance on volunteers and lack of authority to compel overtime work underlined the absence of supervisory power. *See Harborside*, 330 NLRB No. 191 at 3; *see also Hilliard*, 161 LRRM at 2975; *Illinois Veterans Home at Anna L.P.*, 323 NLRB 890, 891 (1997).

The Board and federal courts “typically consider assignment based on assessment of a worker’s skills to require independent judgment and, therefore, to be supervisory,” except where the “matching of skills to requirements [is] essentially routine.” *Brusco*, 247 F.3d at 278 (citing *Hilliard Development Corp.*, 187 F.3d 133, 146, 161 LRRM 2966 (1st Cir. 1999)). In this regard, *Ten Broeck Commons*, 320 NLRB 806 (1996), held that charge nurses’ assignment of work to certified nursing assistants “(CNAs)” did not require the use of independent judgment, because all the CNAs had the same skills, and were routinely rotated on a monthly basis. *Ten Broeck*, 320 NLRB at 810. The charge nurses’ rotation of extra duty assignments among the CNAs, and the shifting of CNAs between the early and late lunch breaks, were also found to be routine and clerical. *Ten Broeck*, 320 NLRB at 811. Similarly, in *Hilliard Development Corp.*, the 1st Circuit found that the matching of skills to residents’ requirements was “essentially routine,” where nurses assigned mental health assistants (“MHAs”) to predetermined groups of residents, and occasionally reassigned some MHAs because of the absences of others. *Hilliard*, 161 LRRM at 2975. The Court also found the determination of the order of lunch and other breaks to be “essentially clerical.” *Hilliard*, 161 LRRM at 2975.

The Second Circuit in *Schnurmacher Nursing Home*, 214 F.3d 260 (2nd Cir. 2000), upheld the Board's finding that the charge nurses' ability "to assign CNAs to patients and to dictate the[ir] break times" was "merely routine," where the CNAs were "usually assigned to particular patients on a permanent basis, and it [was] generally unnecessary for CNs to do more than refer to prior practice in making assignments at the beginning of each shift." *Schnurmacher*, 214 F.3d at 266. When a CNA was absent, a substitute CNA was assigned to the absent CNA's patients. If no substitute was available, the absent CNA's patients were divided among the other CNAs. The Court analogized the assignments made by the charge nurses to dispatchers' assignments of routes and jobs, where the decision-making was "routine and clerical" and "governed by parameters." *Schnurmacher*, 214 F.3d at 266 (citing *Meenan Oil Co.*, 139 F.3d 311 (2nd Cir. 1998)).

The Section 2(11) definition of "supervisor" and the Section 2(12) definition of "professional" overlap, to the extent that "judgment" is an element of both definitions. Since professionals are protected by the Act and supervisors are not, the Board has long endeavored to distinguish between "professional judgment" and "independent judgment." However, in *Kentucky River Community Care, Inc.*, 121 S.Ct. 1861 (May 29, 2001), the Supreme Court announced that the Board's per se approach to professionals was not justified by the statute, and invalidated some aspects of the Board's traditional analysis.

The question of "professional judgment vs. "independent judgment" has frequently arisen in connection with the "responsibly to direct" indicium. For example, in *Providence Hospital*, 320 NLRB 717, 729 (1996), which found charge nurses not to be supervisors, the Board contrasted "supervisors who share management's power or have some relationship or identification with management" with "skilled non-supervisory

employees whose direction of other employees reflects their superior training, experience, or skills.” *Providence Hospital*, 320 NLRB at 729. The Board reasoned that whereas “making decisions requiring expert judgment is the quintessence of professionalism, mere communication of those decisions and coordination of their implementation do not make the professional a supervisor.” *Providence Hospital*, 320 NLRB at 729. Thus, the Board stressed, “supervisory authority does not include the authority of an employee to direct another to perform discrete tasks stemming from the directing employee’s experience, skills, training, or position.” *Providence Hospital*, 320 NLRB at 729 (citations omitted). With regard to the job responsibilities of the disputed charge nurses, the Board found that “monitoring other employees’ skills and performance” and “coordinating patient care” involved professional judgment only, while the preparation of end-of shift reports was “clerical in nature.” *Providence Hospital*, 320 NLRB at 733.

Similarly, in *Illinois Veterans Home at Anna L.P.*, 323 NLRB 890, 891 (1997), RNs were responsible for preparing worksheets setting forth the care plan for each resident, and the tasks to be performed by nursing assistants on the following shift. The Board found this to be “a part of their professional responsibility in determining the treatment or care plans for the residents and...not indicative of supervisory status.” *Illinois Veterans Home*, 323 NLRB at 891 n.5 (citing *Ten Broeck Commons*, 320 NLRB at 811 n. 10). Further, the Board noted that if “special tasks arise during the shift, such as a resident’s development of a fever, the RN will direct whoever is available to perform the task. Such limited authority of the RNs to assign and direct employees does not require the use of independent judgment.” *Illinois Veterans*, 323 NLRB at 891. In *Ten*

Broeck Commons, the Board held that “although the LPNs use their technical expertise and judgment to prepare a comprehensive health care plan for each resident, the directions they give to the CNAs in carrying out the plan do not require the use of Section 2(11) independent judgment,” nor did checking patients’ records and telling nursing assistants that “a patient needs attending to, or a job has not been properly done.” *Ten Broeck Commons*, 320 NLRB at 811. In making this assessment, one of the factors relied on by the Board was the fact that “The job duties of CNAs required “little skill, [were] repetitive...Every day, CNAs must perform the same care, in the same manner, for the same people.” *Ten Broeck Commons*, 320 NLRB at 811. *Ten Broeck*, 320 NLRB at 811.

Prior to the Supreme Court’s decision in *Kentucky River*, some federal courts approved the Board’s approach (e.g., *Hilliard Development Corp.*, 187 F.3d 133, 161 LRRM 2966, 2972 (1st Cir. 1999)), and others repeatedly denied enforcement (e.g., *Beverly Enterprises, Virginia, Incorporated, d/b/a Carter Hall Nursing Home*, 165 F.3d 290 (4th Cir. 1999); *Glenmark Associates, Incorporated, d/b/a Cedar Ridge Nursing and Rehabilitation Center*, 147 F.3d 33 (4th Cir. 1998)). In *Schnurmacher Nursing Home*, the Second Circuit observed that the Board’s distinction between “expert judgment” and “independent judgment” might be useful in some limited situations, such as those in which less experienced employees defer to the judgment of “more experienced coworkers who do not purport to act in behalf of management,” or where an employee “makes a judgment as to the need for certain actions based on specialized knowledge and experience and exercises no further authority.” *Schnurmacher*, 214 F.3d at 268-269. However, the Court stressed that “where the responsibility to make such a judgment and

to see that others do what is required by that judgment are lodged in one person, that person is a quintessential statutory supervisor.” *Schnurmacher*, 214 F.3d at 268.

In addition, prior 2nd Circuit decisions had established that “accountability for another’s failure to perform a duty establishes as a matter of law an employee’s supervisory power responsibly to direct: ‘To be responsible is to be answerable for the discharge of a duty or obligation. In determining whether ‘direction’ in any particular case is responsible, the focus is on whether the alleged supervisor is held fully accountable and responsible for the performance and work product of the employees he directs.’” *Schnurmacher*, 214 F.3d at 267 (quoting *Spentonbush/Red Star Cos.*, 106 F.3d 484, 490 (2d Cir.1997)). In *Schnurmacher*, the record contained disciplinary warnings and evaluations specifically holding nurses accountable for their failure to direct and delegate work to subordinates. *Schnurmacher*, 214 F.3d at 266-67. For example, one warning letter stated that “[O]n or about June 24, 1997...there had been no directive from you to take any action regarding the patient’s condition...If the resident was in a condition that required immediate medical attention...it is your responsibility to make this assessment and to delegate the responsibility to your staff.” *Schnurmacher*, 214 F.3d at 267. The Court also relied on testimony by charge nurses that their job entailed “check[ing] up on” nursing assistants and telling them to “fix” anything that is “not right,” and that the nursing assistants had to obey their instructions. *Schnurmacher*, 214 F.3d at 267. Although the charge nurses often directed the nursing assistants to perform routine tasks, they were also responsible for directing their staffs in “providing all necessary patient care including the filling of critical and changing medical needs.” *Schnurmacher*, 214 F.3d at 268. Accordingly, the Court rejected the Board’s

“independent judgment” analysis, declaring that “the exclusion of some responsibilities as ‘routine’ and of others as ‘based on superior training and skills’ is a lethal combination allowing the Board to narrow the definition of supervisor to a vanishing point.”

Schnurmacher, 214 F.3d at 266, 269.

In *Kentucky River*, the Sixth Circuit found that “the Board had erred by classifying ‘the practice of [an RN] supervising a nurse’s aide in administering patient care’ as ‘routine’ [simply] because the nurses have the ability to direct patient care by virtue of their training and expertise, not because of their connection with ‘management.’” *Kentucky River*, 193 F.3d at 453. The Sixth Circuit’s conclusion that the RNs were supervisors was based on duties encompassing the supervisory indicia of assignment, discipline, and direction; the RNs “direct[ed] the LPNs in the proper dispensing of medication, regularly serve[d] as the highest ranking employees in the building, [sought] additional employees in the event of a staffing shortage, move[d] employees between units as needed, and [had] the authority to write up employees who [did] not cooperate with staffing assignments.” The Sixth Circuit held that “these duties involved independent judgment which [was] not limited to, or inherent in, the professional training of nurses.” *Kentucky River*, 193 F.3d at 452.

The Supreme Court upheld the Sixth Circuit’s findings with respect to the supervisory status of the nurses, and invalidated the Board’s longstanding interpretation of “independent judgment” as always automatically excluding the use of judgment based on “ordinary professional or technical skill or experience in directing less-skilled employees to deliver services in accordance with employer-specified standards.”

Kentucky River, 121 S.Ct. at 1867-1871.²¹ Nevertheless, the Court left standing two facets of the Board’s traditional approach:

Two aspects of the Board’s interpretation are reasonable, and hence controlling on this Court...First, it is certainly true that the statutory term “independent judgment” is ambiguous with respect to the degree of discretion required for supervisory status...Many nominally supervisory functions may be performed without the ‘exercis[e of] such a degree of ...judgment or discretion...as would warrant a finding’ of supervisory status under the Act...it falls clearly within the Board’s discretion to determine, within reason, what scope of discretion qualified. Second, as reflected in the Board’s phrase “in accordance with employer-specified standards,’ it is also undoubtedly true that the degree of judgment that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer. So, for example, in *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995), the Board concluded that ‘although the contested licensed officers are imbued with a great deal of responsibility, their use of independent judgment and discretion is circumscribed by the master’s standing orders, and the Operating Regulations, which required the watch officer to contact a superior officer when anything unusual occurs or when problems occur.

Kentucky River, 121 S.Ct. at 1867 (internal citations omitted).

In addition, the Supreme Court made the following observation, which is highlighted by Petitioner’s brief in the instant case: “Perhaps the Board could offer a limiting interpretation of the supervisory function of responsible direction by distinguishing employees who direct the manner of others’ performance of discrete *tasks* from employees who direct other *employees*, as Section 152(11) requires. Certain of the Board’s decisions appear to have drawn that distinction in the past. We have no occasion to consider it here, however, because the Board has carefully insisted that the proper interpretation of ‘responsibility to direct’ is not an issue in this case.” *Kentucky River*,

²¹ Seven years ago, the Supreme Court repudiated the Board’s exclusion of “a nurse’s direction of less-skilled employees, in the exercise of professional judgment incidental to the treatment of patients,” from the definition of “responsibly to direct in the interest of the employer.” *NLRB v. Health Care and Retirement Corp.*, 511 U.S. 571, 114 S.Ct. 1778, 146 LRRM 2321 2322, 2326-27 (1994), *aff’g*, 978 F.2d 1256, 142 LRRM 2728.

121 S.Ct. at 1871 (emphasis in original)(citing *Providence Hospital*, 320 NLRB 717, 729²² (1996)). However, if “direct[ing] the manner of others’ performance of discrete tasks” is excluded from the definition of “direction,” while “directing less-skilled employees to deliver services in accordance with employer-specified standards” cannot be automatically excluded under *Kentucky River*, it is unclear what criteria would be used in distinguishing these two types of direction in an actual case. In *Providence Hospital*, the Board considered a similar distinction with respect to the definition of “assign,” but concluded only that “assigning a task” and “directing employees” can be viewed as equivalent:

“The term ‘assignment’...differs from responsible direction in that it refers to the assignment of an employee to a department or other division, or other overall job responsibilities. It would also include calling in an employee or reassigning the employee to a different unit. Whether assignment also includes ordering an employee to perform a specific task is, however, less clear. Indeed at oral argument it was contended that the assignment of a particular task to an employee is not an assignment as contemplated by Section 2(11); rather, Section 2(11) contemplates only the assignment of employees. Certainly there are times when the assignment of tasks overlaps with direction. For example, ordering a nurse to take a patient’s blood pressure could be viewed at either assigning the nurse to that procedure or directing the nurse in the performance of patient care. Because the distinction between assignment and direction in these circumstances is unclear, the Board has often analyzed the two statutory indicia together.”

Providence Hospital, 320 NLRB at 727.

²² It appears that the Court’s citation to *Providence Hospital* refers to the following statement: “Supervisory authority does not include the authority of an employee to direct another to *perform discrete tasks* stemming from the directing employee’s experience, skills, training, or position.” *Providence Hospital*, 320 NLRB at 729 (emphasis added). The Board made this observation in the context of its analysis of whether the judgment used in directing employees “stemm[ed] from the directing employee’s experience, skills, training, or position,” and thus was “professional judgment” rather than “independent judgment” (an analysis which has now been invalidated by *Kentucky River*).

The Employer's Registered Nurses

In presenting its case on the supervisory status of the RNs, LPNs, and Senior RPSs, the Employer relied heavily on leading questions, soliciting witnesses' affirmation of legal conclusions and general, conclusory statements. When providing examples, the Employer omitted the dates and locations of the incidents and the names of the individuals involved.

Accordingly, Dalloo answered "yes" when asked whether the RN at the Waterside site participates in hiring employees, interviewing employees, evaluating employees, terminating employees, and assigning work to employees. Kelly stated that the RNs "supervise over" Residential Program Specialists (RPSs), LPNs and Teacher Assistants.²³ When asked whether RNs can "suspend or lay off" employees, Kelly contended, without further elaboration, that RNs "have participated in the process." However, she stated that RNs "usually do not" recall employees from suspension, and do not have the authority to transfer employees or grant wage increases.

The supervisory indicia regarding which further information was provided are discussed below.

Hire

Kelly testified that the RNs do not have the power to hire employees. However, they "participate" in hiring decisions and the interviewing of new employees. With respect to the hiring of LPNs, she estimated that 90% of the Program Directors include RNs in the interview process. When there is no RN present, Kelly and the nursing

²³ Since the parties stipulated that the Employer does not employ Teacher Assistants at the residences, Kelly was apparently testifying about RNs at locations not being sought by Petitioner in the instant case.

supervisor participate instead. According to Kelly, an RN's opinion "weighs heavily" in the selection of an LPN, which she also characterized as a "joint decision" between the director and the RN. Kelly did not provide specific examples or documentation, and did not claim that any LPN currently working for the Employer at its residential facilities was recommended by an RN, much less that an RN's recommendation was the sole or primary basis for any hiring decision. Mere participation in the interviewing process does not confer the authority to make effective hiring recommendations. *Catholic Community Services*, 254 NLRB 763, 766 (1981). The power to effectively recommend "generally means that the recommended action is taken with no independent investigation by superiors, not simply that the recommendation is ultimately followed." *ITT Lighting Fixtures*, 265 NLRB 1480, 1481 (1982). Moreover, according to Kelly's own testimony, there are only three or four residential sites that currently employ both an RN and an LPN.²⁴ Thus, it appears that the Employer's description of RNs' participation in the hiring of LPNs pertains to only a minority of the Employer's residential sites. In sum, the evidence regarding the RNs' authority to hire employees, or effectively recommend their hire, is too "general [and] conclusory" to satisfy the Employer's evidentiary burden. *See Crittendon Hospital*, 328 NLRB No. 120 at 1.

Promote

The record does not reveal who is responsible for making promotion decisions in behalf of the Employer. However, Kelly maintained that RNs are "free to recommend RPSs who are outstanding at their jobs for senior positions." To illustrate, Kelly pointed to a single instance when an LPN completed her state boards to become an RN, and an

²⁴ See *infra* p. 43.

RN who had worked with her recommended that she be given an RN slot at another site. The newly qualified RN was, in fact, given this slot. The Employer's attorney contended that "That was based on the recommendation of the RN," and Kelly agreed with this contention. No documentation was provided, and the Employer did not divulge the year in which the promotion occurred, the identities of the individuals involved, the job title of the individual who made the promotion decision, the reasoning behind the RN's recommendation, how Kelly knew that the promotion decision was based on the RN's recommendation, or whether other factors entered into the promotion decision. One might speculate that perhaps the major considerations in the promotion decision included the fact that the former LPN had recently earned the credentials to become an RN, combined with the need for an RN at the new site. The meager evidence submitted by the Employer is insufficient to establish that the RN's recommendation was a crucial factor in the promotion decision, or that the recommendation was made with the use of independent judgment. Furthermore, evidence of a single effective recommendation is insufficient to demonstrate that the alleged supervisory authority is more than "sporadic" in nature. *See Chicago Metallic*, 273 NLRB 1677, 1689 (1985).

Discharge

Kelly testified that the RNs do not have the power to discharge employees. She was subsequently asked, with respect to RPS employees who had been discharged for multiple medication errors, "Was it the RN that made that decision to terminate that employee, or did the RN suggest the termination of that employee?" Given these two options, Kelly responded, "I would have to say that the RN strongly suggested termination...to the director." However, the record does not reflect whether the RN's

“strong suggestion” was a factor in the decisions, whether the Employer conducted an independent investigation, or whether the Employer has a progressive disciplinary procedure which mandates automatic termination after a set number of serious medication errors. Hence, the Employer has not met its burden of proving that the discharge recommendations were “effective,” or that they were made with the use of independent judgment.

Assign

Kelly testified that RNs do not make schedules for other employees, and are unable to authorize overtime without obtaining either Kelly’s permission or that of a nursing supervisor. The Employer’s attorney asked her, “If the RN and the LPN are working on the same shift, does the RN assign or direct work to the LPN?” Kelly replied in the affirmative. Kelly was then asked, “Does the RN assign these duties in his or her judgment?” Kelly’s response was that an RN assigns work to an LPN in accordance with “the needs of the consumer, and the LPN’s scope of practice.” However, the record is devoid of examples of work which the RNs have assigned to LPNs in accordance with the LPNs’ varying scopes of practice. Moreover, there is no evidence of a specific instance when an RN assigned work to an LPN at a residential facility. Although the Employer’s standard job description for RNs (Employer’s Exhibit 1) provides that the RNs “supervise” LPNs, and the job description for LPNs states that they are “responsible to” RNs, I am unable to conclude, based on this record, that RNs use independent judgment when making assignments to LPNs at the Employer’s residential sites. *See Brusco*, 247 F.3d at 278; *Hilliard*, 187 F.3d at 146.

Furthermore, Kelly did not indicate how often an RN and LPN would “work on the same shift” at the residential facilities. According to Kelly’s own earlier testimony, eight of the residential sites currently employ one RN and no LPN: Overnight Respite, Michaelangelo, Ardsley, Belsky, Landings, Lake Street, Tanya Towers,²⁵ and Paulding Avenue. A ninth residential site, at 61 Lexington Avenue, employs one LPN only. Kelly indicated that only three sites employ both an RN and an LPN: Vandalia, Waterside, and Castleton. Moreover, Kelly stated that when both an RN and an LPN are assigned to a site, they are generally assigned to different shifts, to maximize their availability to the RPSs at a site.

With respect to the on-call employees, Dalloo asserted that the Waterside staff members who have the authority to call them in include the Residence Manager, the Case Manager, the Senior RPS, and the RN. However, the record sheds no light on the Waterside RN’s procedure for deciding whether to exercise her call-in authority, or for determining which employees to call, and in what sequence. In the absence of some evidence that these procedures entail the use of independent judgment, the Waterside RN’s ability to call in employees is not probative of her supervisory status. *See Harborside Healthcare, Inc.*, 330 NLRB No. 191 at 3 (2000); *Crittenton Hospital*, 328 NLRB No. 120 at 1 (1999).

²⁵ At one point in her testimony, Kathy Kelly stated that Tanya Towers employs one RN only. At another point in her testimony, Kelly indicated that the Employer’s three Manhattan residences, including Tanya Towers, Waterside, and 61 Lexington Ave, are covered by one LPN. Thus, it is not clear from the record whether Tanya Towers employs an RN only, a part-time LPN only, or both an RN and a part-time LPN.

Discipline

Kelly testified that when an RPS and/or AMAP²⁶ makes a “medical mistake,” such as a medication error, the RN or LPN completes a written incident form. Examples of the form were not offered into evidence. The incident report identifies the medical problem, the infraction, and the “necessary follow-up” to prevent the infraction from occurring again. Typically, Kelly stated, “The follow-up to the mistake will require the RN to review with that AMAP the responsibilities of medication administration or to review a segment of the course” on medication administration. The record indicates that copies of the incident form are provided to the Program Director, the Senior RPS and Kelly, the Director of Clinical Services. There is no evidence as to whether the incident form completed by the RNs contains disciplinary recommendations.

Next, according to Kelly, there is a review of the incident by the RN and the Director. The LPN might also be included if the site employs both an RN and an LPN. The review would determine the necessary procedures to put into place to prevent a recurrence, such as individualized training or continuous “supervision” of the RPS. Kelly stated that “if there is a disciplinary, it could be a verbal disciplinary, or suspension without pay, or a letter placed in their personnel file, or termination if the infraction is severe.” The RN’s precise role in the review, and in making disciplinary determinations, was not clarified.

The record does not establish that the RNs effectively recommend discipline. Writing reports on employee misconduct does not establish supervisory authority if the

²⁶ The “AMAPs,” or “Approved Medical Administration Personnel,” are employees who are authorized to administer medication without being licensed professionals, as further discussed *infra* p. 25, 45.

reports do not always lead to discipline, and do not contain disciplinary recommendations. *E.g., Schnurmacher*, 214 F.3d at 265; *Ten Broeck Commons*, 320 NLRB 806, 812 (1996). The power to “point out and correct deficiencies” is not the same as the authority to discipline employees. *Crittenton Hospital*, 328 NLRB No. 120 at 2. It appears that the role of RNs in dealing with the AMAPs’ medical mistakes by “review[ing] with the AMAP the responsibilities of medication administration or...review[ing] a segment of the course” on medication administration is subsumed under the RNs’ role in directing employees.

Responsibly to Direct

Kelly testified that the job of an RN includes developing treatment plans for the clients and ensuring, through training and oversight, that these treatment plans are “carried out by the personnel who provide direct medical services to the consumer.” According to Kelly, sometimes either the RN or LPN will “describe to employees [including RPSs] how they can interact with the consumer in a very safe way,” with respect to medical care, recreation, and the types of activities then can do. The RNs train the program staff, including the RPSs, on how to identify an individual with the signs and symptoms of illness, prevent the spread of infection, change dressings, turn and position patients, and administer intravenous feedings. The RNs are authorized to issue certificates of completion under their own licenses, stating that the RPSs have been trained in these various procedures. In addition, the RNs are responsible for teaching a week-long course which certifies non-professionals such as the RPSs (also referred to after they complete the course as “AMAPs,” or “Approved Medical Administration Personnel”), to administer medication under the “supervision” of the RN. The RNs at

each residential facility annually recertify the AMAPs working at that facility, and any other direct care staff who administer medication without being licensed professionals. The AMAP certifications are also issued under the RNs' licenses.

Kelly testified that after the RPSs are trained and certified, they still cannot administer medication or perform medical procedures without being directly "supervised" by LPNs or RNs, who must always be either physically present, or available by means of beepers. Kelly indicated that the RNs "carry beepers at all times."²⁷ According to Kelly, the RNs regularly "review and re-review" with the RPSs any training relating to their responsibilities towards consumers. At each site, the RNs and LPNs maintain a log book, referred to as an "AMAP supervision book," documenting their interactions with AMAPs and instructions given them. In addition, there is a medication administration record ("MAR") maintained by RNs, LPNs, and AMAPs, which documents what medications have been administered. The MARs are reviewed daily by the RNs and the LPNs for errors in documentation or in medication administration.

According to Kelly, there have been instances when RNs have been disciplined for AMAPs' errors in distributing medication, because the errors resulted from the RNs' failure to properly instruct and oversee the AMAPs. The Employer did not furnish any specific facts or supporting documents regarding these past disciplinary actions.

Kelly also claimed that on occasion, program directors have asked an RN or LPN to "oversee" an entire site. She was unable to estimate how many times this has occurred in the past year, and gave no specific examples.

²⁷ Kelly did not indicate whether the LPNs carry beepers at all times.

RPS John Francis confirmed that the Employer's nurses provided him with his "AMAP" training, and that the nurse at his site recertified him each subsequent year. In addition, he confirmed that after administering medication, he writes his initials in a book next to the pills he gave out for each time slot. However, on Sunday evenings, when he dispenses medications, he stated that the nurse is not present because she goes home at 5:00 p.m. Francis testified that his only communications with the nurse occur when she notifies him of a medication change for a particular client. Under cross-examination, he denied that the nurse has ever talked to him about feeding patients, or that she has ever explained to him how to do a "body check." However, he did not deny that the nurse stays in contact with the facility by beeper during her off hours.

Thus, some of John Francis's testimony does not materially conflict with that of the Employer's witnesses. With regard to the contradictions, it is possible that employees at Tanya Towers, including Francis, receive somewhat less direction than employees at some of the other residential facilities. At the outset of the hearing, Assistant Executive Director Linda Laul described the Tanya Towers site as an individualized residential alternative, in which seven individuals live in separate apartments. These clients have cerebral palsy, with mild to moderate mental retardation, whereas the clients at some of the other residences have severe or profound mental retardation, with multiple medical diagnoses. At Tanya Towers, according to Laul, the emphasis is on preparing the residents to move to a less restrictive environment, through such activities as travel training and money management.

Employer's Exhibit 1 is the Employer's job description for RNs in the Employer's Adult Day and Residential Services. Most of the duties it describes involve the direct

treatment of patients, and the formulation of treatment plans. However, portions of the job description corroborate the Employer's testimony regarding direction by RNs. For example, "conveys treatment techniques to others" is among the items in the "Job Summary." The RNs' "Job Responsibilities" include maintaining "surveillance and listing of all medication given to persons served during the day and [being] responsible for administration of medication by self or AMAP's." "The ability to attain desirable work-related response from others" is among the "Adaptive Social Skills" an RN must have. The "Decision Making" paragraph requires RNs to have the "ability to visualize end results of several related functions involving the integrated tasks of own work and work of others subject to check and approval...to develop and coordinate work procedures to attain results..." The last page of the RN Job Description reads as follows:

4. Assists in routine structured staff development of employees, students, or volunteers.
 - 4.1: Trains and instructs program staff in signs and symptoms of illness, basic first aid, infection control, personal health and other relevant topics.
 - 4.2: Provides supervision and training for licensed practical nurses and/or less experienced registered nurses during their tenure at UCP/NYC.

Employer's Exhibit 2 is a document prepared by the New York State Nurses Association in 1997, for a "Delegation and Supervision Workshop," entitled "Concepts of Nursing Delegation." Kelly testified that the document is part of the Employer's nursing manual, and was distributed at monthly nurses' meetings in both 2000 and 2001. It states, in paragraph 2, that "an RN retains the ultimate responsibility and accountability for the management and provision of nursing care. The RN has a responsibility to assure that the delegated task is performed in accord with established standards of practice,

policies and procedures.” Further down, paragraph 6 sets forth six risk factors which RNs must assess when they assign tasks to unlicensed assistive personnel (“UAP’s”):

- potential for harm
- condition/stability of the consumer
- complexity of task
- problem-solving and innovation necessary
- unpredictability of outcome
- level of interaction required with consumer

The document then goes on to warn that “Inappropriate delegation by the nurse and/or unauthorized performance of nursing tasks by unlicensed assistive personnel may lead to legal action against the RN and/or unlicensed assistive personnel. Inappropriate delegation of nursing tasks by an RN is considered professional misconduct in New York State and is a Class E felony.” It cautions RNs that they are “at risk” when delegating skilled nursing activities or health-related tasks to unqualified UAPs, LPNs, RNs, or other professionals, or when failing to “exercise adequate supervision to new graduates, LPNs and UAPs.” The Employer’s witnesses did not specifically address the extent to which the Nursing Delegation handout is applicable to RNs who work in the Employer’s residential facilities.

In order to determine whether the RNs “responsibly direct” employees as defined in Section 2(11), I must assess (1) whether they “direct” employees; (2) whether they direct employees “responsibly”; (3) whether they “use independent judgment” in directing employees; and (4) whether they direct employees “in the interest of the employer.” The record reflects that the RNs devise treatment plans for the Employer’s

clients. It appears that this includes determining which tasks will be delegated to individuals other than RNs. In addition, the evidence is uncontroverted, that the RNs train RPS employees to administer medication, perform simple medical procedures, and interact with the Employer's clients in a safe manner. There was testimony that after the training is completed, the RNs continue to monitor the performance of RPS employees by checking medical administration records on a daily basis, and reinstructing the RPS employees when necessary. There is also some evidence, although it is lacking in specificity, that some of the RNs direct LPNs.²⁸

Petitioner's brief concedes that the RNs direct employees, while contending that "Both RNs and LPNs direct only a discrete portion of RPSs' work, i.e. that work involved in medical care of consumers."²⁹ Apparently, the Petitioner is claiming that the direction of "work involved in medical care" does not fall within the possible "limiting interpretation of the supervisory function of responsible direction" that was alluded to, in *dicta*, by the Supreme Court. *See Kentucky River*, 121 S.Ct. at 1871. Thus, the Petitioner appears to be arguing that the direction of "work involved in medical care" is merely the direction of "the manner of others' performance of discrete tasks," rather than the "direction of employees" as defined in Section 2(11) of the Act. *See Kentucky River*, 121 S.Ct. at 1871. However, in the instant case, the RNs' direction of "work involved in medical care" also entails the direction of the employees who perform this work, by training them, certifying them, reinstructing them, recertifying them, and monitoring their performance. Accordingly, I find that the RNs direct the RPS employees.

²⁸ See *infra* p. 53-54

²⁹ Brief of Petitioner, p. 31 (citing *Kentucky River*, 121 S.Ct. at 1871).

The RNs' direction of employees appears to conform to the Second Circuit's definition of "responsible" direction as entailing full "accountab[ility] and responsib[ility] for the performance and work product of the employees [the alleged supervisor] directs." Thus, the certification of RPS employees to dispense medication and conduct minor medical procedures is under the RNs' licenses. The Employer's job description states that RNs are "responsible for the administration of medication by self or AMAP's." Therefore, RNs are required to document their interactions with AMAPs and monitor their performance. According to the Nursing Delegation handout, the RN "retains the ultimate responsibility and accountability" when delegating nursing tasks, and "inappropriate delegation of nursing tasks by an RN is considered professional misconduct in New York State and is a Class E felony." The Employer's witnesses asserted that RNs have been disciplined in the past for failing to properly supervise AMAPs, and while vague and undocumented, this testimony appears plausible in light of the Employer's other evidence regarding the accountability of RNs. Moreover, the Petitioner's one witness, who was not an RN, was not competent to testify on this issue. In sum, the record evidence supports the Employer's contention that the RNs responsibly direct the RPSs.

With regard to the issue of "independent judgment," some aspects of the RNs' direction of employees are routine in nature. However, in light of the six "risk factors" which RNs evaluate when assigning work to unlicensed assistive personnel, it appears that the RNs use independent judgment when formulating treatment plans and determining which tasks can be delegated to the RPS employees. In addition, the issuance of "certificates of completion" and "recertifications" to RPS employees

necessarily entails an evaluation of their competence to dispense medication and perform the minor medical procedures taught. Similarly, there was testimony that RNs must assess whether RPSs need to be reinstructed regarding the proper performance of these tasks. Despite the absence of record evidence regarding the procedure for deciding whether RPSs are ready to be certified, or determining whether they need reinstruction, such decision-making generally requires the use of independent judgment.

Lastly, with regard to the question of whether the RNs direct employees “in the interest of the employer,” the Board’s traditional interpretation of this phrase as excluding “a nurse’s direction of less-skilled employees in the exercise of professional judgment incidental to the treatment of patients” was addressed and rejected by the Supreme Court. *Health Care & Retirement Corp.*, 146 LRRM at 2326-27. The Court reasoned that since the employer in that case, a nursing home, was in the business of patient care, it followed that “attending to the needs of the nursing home patients, who are the employer’s customers, [was] in the interest of the employer.” *Health Care & Retirement Corp.*, 146 LRRM at 2324. In the instant case, for similar reasons, attending to the needs of UCP’s clients is in the interest of the Employer.

Accordingly, I find that the RNs’ authority to direct employees is supervisory in nature, and that the RNs employed at the Employer’s residential facilities are statutory supervisors.

Licensed Practical Nurses

The LPNs at the Employer’s residential facilities, unlike the RNs, are not claimed to have the authority to effectively recommend promotions or to call in the on-call RPS employees. In contrast with the RNs, there are no allegations that LPNs can be

disciplined for failing to adequately supervise employees, that they have beepers at all times, or that LPNs train other employees to conduct simple medical procedures or administer medication. Accordingly, the Employer's standard job description for LPNs, received into evidence as Employer's Exhibit 5, differs from that of RNs, in that (*inter alia*) it does not include "trains and instructs program staff," "conveys treatment techniques to others" or the "responsib[ility] for administration of medication by self or AMAPs." In addition, there is no document for LPNs comparable to Employer's Exhibit 2, "Concepts of Nursing Delegation," which describes the risks involved in delegating nursing tasks to unlicensed employees.

While taking the position that the LPNs assign and direct employees, the Employer's witnesses indirectly impugned the LPNs' capacity to do so. For example, Kelly noted that "The RN that supervises the LPN must always be mindful of the scope of practice of the LPN. You cannot assume that an LPN will know how to handle or implement treatment plans for a consumer [such as intravenous feeding]." When asked whether LPNs use independent judgment in dealing with patient care, Kelly testified that "The LPN under the guidelines and their scope of practice should get support from an RN or a supervisor before rendering a decision...on the outcome of care for the consumer." Consistently with this testimony, the Employer's standard job description for LPNs includes the following job summary: "provides medical treatment, first aid, emergency care and medications, under the direction of a registered professional nurse, and in accordance with UCP/NYC policies, the regulations and requirements of applicable regulatory agencies and the standards of the profession." The first item on the LPN's list

of job responsibilities is to “provide health care to individuals receiving services as instructed by the registered nurse.”

Assign

Both Dalloo and Kelly answered “yes” when asked whether the Employer’s LPNs assign work to employees. However, Kelly conceded that LPNs have no role in scheduling other employees, or determining their days off or shift assignments. As with the RNs, the LPNs do not have the authority to authorize overtime without obtaining the permission of either a nursing supervisor, or Kelly herself. Kelly further testified that an LPN does not assign a particular RPS to a particular patient. Rather, she stated that “there are times when a consumer may be going to a special appointment and she would seek out an RPS to assist in that appointment or procedure because of the relationship that the consumer may have with the RPS.” In such an instance, the LPN would not make the assignment; rather, the LPN would speak with the Senior RPS, the Director, or “whoever is doing the scheduling for that shift.” There is no evidence as to how often this occurs, or how often the LPN’s recommendation would be followed. Accordingly, the record does not establish that LPNs’ recommendations regarding this type of assignment are “effective.”

When asked what types of tasks an LPN would assign to an RPS, Kelly testified that an LPN would “oversee” the administration of medication, “oversee” routine health care functions, and “supervise” the treatment plans, including intravenous feedings, dressing changes, and the positioning of patients.³⁰ In addition, Kelly asserted that the

³⁰ As indicated *supra* p. 53, Kelly also testified that “you cannot assume that an LPN will know how to handle or implement treatment plans for a consumer [such as intravenous feeding].”

LPNs occasionally alter the “day to day delivery of services.” As a hypothetical example, Kelly stated that if a patient is constipated, an LPN might “instruct” or “order” an RPS to administer medication that has been prescribed on an “as needed” basis, or the LPN might contact the physician for a prescription. However, the record does not show how such assignment decisions are made, or whether they are based on an assessment of employees’ skills. Accordingly, the record evidence is insufficient to establish that the LPNs use independent judgment in assigning employees. *See Brusco*, 247 F.3d at 278; *Hilliard Development Corp.*, 161 LRRM at 2975; *Ten Broeck Commons*, 320 NLRB at 810.

Direct

Kelly testified that the LPNs, like the RNs, “supervise” RPS employees with respect to the administration of medication. Like the RNs, the LPNs document their interactions with AMAPs in the “AMAP supervision book,” and help to maintain the medication administration record (“MAR”). In addition, Kelly stated that the LPNs, like the RNs, teach the RPSs how to “interact with the consumer in a very safe way,” with respect to medical care, recreation, and other activities.

However, there is insufficient evidence to establish that the LPNs use “independent judgment” in directing employees. Unlike the RNs, the LPNs do not formulate treatment plans, involving an assessment of which tasks can be delegated to the RPS employees. The LPNs are not involved in evaluating whether to issue “certificates of completion” to RPSs, or whether RPSs need to be reinstructed regarding the proper performance of nursing-related tasks. The Employer did not provide examples of the ways in which the LPNs’ direction of employees involves the use of independent

judgment. Maintaining log books and medical administration records is routine in nature. Conveying to employees the Employer's standards with respect to relating with clients safely is also routine. Moreover, the Employer's standard job description for LPNs does not support the theory that they use independent judgment in directing the RPS employees. For example, the "Decision-Making" section, unlike the comparable section for RNs, mentions nothing about integrating tasks performed by LPNs with those of other employees, or coordinating work procedures. The section on "Adaptive Social Skills" does not include "The ability to attain desirable work-related response from others," as does the comparable section for RNs.

As with the RNs, Kelly asserted that there are times when a director asks an LPN to "oversee" a residential site, if none of the senior personnel are present. Kelly estimated that this happens "less than 10%" of the time. She did not provide examples of any specific instances when this had occurred, and was unable to estimate how many times this has occurred in the past year. Thus, there is insufficient evidence to make a finding in this regard.

Hire

Kelly testified that an "LPN may need to participate to evaluate whether or not the individuals, the RPSs that are hired, are able to carry out the healthcare needs of a consumer at a location." However, Kelly acknowledged that an LPN would probably not be involved in the hiring process as often as an RN. The Employer did not offer any specifics regarding an LPN's precise role in hiring, or any examples of actual hiring decisions in which LPNs "participated." Thus, the Employer has failed to prove that LPNs make effective recommendations with respect to hiring decisions.

Discipline

Kelly answered “yes” to a number of leading questions about LPNs’ authority to discipline RPSs and recommend discipline. To illustrate, she stated that LPNs are empowered to “re-instruct” RPSs who are not performing their jobs properly. Further, she asserted that after discovering an RPS’s mistake, an LPN brings it to the attention of the Residence Director, and initiates “the proper paperwork, and...the proper procedure to ensure that the health and safety of the consumer is addressed...” However, Dalloo testified that all employees who witness infractions are required to report them to management. Moreover, as with the RNs, writing reports on employee misconduct does not establish supervisory authority if the reports do not always lead to discipline, and do not contain disciplinary recommendations. *E.g., Schnurmacher*, 214 F.3d at 265; *Ten Broeck Commons*, 320 NLRB 806, 812 (1996). The power to “point out and correct deficiencies” is not the same as the authority to discipline employees. *Crittenton Hospital*, 328 NLRB No. 120 at 2. Accordingly, the Employer has not established that the LPNs have supervisory authority with respect to disciplining employees.

Discharge

Dalloo said “yes” when asked whether the LPN at the Waterside site “participates” in terminating employees. The record does not define what “participates” means in this context. Thus, I am unable to conclude that the LPN’s role in termination decisions meets the statutory test for supervisory authority.

Accordingly, I find that the LPNs at the Employer’s residential facilities do not meet the Section 2(11) definition of “supervisor.”

Senior Residential Program Specialists

Laul testified that Senior RPSs provide “shift supervision” at the Employer’s residential sites. When asked whether Senior RPSs participate in the management of the residences, and “have to utilize independent judgment,” she replied affirmatively. However, she disclosed that Senior RPSs are paid about between \$19,200 and \$25,000 per year, which is only about \$2000 per year more than the regular RPSs salary.

Most of the testimony regarding the Senior RPSs was supplied by Dalloo, Residence Program Director of the Waterside facility. She characterized the job of the Senior RPS as one of “insuring the operation of the shift that they are the Senior on...insuring the safety of the consumers, their medical needs are taken care of...recreation, housekeeping, cooking.” Although she stated that the Employer has a standard job description for the Senior RPSs, it was not offered into evidence or described.

Director Dalloo testified that at Waterside, there are eight Senior RPSs and about 17 regular RPSs. Also employed at Waterside are one LPN, one RN, one Case Manager and one Residence Manager. Thus, according to the Employer, Waterside employs a total of 13 supervisors or managers, all of whom have a role in overseeing the 17 Residence Program Specialists.

The testimony of Dalloo and other witnesses regarding the supervisory indicia exercised by the Senior RPSs is outlined below.

Discharge

When asked, “Are [Senior RPSs] involved in decisions to terminate employees?” Dalloo testified that they are. However, this testimony, alone, is insufficient to establish

that the Senior RPSs use independent judgment when recommending the discharge of employees, or that the recommendations of the Senior RPSs are effective.

Transfer

Daloo testified that a Senior RPS once transferred an RPS from one facility to another within the Waterside site, without consultation with “a more senior person.” However, she conceded that the transfer was only “a temporary on shift transfer...as the need arose on a particular shift for a particular day.” Thus, at most, this evidence shows that Senior RPSs exercise “some supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner,” which does not adequately demonstrate that they are supervisors. *Chicago Metallic*, 273 NLRB at 1689. Moreover, Daloo acknowledged under cross-examination that Senior RPSs are not authorized to permanently transfer RPSs.

Discipline

Daloo answered “yes” when asked whether the senior RPSs have recommended discipline, and whether their recommendations have been followed. She claimed that Senior RPSs “consistently” participate in the disciplinary process, and provided a single example, involving an RPS who left at the end of his or her shift without completing an assignment. Subsequently, there was “a meeting where the Senior in [Daloo’s] presence administered disciplinary action to that staff person.” However, the record does not reveal whether the Senior RPS made the disciplinary decision, nor does it illuminate whether he or she recommended discipline. In “administering disciplinary action, the Senior may have been merely acting as a conduit. Moreover, a single incident is

insufficient to establish that the Senior RPSs' disciplinary authority is more than sporadic in nature.

Assign

Daloo testified that the Senior RPSs assign work to the regular and on-call RPSs by developing a "schedule or work assignment" for the shift, including the names of the staff scheduled for the day, the consumers with whom they are assigned for that shift, and the job responsibilities assigned to the RPSs for that shift, such as recreational activities and medical appointments. In addition, she stated that a Senior RPS might change the schedule or the job responsibilities for the shift, because of an unforeseen event, such as a parent visit, or a client's sudden need to go to an emergency room. Senior RPSs have also assigned regular or on-call RPSs to accompany consumers on recreational excursions, and to make travel arrangements for the trips. According to Daloo, Senior RPSs "prioritize" which consumer needs attention more quickly. As an example of the Senior RPSs' ability to "make judgment calls," Daloo disclosed that if a client needs to go to the Emergency Room, the Senior RPS assigns a staff person as an escort, and reassigns the staff person's job responsibilities to other employees. When an RPS is absent, according to Kelly, a Senior RPS telephones a substitute RPS.

Daloo acknowledged that a Senior RPS does not have the authority to give an RPS a day off, or change the shift of an RPS. Although she contended that a Senior RPS has the ability to authorize overtime work without consulting with anyone, she admitted that this has only happened "on a couple of emergencies."

RPS John Francis testified that he has responsibility for all five male clients at

Tanya Towers, and on a typical day, he is assigned to assist any two or three consumers out of the five. When other RPSs are absent, a Senior RPS asks Francis to assume some of their responsibilities, such as assisting additional clients or administering medications more than his usual one day per week. However, his days and shifts were assigned to him by the Residence Manager when he was first hired.

Although the above summary establishes that the Senior RPSs assign employees, it does not establish that they use independent judgment when doing so. As with the RNs and LPNs, the Employer has failed to submit evidence showing how assignment decisions are made, and whether these decisions are based on an assessment of employees' skills. *E.g.*, *Ten Broeck*, 320 NLRB at 810; *Harborside*, 330 NLRB No. 191 (2000); *Crittenton*, 328 NLRB No. 120 (1999). Moreover, the emergency assignment of overtime does not establish that the Senior RPSs are supervisors. *Quadrex*, 308 NLRB 101 (1992).

Direct

When asked, "how much time percentage wise could you estimate that Senior RPSs direct the work of other employees?" Dalloo's response was, "100% of the time." She also testified that the Senior RPSs "train" the regular and on-call RPSs. The record contains no examples of the direction or training provided by the Senior RPSs. Moreover, during her cross-examination, Dalloo acknowledged that the job duties of Senior RPSs and regular RPSs overlap, in that both assist the consumers at the residential sites with eating, dressing, moving from one location to another, and documenting goals. RPS John

Francis testified that during his shift, from 4:00 p.m. until midnight, the Senior RPSs' job is virtually the same as his. Francis provided a detailed description of his daily

responsibilities, and maintained that while he is helping clients to ascend staircases, eat, dress and undress, shower, play games and go over “goals” such as making shopping lists, the Senior RPSs engage in similar activities with their own clients. Francis asserted that his routine changes very little from one day to the next, and that he conducts his daily tasks without supervision.

Accordingly, the record does not establish that the Senior RPSs direct employees.

Hire and Reward

Daloo conceded that Senior RPSs do not participate in the hiring process, and cannot independently promote an RPS, raise the wages of an RPS, extend benefits to a subordinate employee, or grant a leave of absence to an RPS.

Based on the foregoing, I find that the Senior RPSs do not exercise with the requisite discretion or independent judgment any of the indicia set forth in Section 2(11) of the Act. Therefore, the record does not establish that they are statutory supervisors.

Alleged Professional Status of LPNs

Section 2(12) of the Act defines a “professional employee” as:

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical processes; or

(b) any employee, who (i) has completed the courses of specialized

intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

The Board has traditionally held that registered nurses are professional employees,” based on their advanced level of education and high level of skills. *Pleasant Valley Services Corporation d/b/a Centralia Convalescent Center*, 295 NLRB 42 (1989)(citing *Mercy Hospitals of Sacramento*, 217 NLRB 765 (1975). At UCP, for example, the record reflects that the Employer’s RNs have completed their nursing education and training through either a “two to three-year diploma program,” or a four-year college program. After they graduate, the State of New York requires them to take a licensing exam. The Employer’s job summary for RNs, contained in its standard job description, states that an RN “provides evaluation, diagnosis and therapeutic intervention in accordance with UCP/NYC policies, the regulations and requirements of applicable regulatory agencies and the standards of the profession. Monitors treatment plan and progress. Conveys intervention techniques to others.” Further, the “Skills” section of the RNs’ job description requires that the Employer’s RNs have “high proficiency in the use of difficult manipulative skills needed to perform a variety of procedures where results and the safety of the person served and the employee are affected by the quality of physical contact, such as monitoring of vital signs, manipulation of limbs, etc.”

By contrast, the Employer’s attorney stated that its LPNs have pursued “an independent program or vocational program that solely teaches the LPN skills.” It is “about one and a half to two years long.” Afterwards, the LPNs receive a certificate of

completion and take the licensing exam administered by the State of New York. The Employer's job summary for LPNs states only that an LPN "provides medical treatment, first aid, emergency care and medications, under the direction of a registered professional nurse, and in accordance with UCP/NYC policies, the regulations and requirements of applicable regulatory agencies and the standards of the profession." The "Skills" section of the job description requires the Employer's LPNs to have "moderate proficiency in the use of simple manipulative skills needed to perform hands-on work procedures involving physical contact with persons receiving services, such as lifting, moving, and positioning, etc." Hence the LPNs' level of education and skills does not meet the statutory definition of "professional."

The Board has found LPNs to be technical employees, based on their "training, licensing, and job duties requiring the use of independent judgment." *Barnert Memorial Hospital Center*, 217 NLRB 775, 781 (1975); *see also Faribault Clinic*, 308 NLRB 131 (1992). Technical employees are those "who do not meet the strict requirements of the term 'professional employee' as defined in the Act but whose work is of a technical nature involving the use of independent judgment and requiring the exercise of specialized training usually acquired in colleges or technical schools or through special courses." *Audiovox Communications Corp.*, 323 NLRB 647 (1997); *Barnert Memorial*, 217 NLRB at 777. In *Barnert*, for example, the Board noted that the LPNs were "licensed by the State of New Jersey and must attend a 1-year course of instruction in their field after high school...result[ing] in a diploma...and...encompass[ing] both classroom work and clinical training...The LPN's license is official recognition of their technical competence and proficiency...It also attests to their ability and allows them to

administer certain types of treatments specifically authorized by a professional nurse, a licensed physician, or a licensed dentist.” *Barnert*, 217 NLRB at 781.

The Employer has not pointed to any contrary case law. Although the issue of the LPNs’ alleged professional status was raised by UCP at the hearing, it was omitted from the Employer’s brief. In the absence of any Board law to the contrary, I find that the Employer’s LPNs are technical employees and should vote with the non-professional voting group.

In light of all of the above I find that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a)(1) of the Act:

All full-time and regular part-time Senior Residential Program Specialists, Residential Program Specialists, Cooks, Housekeepers, Licensed Practical Nurses, Social Workers, Administrative Assistants, Physical Therapist Assistants, Psychologists, Recreation Specialists, Doctors, Occupational Therapists and Speech Therapists, excluding all Managerial Employees, Confidential Employees, Supervisors and Guards as defined by the Act, employed by the Employer at its residential sites, including but not limited to the following: (1) Overnight Respite, 1709 East Delow Avenue, Bronx, New York 10469; (2) Michelangelo, 245 East 149th Street, Bronx, New York, and 235 East 149th Street, Apt. 7H, Bronx, New York; (3) Ardsley, 185 Ardsley Loop, Brooklyn, New York 11239; (4) Vandalia, 225 Vandalia Avenue, Brooklyn, New York 11239; (5) Belsky, 140 Lawrence Avenue, Brooklyn, New York 11230; (6) Landings, 596-598 Louisiana Avenue, Brooklyn, New York 11239; (7) Lake Street, 121 Lake Street, Brooklyn, New York 11239; (8) Tanya Towers, 620 East 13th Street, New York, New York; (9) Waterside, 10 Waterside Plaza, Apts. 2C and 8F, New York, New York 10010; (10) Castleton, 165 St. Marks Place, Apartments 1-AB and 2-AB, and 185 St. Marks Place, Apartments 1-LM and 2-LM, Staten Island, New York 10302; (11) 61 Lexington Avenue, New York, New York; (12) 2741 Paulding Avenue, Bronx, New York; (13) 175 Willoughby Avenue, Apt 6N, Brooklyn, New York; (14) 122 Ashland Place, Brooklyn, New York; and (15) an address presently unknown to the Board on 131st Street, Bronx, New York.

Separate Ballot for Professional Employees

Section 9(b)(1) of the Act forbids the Board from including professional employees in a unit with non-professional employees “unless a majority of such professional employees vote for inclusion in such unit.” Since the parties have stipulated, and I find, that some of the petitioned-for employees are professional, they are entitled to their own ballot for that purpose. Specifically, the ballots of doctors, social workers, psychologists, recreation specialists, occupational therapists and speech therapists must be tallied separately from non-professional employees, to determine whether a majority of those professional employees desire to be included in the existing unit, which also includes non-professional employees.

Accordingly, I hereby direct an election in the following voting groups for this purpose:

Voting Group A – Professional Employees

All full-time and regular part-time Doctors, Social Workers, Psychologists, Recreation Specialists, Occupational Therapists and Speech Therapists employed by the Employer at its residential facilities, excluding all Managerial Employees, Confidential Employees, Supervisors and Guards as defined by the Act.

Voting Group B – Non-Professional Employees

All full-time and regular part-time Senior Residential Program Specialists, Residential Program Specialists, Cooks, Housekeepers, Licensed Practical Nurses, Administrative Assistants, Physical Therapist Assistants, excluding all Managerial Employees, Confidential Employees, Supervisors and Guards as defined by the Act.

The ballots for Voting Group A, in one color, will ask the professional employees two questions:

(1) Do you wish the professional employees to be included with the non-professional employees in a bargaining unit composed of all employees employed by the Employer at its residential facilities?

(2) Do you wish to be represented for the purposes of collective bargaining by United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO?

The ballots for Voting Group B, in a different color, will ask the non-professional employees one question:

(1) Do you wish to be represented for the purposes of collective bargaining by United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO?

If a majority of the Group A employees vote “yes” to the first question, indicating a desire to be included in a unit with nonprofessional employees, they shall be so included. Their vote on the second question will then be counted together with the votes of the non-professional employees in Voting Group (B) to determine whether the Petitioner has been selected as the bargaining representative for the entire combined bargaining unit.

If, on the other hand, the employees in Group A do not vote for inclusion in the bargaining unit, their votes on the second question will not be counted.³¹ The votes of the non-professional employees will then be separately counted to determine whether the Petitioner has been selected as the bargaining representative for a separate non-professional bargaining unit.

³¹ The professional employees will not be given the option of representation by Petitioner in a separate professional unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of

the date of this Decision, four (4) copies of the election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor (Corner of Jay Street and Myrtle Avenue), Brooklyn, New York 11201 on or before August 31, 2001. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional Office at least five working days prior to the commencement of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

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.

This request must be received by September 7, 2001.

Dated at Brooklyn, New York, August 24, 2001.

/s/ David Pollack
David Pollack
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National Labor Relations Board
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