

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

UNITED CEREBRAL PALSY OF NEW YORK, INC.
Employer

and

Case No. 29-RC-9578

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

SUPPLEMENTAL DECISION

This case was re-opened by the National Labor Relations Board and remanded to the undersigned Regional Director for further consideration of whether certain employees are supervisors as defined in the Section 2(11) of the National Labor Relations Act. For reasons set forth more fully below, I find that the individuals in question are not statutory supervisors.

I. Background

United Cerebral Palsy of New York, Inc. (herein called the Employer) is engaged in providing treatment and other services to people with cerebral palsy and other disabilities. The Employer runs three programs from its facilities at 160 and 175 Lawrence Avenue, Brooklyn, New York. The programs include the Children's Program for children up to age 21 with cerebral palsy, the Day Habilitation Program for relatively high-functioning adults with disabilities, and the Day Treatment Program for more severely disabled adults.

In a previous case (Case No. 29-RC-9513), after an election that was held pursuant to a stipulated election agreement, the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO (herein called the Petitioner), was certified in August 2000 as the bargaining representative of some, but not all, of the employees in the Employer's three programs. The election in Case No. 29-RC-9513 was a Sonotone election,¹ in which professional employees voted to be included in the same unit as non-professional employees.

The following list shows the employees employed in the Employer's three programs. Those classifications printed in regular typeface were employees in the existing bargaining unit, created in Case No. 29-RC-9513. Those printed in bold are the classifications involved in the instant petition:

<u>Children's Program</u>	<u>Day Habilitation Program</u>	<u>Day Treatment Program</u>
58 teaching assistants	30 habilitation assistants	19 program assistants
42 "clinical" employees (including psychologists, social workers, speech therapists, physicians, nurses, occupational therapists, physical therapists)	1 social work assistant 2 admin. assistants 9-11 habilitation specialists 1 pool coordinator	2 social workers 1 psychologist 2 nurses 1.5 occupational therapists 2 physical therapists 1 speech therapist 6 developmental specialists
5 administrative assistants		
19 teachers		

On November 27, 2000, the Petitioner filed a petition in the instant case (Case No. 29-RC-9578), seeking to represent a unit of all full-time and regular part-time teachers, day

¹ Sonotone Corp., 90 NLRB 1236 (1950).

habilitation specialists, developmental specialists, and pool coordinators employed by the Employer at its Lawrence Avenue facilities in Brooklyn. Those classifications are indicated in bold above.

At that time, the Employer made several contentions. First, the Employer contended that the teachers, habilitation specialists, pool coordinator and developmental specialists are all supervisors as defined in Section 2(11) of the Act, and that the instant petition must therefore be dismissed. Second, the Employer argued alternatively that, even if those four classifications were found not to be supervisory, the petitioned-for unit would be inappropriate inasmuch as the four classifications do not share a community of interest with each other. The Employer argued that three separate units for teachers, habilitation specialists and developmental specialists would be appropriate. Finally, the Employer argued that the petition must be dismissed as to the pool coordinator, inasmuch as he does not share a community of interest with the teachers, habilitation specialists or developmental specialists, and that he cannot stand alone as a one-person bargaining unit. The Petitioner denied that the petitioned-for classifications are supervisory, and that the petitioned-for unit is inappropriate. Nevertheless, the Petitioner expressed its willingness to proceed to an election in any unit or units found appropriate herein.

A five-day hearing was initially held in December 2000.² The record was later reopened on March 3, 2001, to obtain evidence regarding whether any or all of the petitioned-for classifications were professional employees under Section 2(12) of the Act.

² During the first hearing, the Employer called three witnesses to testify: Nicholas DiPasquale (assistant director of the Children's Program), Veronica McCormack (director of the Day Treatment Program)

In a Decision and Direction of Election dated March 29, 2001, the Acting Regional Director found that the teachers, day habilitation specialists, developmental specialists, and pool coordinators were not supervisors as defined in Section 2(11) of the Act. He also found that the teachers in the pre-school, school-age and early intervention programs are professional employees, whereas the teachers in the day-care program, habilitation specialists, developmental specialists and pool coordinator are not professional employees. Furthermore, he found that the petitioned-for, separate bargaining unit of teachers and specialists was inappropriate, since those classifications shared a strong community of interest with the employees already represented by the Petitioner. He therefore directed a self-determination election, using separate Sonotone ballots for the professional and non-professional employees, to determine whether each group wished to be added to the existing bargaining unit represented by the Petitioner. The Employer filed a Request for Review of the Decision, but the Board denied review on April 25, 2001.

An election was held on April 26, 2001. A majority of employees in both voting groups voted to be included in the existing bargaining unit represented by the Petitioner. Thereafter, a certification of representation issued on May 10, 2001.

Later that month, on May 29, 2001, the United States Supreme Court issued its decision in NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706 (2001) (“Kentucky River”), which *inter alia* rejected the Board's interpretation of "independent judgment" in Section 2(11)'s test for supervisory status. On July 2, 2001, the Second Circuit Court of

and Amy Fried (assistant director of the Day Habilitation Program). The Petitioner called three witnesses to testify: teacher David Simmons, and teaching assistants Matthew Lowenthal and Edgar Irizarry.

Appeals issued its decision in NLRB v. Quinnipiac College, 256 F.3d 68 (2nd Cir. 2001)(“Quinnipiac”), which rejected the Board's finding that certain individuals were not supervisors under the Act.

On October 29, 2001, the Petitioner filed an unfair labor practice charge in Case No. 29-CA-24569, alleging that the Employer refused to bargain with the Petitioner and refused to provide it with certain information, in violation of Section 8(a)(5) of the Act. A complaint in this "test of certification" case issued on December 7, 2001, and an amended complaint issued on January 11, 2002. Counsel for the General Counsel filed a Motion for Summary Judgment on January 28, 2002, and the Board issued a Notice to Show Cause on February 1, 2002. Thereafter, the Employer filed a Cross-Motion for Summary Judgment, contending that in light of the Kentucky River decision, the Board should find that all the individuals in the instant case (teachers, specialists and pool coordinator) are supervisors. The Employer therefore asked the Board to revoke the Petitioner's certification in Case No. 29-RC-9578 and to dismiss the complaint in Case No. 29-CA-24569.

Thereafter, in an Order dated October 29, 2002, the Board denied both the General Counsel's and the Employer's motions in Case No. 29-CA-24569, and ordered the Region to re-open the record in Case No. 29-RC-9578 for further consideration of whether the disputed employees are supervisors in light of Kentucky River and Quinnipiac, *supra*.

A hearing before Hearing Officer Marcia Adams resumed for six days between November 25, 2002, and January 23, 2003. The parties were afforded a full opportunity to

participate, to examine witnesses³ and to present evidence. The parties thereafter filed supplemental briefs.

The findings in this Supplemental Decision are based upon the entire record⁴ in this proceeding, including both the evidence adduced at the original hearing in December 2000 and the more recently adduced evidence.

II. Teachers (Children's Program)

A. General description of program

Except where noted, the following description of the teacher classification is based on the testimony of Nicholas DiPasquale, assistant director of UCP Children's Program. The Children's Program has four components: day care (age not specified in the record), early intervention (for "at risk" children, ages 2 months to 3 years), pre-school (ages 3 to 5 years) and school-age (ages 6 to 21 years).

There are 18 to 19 teachers and 56 to 58 teaching assistants employed in the Children's Program. Each classroom has one teacher and up to 12 students. The director of the Children's Program, Judith Shane, assigns 3 or 4 teaching assistants to each classroom. The Employer argues that the teachers are supervisors as defined in the Act

³ In support of its positions on the supervisory issue, the Employer called three witnesses to testify: Nicholas DiPasquale (assistant director of the Children's Program), Veronica McCormack (director of the Day Treatment program and of one of Day Habilitation programs) and Amy Fried (Assistant Director of the Day Habilitation program). The Petitioner called seven witnesses to testify: Ilene Weinerman (psychologist in the Children's Program), Donna Palumbo (developmental specialist), Robert Sultanik (habilitation specialist), Charmaine Marcelle (program assistant), Desiree Samuel-Gaines (teaching assistant), Michelle Fred (teaching assistant) and Audrey Taitt-Hall (habilitation assistant).

⁴ The undersigned Regional Director hereby amends the record sua sponte as indicated in Appendix A attached hereto. References to the record are hereinafter abbreviated as follows: "Tr. #" refers to transcript page numbers (from the re-opened hearing dates from November 2002 to January 2003, which

started again at page 1); "Er. Ex. #" refers to Employer exhibit numbers; and "Pet. Ex. #" refers to Petitioner exhibit numbers.

because they supervise the teaching assistants.

Teachers work as a team with the Employer's clinicians, including psychologists, physicians, nurses, social workers, speech therapists, occupational therapists and occupational therapists. The team meets at least once per year to determine a course of treatment and education for each child. DiPasquale testified that teachers are responsible for "chairing" the team meetings, keeping records, compiling information from all team members, and translating the team's decisions into a written, individualized plan.⁵ Once a plan has been approved by the relevant regulatory agency, the teacher must then translate the educational goals for each student into specific weekly lesson plans, and actually implement the goals in the classroom. The teachers' other duties include obtaining special equipment for the students, and interacting with the students' families.

Because the level of disability varies from child to child, the team must base its goals on what each individual child is capable of learning. For example, some students with profound cognitive and physical limitations may only be able to learn very basic sensory perception. Teacher David Simmons testified that teaching a blind student to grasp objects might first require brushing a soft object on the child's cheek, to make the child perceive and understand where the object is in space vis-à-vis his body, and then eventually teaching the child to grasp for the object. The goals for other students -- depending on the level of ability -- may include identifying body parts, learning to be toilet trained, color recognition, number recognition and

⁵ In the pre-school and school-age programs, the plan is known as an "individualized education plan" (IEP). In the early intervention program, the plan is known as an "individual family service program" (IFSP).

counting. Each teacher must devise a series or "hierarchy" of specific, short-term learning steps in order to achieve the long-term goals.

By contrast, the day care program is not for disabled children but, rather, is an "ordinary" day care program for employees' children. There is virtually no evidence in the record regarding the day care teachers' specific duties vis-à-vis their teaching assistants. Thus, the following evidence regarding teachers' interactions with teaching assistants pertains only to the early intervention, pre-school and school-age portions of the Children's Program.

B. Assignment of work

Within the classroom, according to assistant director DiPasquale, teachers assign the teaching assistants to carry out specific tasks, such as which assistants should help students with "activities of daily living" (e.g., removing their coats when they arrive, toileting); which assistants should feed the children breakfast; which assistants should conduct a particular language exercise, sensory motor activity, or art project; and, at the end of the day, which assistants should help students to get ready to leave and board the buses home. It is not clear from the record how much time DiPasquale spends in the classrooms, or whether he has actually observed teachers making assignments. However, he testified that he is "sure" that teachers must take into account the assistants' varying abilities. For example, a teacher "might" ask an artistically creative assistant to make decorations. He also stated that a teacher may assign a particularly patient or skilled assistant to feed the children who have the most difficulty in swallowing and eating.

Although teacher Simmons did not generally dispute DiPasquale's testimony that teachers are responsible for directing assistants in the educational activities of the program, he

also testified that many routine tasks are divided up by the assistants themselves. For example, as for the toileting duties, the three female teaching assistants in Simmons' classroom simply divide up the nine female students among themselves (i.e., three each), and the one male assistant takes care of the one male student. One time, when a particular teaching assistant complained about always having to lift a heavy student, Simmons and the other assistants discussed the issue and collectively decided to start helping that assistant lift the student onto the table.

The record contains contradictory testimony regarding the assignment of teaching assistants to "busing" duty, i.e., helping students off the buses when they arrive in the morning. On one hand, it is undisputed that director Shane devises a written schedule for the school-age program (ages 5 to 21), assigning specific teaching assistants to busing duty. However, DiPasquale also testified that teachers in the *other* children's programs assign assistants to busing duty. By contrast, Petitioner witness Matthew Lowenthal, who works as a teaching assistant in the pre-school program, testified that the assistants themselves, not the teacher, decide how to divide up the busing duties among themselves.

The Employer does not employ substitute teachers when a regular teacher is absent, even for a long absence such as a maternity leave. During that time, the teaching assistants essentially run the classroom by themselves on a day-to-day basis, including deciding how to divide up the necessary assignments and tasks. DiPasquale testified that he may ask a teacher in a nearby room to "look in" to the absent teacher's classroom from time to time. However, psychologist Ilene Weinerman testified that she has never seen another teacher come into an absent teacher's classroom.

C. Being held responsible

Section 4 of the evaluation form for teachers (Er. Ex. 2) states that each teacher "supervises" a small group of employees, including such specific duties as "assigns group activities and duties." (This section contains identical language to the teachers' job description, Er. Ex. 13.) DiPasquale testified generally that teachers are evaluated on their supervisory performance, although no specific examples were given.

DiPasquale also testified that teachers are held responsible for the failures of their assistants. DiPasquale mentioned an incident where a child was accidentally left behind in the classroom during a fire drill. Initially, in response to somewhat leading questions about whether the assistants were supposed to attend to the children during a fire drill, DiPasquale answered affirmatively, and added that he disciplined the teacher (Alla Kachalova) for "failure to supervise." However, upon further questioning by the Hearing Officer, it was not clear that any assistants were at fault. According to DiPasquale, Kachalova said that she was responsible (as the last person out of the room and as the person "in charge"), and that she herself should be disciplined. No copy of any written discipline was introduced, making it difficult to verify whether the teacher was disciplined and, if so, whether it was due to her own direct responsibility for the students' safety, or for failing to supervise the assistants' handling of the fire drill.

On cross examination, the Petitioner introduced a written warning (Pet. Ex. 15) which DiPasquale issued to teaching assistant Alan Fisher for leaving work early without

getting permission and without signing out.⁶ To DiPasquale's recollection, the teacher (Adrienne Friedman) was not disciplined for failing to notify the administration of Fisher's absence.

D. Granting lunch breaks and permission to leave early

The teacher and assistants get a half-hour break for lunchtime, some time between 11:30 a.m. and 1:30 p.m. DiPasquale initially testified that the teachers stagger the assistants' lunch breaks, to avoid leaving the classroom unattended. When the hearing re-opened, the Petitioner asked the basis for this knowledge. DiPasquale stated that teachers told him that they had told assistants to take lunch at specific times, but he could not recall the teachers' names.

By contrast, teacher Simmons testified that in his classroom, the assistants generally divide up the lunch times among themselves. Typically, two assistants go to lunch at 12:00 noon, two go at 12:30 p.m., and Simmons himself takes a leftover time slot (either 11:30 or 1:00). Similarly, assistant Lowenthal testified that the assistants and teacher "work out" the lunch times among themselves, knowing that at least two people must be in the classroom with students at all times.

The original record contained somewhat contradictory evidence regarding the granting of time off to assistants. On one hand, DiPasquale testified that whenever a teaching assistant asks for permission to leave early, he (DiPasquale) asks the teacher whether s/he can "spare" the assistant from the classroom. DiPasquale testified that he

⁶ Employees are supposed to "sign out" on a sheet of paper kept in the administration's office, as well as submit a "request for early departure form." This warning came about after director Judith Shane noticed that Fisher had not signed out on 11/30/01. DiPasquale later asked teacher Friedman what had happened. According to Friedman, Fisher said that he felt ill and, the next thing she knew, he was gone.

then makes his decision based on the teacher's recommendation. On the other hand, teacher Simmons testified that assistants must ask "the office" (i.e., DiPasquale or Shane) for permission to leave, and that the office does not "as a rule" ask him whether to approve or deny the request. Similarly, teaching assistant Edgar Irizarry testified that he usually lets the teacher know "as a courtesy" when he has to leave early, but that permission comes only from DiPasquale or Shane. (*See also* Pet. Ex. 3, request for early departure form, to be signed by "administration.")

However, at some point after the initial hearing, the Employer adopted a new form (Pet. Ex. 13), which has signature lines for both "teacher approval" and "administration approval." DiPasquale subsequently testified that the teacher has full authority to decide whether to give an assistant permission to leave early. He claimed that the administration receives the forms only for the purpose of knowing who is in the building, in case of a fire drill or emergency. This does not appear to explain why the administration also needs to sign the form for "approval," especially since employees' presence or absence is also indicated by the "sign out" sheet which employees are required to sign at the administrative office. On cross-examination, the Petitioner introduced a form (Pet. Ex. 13) showing that director Shane disapproved an assistant's request to leave early in October 2002, even though the teacher had approved it. DiPasquale said that, to his knowledge, this was the only time that the administration has countermanded a teacher's decision regarding permission to leave early.

E. Hiring

DiPasquale testified that teachers have a role in the hiring of teaching assistants. Specifically, after DiPasquale reviews the candidates' resumes and conducts the initial interviews, he selects those candidates for a "try-out" period in the classroom. Potential

teaching assistants spend one or two hours in the classroom, interacting with the teachers and students, then DiPasquale solicits "feedback" from the teacher as to each candidate's skills in the classroom. DiPasquale also testified that he himself observes candidates in the classroom "from time to time." DiPasquale testified generally that he relies on the teacher's assessment in deciding whether or not to pursue the candidate, although he gave no specific examples during the initial hearing. In response to a leading question as to whether this reliance has happened "with some regularity," DiPasquale answered affirmatively. However, the initial record contained no specific indication of how often DiPasquale makes a hiring decision consistent with the teacher's feedback, or how often he "overrules" the teacher. In any event, after the classroom try-out period, DiPasquale checks the candidate's references and diplomas before making a final decision. The record also indicates that DiPasquale sometimes hires teaching assistants without consulting the teacher, such as when he must hire assistants in August during the teachers' vacation.⁷

When the hearing re-opened, DiPasquale attempted to give two specific examples of his reliance on a teacher's recommendation to hire an assistant. In one instance, he testified that he interviewed a potential assistant named Jennifer Ojeda for "a few minutes" before sending her to spend time in teacher Glenda LaVassiere's classroom. DiPasquale initially claimed that, afterward, he asked LaVassiere if Ojeda would be a "good person to work with," LaVassiere said yes, and he hired Ojeda thereafter. However, DiPasquale completely changed the story on

⁷ For example, assistant Daveen Reid was hired in August 2000, while teacher David Simmons was on vacation. Assistant Michelle Fred testified that she was hired in August 2002, while the teacher in that classroom was not available. Another assistant, Natalie Lakey, was not placed with a teacher as part of the application process because she and the teacher (Evangelina Clark) were both hired at the same time in September 2002 for a new classroom.

cross examination. Specifically, DiPasquale later conceded that Ojeda was interviewed in August 2002, when the teacher was away (presumably on vacation), and that he himself observed Ojeda in the classroom that day (i.e., without the teacher) before deciding to hire her. In the other example, he initially testified that he interviewed a candidate named Maximiliano Grito in early 2002; that Grito then spent one or two hours in teacher Yvonne Harris' classroom; that DiPasquale then asked Grito to wait outside the room; that Harris expressed her view that Grito would be good to work with; and that DiPasquale proceeded to give Grito a packet of forms for hiring (e.g., a medical immunization form). However, upon further questioning by the Hearing Officer, DiPasquale stated that he did not specifically recall whether Grito went into Harris' classroom as part of the hiring process. ("If he was hired during the [school] year, he probably did. I don't remember.") DiPasquale also testified generally that there were candidates whom he did *not* hire based solely on the teacher's negative feedback, but he did not give any specific examples.

The Petitioner submitted a letter into evidence (Pet. Ex. 28) from the Employer's director of human resources to a newly-hired teaching assistant, informing him that Judith Shane would be his supervisor.

F. Promotion

DiPasquale also testified somewhat vaguely during the initial hearing that teachers have input regarding teaching assistants' promotion to positions as teachers. He said that the Employer employed two teaching assistants who finished their college degrees and who applied for teaching positions. DiPasquale said that the teachers (in whose classrooms the assistants previously worked) "might have" said the assistants would make good teachers, and that the

Employer promoted those people based on the teachers' recommendation. DiPasquale did not specifically name those assistants, or explain the decision-making process in detail, such as whether the Employer used any other criteria for assessing the candidates (their academic transcript, DiPasquale's own observation of the assistants' work, input from students' parents or other sources, etc.). When the hearing re-opened, DiPasquale again testified that teaching assistants who have gotten their college degrees and who have gotten good evaluations have been promoted to teaching positions. Conversely, he also stated that there is "a person" who will not get a promotion to a teaching position, even after obtaining his or her degree, because of negative evaluations he or she has received. However, no specific details were given.

G. Transfer of assistants

During the initial hearing, teacher Simmons testified generally that teachers do not have authority to transfer assistants between classrooms. In one incident, teacher Mila Levinson asked DiPasquale to transfer assistant Crystal Jackson out of her classroom, but her request was denied. (Jackson was later terminated, as described in more detail in Section II(I) below.)

When the hearing reopened, assistant director DiPasquale gave one example of a teacher recommending a transfer. Specifically, a couple of years ago, teacher Inna Bermont complained to DiPasquale about an incident where assistant Desiree Samuel-Gaines had yelled at Bermont in a public place, in front of professionals. Bermont told DiPasquale that she did not want Samuel-Gaines in her classroom for the next school year. Subsequently, in the fall of 2001, Samuel-Gaines was transferred to the classroom of teacher Yvonne Harris.

On the other hand, DiPasquale was questioned on cross examination regarding two instances where transfer decisions were not based on teachers' recommendations. DiPasquale

conceded that, when teacher Robert Harsen requested the transfer of teaching assistant Edgar Irizarry out of his classroom, the teacher's request was denied. He also conceded that his decision to transfer teaching assistant Elaine Forrest from one classroom to another was based on changing enrollment levels, not on any recommendation from a teacher.

H. Annual evaluations

There is no dispute that teachers play a role in evaluating the teaching assistants. The Employer's evaluation form contains two columns for numerical ratings, as well as spaces for narrative comments. (*See Er. Ex. 1*)⁸ During the initial hearing, both DiPasquale and teacher David Simmons testified to the following procedure for evaluations. First, the assistant assigns numerical ratings to himself/herself according to various criteria (under the "employee rating" column), then the teacher assigns numerical ratings to the assistant for those same criteria (under the "supervisor rating" column) and may also add narrative comments. The teacher must then show the evaluation form to DiPasquale before signing it and giving it to the assistant.

DiPasquale sometimes adds comments to the form. For example, in the evaluation of teaching assistant Kate Hasson (*Er. Ex. 1*), DiPasquale wrote the narrative comments, based on his discussion with the teacher. On the evaluations of Jose Gomez and Carlos Acosta, DiPasquale added comments regarding their punctuality and attendance after DiPasquale checked the attendance records, which are maintained by the Employer's administrative office.⁹ On the last page of Josephine Porter's evaluation, DiPasquale added several comments regarding Porter's

⁸ Er. Ex. 1 consists of evaluations for six teaching assistants. Only five of those six are discussed in this paragraph. The evaluation of Edgar Irizarry is discussed separately below, in Section II(J) regarding discipline.

attendance and sleeping on the job, including a threat of termination if those problems continued. On the evaluation of Matthew Lowenthal, DiPasquale added both a positive comment regarding Lowenthal's attendance record, and a negative comment that Lowenthal needed to "maintain proper voice control" when dealing with students. (The latter comment arose from a "screaming" incident which DiPasquale himself observed when the teacher was not in the classroom.) At some point, both DiPasquale and Shane also sign the last page of evaluation forms.

When the hearing re-opened, the hearing officer asked whether the evaluation process had changed since the prior hearing dates. DiPasquale said yes, that now the teaching assistants are evaluated "solely" by the teachers. However, he then went on to describe the process exactly as before, including that the teacher's draft must be reviewed by either DiPasquale and/or Shane before the teacher can give it to the assistant, and that he may add additional comments or ask the teacher to add comments. *See also* Pet. Ex. 19, an October 2002 memo in which DiPasquale instructs teachers not to sign or discuss the evaluation until it has been reviewed by the administration. The evaluation form itself appears not to have changed. *Compare* Er. Ex. 1 (various evaluations dated in 2000) to Pet. Ex. 26 (evaluation signed on 11/12/02).

When the hearing re-opened, one of the Petitioner's witnesses, teaching assistant Desiree Samuel-Gaines, testified regarding DiPasquale's role in her annual evaluation which was completed in November 2002 (Pet. Ex. 26). Specifically, Samuel-Gaines testified that she

⁹ *See* Pet. Ex. 5, example of a monthly time sheet, signed by DiPasquale. Teaching assistant Matthew Lowenthal testified that only DiPasquale or Shane, not teachers, have authority to sign the time sheet.

initially filled out the "goals" portion of the evaluation by stating that her goals remained the same as the previous year. DiPasquale sent the evaluation back to her and told her to write more specific goals, which she did. At some point, the teacher filled in the evaluation with positive ratings and comments, and the evaluation was again forwarded to DiPasquale. At the end of the evaluation form, DiPasquale added some negative comments regarding Samuel-Gaines' lateness in early 2002 and other issues which the teacher had not mentioned in the evaluation. Samuel-Gaines testified that the teacher, Yvonne Harris, said that DiPasquale told her (Harris) to write about the attendance problem, but that Harris refused because she felt that Gaines' performance had improved by the time of the evaluation in late 2002. After Samuel-Gaines saw DiPasquale's negative comments, she demanded a meeting to discuss the evaluation and refused to sign it. The evaluation was signed by Harris, DiPasquale and Shane, along with Shane's notation that Samuel-Gaines had refused to sign. Thus, Samuel-Gaines' testimony appears to contradict DiPasquale's assertion that assistants are evaluated "solely" by teachers.

At the initial hearing, both DiPasquale and Simmons testified that the annual evaluations have no direct impact on the teaching assistants' wages, promotions or other terms of employment. When the hearing re-opened, DiPasquale confirmed that the annual evaluations still have no *direct* impact on the assistants' wage rate. However, he claimed that, if assistants were to apply for a teaching position or other promotion within the Employer's programs, their evaluations would help determine their chance of getting the position. As discussed above, DiPasquale testified that there have actually been assistants whose chance of promotion were affected by their evaluations, but he did not give any specific details.

I. Probationary evaluations/terminations

During the initial hearing, DiPasquale testified that teachers have authority to recommend whether to retain or terminate new assistants at the end of their probationary period. He specifically described the terminations of three probationary teaching assistants. First, teaching assistant Marilyn Rosa had a problem with lateness and absences. DiPasquale checked Rosa's attendance record, and asked the teacher (Glenda LaVassiere) about Rosa. The teacher responded that Rosa's performance in class was deteriorating to the point where she was "ineffective" in working with the students. DiPasquale himself had also observed Rosa in the classroom, and agreed that her attitude had deteriorated. DiPasquale said to the teacher "It looks like this person might need to be terminated," and the teacher agreed. DiPasquale, who does not have final authority to terminate employees, then discussed the matter with Shane, and Rosa was terminated thereafter.

The second example involved Crystal Jackson, who had time and attendance problems, did not follow the teacher's directions in the classroom, and left the classroom without the teacher's permission. The teacher, Mila Levinson, asked DiPasquale to transfer Jackson to another classroom, but DiPasquale asked in response "Can't you work this out?" Levinson said, no, that if Jackson could not be transferred, she should be terminated. DiPasquale himself had seen Jackson making a phone call at a time when she was supposed to be in the classroom. He checked Jackson's attendance records and observed her in class, agreeing that she was not effective. Jackson was then terminated.¹⁰

¹⁰ When the hearing re-opened, DiPasquale reiterated the story of Crystal Jackson's termination, but this time omitting his review of her attendance records and his own observations of her. When the Employer's attorney asked whether the termination was based solely on the teacher's recommendation, he answered yes, and when the attorney asked if he made any independent inquiry, he answered no.

The third example involved a probationary assistant, Takisha Holt, who had an "atrocious" attendance record. The teacher, Shai Nissen, complained to DiPasquale that Holt's attendance was unacceptable, and that he did not want Holt in his classroom. DiPasquale asked if the teacher recommended transferring Holt to another classroom, but the teacher responded, no, that Holt would have the same attendance problem in any classroom, and that Holt should be terminated. DiPasquale checked Holt's attendance records, and discussed the termination with Shane. (Since Holt had attended work so infrequently, DiPasquale did not have a chance to observe her in the classroom.) Holt was terminated thereafter.¹¹

When the hearing re-opened, DiPasquale gave an additional example of an assistant, Rashaa Reiss, who was not given a permanent position, at least in part due to negative teacher recommendations. Specifically, Reiss was hired on a temporary basis, to replace another assistant who was on leave. She worked on a split schedule with two different teachers in two different classrooms. At some point, a parent called to complain that she saw Reiss attending to only one child while ignoring the other children. This alleged incident occurred between 7:30 and 8:00 in the morning, when the teacher was not there. DiPasquale discussed the incident with the parent, and then with Reiss. Reiss denied the allegation, stating that she pays attention to all the children. Since it was one person's word against the other's, DiPasquale did not take action at that time, but the allegation raised a

¹¹ Here again, when DiPasquale reiterated the Takisha Holt story after the hearing re-opened, he did not mention his review of her attendance records. In response to a leading question as to whether the termination was based on the teacher's recommendation, he answered affirmatively.

It should also be noted that Petitioner witness Ilene Weinerman testified that the teacher, Shai Nissen, told her that he did *not* recommend terminating Holt. (According to Weinerman, Nissen was upset that Holt was terminated because he felt that Holt worked well with the children, and that perhaps her

concern in his mind. Then, in approximately October 2002, when Reiss' temporary position was ending, DiPasquale asked the two teachers if they recommended giving Reiss a permanent position. They both said no, that they did not think Reiss should be supervising children in the classroom "by herself."¹² Reiss did not receive a permanent position. Under cross examination, DiPasquale admitted that he had also checked the time and attendance records because Reiss also had problems in that area. But he insisted that, although time and attendance are "very important," the primary concern was Reiss' inability to supervise children in the classroom.

The above-cited examples were based on DiPasquale's testimony regarding the teachers' recommendation whether or not to retain certain probationary or temporary assistants. No copies of their written probationary evaluations were submitted into evidence.

A witness called by the Petitioner, teaching assistant Michelle Fred, recounted how DiPasquale, not the teacher, ultimately controlled the contents of her probationary evaluation. Specifically, Fred testified that she saw an early draft of her evaluation, in which teacher Yvonne Harris rated Fred as average or above average in all eight categories. However, at a meeting in January 2003, DiPasquale "whited out" the average checkmarks in three categories (attendance, punctuality and overall performance) and directed the teacher to check below average in those three categories and to add a narrative comment that Fred needs to improve attendance. Harris said that she did not want to make those changes, and she wrote next to the below average checkmarks "as per directed 1/3/03 YH." (See Pet. Ex. 27(a) and (b), interim drafts, and Er.

attendance problems could be worked out.) However, without Nissen's testimony, the evidence from Weinerman is only hearsay.

¹² It is not clear from the record why Reiss was expected to supervise a whole group of children by herself. Elsewhere in the record, there was testimony that at least two people were required to be with the students at all times. (For example, see the discussion of lunch-break times in Section II(D) above.)

Ex. 32, final version.) At the time of the hearing, Fred was four months into her six-month probationary period, so the Employer had not yet decided whether to retain her beyond the probationary period.

J. Discipline

As for the teachers' possible role in disciplining assistants, DiPasquale initially testified that teachers have authority to "correct" problems in their classroom, and to recommend specific discipline such as suspensions. By contrast, teacher Simmons testified that the Employer never told him that he could discipline assistants or recommend discipline.

The only specific example of discipline from the initial hearing dates (other than terminations, which are discussed separately in Section II(K) below) involved teaching assistant Edgar Irizarry. Although the exact chronology of events is not clear from the record, it appears that Irizarry was involved in several incidents of misconduct from November 1999 to May 2000, while he worked as an assistant in the classroom of teacher Revekka Soloveychik. These incidents were reported to the Employer's administration from a variety of sources, including Soloveychik, a parent, a physical education assistant employed by the Employer, and a driver employed by the bus company which transports UCP's students. Specifically, the teacher complained that Irizarry failed to follow her instructions in the classroom; that he interfered with the classroom activities; that he was absent without leave on one occasion; and that he breached confidentiality by "screaming" information about a student in front of many people who had gathered in the lobby (where students wait for buses at dismissal time). At some point, both a teacher and the bus company complained to DiPasquale and Shane that Irizarry screamed at one of the bus drivers. Furthermore, a physical education assistant

complained to DiPasquale that Irizarry had a very inappropriate and heated "verbal exchange" with the assistant in the gym. DiPasquale, who reviews the time and attendance once per month, was also aware of Irizarry's poor attendance record. The incident which may have actually triggered the discipline, in which Irizarry allegedly made fun of a student's disability, was reported to DiPasquale both by a parent and the teacher (Soloveychik). Specifically, while the class was at a public library, Irizarry made fun of someone as if the person were having a seizure. The private nurse of a student who actually suffers from seizures reported the incident to the student's parent, who called DiPasquale to complain and to demand that Irizarry be terminated immediately. DiPasquale testified that he told the parent he would investigate the matter, and get back to her.

DiPasquale then asked both Soloveychik and Irizarry what happened regarding the "mocking" incident. Irizarry claimed to be joking around, and that he did not mean any harm. It is not clear from the record what Soloveychik said about this particular incident. In any event, according to DiPasquale, the parent remained quite adamant that Irizarry not be allowed to work in a classroom with her child. At some point, DiPasquale asked Soloveychik if she recommended terminating Irizarry. According to DiPasquale, Soloveychik said no, but that Irizarry should be transferred to another classroom, preferably one with a male teacher. DiPasquale decided to place Irizarry on probation for 90 days and to transfer Irizarry to David Simmons' classroom in May 2000. Thereafter, Irizarry's performance improved remarkably. Irizarry's 11-page evaluation (part of Er. Ex. 1) which was written in August 2000 therefore contains the negative comments from Soloveychik (covering the November 1999 to May 2000 period), positive comments from Simmons (covering May to July, 2000), plus cover pages

written by DiPasquale which summarized the problems, specified a performance improvement plan, and warned that any future problems would lead to termination.

Other than the Irizarry probation/transfer, there were no other specific examples in the initial record of teachers' role in disciplinary measures such as written warnings or suspensions. When the hearing re-opened, DiPasquale again testified generally that teachers may recommend discipline, and that he "follows through" on it by discussing the matter with both the teacher and the assistant, and possibly checking attendance records. He did not give any further examples. As noted above, the Petitioner introduced evidence of a written warning issued to teaching assistant Alan Fisher for leaving early without permission (Pet. Ex. 15). The warning was issued by DiPasquale, not the teacher.

K. *Non-probationary termination*

DiPasquale testified that teachers have authority to recommend whether to terminate assistants. Although DiPasquale gave no examples during the initial hearing dates, he gave an example when the hearing re-opened. Specifically, an assistant named Jose Gomez, who had worked for the Employer for approximately 10 years, began to have time and attendance problems. The teacher, Eda Subbotovskaya, complained to DiPasquale, and he asked what she recommended. She responded that, since Gomez had worked there for so long, she would try to "work with him" to correct the situation. According to DiPasquale, Gomez's attendance improved for a while, but then it relapsed again. Eventually, after about 18 months of temporary improvements and then relapses, Subbotovskaya said "enough," and recommended that the Employer terminate Gomez. DiPasquale, who had investigated Gomez' time and attendance

records and who had met with Gomez to discuss the problem at some point, indeed decided to terminate Gomez.¹³

L. Other primary indicia of supervisory status

DiPasquale testified that teachers have authority to adjust teaching assistants' grievances, but did not give any specific examples. There is no evidence that teachers have authority to reward assistants. Teacher Simmons testified that he has no input into the assistants' pay and benefits. Finally, there is no evidence that teachers have authority to lay off or recall employees.

M. Secondary indicia of supervisory status

The record contains contradictory evidence as to whether teachers receive supervisory training. When asked about this, DiPasquale responded somewhat vaguely that teachers may bring up "issues" for discussion in team meetings, or in individual meetings with him, and that he "works with" teachers on "different kinds of strategies." By contrast, Simmons testified that he has never received supervisory training.

Teachers' salaries start at \$24,500 per year, and increase to \$28,500 for those who complete their master's degree. The yearly salary for teaching assistants starts at \$14,500.

DiPasquale testified that they have the same health benefits.

III. Habilitation Specialists (Day Habilitation Program)

A. General description of program

¹³ DiPasquale also testified about his response to two teachers' complaints about assistant Desiree Samuel-Gaines. In each instance, the teacher complained about Samuel-Gaines to DiPasquale, but did not recommend termination. However, as mentioned above in Section II(G), one of these conversations resulted in the assistant's transfer to another classroom.

As noted above, the Employer's Day Habilitation program is for adults who are over 21 years old and who are disabled, although not as severely as the adults in the Day Treatment program described below. (The Employer calls the adults in its programs "consumers.") Consumers in the Day Habilitation program typically require less clinical intervention than consumers in Day Treatment. The day habilitation consumers' activities are also more integrated into the community, for example, volunteering at hospitals and senior centers, and taking classes at other locations. Consumers are grouped by their interests. For example, an "entrepreneurial" group runs a snack bar at the Employer's facility. Other groups include an educational group, a fitness group and a music/art group. The program has a fleet of vans used to transport consumers to their trips in the community. The trips and vans for all of the Day Habilitation program rooms are coordinated by program coordinator Jerry Negron.

Habilitation specialists do not develop the "individualized service plans" (ISPs) for each consumer, as required by the state Office of Mental Retardation and Developmental Disabilities. Rather, the ISPs are developed by "service coordinators," whom Fried described as case managers from a separate program. Nevertheless, the habilitation specialists are part of the ISP team. They subsequently develop a "day habilitation plan" (DHP) based on each ISP, and then make sure that the plans are actually implemented. Fried gave examples of consumers' goals and specific plans to implement those goals. For example, if a consumer is interested in modeling, and if the ISP team decides to include modeling as a goal, the habilitation specialist would take specific steps such as contacting a photographer to develop a portfolio and/or contacting a modeling agency. If a consumer wants to volunteer, the habilitation specialist helps

find an appropriate placement, such as tutoring elementary school children. Each specialist oversees two to four assistants who help implement the plans for each consumer group.

The Petitioner herein represents the habilitation assistants, social work assistants and administrative assistants employed in the Day Habilitation program. The Employer claims that the habilitation specialists involved in the instant petition are supervisors as defined in the Act because they supervise the habilitation assistants. There are approximately 9 specialists, 30 assistants and 150 consumers in the program. The specialists are supervised by two program coordinators (Jerry Negron and Juana Flores), assistant director Fried and director Doug Green.

B. Assignment of work

During the initial hearing dates, Fried generally testified that the habilitation specialists decide how to assign work to the assistants, based on the assistants' various skills. No specific examples were given. On cross examination, Fried conceded that the program coordinators prepare a weekly assignment of duties for habilitation assistants. For example, Pet. Ex. 6 is a weekly schedule prepared by program coordinator Jerry Negron, assigning assistants to various duties such as helping consumers arrive from the buses, helping feed lunch to the consumers, helping consumers with toileting, and going on various field trips to sites where consumers volunteer and take classes. The weekly schedule may be adjusted throughout the week, as needed. Fried testified that, when program coordinators meet with habilitation specialists each morning to discuss assignments for the day, the specialists may recommend adjustments to the program coordinator. When the hearing re-opened, Fried reiterated that the program coordinator's written schedule is only a "template," and must be modified every day, to account

for assistants' absences and other changes. She also added that habilitation specialists decide how many assistants must go on particular field trips, depending on the consumers' needs.

When the hearing re-opened, the Petitioner called two witnesses from the Day Habilitation program: habilitation specialist Robert Sultanik and habilitation assistant Audrey Taitt-Hall. Sultanik testified that, after he and the three assistants report to work at 8:30 a.m., they typically discuss what they will do that day. For example, one assistant may have been previously assigned by Negron to drive some consumers on a field trip. Another assistant might want to read with certain other consumers. One assistant, Maria (last name not indicated), stays with the consumers who attend a computer course. Sultanik conceded theoretically that, if two assistants wanted to do the same thing, he would have to decide which one to assign. However, Sultanik did not recall any actual disputes of that nature. At 9:00 a.m., Sultanik and the other habilitation specialists meet with Negron, who reviews the written schedule described above for bathroom duties, feeding duties, etc., as well as field trips. At 9:30 a.m., Sultanik returns to his program room, and helps the assistants prepare for the arrival of consumers at 10:00 a.m. They then proceed through the day as scheduled: taking off the consumers' coats, taking attendance, doing exercises, snack time, activities, consumers' lunch time, employees' lunch time, more activities, and some clinical appointments for consumers. At 3:30, they start putting on the consumers' coats and escorting them to the buses. From 3:30 to 4:00 p.m., Sultanik and the assistants return to the program room to fill out a daily log and other paperwork, and to discuss any issues that arose. In short, Sultanik's testimony suggests that the assistants' work is allocated by a combination of Negron's written schedule, a fairly regular

routine, and collaborative decision-making which includes the assistants themselves. There were no examples of Sultanik having to decide how to assign any work.

Similarly, assistant Taitt-Hall testified that the specialist and two assistants in her program room decide what to do as a team, based on the consumers' goals. If she feels artistically inspired, she may take the initiative in starting an art project with the consumers. Taitt-Hall said that the specialist does not assign her to work with any particular consumers. Rather, the three of them "rotate around the room" to help all the consumers.

Taitt-Hall also testified that all proposals for field trips must be approved by the program coordinators. The coordinators decide if a trip is appropriate for the consumers. (For example, coordinator Juana Flores recently decided that a trip to see "Sesame Place" at Madison Square Garden would be inappropriate.) Negron must approve and coordinate the use of the program's vans.

Both Sultanik and Taitt-Hall testified that assistants run the programs rooms by themselves when the specialist is on vacation. Fried, testifying on rebuttal, stated that "many" specialists leave written assignments for the assistants before leaving. For example, in Employer Exhibit 31, specialist Neota Holmes left a memo reminding the three assistants to keep a daily log for the consumers to which they had been assigned, reminding them to follow up on their monthly assignments (i.e., the assignments for attendance, maintenance, clinic appointments and trips which are rotated among the three assistants on a monthly basis), and so forth. Fried testified that she has received at least 5 or 6 such memos from the 9 specialists in her program since she started in 1999.

C. Being held responsible

Fried testified that the Employer holds habilitation specialists accountable for the assistants' performance in their (the specialists') evaluations. No specific examples or evaluations were provided. Fried also testified that specialists are accountable for knowing the assistants' whereabouts, including when they are on field trips and when they are out to lunch. Fried stated generally that some assistants were failing to report to the specialists in the morning. She did not specify whether any specialists were disciplined for not knowing the assistants' whereabouts.

D. Granting time off

On direct examination during the initial hearing dates, Fried testified that habilitation assistants must get a specialist to sign a leave form, in order to get permission to take time off or leave early. On cross examination, the Petitioner introduced Pet. Ex. 8, an assistant's request to leave early which was initialed by program coordinator Negron and signed by program director Doug Green, but not signed by the specialist. However, Fried explained that this was an unusual situation. The assistant (Olivia Wint) had just returned from a leave of several months, and for some reason kept going directly to Green for permission to leave early, rather than following the normal chain of command. On redirect examination, the Employer introduced Er. Ex. 11, several leave-request forms that were all signed (or initialed) by the specialist, as well as Negron and Green. Fried explained that Negron must approve all time-off requests because he coordinates staffing for the entire program, to make sure there is enough "coverage" for the field trips and other activities.

When the hearing re-opened, Fried also testified that both the specialist and a program coordinator must approve a leave-request form when an assistant wants to take vacation time.

E. Hiring

During the initial hearing dates, there was no evidence whatsoever of habilitation specialists' involvement in the hiring of assistants.

When the hearing re-opened, Fried testified for the first time that, after she weeds through all the resumes and selects candidates to interview, the specialists also attend her interviews of assistant candidates and make recommendations. Fried purported to give examples of following the specialists' recommendations, but the "testimony" consisted mostly of affirmative answers to leading questions, such as the following exchange (Tr. 450):

BY MR. PANKEN: Hab Spec [Habilitation Specialist] Paula Schwegler interviewed Harvey, H.A. [habilitation assistant] J. Harvey?

WITNESS: Yes. She interviewed that candidate.

Q: And did she recommend against hiring?

A: Yes.

Q: And did you accept that recommendation?

A: Yes.

According to these responses, the Employer followed the specialists' recommendation to hire assistants Figueroa, Butts, and M. Moulriere, and *not* to hire candidates J. Philip, J. Harvey and K. Lashley. However, the circumstances of these examples were not explained in any detail, making it difficult to assess the weight given to the specialists' recommendations, as opposed to other factors (including Fried's own view of the candidates, their resumes, their references, etc.). In response to another leading question as to whether Fried accepted the specialists' recommendations "in all cases," Fried responded affirmatively. On cross examination, when

Fried was asked whether she agreed with the specialists' recommendations on hiring, she responded that the specialists' assessments of the candidates always seemed "reasonable" to her. On the other hand, she did give one example of following a recommendation that she did not necessarily agree with regarding the hiring procedure. Specifically, a specialist (unnamed) was concerned about a particular candidate's "comfort" with doing direct-care work. Fried agree to the specialist's recommendation to have the candidate come back and spend one or two hours in the program to get a better idea of what direct-care work would entail, even though Fried herself did not think it was necessary. (The record does not indicate whether that candidate was ultimately hired.)

At some point in the hiring process, the candidates' references are also checked by either director Doug Green or administrative assistant Linda Labisei.

Habilitation specialist Sultanik, who has worked for the Employer for 11 years, testified that he was never asked to attend job interviews until after the union election in 2001. Since then, he has attended between five and eight interviews. According to Sultanik, Fried asks all the questions during these interviews and he mostly just observes, although Fried sometimes asks Sultanik to tell the candidate what his group does. After the interview, Fried asks his opinion. However, Sultanik claimed that the Employer does not necessarily follow his recommendations. For example, he recommended against hiring an assistant named Leoni (last name not indicated), but the Employer hired her anyway. Conversely, in the fall of 2002, Sultanik attended the interview of Moira Lane for a specialist position, and recommended hiring her, but she was not hired. Finally, Sultanik testified that he recommended an acquaintance (name not indicated) for an assistant position, but that the person was not interviewed or hired.

According to both Fried and Sultanik, this person admitted to having a criminal conviction on a domestic violence matter; Fried asked this person for more information; but the person never got back to her. According to Sultanik, the Employer had hired another person with a criminal record, for selling drugs and ammunition.

Finally, Taitt-Hall (a habilitation assistant) testified that Fried and Green asked her opinion as to whether part-time employee Michael Benjamin should be given a full-time position. Taitt-Hall said yes, and he was hired full-time.

The Petitioner submitted a letter into evidence (Pet. Ex. 29) from the Employer's human resources director, informing a newly-hired habilitation assistant that director Doug Green would be her supervisor.

F. Transfer of assistants

Fried initially testified that habilitation specialists sometimes recommend that the Employer transfer an assistant to another group. She did not testify as to whether those recommendations are given effect, and no specific examples were given.

When the hearing re-opened, specialist Sultanik testified that he asked the Employer to transfer an assistant Olivia (last name not indicated) to another program room, but his request was denied. Program coordinator Negron and director Green both felt that Olivia should stay in Sultanik's program room.

G. Probationary evaluations/terminations

There is no dispute that habilitation specialists play a role in evaluating newly-hired habilitation assistants. Er. Ex. 5 consists of four probationary evaluations, which assistants are supposed to receive after six months of employment. The specialist fills out the form, indicating,

among other things, his/her recommendation as to whether the assistant should be retained or terminated. At the end of the form is a space for director Green to indicate that he is in accord with the assessment. In all four samples given, the specialist recommended retaining the assistant. These forms (Er. Ex. 5) were not reviewed or signed by Fried, and Fried did not testify in detail as to what weight the specialists' recommendation played in Green's decision-making process. However, in response to a leading question regarding whether an assistant was retained "based on" the specialist's evaluation, Fried answered affirmatively. During the initial hearing, Fried testified that no assistants have been terminated as a result of a negative probationary evaluation. The only example given of a new assistant being terminated during her probationary period (Denise Reeves in November 2000) was concededly decided by management, without the habilitation specialist's involvement.

When the hearing re-opened, Sultanik testified that his recommendation to retain a probationary employee was not followed. Specifically, after he rated a probationary assistant (whose name he could not recall) as having satisfactory attendance, program coordinator Negron told Sultanik to write that the assistant had attendance problems because she had taken off too much time for illnesses and doctors' appointments. Sultanik objected to changing the evaluation -- and ultimately to her termination -- because he felt that her absences were legitimate, that she had substantiated her illness with doctors' notes, that she worked well with the consumers, and that she should be given a chance. Nevertheless, Fried and Green said they could not run the program with so many absences, and decided to terminate her.

H. Annual evaluations

Er. Ex. 9 consists of four annual evaluations, similar to the teaching assistant evaluation forms described above, with columns for "employee ratings" and "supervisor ratings." The evaluation forms are signed by the habilitation specialist and, in most cases, also by Negron and/or Green. The evaluation for assistant Mike Brown appears to be signed only by the specialist, but the Petitioner also introduced an evaluation (Pet. Ex. 11) during the initial hearing which appears to be signed only by Green. In any event, the record contained no evidence that these annual evaluations affect the habilitation assistants' wage rates or other terms and conditions of employment. When the hearing re-opened, Fried testified that the evaluation process had not changed in the interim.

Sultanik testified that each evaluation he drafts is reviewed and initialed by Negron and Fried before he gives it to the assistant. Negron has directed Sultanik to change evaluations. For example, Sultanik stated that he changed an evaluation for an assistant whom Negron believed to be somewhat "lazy," even though Sultanik himself thought that the assistant "went the extra mile."

I. Discipline

As for discipline, Fried testified during the initial hearing that habilitation specialists have authority to "counsel" assistants and to bring problems to the attention of a program coordinator, assistant director or director. In response to a leading question as to whether a specialist's recommendation is "generally accepted," Fried answered affirmatively. However, she gave no specific examples of specialists imposing or recommending discipline. During cross examination, Fried testified that she herself disciplined an assistant named Jamal (last name

unknown) for “disappearing” during the work day, specifically giving him a “verbal counseling” and writing a note for his file.

When the hearing re-opened, Fried again testified generally that specialists may counsel assistants and recommend discipline to Fried or Green if the counseling does not work. She stated that the specialists' recommendations are followed, although she gave no specific examples. During cross examination, Fried was asked about a written warning which she herself issued to assistant Sabrina Miller, without the specialist's involvement. In that case, Fried explained, she and Green decided not to involve the specialist in the written warning because the specialist herself had been disciplined numerous times, and they felt that her presence would undermine the process. Specialist Sultanik also testified that one of his assistants, Maria, received a warning from "the office" regarding attendance problems, without his involvement. He learned of the warning after the fact, when Maria showed it to him.

Sultanik testified that Negron once directed him to give a disciplinary warning to an assistant, Marcos Rivas, over Sultanik's objections. Specifically, in December 2002, Rivas arrived an hour late to work, which meant that the consumers could not go on their trip that day. Negron told Sultanik to "discipline" Rivas, so Sultanik verbally told Rivas not to be late. Later that day, Negron told Sultanik to put something in writing for Rivas' file. Sultanik protested that the first warning is supposed to be verbal, not written. Negron insisted that Sultanik put something in writing, and told Sultanik to talk to Fried if he had any questions. Consequently, Sultanik explained to Fried why he believed no warning should be put in Rivas' file (including that this was the only time Rivas was late, and that Rivas had gone above and beyond the call of duty on other occasions), but Fried insisted that the warning should be documented. In short,

although Sultanik signed the warning, the decision to issue the warning was not his but, rather, was Negron and Fried's.

There is no evidence that habilitation specialists have been involved in any disciplinary suspensions or terminations.

J. Other primary indicia of supervisory status

Habilitation assistants may talk to the specialist about any concerns they have, such as whether other assistants in the group are pulling their weight. Fried testified that she "thinks" habilitation specialists have authority to adjust assistants' grievances, but she gave no specific examples.

The record contains no evidence that habilitation assistants have any role in discharging, promoting, rewarding, laying off or recalling employees.

K. Secondary indicia of supervisory status

During the initial hearing dates, Fried testified that habilitation specialists have attended "supervisory" training. Specifically, one specialist attended a seminar given by the Interagency Council in October 1999, but Fried did not know the specific topics covered by the seminar. Subsequently, in September 2000, all habilitation specialists attended an in-service training which included such topics as effective communication with subordinates and time management. Fried also testified that a habilitation specialist attends management meetings on a rotating basis (i.e., one specialist attends for three months, then another), where they receive "communications" from the administration and they discuss "issues" and "challenges" that they face. The habilitation specialist who attends the management meeting is supposed, in turn, to relay those communications to the assistants.

When the hearing re-opened, Fried testified that habilitation specialists attend three levels of supervisory training. Some specialists have attended trainings by "outside" contractors such as Fred Pryor and Skill Path. All specialists were required to attend employer-wide trainings for supervisors. And the Day Habilitation program has held its own meetings to discuss such topics as evaluations, progressive discipline and effective communication. Specialist Sultanik confirmed that he and other habilitation specialists attended meetings on evaluations in January 2001, on discipline in August 2001, and on "supervisory responsibilities" in February 2002. (See Er. Exhibits 28, 29, and 30, attendance sheets and outlines for those trainings.) He also recalled attending some type of Fred Pryor training with Negron, although he could not recall the topic.

Habilitation specialists start at approximately \$23,600 per year, whereas assistants start at \$15,000 per year. Both specialists and assistants receive an annual wage increase, which is based on a set percentage, not on individual evaluations. It appears that specialists also receive more vacation benefits than assistants.

IV. Developmental Specialists (Day Treatment Program)

A. General description of program

As noted above, the Day Treatment program is for adults over age 21, who are more severely impaired than the consumers in the Day Habilitation program, both physically and mentally. The Day Treatment program has more medical and clinical staff than Day Habilitation. It is funded in part, and regulated by, the New York State Office of Mental Retardation and Developmental Disabilities (OMRDD).

Under OMRDD regulations, the Employer must develop an "individualized treatment plan" (ITP) for each consumer in the Day Treatment program.¹⁴ The interdisciplinary team consists of a developmental specialist and various clinicians employed by UCP, as well as people from outside UCP (e.g., case coordinators from other social service agencies, the consumer's family, a representative from the consumer's residential program, etc.). Program director McCormack schedules the ITP team meetings. The developmental specialist leads the team meeting, gathers all the relevant treatment information, and translates it into specific program goals for each consumer's plan. The developmental specialist may rely on the clinicians' input in determining both the overall goals and the specific steps in achieving those goals. For example, the developmental specialist would consult with the physical therapist and/or occupational therapist in setting goals for each consumer's gross motor function. For a severely impaired, "tactile defensive" consumer whose eventual goal is to learn teeth-brushing, it

¹⁴ This general program description is based primarily on McCormack's testimony during the initial hearing dates. For some reason, when the hearing re-opened, she described the consumer's plan as a "comprehensive functional assessment" or "CFA". The difference between ITPs and CFAs is not clear from the record.

may take months just to get the consumer to tolerate having the toothbrush in his mouth. In that scenario, the psychologist may advise the developmental specialist of specific ways to achieve the goal, e.g., approaching the consumer from the front to avoid startling him, showing the toothbrush to him, giving him time to look at and touch the toothbrush until he realizes that it will not hurt him, and so forth.

Once treatment plans are finalized, the developmental specialists actually implement the plans, along with the program assistants. For example, if a developmental specialist establishes a goal involving money management, he or she might set up a mock cash register in the program room to practice, and then have consumers do a monetary transaction (e.g., getting change for a dollar) when they make a field trip into the community. The developmental specialists instruct the assistants to help carry out these tasks.

The Petitioner herein represents the program assistants and clinical staff employed in the Day Treatment program. It appears that each program room contains 13 to 15 consumers, 3 or 4 program assistants and one developmental specialist.¹⁵ The Employer contends that developmental specialists are supervisors as defined in the Act because they supervise the program assistants.

¹⁵ In June 2002, after the initial hearing dates, McCormack's program split into two components, 50% day treatment and 50% day habilitation, for reasons that are unclear from the record. (The day habilitation component, called "Day Hab 3," is separate from the day habilitation program described above by Amy Fried, for reasons that are equally unclear.) Thus, of McCormack's six program rooms, three are run by "developmental specialists" and three are run by "habilitation specialists." However, McCormack testified that the specialists' duties in the two sub-programs are the same. For the sake of simplicity, and to avoid confusion with the other group of habilitation specialists, the specialists in McCormack's program will be described herein as "developmental specialists" or simply "specialists."

B. Assignment of work

The record indicates that developmental specialists are involved in scheduling and assigning program assistants. Initially, director McCormack sets up an overall schedule of duties at the beginning of each year, in order to divide them fairly and equally. For example, if one assistant does bus duty outdoors during a cold month, that assistant would be assigned to an indoor duty the next month. However, McCormack testified that her schedule is only a "prototype" or a "guideline" which must be adjusted from day to day, depending on the assistants' absences or vacations. On a rotating basis, each specialist serves as "specialist of the day," responsible for adjusting these assignments each morning to cover for absences. The specialist of the day must make sure that all the assignments (bus duty, feeding, trips to the dentist, etc.) are covered by the assistants. The specialist of the day then submits a revised schedule to McCormack.

McCormack testified that the specialists decide which assistants should work on which consumer's individual treatment goals. However, she did not give any specific examples or explain how the decision is made. The specialists also assign assistants to go into the swimming pool with consumers for recreational activities, to go on field trips, and to meet with parents. The specialists decide when the assistants take their lunch breaks, within certain parameters established by the Employer.

Developmental specialist Donna Palumbo, who worked for the Employer for more than four years, testified that she and the assistants in her room have a well-established routine of taking off consumers' coats, feeding, activities, and so forth, and that the assistants often decide among themselves how to divide up the duties. For example, even though the more artistically-

inclined assistant usually runs the art activities and the more musically-inclined assistant usually runs the music activities, they might agree to switch with each other on occasion for a “break.” During Palumbo’s first few years of employment with the Employer, she did not need to explicitly assign duties to the assistants. However, in approximately early 2002, a situation arose where a certain consumer (“E.G.”) grew too attached to one assistant, Daniel Davis, and she would not let the other assistants take off her coat or feed her. The other assistants complained and, at some point, Palumbo asked McCormack to transfer Davis to another room. McCormack denied the transfer request at that time. According to Palumbo, conflicts between Davis and the other assistants continued, and Palumbo again asked to transfer Davis. McCormack denied the request, and instructed Palumbo to hold a meeting and hand out assignments to the assistants. Consequently, Palumbo created a schedule to rotate certain duties (e.g., feeding) on a weekly basis, so that different assistants would work with different consumers over time.¹⁶

Palumbo also testified that any disputes regarding assignment to pool duty are referred to McCormack. Specifically, Palumbo asks each assistant, on a rotating basis, to go into the swimming pool with consumers for recreational activities. Palumbo stated that, if the assistant gives her “a hard time,” she sends the assistant to McCormack. When McCormack testified on rebuttal, she acknowledged that assistants who refuse to do pool duty are sent to her office. However, she added that, unless the assistant gives a good reason why he or she should not go into the pool, McCormack “supports” Palumbo’s assignment of that person to pool duty.

¹⁶ Other aspects of the alleged problems with assistant Daniel Davis are discussed below, in the sections on employee transfers and discipline (Sections IV(F) and IV(I)).

Both Palumbo and program assistant Charmaine Marcelle testified that McCormack appointed a committee of assistants and others to devise a bathroom schedule at some point in 2001 or 2002, for the 19 assistants working in the Day Treatment and “Day Hab 3” programs. Assistant Marcelle suggested rotating the duties on a weekly basis, and McCormack accepted the suggestion. The committee thereafter devised a weekly rotation of bathroom assignments. The developmental specialist of the day may adjust the assignments on a day-to-day basis to cover for absences.

Marcelle also testified, as did other Petitioner witnesses mentioned above, that the assistants essentially run the program room by themselves when there is no specialist, due to vacancies, leaves or vacations. Another specialist (presumably the specialist of the day) checks with the assistants in the morning, to make sure they have enough assistants to cover feeding their consumers. And, if a developmental specialist in one program room happens to be out at the time when monthly reports are due, then another specialist must do the monthly reports for the consumers in that room. Otherwise, Marcelle testified, the assistants themselves decide how to run the daily tasks, including working on the consumers’ individual goals, during the specialist’s absence.

C. Being held responsible

McCormack testified that the specialists are evaluated on their supervisory skills. In the developmental specialists’ blank evaluation form (Er. Ex. 4), they are rated for such tasks as “assign[ing] group activities and duties” and “conduct[ing] meetings with support staff.” There were no specific examples of any developmental specialists being disciplined or otherwise held responsible for their assistants’ failures.

D. Granting time off

During the initial hearing dates, there was no evidence that developmental specialists had authority to grant time off. When the hearing re-opened, McCormack stated that specialists must sign the assistants' leave-request forms. McCormack also stated that she herself must check the "overall" calendar, to make sure there are enough assistants in the entire program for the days in question. (Especially during the holidays, she must deny requests if too many assistants want to take leave at the same time.) However, McCormack denied that she actually signs the leave-request forms, unless the specialist happens to be absent. During cross examination, the Petitioner submitted a leave form signed by both McCormack, on the "supervisor signature" line, and by the specialist in a nearby blank space (Pet. Ex. 22(a), dated 12/28/01), and another leave form signed only by McCormack (Pet. Ex. 22(b), dated 1/3/01). McCormack conceded that she does in fact sign the leave forms. McCormack explained that individual specialists do not have the "purview" to assess staffing levels for the entire program.

Specialist Palumbo testified that she does not have authority to grant time off, and that the assistants have always submitted the leave form directly to McCormack. However, Palumbo stated that "in the past couple of months" before the hearing reopened, McCormack told Palumbo that she (Palumbo) had to sign the leave forms. Palumbo testified that she has never disapproved an assistant's request for time off.

E. Hiring

McCormack testified that developmental specialists have input into the hiring of program assistants. During the initial hearing dates, McCormack specifically described the

hiring process as follows. When there is a vacancy, McCormack initially screens the resumes, checks the educational requirements, and selects candidates to be interviewed. After interviewing the candidate, McCormack then brings him or her on a tour of the facility, meeting the developmental specialists who are available that day (e.g., who are not out on field trips) as well as speech therapists and others. The developmental specialists have an opportunity to ask the candidate questions, if they so choose. At some point, McCormack asks the developmental specialists for their recommendation before checking the candidate's references and making a final decision. Although McCormack had hired approximately 10 assistants in her first five years as director of Day Treatment, she said that specialists had never made a negative recommendation about the candidates presented to them.

When the hearing reopened, McCormack essentially described the same process. However, this time she said that it is a specialist, not herself, who gives the candidates a 20-30 minute tour. At some point after the tour, McCormack asks the specialist for his/her "thoughts," including the specialist's observation of whether the candidate seemed comfortable with the severely disabled consumers. McCormack testified in general that, if a specialist thought a candidate was good, McCormack would go on to check references and complete the paperwork needed to hire the person. The only example given was that Palumbo approved of a recent male candidate who was hired.¹⁷ There was no other information regarding the hiring of this particular assistant, and no other specific examples were given. Furthermore, although

¹⁷ There are references in the record to at least three recent male job candidates, "Sergio," "Jeffrey" and Timothy Thomas. It is not clear from the record which candidate McCormack was cited as the example of Palumbo's recommendation (Tr. 799). Furthermore, although Timothy Thomas was identified as a candidate for an assistant position, it is not clear that Sergio and Jeffrey were applying for assistant positions. Palumbo described them as the "only specialists" about whom McCormack asked her (Tr. 643).

McCormack said that she could think of three instances in the past year where she did *not* hire a candidate based on a specialist's negative comment, she gave no details regarding those instances.

Palumbo testified that she has given a tour to job candidates approximately 10 times in her 4½ years of employment, and that the tours last only five minutes to show the candidate the facility. She claimed that McCormack never used to ask her opinion of the candidate, and only started doing so for the past couple of candidates. Palumbo conceded that she spoke favorably of two recent candidates,¹⁸ and that they were in fact hired. However, she denies effectively making the choice of whom to hire, pointing out that she does not review their resumes, she does not interview them, does not know how many candidates are being considered for a particular vacancy, and does not ultimately select from among the multiple candidates.

F. Transfer

McCormack testified that specialists may recommend the transfer of assistants from one program room to another. McCormack explained generally that when a specialist requests a transfer, McCormack checks with other specialists to see if they are willing to accept the potential transferee. She also takes into account the availability of male assistants. (There are fewer male assistants employed than female assistants, and McCormack said that she tries to assign at least one male assistant per room to “bathroom” the male consumers.)

As a specific example, McCormack stated that assistant Daniel Davis was transferred out of Palumbo's room based on Palumbo's request. As noted above in Section IV(B)

regarding assignment of work, Palumbo herself testified that her two requests to transfer Davis were denied by McCormack. Palumbo claimed that Davis was transferred later, only after an incident where he left a knife on a consumer's wheel chair, not based on Palumbo's request. However, on rebuttal, McCormack claimed that Davis' transfer was only delayed because she had to wait until another male assistant was available to trade. (McCormack did not specifically address whether the knife incident had anything to do with the final decision to transfer Davis.) Palumbo pointed out that she has worked in a room with no male assistants; she had to ask other male employees such as specialists and clinicians to "bathroom" the male consumers in that room. No other specific examples of transfer requests were cited by McCormack.¹⁹

Palumbo also testified regarding a rather complicated set of transfers. At some point in time, Palumbo had an assistant named Rose Leon in her room, and another specialist (unnamed) had an assistant named Wanda McNeill in her room. The other specialist was having problems with McNeill, and wanted McNeill transferred out. While Palumbo was away on vacation, McCormack "switched" the two assistants, placing McNeill in Palumbo's room and Rose Leon in the other specialist's room. Palumbo did not learn about this until she returned from vacation. Eventually, Palumbo also started to have problems with McNeill, so she asked McCormack to reverse the switch, i.e., to transfer Leon back into Palumbo's room and McNeill back into the other specialist's room. According to Palumbo, this request was denied. Nevertheless, Palumbo concedes that a subsequent request to transfer McNeill out of her room (after a

¹⁸ As noted above, it is not clear from the record whether these candidates were hired for assistant or specialist positions.

¹⁹ McCormack vaguely testified that a specialist (unnamed) was asked whether she wanted a transfer of an assistant with whom she was having problems, but the specialist said no, she would give the assistant another chance.

problem with McNeill failing to protect the consumers' confidentiality) was granted by McCormack. McNeill was eventually transferred to a third specialist's room.²⁰

G. Annual evaluations

Developmental specialists are supposed to evaluate program assistants, although they had not consistently done so in the few years before the initial hearing dates. The Employer introduced copies of four evaluations (Er. Ex. 3), dated in 1997, which were very similar to the forms described above. McCormack testified generally that the specialist fills out the numerical ratings and some narrative comments. Both the specialist and McCormack sign the evaluation, and then meet with the assistant to discuss it. The record contains no evidence that the evaluations affect the assistants' wage rate or other terms of employment.

When the hearing reopened, the Employer submitted a more recent evaluation (Er. Ex. 21, dated 3/25/02). In response to leading questions as to whether "each and every" specialist fills out evaluations for "every one" of the assistants on an annual basis, McCormack responded affirmatively.

Witnesses McCormack and Palumbo contradicted each other as to whether McCormack reserves the right to review and possibly change the evaluations before they are given to the assistants. Palumbo testified that specialists are required to show their draft evaluations to McCormack before showing them to the assistants, and that McCormack

²⁰ Palumbo also testified vaguely that she asked McCormack to transfer an assistant from the room of a specialist named "Jennifer," and that McCormack denied the request (Tr. 610). It is not clear from the record if this involves the same specialist as described above in the McNeill-Leon switch, or whether this was a separate incident.

reprimanded her once in 2000 when Palumbo showed the evaluations to assistant first.²¹ Palumbo also testified that she is supposed to write the evaluations in pencil first, in case McCormack wants to make any changes. Palumbo specifically recalled one time when she had given assistant Wanda McNeill a rating of only 1 (on a scale of 1 to 3) for maintaining client confidentiality. According to Palumbo, McCormack thought the low rating was “sort of extreme” and told her to change it to a 2, which Palumbo did (Er. Ex. 21). By contrast, when McCormack testified on rebuttal, she denied requiring specialists to write their drafts in pencil, she denied ever reprimanding Palumbo for showing the evaluation to assistants first, and she denied asking Palumbo to change McNeill’s rating for confidentiality. McCormack explained that she offers new specialists the “opportunity” to pencil in anything that they think is questionable, in case they want to review it with McCormack before submitting it.

H. Probationary evaluations

There was no evidence during the initial hearing dates that developmental specialists had any role regarding new assistants’ probationary evaluations. When the hearing reopened, McCormack testified that, after an assistant’s first six months of employment, the specialist fills out an evaluation form stating whether the assistant should be granted “regular” status or terminated. McCormack stated that she always follows the specialists’ recommendation in this regard. The form itself (Er. Ex. 17) also indicates a third option, that the specialist may recommend extending the assistant’s probationary period for a number of weeks, but only with prior approval of the assistant executive director. Two of the evaluations submitted (Er Ex. 17,

²¹ Consistent with this testimony, assistant Charmaine Marcelle recalled that, after Palumbo handed in the draft evaluations to McCormack one year, Palumbo came back into the room “upset,” saying that she

evaluations of Edghill Christopher and Keith DeFreitas, dated in September 2002) involved assistants who did not pass a course in administering medications. The specialists recommended extending the probationary period in order to give the assistants another chance to take the test, and the form indicates that the assistant executive director gave prior approval (“per L.Laul verbal approval on 8/20/02”). The specialist signs the form as the assistant’s “supervisor,” and program director McCormack also signs.

Regarding the probationary evaluation of program assistant Daniel Davis, witnesses McCormack and Palumbo contradicted each other once again. On one hand, McCormack testified that specialist Palumbo checked the box suggesting regular status for Davis, and that she (McCormack) accepted the recommendation and signed the form without changing anything. However, Palumbo testified that McCormack actually controlled what she wrote. Specifically, Palumbo claims she had checked “needs improvement” in the categories of dependability and professionalism, and that she left blank the ultimate recommendation regarding retention or termination. According to Palumbo, McCormack said that Davis was not “that bad,” and told Palumbo to change the rating in those categories to “average.” After McCormack indicated that she thought Davis should be granted regular status, Palumbo filled out the form accordingly. However, on rebuttal, McCormack denied telling Palumbo what to write about Davis. McCormack stated that Palumbo had given very negative ratings to Davis, yet she (Palumbo) did not want to recommend terminating him. McCormack claimed that she merely urged Palumbo to correct the inconsistency, i.e., by *either* upgrading some of the ratings

had gotten “in trouble” with McCormack for showing the evaluations to the assistants first.

or recommending his termination. McCormack herself denied having any opinion as to Davis' retention or termination.

At one point (Tr. 323), McCormack asserted that if a specialist recommends terminating a probationary assistant after six months, that assistant would be terminated. However, she gave no specific examples to substantiate that assertion.

I. Discipline

During the initial hearing dates, McCormack testified that developmental specialists have authority to discipline assistants by reporting a problem to McCormack and writing a "disciplinary action form" for McCormack's review, but no specific examples were given. In response to a question by the Hearing Officer, McCormack stated that the Day Treatment program had not had any such problems in her first five years as director.

When the hearing re-opened, McCormack testified that specialists may independently give a verbal warning or "counseling" to assistants, but that they would get her involved for any higher levels of discipline. Two documents were introduced into evidence, which the Employer's attorney characterized as disciplinary warnings. Er. Ex. 19 is a memo from developmental specialist Nancy Myette, describing a dispute in March 2001 between two assistants, Marjorie Robertson and Angelique McWallace. The memo does not appear to be addressed to the assistants; it essentially describes the nature of the dispute and how Myette told them to work together and communicate better. McCormack testified that Myette gave her a copy of the memo, to be placed in McWallace's file. No action was taken against McWallace as a result of the memo.

Er. Ex. 20 is a memo which specialist Palumbo wrote to McCormack describing a meeting she had with Daniel Davis and two other assistants. As described above, Palumbo held a meeting and created a written schedule in February 2002 to rotate certain duties, after Davis' relationship with one particular consumer was causing problems among the assistants. During the meeting, Davis became agitated and abruptly left the meeting, stating that he would go speak directly to McCormack and later that the meeting was a "joke." In her memo to McCormack describing the meeting, Palumbo wrote that appropriate action such as a "write up" would be taken if Davis exhibited this behavior in the future. McCormack subsequently signed the memo too, adding a note that Davis disputed the facts in the memo and had refused to sign it. Although Palumbo did not deny writing this memo, she denied having authority to discipline assistants and stated that she wrote the memo only because McCormack told her to hold a meeting and to write "minutes" of the meeting.

Palumbo generally testified that she was never told she could "discipline" assistants as their "supervisor" until after the union election in 2002. Palumbo claimed that she does not in fact discipline assistants. If Palumbo has any problems with the assistants (such as refusal to go into the pool), she goes to McCormack for assistance, and McCormack deals with the problems.

There were no examples of specialists recommending suspension or any other form of discipline. McCormack explained that certain types of allegations, such as patient abuse, must be reported to government agencies and investigated under certain regulations by an independent investigator. If an assistant was accused of abuse, the specialist would not conduct the investigation or recommend discipline. For example, Palumbo testified that she reported the

knife incident described above to McCormack, and McCormack said that it would be investigated. Pet. Ex. 20 shows a three-day suspension issued to assistant Patricia Chandler for “psychological abuse.” The incident was investigated by a director of a UCP residence, who also recommended the suspension. McCormack and the Employer’s assistant executive director “signed off” on the suspension; the specialist had no involvement in it.

J. Termination

There is no evidence that specialists have terminated assistants or recommended termination. As of the initial hearing dates, only one program assistant had been terminated in the previous five years, after he made an extremely degrading comment about the consumers in McCormack's office. Thus, the particular incident was witnessed directly by McCormack and did not involve any input from a developmental specialist.

At the reopened hearing, McCormack initially testified that no specialists in her program had recommended terminating assistants. Later, after stating that there were “several” terminations for time and attendance problems, McCormack answered affirmatively to a series of leading questions as to whether those problems were brought to her attention by specialists, whether the specialists recommended “that something should be done,” and whether she accepted the recommendations (Tr. 303). However, in response to questioning by the Hearing Officer, McCormack was unable to provide a specific example. The one purported example, involving the termination of assistant Angelique McWallace, did not establish that the specialist had any involvement in the termination. Rather, McCormack stated simply that the specialist “spoke to” McWallace about her serious time and attendance problems, that McWallace eventually failed to show up at all, and that she was terminated for “failure to report to work.”

There is no evidence whatsoever that the specialist effected or recommended the termination. McCormack could not think of any other examples.

K. Approval of "excess hours"

Although assistants' normal work schedule is 35 hours per week, specialists may authorize assistants to work "excess hours" of up to 40 hours per week, without McCormack's approval. McCormack explained that assistants can choose to be paid for those hours (presumably at the regular rate, not overtime) or can take them as "work adjustment time." For example, McCormack explained, if an assistant has worked an extra half-hour beyond the 35 hours, she may ask the specialist for permission to leave a half-hour earlier on another day. McCormack stated that she does not sign the excess hours form. (No copies were submitted into evidence.) However, she does sign the assistants' overall time and attendance records before they are sent to the Employer's human resources department.

L. Other primary indicia of supervisory status

In terms of adjusting grievances, McCormack testified during the initial hearing dates that developmental specialists deal with assistants' complaints regarding the division of duties, such as an assistant complaining about excessive toileting duties.

The record contains no evidence that developmental specialists have authority to promote, reward, lay off or recall assistants.

M. Secondary indicia of supervisory status

McCormack testified during the initial hearing that at least three developmental specialists had attended "supervisory" training, but did not describe the training in detail. When

the hearing reopened, McCormack stated that some specialists have attended supervisory training by an outside consultant, such as Fred Pryor seminars on “How to Supervise People” and “Excelling as a First-Time Supervisor” (Er. Ex. 22). All specialists are supposed to attend in-house trainings on such general topics as time management, effective communication, active treatment and goal writing. Palumbo testified that she does not recall attending any supervisory training. Although her duties as a “group leader” were discussed when she was hired in 1998, she was never told that she was the assistants’ “supervisor.” Palumbo claimed that it was only since the union election that McCormack started saying that the developmental specialists are supervisors.

McCormack testified somewhat vaguely that specialists attend “management” meetings, where they discuss time and attendance problems and “relationship” issues.

The wages of developmental specialists start at \$23,000, whereas the program assistants start at \$14,200 or \$14,300 per year. The specialists also receive more vacation pay than the assistants.

V. Pool Coordinator

The following description of the pool coordinator's duties is based primarily on the testimony of Fried during the initial hearing dates, although the other Employer witnesses (DiPasquale and McCormack) also mentioned him briefly. The Petitioner's witnesses did not specifically testify regarding the pool coordinator. When the hearing reopened, the Employer's attorney stated that the pool coordinator is “no longer there.” It is not clear from the record whether the position has been permanently eliminated, or if it was simply vacant at the time the hearing reopened. No further evidence was introduced regarding the pool coordinator.

There are two pools at the Employer's Lawrence Avenue facilities, one in each building. All three programs described above use the pools, although at different times.

A. Pool coordinator's general duties

The pool coordinator, Igor Shoukhardin,²² monitors the chemicals and temperature of the pool, complies with Board of Health regulations, and is a certified life guard. The pool coordinator does not provide aquatic therapy or any other form of physical therapy. He does not decide the clients' goals, and may not be aware of their particular IEP/ISP/ITP plans. However, once the goals have been decided, the pool coordinator helps the assistants from various programs carry out any goals involving the water, such as learning to swim. The pool coordinator sometimes works directly with clients in the pool, and sometimes shows the assistants how to work with the clients. He also educates assistants regarding safety issues and Board of Health regulations.

In addition to working in and near the pools, he also works in his office on the first floor, near one of the pools. The Employer also has a fitness center on the second floor, which opened in 2000. Shoukhardin helped establish the fitness center program, including selecting the equipment and planning appropriate fitness activities for the students and consumers. He continues to go to the fitness center on the second floor as an occasional part of his work.

B. Pool coordinator's interaction with specialists and assistants

²² The transcript identifies the pool coordinator only as "Igor," but it appears from Pet. Ex. 10 that his last name is Shoukhardin.

Fried testified that Shoukhardin supervises a habilitation specialist, Deena Bugayeva, who runs the day habilitation fitness program and, in turn, supervises some habilitation assistants. Bugayeva also substitutes as a life guard on occasion. Although Bugayeva has been employed for less than a year, Fried testified that Shoukhardin is expected to complete her annual evaluation when the time comes. Fried testified that Shoukhardin also supervises Bugayeva by attending management meetings, and relaying information from those meetings to her. If Bugayeva wants to request time off, she must get the signatures of both Shoukhardin and program coordinator Negrón.

Shoukhardin also oversees the work of assistants from the three programs (teaching assistants, habilitation assistants and program assistants) while they work in the pools. Specifically, he trains them and shows them how to do various recreational activities with the disabled students and consumers.

As for discipline, Fried testified that Shoukhardin repeatedly "counseled" an assistant who used to work with him. The assistant (name not specified on the record) had attendance problems and was unwilling to perform certain aspects of her job. In somewhat speculative testimony, Fried stated that the Employer "probably ... would have moved to terminate her based on his [Shoukhardin's] recommendation" if the Employer had been "given a little bit more time," but that the assistant chose to leave in the meantime.

There is no record evidence that the pool coordinator has authority to hire, transfer, promote, reward, suspend, lay off or recall employees, or to adjust their grievances.

The pool coordinator earns more than \$36,000 per year.

VI. DISCUSSION

A. General principles

Section 2(11) of the Act defines a supervisor as follows:

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 merely of a routine or clerical nature, but requires the use of independent judgment.

In enacting Section 2(11)'s definition of "supervisor," Congress stressed that only individuals invested with "genuine management prerogatives" should be considered supervisors, as opposed to "straw bosses, leadmen ... and other minor supervisory employees." Quadrex Environmental Co., Inc., 308 NLRB 101, 102 (1992)(quoting S.Rep. No. 105, 80th Cong., 1 Sess. 4 (1947)). It has long been the Board's policy not to construe supervisory status too broadly, since a finding of supervisory status deprives individuals of important rights protected under the Act. Id. A party who seeks to exclude alleged supervisors from a bargaining unit therefore has the legal burden of proving their supervisory status. NLRB v. Kentucky River Community Care, 532 U.S. 706 (2001)(“Kentucky River”); Tucson Gas & Electric Co., 241 NLRB 181 (1979); The Ohio Masonic Home, Inc., 295 NLRB 390, 393 (1989). Furthermore, to prove supervisory status under Section 2(11), the party must demonstrate not only that the individual has certain specified types of authority over employees (e.g., to assign or responsibly direct them), but also that the exercise of such authority requires the use of "independent judgment," and is not “merely routine or clerical” in nature.

B. *Kentucky River* and subsequent cases regarding “independent judgment”

In the Kentucky River decision, *supra*, which issued shortly after the Region's original Decision in this representation case, the Supreme Court reaffirmed that the burden of proving supervisory status rests on the party asserting it. However, the Court rejected the Board's interpretation of "independent judgment" in Section 2(11)'s test for supervisory status, i.e., that alleged supervisors do not use "independent judgment" when they exercise ordinary professional or technical judgment, or judgment based on greater experience, in directing less-skilled employees to deliver services in accordance with employer-specified standards. Thus, on remand, the Region must seek to interpret the statutory distinction between "routine" and "independent" judgment, without categorically discounting judgment based on professional/technical expertise or greater experience.

The Board has done so in such post-Kentucky River cases as Beverly Health and Rehabilitation Services, Inc., et al., 335 NLRB No. 54 (2001), *enforced in relevant part*, 317 F.3d 316 (D.C. Cir. 2003) ("Beverly Health"), where nursing-home LPNs' role in directing the work of CNAs was seen as requiring only "routine" authority rather than independent judgment. Id. at fn. 3. In that case, the Board upheld the administrative law judge, who found that the CNAs' work was low-skilled and repetitive, and that the LPNs simply had to relate the patients' care requirements from a written report. There was no evidence that the LPNs used independent judgment in assigning the "basic tasks" to particular CNAs, who all performed "the same care, in the same manner, for the same people" every day. Id., slip op. at 35. The Board did not rely on any distinction -- rejected by the Supreme Court -- between the LPNs' use of technical judgment in deciding on patient care, versus supervisory judgment in deciding how to

delegate the specific tasks. Nevertheless, the LPNs' direction of CNAs' work did not require the level of independent judgment to warrant a finding of supervisory status.

By contrast, in another post-Kentucky River case, the Board found towboat pilots to be supervisors, in part because their direction of the boat crew required independent judgment. American Commercial Barge Line Co., 337 NLRB No. 168 (2002). In that case, the pilots had authority to post one or more lookouts and to assign an extra crew member whenever they deemed necessary, even if this assignment entailed overtime pay. Significantly, these judgments were based on the pilots' assessment of the crew (e.g., whether a "green" or inexperienced crew member was on board), as well as other "nonroutine" factors (weather, traffic, the boat's condition, the type of cargo, and so forth). Id., slip op. at 2. The Board also emphasized the pilots' responsibility by pointing to the potentially "catastrophic" consequences of any poor judgment, such as a boat collision causing loss of life or a chemical spill. Finally, the Board explicitly rejected any purported distinction between the pilots' greater technical expertise/experience and their supervisory authority. Id., slip op. at 3.

These cases suggest that simply dividing up tasks among "interchangeable" employees who essentially perform the same work is routine, whereas assessing the relative skills of different employees in directing their work may require independent supervisory judgment. *See also* Franklin Hospital Medical Center, 337 NLRB No. 132, slip op. at 5 (2002) ("Franklin Hospital"), citing Brusco Tug & Barge Co. v. NLRB, 247 F.3d 273, 278 (D.C. Cir. 2001) ("Courts typically consider assignment *based on assessment of a worker's skills* to require independent judgment," emphasis added).

C. Quinnipiac and other cases regarding "effective recommendations"

In its remand order, the Board also directed the Region to consider the Second Circuit Court of Appeals' decision in NLRB v. Quinnipiac College, 256 F.3d 68 (2nd Cir. 2001)(“Quinnipiac”). In that case, the Court found college security guard “shift supervisors” to be statutory supervisors, in part because their deployment of guards to various security incidents and emergencies on campus required them to assess each employee’s experience and capability to respond to the incidents, as well as other security needs and requirements. Thus, the assignment was seen as requiring independent judgment. Id. at 75-6. The Court also found, based on two written reprimands issued to the shift supervisors, that the employer held them responsible for the actions of employees on their shifts. Thus, the statutory indicium that the supervisors “responsibly” direct employees was found. Id. at 77.

Finally, the Court found that the shift supervisors had authority “effectively to recommend” disciplining employees because they could report disciplinary infractions to the security chief and assistant chief, and recommend that employees be disciplined. Id. at 76-7. Although the Board had determined that the disciplinary recommendations were not proven to be “effective” because there was no evidence as to the “results or effectiveness of such recommendations,” and because “no employees may be disciplined without an independent investigation” conducted by the security chief and assistant chief, the Court found this determination to be “contrary to settled law,” citing its own prior decision in ITT Lighting Fixtures, Div. of ITT Corp. v. NLRB, 712 F.2d 40 (2nd Cir. 1983), *cert. denied* 466 U.S. 978 (1984). In order to understand the tension between the Board and the Second Circuit on the issue of whether recommendations are “effective,” some background discussion is required.

As stated above, the statutory definition of supervisor includes those who “effectively” recommend such actions as hiring, disciplining and discharging employees. The Board has consistently required that recommendations by alleged supervisors be shown to have some independent effect. For example, in Reliance Insurance Co., 173 NLRB 985 (1968), although “unit leaders” could recommend salary increases and dismissals, the manager did not automatically accept those recommendations but, rather, decided such matters on the basis of his own judgment. Id. at 986. By contrast, the manager accepted such recommendations automatically when they were made by admitted supervisors, without his independent review. In ITT Lighting Fixtures, 265 NLRB 1480 (1982), the Board stated generally that “the authority effectively to recommend generally means that the recommended action is taken with no independent investigation by superiors,” id. at 1481, and specifically found that one “group leader” (Joan Carson) was not a supervisor because the foreman (Ronnie Wirt) would accept her recommendation to issue a written warning only if he noted in his files that the employee had a prior verbal warning about the matter, id. at 1482. However, the Second Circuit rejected the Board’s conclusions, stating that “The Act does not preclude supervisory status simply because the recommendation is subject to a superior’s recommendation.” 712 F.2d at 45. Unfortunately, the Court’s opinion in ITT Lighting did not specifically address what it means for a recommendation to be “effective.”

Despite the Second Circuit’s ruling in ITT Lighting, the Board thereafter continued to distinguish between effective and ineffective recommendations. For example, in Brown & Root, Inc., 314 NLRB 19 (1994), safety inspectors who issued safety “citations” were found not to be supervisors because the acknowledged supervisors independently investigated the incidents

before deciding whether to take disciplinary action. Therefore, the inspectors' citations were found not to have any independent disciplinary effect. In Children's Farm Home, 324 NLRB 61 (1997), although the team leaders' evaluations of employees sometimes recommended whether to grant a wage increase, the undisputed supervisors conducted their own independent investigation before deciding on an increase. In Training School at Vineland, 332 NLRB 1412 (2000), the group home managers sometimes recommended that discipline be imposed on employees. However, the record showed that, in many instances, the employer either chose not to adopt the recommendations, or simply ignored the recommendations altogether. In those circumstances, "it cannot be said that the group home managers' recommendations are effective." Id. at 1417. Thus, in order for the Board to find recommendations to be "effective," there must be some evidence that the recommendations have some independent effect or, at the very least, that they are normally followed. As the Seventh Circuit once said in connection with an employee who recommended discharging a fellow employee for sleeping on the job: "Although any employee could recommend discharge in such a case, an employee whose responsibility it is to make such recommendations, and *whose recommendations therefore carry a special weight with the employer and are normally or at least commonly followed*, is a supervisor." NLRB v. Res-Care, Inc., 705 F.2d 1461, 1467 (1983)(emphasis added).

In the meantime, the Second Circuit had occasion to review other supervisory cases, but without having to pass on the specific issue of effective recommendations. In both NLRB v. Meenan Oil Co., 139 F.3d 311 (2nd Cir. 1998), and Schnurmacher Nursing Home v. NLRB, 214 NLRB F.3d 260 (2nd Cir. 2000), the alleged supervisors' reports of misconduct were

made without any recommendation whatsoever. Therefore, the Court did not need to consider whether the recommendations were effective.

Thus, when the Quinnipiac case came along, the Second Circuit was poised to consider the Board's assessment of "effective" recommendations for the first time since ITT Lighting. In Quinnipiac, although the security shift supervisors could advise management of poor work performance and recommend discipline, the Board found no evidence as to the "results or effectiveness" of such recommendations and no evidence that employees could be disciplined without management's independent investigation. 256 F.3d at 76. However, the Second Circuit, citing its prior language in ITT Lighting, stated that "the Act does not preclude supervisory status simply because the recommendation is subject to a superior's investigation." Id. Unfortunately, the Quinnipiac opinion fails to offer any alternative explanation of what constitutes an effective recommendation. Rather, the opinion goes on simply to note that the shift supervisors use independent judgment because they "have discretion" whether to report an individual for disciplinary infractions. There is no consideration or discussion whatsoever of whether the reports have any effect, i.e., whether the guards were in fact subsequently disciplined by the superiors based on those recommendations. Thus, it appears that the Second Circuit may find individuals to be supervisors if they use "judgment" before recommending discipline, with no requirement that the recommendations, once made, have any independent effect.

Under the plain language of Section 2(11), merely making recommendations regarding discipline and other matters -- even while using independent judgment -- does not make someone a supervisor. Rather, Congress expressly required that the person must "effectively"

recommend such actions. It is a well-established principle of statutory construction that “a legislature is presumed to have used no superfluous words.” United Food and Commercial Workers, Local No. 1996 (Visiting Nurse Health System, Inc.), 336 NLRB No. 35 at fn. 27 (2001), quoting Bailey v. United States, 516 U.S. 137, 145 (1995). It is respectfully submitted that, to the extent the Second Circuit’s opinion in Quinnipiac may have eliminated any requirement that an alleged supervisor recommendation’s must be effective, it seems to have run afoul of that principle. It is further submitted that, unless the Circuit Court provides an alternative interpretation of “effective” supervisory recommendations, this Agency may continue to follow its own approach in requiring evidence of the recommendations’ “results or effectiveness” when assessing an alleged supervisor’s status.

Indeed, it appears that the Board has continued to do so since Quinnipiac. For example, in Fred Meyer Alaska, Inc., 334 NLRB 646 (2001), the stores’ meat manager and seafood managers were found to be supervisors because they had either (1) interviewed candidates on their own and made recommendations that were accepted by the food managers *without independent investigation*, or (2) attended interviews with the food manager, and their resulting recommendations were “*typically followed*” (emphasis added). In Wal-Mart Stores, Inc., 335 NLRB No. 103 (2001), the Board found that the store’s department manager effectively rewarded employees because the ratings he assigned to employees in their evaluations *directly effected* their pay increase, *without independent investigation by superiors*. And in Williamette Industries, Inc., 336 NLRB No. 59 (2001), the Board found leadmen not to be supervisors because there was no evidence of *what weight, if any*, their recommendations carried regarding retention of probationary employees. *See also* Beverly

Health, *supra*, 335 NLRB No. 54, slip op. at 35 (ALJ opinion that “discipline” is not supervisory if it does not lead to personnel action without the independent investigation or review of other management personnel); Franklin Hospital, *supra*, 337 NLRB No. 132, slip op. at 5 (Regional decision, same).

Thus, for purposes of this decision, it will be assumed that evidence of actual effectiveness is required to prove supervisory status based on the authority “effectively to recommend” personnel actions such as disciplining, discharging, hiring and rewarding employees. On one hand, if management completely ignores an employee’s recommendations, or acts on them only after completing its own investigation from scratch, the recommendations cannot be seen to carry much weight. On the other hand, if there is evidence that the recommendations are usually followed, or that they have independent effect without substantial investigation and review by management, then a finding of supervisory status would be warranted.

VII. SPECIFIC FINDINGS AND CONCLUSIONS

After carefully considering the above-cited cases and the entire record in this case, I conclude the Employer has not met its burden of proving that the teachers, habilitation specialists, developmental specialists and the pool coordinator are supervisors as defined in the Act. I find that, at most, they possess some low-level authority to assign and oversee employees, but without using independent supervisory judgment and without exercising any real authority over their employment status. As directed by the Board’s remand order, I will now make separate determinations for each classification.

A. Teachers (Children’s Program)

The Employer submitted virtually no evidence regarding the duties of day-care teachers, who care for employees' children at the Employer's premises. The day care program is separate and distinct from the Employer's early intervention, pre-school and school-age programs for disabled children. I find that the Employer has not met its burden to prove that the day care teachers are supervisors as defined in Section 2(11) of the Act.

The following discussion pertains to teachers in the Employer's early intervention, pre-school and school-age programs for disabled students.

1. Assignment/direction

The record indicates that many of the teaching assistants' duties are interchangeable and repetitive, such as helping students off the buses when they arrive in the morning, removing their coats, and toileting duties. It does not appear that the teachers exercise independent judgment in assigning those tasks. For some tasks, the Employer's upper management has already devised a written schedule, such as assigning specific assistants in the school-age program to busing duty. In some instances, assistants may divide routine tasks among themselves. For example, as for the toileting duties, the female assistants may simply divide up the number of female students, and the male assistant handles the male students. To the extent that teachers actually make or adjust these assignments, such decisions appear to be based on common-sense considerations, such as dividing the work fairly and evenly among the assistants, rather than any meaningful assessment of the assistants' skills. Beverly Health, *supra*, slip op. at 36 (dividing repetitive work among CNAs who all perform the same work, not supervisory); Franklin Hospital, *supra*, slip op. at 5 (assignment of tasks within employer's pre-established parameters, or based on such obvious factors as whether an employee's workload is light, does

not require independent judgment); NLRB v. Meenan Oil Co., 139 F.3d 311, 321 (1988), citing B.P. Oil Co., Inc., 256 NLRB 1107, 1109-10 (1981)(decision-making governed by “common-sense considerations,” not supervisory), *enfd.* 681 F.2d 804 (3rd Cir. 1982). The routine nature of assigning these tasks is further underlined by the assistants’ ability to run the classrooms by themselves when the teacher is absent.

The only area in which, arguably, the teachers might use judgment in assessing the assistants’ skills is in the educational activities designed to meet the students’ IEP and IFSP goals. The Employer did not call any teachers to testify but, rather, relied on assistant director DiPasquale’s testimony on this point. As noted above, it is not clear from the record how much time DiPasquale spends in the classrooms, or whether he has actual knowledge regarding how the teachers make assignments. DiPasquale testified that he is "sure" that teachers must take into account the assistants' varying abilities. For example, a teacher "might" ask an artistically creative assistant to make decorations. Other assistants who are “not so strong” in certain areas “maybe” are assigned to do something else. I find this vague and conclusionary testimony insufficient to prove that teachers use independent judgment in directing assistants to work on the students’ educational activities. A finding of supervisory status and its attendant forfeiture of the Act’s protection requires more than vague references as to what might occur. Without specific and competent evidence in this regard, the Employer has not met its burden to prove that the teachers’ assignment and direction of teaching assistants actually requires independent judgment. Sears, Roebuck & Co., 304 NLRB 193 (1991); Franklin Hospital, *supra*, slip op. at 5 (proof of independent judgment requires “concrete evidence” showing how assignment decisions are made); Nathan Katz Realty, LLC, et al. v. NLRB, 251 F.3d 981, 990 (D.C. Cir.

2001)(employer's claim that alleged supervisors exercise independent judgment by balancing "conflicting demands" rejected, without specific evidence in the record to support the claim). This case is therefore distinguishable from Quinnipiac, where there was specific evidence that college security guard shift supervisors' deployment of guards to various security incidents and emergencies on campus required them to assess each employee's experience and capability to respond to the incidents, as well as other security needs and requirements. 256 F.3d at 75-6.

2. Being held responsible

A supervisor has authority "*responsibly* to direct" employees when he or she is held fully accountable and responsible for the performance of those employees. Franklin Hospital, *supra*, slip op. at 6, citing Schnurmacher Nursing Home v. NLRB, 214 F.3d 260 (2nd Cir. 2000)("Schnurmacher"). In the Schnurmacher case, charge nurses were found to be supervisory, in part, because they were held accountable for the nursing assistants' failures. Specifically, the record contained evidence that the employer had disciplined charge nurses for failing to direct the assistants properly in providing patient care. Similarly, in Quinnipiac, there was specific evidence that security shifts supervisors were reprimanded for problems with the security employees.

In the instant case, DiPasquale mentioned an incident where a child was accidentally left behind in the classroom during a fire drill. Initially, in response to somewhat leading questions about whether the assistants were supposed to attend to the children during a fire drill, DiPasquale answered affirmatively, and added that he disciplined the teacher (Alla Kachalova) for "failure to supervise." However, upon further questioning by the Hearing Officer, it was not clear that any assistants were at fault. No copy of any written discipline was introduced, making

it difficult to verify whether the teacher was disciplined and, if so, whether it was due to her own direct responsibility for the students' safety, or for failing to supervise the assistants' handling of the fire drill. I find that DiPasquale's ambiguous testimony about this one incident is insufficient to prove that the teachers are held fully accountable for the assistants' failure. Furthermore, although the teachers' evaluation form contains a section for rating how well they "supervise" assistants, the Employer gave no specific examples of teachers being held accountable by use of the evaluation form.

3. Granting lunch breaks and permission to leave early

There is no dispute that teaching assistants take their half-hour lunch break at staggered times between 11:30 a.m. and 1:00 p.m., so as to avoid leaving the classroom understaffed. The Petitioner's witnesses testified that the assistants generally divide up the lunch times among themselves, whereas DiPasquale presented hearsay evidence that the teachers told him that they direct their assistants to take lunch at specific times. In any event, I find that even if the teachers actually assign the lunch times, this assignment -- within hours and parameters pre-established by the Employer, and based on such common-sense considerations as keeping a certain number of staff members in the room at a time -- does not require a sufficient exercise of independent judgment to satisfy Section 2(11).

As mentioned above, evidence from the original hearing dates indicated that assistants' requests to leave early had to be signed by the "administration" (Pet. Ex. 3), although there was contradictory evidence as to whether DiPasquale relied on a "recommendation" from the teacher before deciding whether to grant each request. By the time that the hearing re-opened, the Employer adopted another form (Pet. Ex. 13), which contains signature lines for both

“teacher approval” and “administration approval.” However, despite the Employer’s addition of a signature line for teachers, it is obvious that the administration must still approve the assistants’ requests. In fact, the only specific example in the record (Pet. Ex. 13) indicated that the director disapproved an assistant’s request, even though the teacher had approved it. Thus, the record as a whole does not indicate that teachers have independent authority to grant permission to leave early.

4. Hiring

The record evidence indicates that teachers have some input into the hiring of assistants. Specifically, DiPasquale testified that after he screens the candidates' resumes and conduct interviews, he sends the candidates to spend time in a classroom and then seeks "feedback" from the teacher regarding the candidates' skills. DiPasquale then checks the candidates' references and diplomas before making a final decision. He testified generally that he relies on the teacher's assessment in deciding whether to pursue a candidate further and (in response to a leading question) that such reliance occurs "with some regularity." However, DiPasquale did not give any specific examples during the initial hearing dates. When the hearing re-opened, DiPasquale offered two specific examples of relying on a teacher’s recommendation regarding hiring. However, as described in more detail above, the examples turned out to be spurious.²³

At most, this evidence establishes that teachers have *some* participation in the hiring process, and their input is *one* factor that the Employer's management considers when making a

²³ See Section II(E) above. In one example, despite DiPasquale’s detailed testimony regarding teacher LaVassiere’s role, it turned out that LaVassiere was away when DiPasquale hired the assistant. In the other example, despite similarly detailed testimony regarding teacher Harris’ role, DiPasquale later could not recall whether the candidate actually spent time with Harris.

decision, in addition to management's reviewing resumes, conducting interviews, and checking references and diplomas.

The Board has consistently held that mere participation in the hiring process does not confer supervisory status, unless the person hires or *effectively* recommends hiring employees. For example, in New York University Medical Center, 324 NLRB 887 (1997), *enforced in relevant part*, 156 F.3d 405 (2nd Cir. 1998)(“NYU Medical Center”), the employer alleged that psychiatric unit chiefs were supervisors, in part, because they hired or effectively recommended hiring psychiatrist-candidates. However, the evidence indicated that one unit chief merely “chatted” with a candidate for 15 to 20 minutes after the candidate was interviewed by the assistant director, and later said that the candidate would be “fine.” *Id.*, 324 NLRB at 897. The unit chief had not reviewed any of the applicant’s documentation. In upholding the Board’s finding that the unit chiefs were not supervisors, the Second Circuit noted that this “interview” was “not highly substantive,” and that the unit chiefs had “little control” over hiring and other matters. 156 F.3d at 413.

In Beverly Health, *supra*, the employer ran several nursing homes. At some homes, where there was already an incumbent union, the LPNs went on strike. In the meantime, at another home, LPNs were attempting to organize for the first time. Around the time of the strike and organizing, the employer started directing LPNs to attend job interviews, in an apparent attempt to make them appear supervisory. The evidence showed that one LPN interviewed potential CNAs after the assistant director of nursing (ADON) had already interviewed them; another LPN attended the interviews conducted by the ADON or an RN; and a third LPN was directed to participate in two interviews and provided with a list of

questions for her use. The LPNs were asked for their recommendations on those candidates, but the evidence in that case did not indicate whether the recommendations were followed. In another instance, a LPN was not asked for her “recommendation” until after the CNA was already hired. The ALJ in that case found that, although the employer was attempting to “clothe” the LPNs with supervisory authority, their participation in the hiring process was “little more than a sham.” 335 NLRB No. 54, slip op. at 34. The ALJ found that the LPNs did not in fact exercise independent judgment, and had no real authority to hire or effectively recommend hire CNAs. *See also* Dole Fresh Vegetables, Inc., 339 NLRB No. 90, slip op. at 2 (2003)(participation in interview, but not hiring decision, not supervisory), Catholic Community Services, 254 NLRB 763, 766 (1981)(case manager's mere participation in the interviewing process does not confer authority to make effective hiring recommendations); GRB Entertainment, Inc., d/b/a Aardvark Post, 331 NLRB 320 (2000) and cases cited therein at 321 (alleged supervisor’s testing of candidates’ technical ability does not constitute an effective recommendation to hire); Wake Electric Membership Corp., 338 NLRB No. 32 (2002) (alleged supervisor’s preliminary screening, essentially narrowing the number of applicants to be interviewed and considered by the department head, does not constitute effective recommendation of hiring).

Rather, in order to show the authority effectively to recommend hiring, there must be evidence detailing *specific instances where the recommendations played an effective role in the superiors’ ultimate decision to hire or not hire an applicant*. For example, in Fred Meyer Alaska, Inc., 334 NLRB 646 (2001), the stores’ meat manager and seafood managers were found to be supervisors based on specific instances in the record that they had either (1)

interviewed candidates on their own and made recommendations that were accepted by the food managers without independent investigation, or (2) attended interviews with the food manager, and their resulting recommendations were “typically followed.” By contrast, in Third Coast Emergency Physicians, P.A., 330 NLRB 756 (2000), although there was general testimony that physicians on a hospital’s “senior advisory council” voted on whether new physicians should be hired and that the medical director allegedly relied on those recommendations, there was no evidence detailing *specific instances* of where and when these votes had occurred, or what role the votes played in the medical director’s ultimate hiring decision. Id. at 759.

In the instant case, the mere fact that some teachers give feedback to DiPasquale after spending time with candidates in the classroom does not prove supervisory status. It is, at most, evidence of some participation in the hiring process, perhaps analogous to testing candidates’ technical abilities, GRB Entertainment, Inc., d/b/a Aardvark Post, *supra*, or attending a supplementary interview, NYU Medical Center and Beverly Health, *supra*. The Employer’s evidence does not establish that the teachers have any significant control over the hiring process. Although DiPasquale testified generally that he relies on the teacher’s assessment in deciding whether to hire an assistant, there is no evidence detailing specific instances of those recommendations and what role those recommendations played in DiPasquale’s ultimate hiring decision. The evidence does not actually show, for example, that DiPasquale typically follows the teachers’ recommendations, or that their recommendations carry any more weight than other factors (such as the candidates’ resumes, references and DiPasquale’s own impression from the

interview). In short, the Employer has failed to substantiate, with specific and competent evidence, that any hiring recommendations from teachers are *effective*.

5. Promotion

Here again, the Employer's evidence is too vague and conclusionary. DiPasquale testified that teachers "might have" said that certain assistants (unnamed) would make good teachers, and that the Employer promoted the assistants to teaching positions based on the teachers' recommendations or evaluations. However, DiPasquale gave no details whatsoever to substantiate this assertion. Without more specific details demonstrating the teachers' role in the decision-making process, it is simply impossible to determine whether the teachers have actually made recommendations regarding promotion and, if so, whether those recommendations were effective. Therefore, the Employer's evidence fails to meet its burden of proving this indicium of supervisory status.

6. Transfer of assistants

DiPasquale testified that he granted teacher Inna Bermont's request to transfer an assistant out of her classroom after an incident where the assistant yelled at Bermont. The Employer's post-hearing brief cites this incident (at Tr. 32) as evidence that teachers effectively recommend transferring assistants. However, DiPasquale also recounted that he did not grant teacher Mila Levinson's request to transfer assistant Crystal Jackson to another classroom. During cross examination, DiPasquale also acknowledged that he denied teacher Robert Harsen's request to transfer an assistant out of his classroom, and that his decision to transfer another assistant (Elaine Forrest) was not based on any teacher's recommendation.

Conflicting or inconclusive evidence regarding an indicium of supervisory authority is insufficient to establish that particular indicium, and therefore fails to meet the Employer's burden of proof. Phelps Community Medical Center, 295 NLRB 486, 490 (1989). In the instant

case, the Employer's one proffered example of a transfer request is insufficient to prove that teachers generally have authority effectively to recommend transfer, especially in light of the counter-examples.

7. Annual evaluations

As described in detail above, teachers fill out a written form to evaluate each teaching assistant on a yearly basis, including numerical ratings and narrative comments, and must submit the form to DiPasquale before giving it to the assistant. Annual evaluations submitted into evidence during the initial hearing dates (Er. Ex. 1) showed DiPasquale's substantial involvement in the process, including checking the assistant's attendance records and adding his own narrative comments and signature. When the hearing re-opened, despite DiPasquale's testimony that assistants are evaluated "solely" by teachers, the evidence clearly showed DiPasquale and Shane's continuing involvement. For example, an October 2002 memo (Pet. Ex. 19) instructed teachers not to sign or discuss the evaluation until it has been reviewed by the administration. Furthermore, assistant Samuel-Gaines recounted how DiPasquale told the teacher to write about Samuel-Gaines' attendance problem and, when the teacher refused, DiPasquale added his own comments to Samuel-Gaines' evaluation regarding the attendance problem and other issues.

Testimony at the initial hearing indisputably showed that the annual evaluations had no direct impact on the teaching assistants' wages, promotions or other terms of employment. When the hearing re-opened, DiPasquale confirmed that the annual evaluations still have no *direct* impact on the assistants' wage rate. However, he claimed that, if assistants were to apply for a teaching position or other promotion within the Employer's programs, their evaluations

would help determine their chance of getting the position. DiPasquale also claimed that there have actually been assistants whose chance of promotion were affected by their evaluations, but he did not give any specific examples.

This evidence fails to prove supervisory status for at least two reasons. First, it is doubtful that teachers exercise much independent authority in evaluating the assistants where upper management retains so much control. NYU Medical Center v. NLRB, *supra*, 156 F.3d at 413 (physicians exercised no independent judgment where the director told them what grades to give and redid some evaluations himself); Beverly Health, *supra*, slip op. at 35 (evaluations written by LPNs not supervisory where the ADON had “substantial input,” including changing evaluations she disagreed with).

More significantly, the evidence fails to prove that the evaluations had any effect on the assistants’ job status. It is well settled that the authority simply to evaluate employees, without any independent impact on their employment status, is insufficient to confer supervisory status. Beverly Health, *supra*, slip op. at 35; Williamette Industries, Inc., 336 NLRB No. 59, slip op. at 2 (2001); Franklin Hospital, *supra*, slip op. at 6; Dean & Deluca New York, Inc., 338 NLRB No. 159, slip op. at fn. 13 (2003); NYU Medical Center, *supra*, 156 F.3d at 413-4; Schnurmacher, *supra*, 214 F.3d at 265. In the instant case, there is no evidence that the evaluations have independently resulted in wage increases or decreases, demotions, discipline or terminations. DiPasquale’s claim that evaluations have played some part in deciding whether to promote assistants, without specific examples, is insufficient to prove that the evaluations actually affected any assistant’s promotion. Essentially, the annual evaluations allow teachers to report on the assistants’ performance, without any independent impact on their employment

status. Accordingly, under the cases cited above, the teachers' role in evaluating employees does not establish supervisory status.

8. Probationary evaluations/terminations

DiPasquale testified generally that teachers have authority to recommend whether to retain or terminate new assistants at the end of their probationary period. He gave four specific examples of probationary employees who were terminated, supposedly based on the teachers' recommendation. (See Section II(I) above). However, I find that the examples do not support the conclusion. For one thing, it is not clear that the teachers actually recommended the terminations. In the first example, DiPasquale was the person who said that the assistant might need to be terminated, and teacher (LaVassiere) simply agreed. In the second example, the teacher (Levinson) initially recommended a transfer; it was only after the transfer was denied that the teacher recommended termination. In the third example, the Petitioner introduced some evidence, albeit hearsay, that the teacher (Nissen) did not recommend terminating the assistant.

In any event, even assuming *arguendo* that the teachers actually recommended terminations in those cases, it is significant that the terminations occurred only after management's independent investigation. Despite the Employer's attempt to minimize management's role when the hearing re-opened (see footnotes 10 and 11 above), the record evidence clearly establishes that DiPasquale himself checked the assistants' attendance records, observed the assistants himself (both in and out of the classrooms), received input from parents, and/or discussed the terminations with director Shane. Thus, although teachers may have recommended terminations in at least some of the examples cited, the evidence does not establish that the evaluations alone directly affected the assistants' status.

Furthermore, a witness called by the Petitioner gave a counter-example, showing that it was DiPasquale, not the teacher, who controlled the content of her probationary evaluation. As described above in more detail, DiPasquale specifically “whited out” some of the ratings initially written by the teacher and directed the teacher to put lower ratings, over the teacher’s objections.

In sum, the evidence suggests that, while teachers may make recommendations in connection with probationary assistants’ evaluations, the recommendations have no direct effect, independent of management’s control and review. They therefore do not establish supervisory authority. Willamette Industries, Inc., *supra*, slip op. at 1-2.

9. Discipline

DiPasquale testified that teachers have authority to “counsel” assistants informally and to recommend discipline. There was no specific evidence of teachers issuing or recommending disciplinary warnings. In fact, the only warning in the record against a teaching assistant (Pet. Ex. 15) was issued by DiPasquale, not the teacher. Thus, any testimony regarding teachers’ alleged authority to “counsel” or warn assistants is conclusionary and insufficient to prove supervisory status. Sears, Roebuck, *supra*.

The only specific example of discipline described in detail involved teaching assistant Edgar Irizarry (See Section II(J) above). Briefly, the record indicates that DiPasquale decided in May 2000 to place Irizarry on probation for 90 days and to transfer him to another classroom, after several incidents of misconduct or poor performance were reported by a variety of sources, including the teacher, the bus company, a physical education assistant and DiPasquale's own review of Irizarry's attendance record. The specific incident that may have

triggered the disciplinary probation and transfer was reported to DiPasquale by both the teacher and a parent, and which DiPasquale then investigated further by interviewing both the teacher and Irizarry. There is no evidence that DiPasquale's decision to place Irizarry on a 90-day probation was based on any specific recommendation by the teacher. Nevertheless, DiPasquale testified that his decision to transfer Irizarry to another classroom (rather than terminating him) was based on the teacher's recommendation. Irizarry's subsequent evaluation (part of Er. Ex. 1) shows that DiPasquale also issued specific "performance improvement plan" measures, and warned Irizarry that any future problems would lead to immediate termination.

Thus, while it appears that DiPasquale followed the teacher's recommendation to transfer Irizarry, this action was only one part of DiPasquale's comprehensive disciplinary action against Irizarry, which also included the probation, performance improvement plan and final warning of termination. Furthermore, the record clearly indicates that DiPasquale took these disciplinary actions only after conducting his own independent investigation, including gathering information from the teacher, a parent and Irizarry himself. This one instance does not support a finding that the disciplinary recommendations of teachers are regularly or automatically accepted by management, without independent review. Thus, under the Board cases discussed in Section VI(C) above, the evidence does not prove that teachers *effectively* recommend discipline.

10. Non-probationary termination

As described above, the Employer terminated an assistant, Jose Gomez, who had recurring time and attendance problems. The evidence indicates that DiPasquale's decision to terminate Gomez was based on the teacher's recommendation, as well as his own review of Gomez' time and attendance records, and discussion with Gomez. In this example, the

Employer's control over -- and investigation of -- the employees' attendance records underscores the fact that management really makes the decisions regarding termination. A teacher's recommendation may be considered, but it is not necessarily accepted without management's own investigation and review of the attendance issues. Here again, I find this evidence insufficient to prove that any recommendations regarding termination have an independent effect, so as to warrant a finding of supervisory status.

11. Other indicia of supervisory status

The record contains no specific evidence that teachers have authority to adjust assistants' grievances, or to reward, lay off or recall them.

Absent proof of any "primary" statutory criteria, any secondary indicia (e.g., superior pay and benefits, training, attending management meetings) are insufficient to support a finding of supervisory status. Training School at Vineland, *supra*, 332 NLRB at 1417.

Finally, their job description (Er. Ex. 13) states that each teacher "supervises" a small group of employees, including such specific duties as "assigns group activities and duties." Even assuming *arguendo* that this document actually conveyed supervisory authority (e.g., the non-routine assignment of work using independent judgment), a grant of authority on paper is not sufficient to prove supervisory status if the authority is not exercised in practice. Beverly Health, *supra*, 335 NLRB No. 54, slip op. at 36; NYU Medical Center, *supra*, 156 F.3d at 413 ("Theoretical or paper power does not a supervisor make").

B. Habilitation Specialists (Day Habilitation Program)

Although assistant director Fried generally testified that specialists in the adult Day Habilitation program have supervisory authority over the habilitation assistants, her testimony

was not supported by specific evidence or examples and, in many instances, was contradicted by counter-examples by the Petitioner's witness, habilitation specialist Robert Sultanik.

1. Assignment of work

For example, although Fried testified generally that habilitation specialists assign work to assistants based on the assistants' various skills, she gave no specific examples. Without specific and competent evidence in this regard, the Employer has not met its burden to prove that the habilitation specialists' assignment and direction of assistants actually requires independent judgment. Sears, Roebuck & Co., 304 NLRB 193 (1991); Franklin Hospital, *supra*, slip op. at 5 (proof of independent judgment requires "concrete evidence" showing how assignment decisions are made); Nathan Katz Realty, LLC, et al. v. NLRB, 251 F.3d 981, 990 (D.C. Cir. 2001)(employer's claim that alleged supervisors exercise independent judgment by balancing "conflicting demands" rejected, without specific evidence in the record to support the claim).

Furthermore, as discussed in more detail in Section III(B) above, it appears that the habilitation assistants' work is allocated, at least initially, by a written schedule devised by program coordinator Jerry Negron. To the extent that additional work assignments are needed to fill in any "gaps," it appears from Sultanik's testimony that specialists and assistants decide collaboratively how to divide the work. In some instances, assignments are simply rotated among the assistants on a monthly basis. There is no evidence that the habilitation specialists make assignments requiring independent judgment, as opposed to routine or common-sense judgment.

2. Being held responsible

Fried testified generally that the Employer holds habilitation specialists accountable for the assistants' performance, but gave no specific examples. Conclusionary statements by witnesses, without specific evidence to support those statements, do not demonstrate supervisory status. Sears, Roebuck & Co., 304 NLRB 193 (1991).

3. Granting time off

It is obvious from the record that, when an assistant wants to request time off, the form must be approved by program coordinator Jerry Negron and program director Doug Green, as well as the specialist. Fried explained that Negron must approve all time-off requests because he coordinates staffing for the entire program, to make sure there is enough coverage for the field trips and other activities. There is no evidence that habilitation specialists have independent authority to grant time off.

4. Hiring

As described above in more detail (Section III(E)), Fried testified for the first time when the hearing re-opened that habilitation specialists attend her interviews of potential assistants and make recommendations. The Employer's counsel then proceeded to ask a series of leading questions, to which she responded affirmatively, purporting to show examples where Fried had accepted the specialists' recommendations. However, the circumstances of these examples were not explained in any detail, making it impossible to assess the weight actually given to the specialists' recommendations. I find this type of evidence insufficient to prove that the alleged recommendations played an effective role in Fried's ultimate decision whether to hire the applicants.

Furthermore, specialist Sultanik testified that he was never asked to attend a job interview for assistants until after the union election in 2001. Since then, he has attended a half-dozen interviews, during which Fried asked all of the questions. Sultanik further testified, citing specific examples, that the Employer did not follow his recommendations.

As noted above, mere participation in the hiring process, such as attending interviews, does not confer supervisory status. Thus, an employer's attempt to "clothe" certain employees with supervisory status by asking them to attend interviews, without evidence that their recommendations are followed, is insufficient to prove that those employees effectively recommend hiring. Beverly Health, *supra*, 335 NLRB No. 54, slip op. at 34. I therefore find that the Employer has not met its burden of proof as to this indicium.

5. Transfer

Fried testified that habilitation specialists may recommend transferring an assistant, but she gave no specific examples and no indication of whether any such recommendations were followed. This testimony falls far short of establishing that specialists effectively recommend transferring assistants. Furthermore, Sultanik testified that his request to transfer an assistant was denied. Where evidence is conflicting or inconclusive regarding a particular indicium of supervisory status, the Board finds that supervisory status has not been established with respect to that indicium. Lakeview Health Center, 308 NLRB 75, 78 (1992); Children's Farm Home, 324 NLRB 61, 64 (1997).

6. Probationary evaluations/terminations

As described above in Section III(G), Fried generally testified that habilitation specialists recommend whether to retain or terminate new assistants when the specialists write their probationary evaluations. However, the specific examples given (Er. Ex. 5) were reviewed and signed by director Green, not Fried, and Fried did not testify in detail as to what role the evaluations played in Green's decision-making process, other than answering a leading question affirmatively that an assistant was retained "based on" the evaluation. The only example that Fried gave of a probationary assistant being terminated (Denise Reeves) was concededly decided by management, not the specialist. The Petitioner's witness, specialist Sultanik, testified that his recommendation to retain a new assistant, despite her illness-related absences, was not followed. The Employer specifically told Sultanik to write that the assistant's attendance was unsatisfactory, and terminated her over Sultanik's objections.

Here again, the Employer's evidence fails to establish that any recommendations made by habilitation specialists are effective. Although the evaluation forms include the specialists' recommendation of whether to retain or terminate probationary assistants, Fried's testimony does not demonstrate that the evaluations carried any particular weight in the director's ultimate decision. In fact, Sultanik's counter-example tends to suggest that the specialists' recommendation does not carry much weight, as compared with management's own view. Under these circumstances, recommendations regarding probationary employees' status are not deemed to be effective. Williamette Industries, Inc., *supra*, 336 NLRB No. 59, slip op. at 1-2.

7. Annual evaluations

The record contains no evidence that the habilitation specialists' annual evaluation of the assistants have any direct impact on the assistants' wage rates or other terms of employment. The authority simply to evaluate employees, without any independent impact on their employment status, is insufficient to confer supervisory status. Beverly Health, *supra*, slip op. at 35; Willamette Industries, Inc., 336 NLRB No. 59, slip op. at 2 (2001); Franklin Hospital, *supra*, slip op. at 6; Dean & Deluca New York, Inc., 338 NLRB No. 159, slip op. at fn. 13 (2003); NYU Medical Center, *supra*, 156 F.3d at 413-4; Schnurmacher, *supra*, 214 F.3d at 265.

8. Discipline

As described above in more detail (Section III(I)), Fried testified generally that habilitation specialists have authority to "counsel" assistants and to recommend discipline if the counseling does not work. However, Fried gave no specific examples of specialists imposing or recommending discipline. Conclusionary statements, without supporting evidence, are insufficient to prove supervisory authority. Sears, Roebuck, *supra*. In fact, the only examples of discipline in the record for the Day Habilitation program were imposed by management, for assistants Jamal (last name unknown), Sabrina Miller and Maria (last name unknown), not by the specialists. Furthermore, Sultanik testified that management directed him to give a disciplinary warning to an assistant (Marcos Rivera) over Sultanik's objection. Acts of discipline that were actually directed or dictated by management do not prove supervisory authority. Dole Fresh Vegetables, Inc., 339 NLRB No. 90, slip op. at 2 (2003); Beverly Health, *supra*, 335 NLRB No. 54, slip op. at 35; NYU Medical Center v. NLRB, *supra*, 156 F.3d at 414.

In short, the Employer has failed to meet its burden of proving that the habilitation specialists have authority to discipline employees or effectively recommend discipline.

9. Other indicia of supervisory status

The record contains no specific evidence that habilitation specialists have authority to discharge, promote, reward, lay off or recall assistants, or to adjust their grievances.

Absent proof of any "primary" statutory criteria, any secondary indicia (e.g., superior pay and benefits, attending management meetings or supervisory trainings) are insufficient to support a finding of supervisory status. Training School at Vineland, *supra*, 332 NLRB at 1417.

Finally, their job description (Er. Ex. 16) states that each habilitation specialist “supervises” a small group of employees, including such specific duties as “assigns group activities and duties.” Even assuming *arguendo* that this document actually conveyed supervisory authority (e.g., the non-routine assignment of work using independent judgment), a grant of authority on paper is not sufficient to prove supervisory status if the authority is not exercised in practice. Beverly Health, *supra*, 335 NLRB No. 54, slip op. at 36; NYU Medical Center, *supra*, 156 F.3d at 413.

C. Developmental Specialists (Day Treatment Program)

1. Assignment of work

As discussed above, simply dividing up tasks among “interchangeable” employees who essentially perform the same work -- based on common-sense considerations, such as dividing the work fairly and evenly among employees, -- is routine or clerical in nature. By contrast, assessing the relative skills of different employees in assigning and directing their work may

require independent supervisory judgment. Beverly Health, *supra*, 335 NLRB No. 54, slip op. at 35; American Commercial Barge Line Co., *supra*, 337 NLRB No. 168 (2002); Franklin Hospital, *supra*, 337 NLRB No. 132; NLRB v. Meenan Oil Co., *supra*, 139 F.3d 311, 321.

The record contains a great deal of testimony, which will not be reiterated here, regarding the assignment and direction of developmental assistants, including the director's initial monthly schedule of duties, the daily readjustment of the schedule by the "specialist of the day," a weekly bathroom rotation suggested by an assistant, and so forth. (See Section IV(B) above.) Yet, despite all this testimony, there is no evidence that specialists must assess the assistants' skills or otherwise use independent supervisory judgment in assigning their work. Rather, the assignment appears to involve simply dividing or rotating the various interchangeable tasks among the assistants, to insure a fair and equal workload and to insure that all the tasks are "covered." In many instances, the assignments seem intended rotate the tasks that are considered unpleasant (e.g., bathroom duty, outdoor bus duty in cold weather), so that no one assistant is unfairly burdened with those tasks. Under the cases cited above, such routine considerations do not rise to the level of independent judgment within the meaning of Section 2(11). The routine nature of assigning these interchangeable tasks is further underlined by the assistants' ability to run the classrooms by themselves when the specialist is absent. Any disputes regarding the assignments (e.g., when an assistant does not want to go into the swimming pool) are referred to the acknowledged supervisor, McCormack, for resolution.

There was one sentence of testimony (Tr. 299) from McCormack that the developmental specialists decide which assistants should work on which consumer's individual treatment goals. McCormack did not explain whether certain assistants have more skill in

dealing with a particular type of disability or a particular aspect of treatment, or therefore whether a specialist might have to assess the assistant's skills in deciding how to assign those tasks. McCormack gave no specific examples of assigning the treatment goals, and as no explanation of how specialists make this decision. This evidence falls far short of the concrete evidence required to prove that an alleged supervisor uses independent judgment in assigning or directing employee. Franklin Hospital, *supra*. Thus, the evidence here is distinguishable from the specific testimony in Quinnipiac College that the college security guard shift supervisors' deployment of guards to various security incidents and emergencies on campus *required them to assess each employee's experience and capability to respond to the incidents*, as well as other security needs and requirements.

In short, the record indicates that the program's director establishes an initial prototype of assignments for the developmental assistants. To the extent that developmental specialists are involved in assigning the routine, unskilled or interchangeable tasks to various assistants based on such common-sense factors as dividing the work evenly, the assignment is routine or clerical in nature. Although there was one sentence of testimony that specialists assign assistants to work on the consumers' treatment goals (which, arguably, might require more skill), there was no explanation whatsoever of how those assignments are actually made and whether the specialists must assess the assistants' various skills. Thus, the Employer has not met its burden of demonstrating that the developmental specialists' assignment and direction of work requires independent judgment within the meaning of Section 2(11).

2. Being held responsible

The record contains no specific evidence that developmental specialists have been held responsible for the assistants' conduct.

3. Granting time off

Despite McCormack's initial denial that she signs the assistants' leave-request forms, and despite the Employer's recent insistence that developmental specialists also sign the form, it is obvious that McCormack is the person who actually decides whether to grant leave requests. As McCormack explained, she must make sure that there are enough assistants in the program every day, and the specialists do not have the "purview" from their individual classrooms to assess staffing levels for the entire program. Thus, the evidence does not demonstrate that developmental specialists have independent authority to grant time off to assistants.

4. Hiring

As described above in more detail (Section IV(E)), McCormack initially screens candidates' resumes, checks their educational requirements, selects them for interview, and actually interviews them. She generally has two or three candidates for each vacancy. After the interview, McCormack then takes each candidate on a tour of the facility, or asks a developmental specialist to give a tour. There is no dispute that specialists have given these tours to potential assistants, although witnesses disagreed as to the length of the tour (McCormack said 20 to 30 minutes, whereas specialist Palumbo said only 5 minutes). McCormack testified that she likes to get the specialist's "thoughts," including whether the candidate seemed comfortable with the severely disabled consumers. The only specific example McCormack gave was that Palumbo approved of a candidate who was recently hired.

Finally, McCormack testified that, after receiving input from the specialists, she goes on to check references and make a final decision.

Palumbo (who worked for the Employer since 1998) claimed that McCormack started asking her opinion of candidates only recently. She acknowledged making favorable comments regarding a candidate who was indeed hired. However, Palumbo also denied effectively making the choice of whom to hire, pointing out that she does not review their resumes, she does not interview them, does not know how many candidates are being considered for a particular vacancy, and does not ultimately select from among the multiple candidates.

Mere participation in the hiring process does not confer supervisory status. NYU Medical Center, 324 NLRB 887 (1997), *enforced in relevant part*, 156 F.3d 405 (2nd Cir. 1998); Beverly Health, *supra*; Dole Fresh Vegetables, Inc., 339 NLRB No. 90 (2003); Catholic Community Services, 254 NLRB 763, 766 (1981)(case manager's mere participation in the interviewing process does not confer authority to make effective hiring recommendations); GRB Entertainment, Inc., d/b/a Aardvark Post, 331 NLRB 320 (2000) and cases cited therein at 321 (alleged supervisor's testing of candidates' technical ability does not constitute an effective recommendation to hire unless the person hires or effectively recommends hiring employees). Rather, in order to show the authority effectively to recommend hiring, there must be evidence detailing specific instances where the recommendations played an effective role in the superiors' ultimate decision to hire or not hire an applicant. Fred Meyer Alaska, Inc., 334 NLRB 646 (2001); Third Coast Emergency Physicians, P.A., 330 NLRB 756 (2000). In the instant case, the mere fact that some specialists may give feedback to McCormack after giving them a tour does not prove supervisory status. It is, at most, evidence of some participation in the hiring

process, perhaps analogous to testing candidates' technical abilities, GRB Entertainment, Inc., d/b/a Aardvark Post, *supra*, or attending a supplementary interview, NYU Medical Center and Beverly Health, *supra*. The Employer's evidence does not establish that the developmental specialists have any significant input into the hiring process. For example, it is not clear from the one example briefly cited (Palumbo's approval of a recent candidate) that the specialists' recommendations carry any more weight than other factors, such as the candidates' resumes, references and McCormack's own impression from the interview. As Palumbo herself pointed out, while she may give an opinion on a particular candidate presented to her, she does not have access to the multiple candidates' resumes and interviews, and does not make a recommendation from among the multiple candidates. *Cf.* NYU Medical Center, 156 F.3d at 413 (physician's 15-20 minute "chat" with a candidate, without reviewing documentation, is not a "highly substantive" interview). In short, the Employer has failed to substantiate that the specialists effectively recommend hiring.

5. Transfer

There is no dispute that developmental specialists may request to have assistants transferred in or out of their program room. For present purposes, the question is whether they have authority effectively to recommend transferring assistants within the meaning of Section 2(11).

The record indicates that when a specialist asks McCormack to transfer an assistant out of her room, McCormack conducts an independent review, including whether another specialist consents to receiving the assistant in her room, and whether such transfer would disrupt the distribution of male assistants available to "bathroom" the male consumers.

Despite the Employer's assertion that specialists have effectively recommended transferring assistants "on numerous occasions" (Employer's brief p.15), McCormack gave only one specific example, i.e., the transfer of Daniel Davis out of Palumbo's room. However, McCormack and Palumbo contradicted each other's testimony regarding the Davis transfer. Palumbo claimed that her initial requests to transfer Davis were denied, and that he was only transferred later, after an unrelated incident. By contrast, McCormack testified that she transferred Davis based on Palumbo's request, after securing consent from the "receiving" specialist. McCormack claimed that the transfer was simply delayed, not denied, because she had to wait for another male assistant to become available. Given this contradictory evidence, it is impossible to determine whether Palumbo's "recommendation" to transfer Davis had any effect.

Conflicting or inconclusive evidence regarding an indicium of supervisory authority is insufficient to establish that particular indicium, and therefore fails to meet the Employer's burden of proof. Lakeview Health Center, 308 NLRB 75, 78 (1992); Children's Farm Home, 324 NLRB 61, 64 (1997); Phelps Community Medical Center, 295 NLRB 486, 490 (1989). In the instant case, the Employer's proffered example regarding the Davis transfer is insufficient to prove that teachers generally have authority effectively to recommend transfer. Furthermore, Palumbo testified that her request to transfer another assistant, Wanda McNeill, was denied, although a subsequent request to transfer McNeill was granted after an unrelated incident.

In short, although specialists may request transferring an assistant, the decision is made by McCormack based on a number of factors. The requests may or may not be granted. The

evidence does not demonstrate that the specialists' "recommendations" have any independent effect, or that they are usually granted without management's own review.

6. Annual evaluations

As described above in more detail in Section IV(G), Palumbo and McCormack contradicted each other as to whether McCormack reserves the right to review and possibly change the annual evaluations before they are given to the assistants. It is doubtful that specialists would exercise much independent authority in evaluating the assistants if upper management retains a great deal of control. NYU Medical Center v. NLRB, *supra*, 156 F.3rd at 413 (physicians exercised no independent judgment where the director told them what grades to give and redid some evaluations himself); Beverly Health, *supra*, slip op. at 35 (evaluations written by LPNs not supervisory where the ADON had "substantial input," including changing evaluations she disagreed with).

More significantly, the evidence fails to prove that the evaluations had any effect on the assistants' job status. It is well settled that the authority simply to evaluate employees, without any independent impact on their employment status, is insufficient to confer supervisory status. Beverly Health, *supra*, slip op. at 35; Williamette Industries, Inc., 336 NLRB No. 59, slip op. at 2 (2001); Franklin Hospital, *supra*, slip op. at 6; Dean & Deluca New York, Inc., 338 NLRB No. 159, slip op. at fn. 13 (2003); NYU Medical Center, *supra*, 156 F.3d at 413-4; Schnurmacher, *supra*, 214 F.3d at 265. In the instant case, there is no evidence that the evaluations have independently resulted in wage increases or decreases, promotions, demotions, discipline or terminations. Essentially, the annual evaluations allow developmental specialists to report on the assistants' performance, without any independent impact on their employment

status. Accordingly, under the cases cited above, the specialists' role in evaluating employees does not establish supervisory status.

7. Probationary evaluations

The record indicates that developmental specialists fill out a probationary evaluation form, indicating whether new assistants should be given “regular” status, terminated, or have their probationary period extended for a number of weeks. McCormack testified that she follows the specialists’ recommendation in this regard. However, in the specific instances discussed, it appears that management may actually control the determination. For example, with regard to assistants Edghill Christopher and Keith DeFreitas, the Employer’s assistant executive director had already approved extending their probationary period. With regard to assistant Davis, the two witnesses (McCormack and Palumbo) directly contradicted each other as to whether McCormack told Palumbo to write more favorable ratings and to recommend retaining Davis. Short of making a credibility determination, it is impossible to determine whether Palumbo made an effective recommendation regarding Davis’ status. Finally, although McCormack asserted that a specialist’s recommendation to terminate a probationary assistant would result in the assistant’s termination, she gave no specific examples to substantiate this assertion.

In light of the foregoing, the Employer’s evidence does not establish that the specialists’ recommendations regarding probationary employees’ status have any independent effect. The evaluations therefore do not prove supervisory authority. Willamette Industries, *supra*, 336 NLRB No. 59.

8. Discipline

McCormack testified that specialists may give verbal warnings to assistants, but that they would get her involved for any higher levels of discipline. Two documents were introduced into evidence (Er. Exs. 19 and 20), which the Employer's attorney characterized as disciplinary warnings. However, both documents are simply memoranda addressed to management, reporting employee misconduct but without actually imposing or recommending discipline for the misconduct. It is well established that "reportorial" warnings, which bring employee misconduct to management's attention but do not have any independent effect on the employee's job status, do not demonstrate supervisory authority. Williamette Industries, 336 NLRB No. 59, slip op. at 2; Franklin Hospital, 337 NLRB No. 132, slip op. at 5; NLRB v. Meenan Oil Co., 139 F.3d at 322; Schnurmacher Nursing Home, 214 F.3d at 266; Nathan Katz Realty, 251 F.3d at 989. Contrary to the Employer's assertion, these two memoranda do not demonstrate that any disciplinary recommendations from specialists are "usually followed" (Employer's brief, p.34). Furthermore, there were no examples of specialists imposing or recommending other discipline such as suspensions. The record indicates that more serious allegations (e.g., assistants' abuse of consumers) must be investigated by someone other than the specialist.

Finally, it should be noted that Palumbo testified that she was never told she could "discipline" assistants until after the union election in 2002, and that she wrote the memo regarding Davis (Er. Ex. 20) only because McCormack told her to do so. To the extent that an employer may attempt to "clothe" alleged supervisors with responsibility for discipline by directing them to issue or sign warnings, where the alleged supervisors do not actually exercise any independent judgment in imposing discipline, supervisory authority is not established.

Beverly Health, 335 NLRB No. 54, slip op. at 35. *See also* Dole Fresh Vegetables, Inc., 339

NLRB No. 90, slip op. at 2 (2003)(warning initiated by management and issued under the direction of management, not evidence of supervisory authority).

9. Termination

During the initial hearing, the Employer provided no evidence that specialists had terminated or recommended terminating any assistants. When the hearing re-opened, McCormack initially reiterated that no specialists had recommended terminating assistants. Later, after stating that there were “several” terminations for time and attendance problems, McCormack answered affirmatively to a series of leading questions as to whether those problems were brought to her attention by specialists, whether the specialists recommended “that something should be done,” and whether she accepted the recommendations (Tr. 303). However, in response to questioning by the Hearing Officer, McCormack was unable to provide any specific examples of a specialist recommending termination of an assistant for time and attendance problems. I therefore find that this indicium of supervisory status has not been demonstrated.

10. Approval of “excess hours”

McCormack testified that specialists may authorize assistants to work “excess hours,” i.e., more than their scheduled 35 hours per week, but less than 40 hours per week. “Excess hours” do not appear to involve overtime payment but, rather, a small amount of additional pay or “work adjustment time.” (For example, McCormack stated that an assistant could ask to leave a half-hour earlier on another day.) Although McCormack claimed she does not sign the excess hours form, she does sign the assistants’ overall time and attendance records before they are sent to the Employer’s human resources department.

Scheduling employees does not necessarily require independent judgment, where it is done within parameters pre-established by management and is subject to management's review. Dean & DeLuca New York, Inc., 338 NLRB No. 159 at n.15, citing Jordan Marsh Stores Corp., 317 NLRB 460, 467 (1995). *See also* Nathan Katz Realty, 251 F.3d at 990 (no evidence that building superintendents exercised "substantial autonomy" or independent judgment in creating the porters' schedules). I find that the specialists' ability to authorize some additional pay or "work adjustment time" falls within very limited parameters set by the Employer, such as setting the maximum of 40 hours per week. There is no evidence that the specialists' role in authorizing excess hours requires independent judgment within the meaning of Section 2(11) of the Act.

11. Other indicia of supervisory status

McCormack testified that developmental specialists deal with their assistants' complaints regarding the division of duties. Here again, I find the testimony to be vague and conclusionary. The evidence does not specify with any clarity what role the teachers and specialists play, and does not establish that they used independent judgment to adjust, or effectively recommend adjusting, employees' grievances. Training School of Vineland, *supra*, 332 NLRB 1412 at fn. 2.

The record contains no specific evidence that developmental specialists have authority to promote, reward, lay off or recall assistants.

Absent proof of any "primary" statutory criteria, any secondary indicia (e.g., superior pay and benefits, attending management meetings or supervisory trainings) are insufficient to

support a finding of supervisory status. Training School at Vineland, *supra*, 332 NLRB at 1417.

Finally, their job description (Er. Ex. 15) states that each developmental specialist “supervises” a small group of employees, including such specific duties as “assigns group activities and duties.” Even assuming *arguendo* that this document actually conveyed supervisory authority (e.g., the non-routine assignment of work using independent judgment), a grant of authority on paper is not sufficient to prove supervisory status if the authority is not exercised in practice. Beverly Health, *supra*, 335 NLRB No. 54, slip op. at 36; NYU Medical Center, *supra*, 156 F.3d at 413.

D. Pool coordinator

In the original Decision and Direction of Election in this case, dated March 29, 2001, the Acting Regional Director found the pool coordinator, Igor Shoukhardin, not to be a supervisor. Fried testified generally that Shoukhardin supervised one habilitation specialist by writing her evaluation, relaying information to her from management, and signing her time-off request forms along with the program coordinator. Fried also testified that Shoukhardin showed assistants from various programs how to do various recreational activities with the disabled students and consumers. Finally, as for discipline, Fried stated that the pool coordinator had “counseled” an unnamed assistant for her poor attendance and performance. There was no evidence that the counseling had any impact on the assistant's employment status, such as a wage decrease, demotion, suspension or being placed on probation. The Board has repeatedly found that verbal or written warnings, with no resultant adverse action against the employee, do not demonstrate any authority to discipline employees under Section 2(11). Bay

Area-Los Angeles Express, Inc., 275 NLRB 1063, 1077 (1985)(dispatcher's oral reprimand had no impact on employee's status); Washington Nursing Home, Inc., 321 NLRB 366 (1996)(LPNs' disciplinary warnings did not independently result in adverse action to CNAs); Panaro and Grimes, a Partnership d/b/a Azusa Ranch Market, 321 NLRB 811, 813 (1996) (absent evidence of impact on employee's status, "the mere issuance of a written warning is insufficient to establish supervisory authority"). Although Fried testified that the assistant "probably ... would have" been terminated based on the pool coordinator's recommendation if the assistant had not quit in the meantime, I find such testimony to be wholly speculative and insufficient to prove that the pool coordinator has independent authority to discipline employees or effectively to recommend their termination. There was no evidence that the pool coordinator possessed any other type of supervisory authority.

When the hearing re-opened, the Employer's attorney stated that the pool coordinator is "no longer there." It is not clear from the record whether the position has been permanently eliminated, or if it was simply vacant at the time the hearing reopened. No further evidence was introduced regarding the pool coordinator.

Thus, the current record does not warrant changing the original determination that the pool coordinator is not a supervisor as defined in Section 2(11) of the Act. In the future, if the Employer fills the pool coordinator position again, and if the duties change such that the person's 2(11) status is called into question, the Employer may take appropriate action at that time, such as filing a unit clarification petition.

VIII. SUMMARY AND RECOMMENDATIONS

In summary, I have found that that the Employer has not met its burden under Kentucky River, supra, of proving that teachers, habilitation specialists, developmental specialists and the pool coordinator are supervisors as defined in Section 2(11) of the Act. It is therefore recommended that the certification of representative which issued in Case No. 29-RC-9578 be deemed valid, and that the Board take appropriate action in the related test-of-certification case, Case No. 29-CA-24569.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 and 102.69 of the Board's Rules and Regulations, a request for review of this Supplemental 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 August 20, 2003.

Dated: August 6, 2003

/S/ DAVID POLLACK

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Acting Regional Director, Region 29
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177-8560-1500, 177-8560-4000,
177-8560-8000, 177-8560-9000

Appendix A -- Amendments to the record

The exhibits are hereby corrected as follows:

Exhibits which were rejected (Employer Exhibit 23, Petitioner Exhibits 16 and 17) should be placed in a separate "rejected exhibits" file, not together with the exhibits which were accepted into evidence.

The transcript is hereby amended as indicated below. (Page numbers below refer to the transcript from the re-opened hearing dates from November 2002 to January 2003, which started again at page 1.)

Page 71, line 20: The question was asked by "MR. RUBENSTEIN", rather than "MR. PANKEN".

Page 74, line 18 et seq.: All references to Robert "Parson" should be spelled "Hartson".

Page 172, lines 15-16 et seq.: "Evangalina Clark" rather than "Bangelino Clough".

Page 196, line 8: "a narrow issue" rather than "an arrow issue".

Page 309, line 20: "obstreperous" rather than "estapulous".

Page 332, line 10 et seq.: All references to "disfouge" or "disfougia" should be spelled "dysphagia".

Page 390, line 25: Linda "Laul" rather than "Law".

Page 575, line 21 et seq.: All references to "IPP" should be spelled "ITP" (abbreviation for Individualized Treatment Plan).

Page 665, line 5: HEARING OFFICER "ADAMS" rather than "PANKEN".

Page 819, line 2 et seq.: All references to program coordinator "Juan" or "Wanda" Flores should be spelled "Juana" Flores.

Page 878, line 6 et seq.: All references to Amy "Free" should be spelled "Fried".

Page 895, line 14: "Well, Doug Green" rather than "Wanda Green".

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