

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12**

LAKELAND HEALTH CARE ASSOCIATES, LLC.,
D/B/A WEDGEWOOD HEALTHCARE CENTER

and

Case 12-CA-27044

UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, LOCAL 1625

**MOTION TO TRANSFER PROCEEDINGS TO THE
NATIONAL LABOR RELATIONS BOARD AND FOR SUMMARY JUDGMENT**

The above-captioned case involves a test of the certification of representative issued by the Regional Director for Region 12 to United Food and Commercial Workers Union, Local 1625 (the Union) as the exclusive collective-bargaining representative of a unit of certain employees employed by Lakeland Health Care Associates, LLC., d/b/a Wedgewood Healthcare Center (Respondent or the Employer). Pursuant to Sections 102.24 and 102.50 of the Rules and Regulations of the National Labor Relations Board (the Board), and in order to effectuate the purposes of the Act and to avoid unnecessary costs and unwarranted delay, Counsel for the Acting General Counsel respectfully moves that the above-captioned case be transferred to and continued before the Board, and that the Board enter a Summary Judgment in this matter.

In support of this Motion, Counsel for the Acting General Counsel states as follows:

1. On August 11, 2010, the Union filed a petition in Case 12-RC-9426 seeking to represent certain employees of Respondent. On August 13, 2010, the Regional Director issued a Notice of Hearing to be held on August 25, 2010, and a Hearing Officer conducted a hearing on various dates in August 2010. On September 24, 2010, the Regional Director issued a Decision and Direction of Election in Case 12-RC-9246, which directed that an election be held among Respondent's employees in the following appropriate unit (the Unit):

All licensed practical nurse team leaders employed by the Employer at its facility located at 1010 Carpenter's Way, Lakeland, Florida, excluding all other employees, guards and supervisors as defined in the Act.

On October 8, 2010, Respondent filed a timely Request for Review of the Decision and Direction of Election and Request to Stay Election with the Board. Pursuant to the Decision and Direction of Election, on October 21, 2010, an election by secret ballot was held among the employees employed in the Unit and the ballots were impounded. On December 6, 2010, the Board issued its order denying the Request for Review as it raised no substantial issues warranting review, and denying the Request to Stay Election as moot. Thereafter, the ballots were counted and the tally showed that 13 employees voted in favor of representation by the Union, eight employees voted against representation by the Union, there was one challenged ballot which was not sufficient in number to affect the results of the election, and that a majority of the valid votes counted plus challenged ballots had been cast for the Union. No objections to the election were filed.

On January 6, 2011, the Regional Director issued a Certification of Representative of the Union as the exclusive collective-bargaining representative of the employees in the Unit.

Copies of the petition, Decision and Direction of Election, the Employer's Request for Review and Request to Stay Election, the Board Order Denying the Employer's Request for Review and Request to Stay Election, the Tally of Ballots, and Certification of Representative are attached as Exhibits A, B, C, D, E and F, respectively.

2. On February 9, 2011, the Union filed an unfair labor practice charge in Case 12-CA-27044. On February 10, 2011, a copy of that charge was served on Respondent by regular mail. Copies of the charge, service letter, and the affidavit of service are attached as Exhibits G, H and I, respectively. On February 22, 2011, the Acting Regional Director issued a Complaint and Notice of Hearing, alleging that Respondent has violated Section 8(a)(1) and (5) of the Act by failing and refusing to recognize and bargain with the Union as the

exclusive collective-bargaining representative of the Unit since on or about January 13, 2011. On March 7, 2011, Respondent filed an Answer to the Complaint. Copies of the Complaint and Notice of Hearing, the affidavit of service of the Complaint and Notice of Hearing, and Respondent's Answer are attached as Exhibits J, K and L, respectively.

3. Counsel for the Acting General Counsel respectfully submits that this Motion for Summary Judgment should be granted inasmuch as Respondent's Answer raises no material issues requiring a hearing in this case. In its Answer, Respondent admits paragraphs 2(a) through 2(d), 3, 4, 5(b), 6 and 7, and essentially admits paragraph 1 of the Complaint. Respondent admits the allegations in paragraph 1 that the charge in Case 12-CA-27044 was filed and served on or about the dates alleged therein, but otherwise denies paragraph 1 of the Complaint. Thus, notwithstanding the denial, Respondent effectively admits Paragraph 1 of the Complaint. Paragraph 1 of the Complaint is also proven by the charge, service letter for the charge, and affidavit of service of the charge, which are attached as Exhibits G, H and I.

Respondent denies paragraph 5(a) of the Complaint, which alleges the appropriateness of the Unit, and paragraph 5(c) of the Complaint, which alleges that the Union is the Section 9(a) representative of the Unit. However, these issues were litigated and determined in the underlying representation case, Case 12-RC-9426.

Respondent denies paragraphs 8 and 9 of the Complaint, the conclusions alleging that Respondent has been failing and refusing to bargain collectively with the Union in violation of Section 8(a)(1) and (5) of the Act, and that Respondent's unfair labor practices affect commerce. Respondent also denies the unnumbered paragraph following paragraph 9 of the Complaint, stating that the Acting General Counsel seeks a remedial Order requiring Respondent to bargain in good faith with the Union, on request, for the period required under *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962), as the recognized bargaining representative of

the Unit, and further seeking all other relief as may be just and proper to remedy the unfair labor practices alleged.¹ The legal conclusions set forth in paragraphs 8 and 9 of the Complaint are established by the previously litigated representation case determinations and by Respondent's admissions in its Answer.

In its Answer, Respondent states three affirmative defenses. As a first defense, Respondent states that the allegations of the Complaint are barred by Section 10(b) of the Act. However, Respondent does not cite any evidence in support of this defense, and Respondent's admissions establish that the charge was timely filed and the Complaint was properly issued. Section 10(b) of the Act provides that no complaint shall issue based upon any unfair labor practice occurring more than six (6) months prior to the filing and service of the charge. As noted above, Respondent admits that the charge was filed on or about February 9, 2011, and a copy was served on or about February 10, 2011, and the dates of filing and service of the charge are also proved by the attached Exhibits G, H and I. In addition, Respondent admits that its alleged unfair labor practice occurred less than six months before the filing and service of the charge. Accordingly, the charge was timely filed and served. Specifically, in its Answer, Respondent admits the allegation in paragraph 7 of the Complaint that since on or about January 13, 2011, a date less than one month before the filing and service of the charge, it has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit.

As a second defense, Respondent states that the Certification of Representative issued by the Board is invalid, and as a third defense, Respondent incorporates by

¹ Other relief as may be just and proper to remedy the unfair labor practices includes an order requiring Respondent, in addition to physically posting paper Notices to Employees at its facility, to distribute the Notices to Employees electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if Respondent customarily communicates with employees by such means. *Mi Pueblo Foods*, 356 NLRB No. 107 (2011) and *Fountain View of Monroe*, 356 NLRB No. 94 (2011), citing *J. Picini Flooring*, 356 NLRB No. 9 (2010).

reference, as though fully set forth in its Answer, “Respondent’s Post Hearing Brief and Request for Review, all of which were filed In Case 12-CA-27044.” Respondent erroneously asserts in its third defense that its Post Hearing Brief and Request for Review were filed in the instant case. Rather, those documents were filed and considered in the underlying representation case, Case 12-RC-9426.² Like Respondent’s denials of paragraphs 5(a) and 5(c) of the Complaint, Respondent’s second and third defenses are attempts to relitigate issues which were previously raised in the related representation proceeding and ruled on by the Board. It is well settled that in a proceeding alleging a violation of Section 8(a)(5) of the Act, absent newly discovered and previously unavailable evidence or special circumstances, a respondent is not entitled to relitigate issues that were, or could have been, litigated in prior related representation proceedings. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); Secs. 102.67(f) and 102.69(c) of the Board’s Rules and Regulations.

Respondent is testing the certification of the Union as the exclusive bargaining representative of the Unit. Respondent does not assert the existence of any newly discovered or previously unavailable evidence or special circumstances that would require the Board to reexamine its denial of Respondent’s Request for Review. Accordingly, Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding, and there is no need for a hearing in this matter.

4. As an appropriate remedy for the refusal to bargain herein, it is submitted that in order to accord the employees the services of their selected bargaining representative for the period provided by law, the initial year of certification should be construed as beginning on the date Respondent commences to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229

² As noted above, Respondent’s Request for Review and Request to Stay Election is attached hereto as Exhibit C.

(1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

WHEREFORE, because Respondent has failed to raise any issues of material fact requiring a hearing, it is respectfully requested that:

- (A) This case be transferred to and continued before the Board;
- (B) The allegations of the Complaint be found to be true;
- (C) This motion for summary judgment be granted; and
- (D) The Board issue a Decision and Order containing findings of fact and

conclusions of law in accordance with the allegations of the Complaint, and remedying Respondent's unfair labor practices by granting relief including a provision that for the purpose of determining the effective duration of the Union's certification, the initial year of certification shall be deemed to begin the date Respondent commences to bargain in good faith with the Union, and other relief as is deemed just and proper.

Dated at Tampa, Florida, this 18th day of March, 2011.

/s/ Kathleen M. Troy

Kathleen M. Troy
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Attachments - Exhibit A through L

CERTIFICATE OF SERVICE

I hereby certify that the Acting General Counsel's Motion to Transfer Proceedings to the Board and Motion for Summary Judgment in the matter of Lakeland Healthcare Associates, LLC. d/b/a Wedgewood Healthcare Center, Case 12-CA-27044, was electronically filed with the National Labor Relations Board and served by electronic mail upon the below-listed parties on the 18th day of March, 2011.

Electronically filed with:

Hon. Lester Heltzer
Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, DC 20570-0001

By electronic mail to:

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EXHIBIT A

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
PETITION

DO NOT WRITE IN THIS SPACE	
Case No. 12-RC-9426	Date Filed 8-11-10

INSTRUCTIONS: Submit an original of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.

The Petitioner alleges that the following circumstances exist and requests that the NLRB proceed under its proper authority pursuant to Section 9 of the NLRA.

1. PURPOSE OF THIS PETITION (if box RC, RM, or RD is checked and a charge under Section 8(b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.) (Check One)

RC-CERTIFICATION OF REPRESENTATIVE - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.

RM-REPRESENTATION (EMPLOYER PETITION) - One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.

RD-DECERTIFICATION (REMOVAL OF REPRESENTATIVE) - A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.

UD-WITHDRAWAL OF UNION SHOP AUTHORITY (REMOVAL OF OBLIGATION TO PAY DUES) - Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.

UC-UNIT CLARIFICATION - A labor organization is currently recognized by Employer, but Petitioner seeks clarification of placement of certain employees: (Check one) In unit not previously certified. In unit previously certified in Case No. _____

AC-AMENDMENT OF CERTIFICATION - Petitioner seeks amendment of certification issued in Case No. _____
Attach statement describing the specific amendment sought.

2. Name of Employer: **Wedgewood Healthcare Center** Employer Representative to contact: **Cara Roland** Tel. No.: **863-815-0488**

3. Address(es) of Establishment(s) involved (Street and number, city, State, ZIP code): **1010 Carpenter's Way, Lakeland, Florida 33809** Fax No.: **863-815-0580**

4a. Type of Establishment (Factory, mine, wholesaler, etc.): **Nursing Home** 4b. Identify principal product or service: **Health Care** Cell No.: _____ e-Mail: _____

5. Unit Involved (In UC petition, describe present bargaining unit and attach description of proposed clarification.) 6a. Number of Employees in Unit

Included: **All full-time and regular part-time Licensed Practical Nurses (LPN's)** Present: **21**

Excluded: **All other employees, guards and supervisors as defined by the Act.** Proposed (By UC/AC): _____

6b. Is this petition supported by 30% or more of the employees in the unit? Yes No
*Not applicable in RM, UC, and AC

(If you have checked box RC in 1 above, check and complete EITHER item 7a or 7b, whichever is applicable)

7a. Request for recognition as Bargaining Representative was made on (Date) **8/10/2010** and Employer declined recognition on or about (Date) **8/10/2010** (if no reply received, so state).

7b. Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8. Name of Recognized or Certified Bargaining Agent (if none, so state): _____ Affiliation: _____

Address: _____ Tel. No.: _____ Date of Recognition or Certification: _____
Cell No.: _____ Fax No.: _____ e-Mail: _____

9. Expiration Date of Current Contract. If any (Month, Day, Year): _____ 10. If you have checked box UD in 1 above, show here the date of execution of agreement granting union shop (Month, Day and Year): _____

11a. Is there now a strike or picketing at the Employer's establishment(s) involved? Yes No 11b. If so, approximately how many employees are participating? _____

11c. The Employer has been picketed by or on behalf of (Insert Name) **N/A**, a labor organization, of (Insert Address) _____ Since (Month, Day, Year) _____

12. Organizations or individuals other than Petitioner (and other than those named in items 8 and 11c), which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in unit described in item 5 above (If none, so state)

Name	Address	Tel No	Fax No.

13. Full name of party filing petition (if labor organization, give full name, including local name and number): **United Food & Commercial Workers, Local 1625**

14a. Address (street and number, city, state, and ZIP code): **705 E Orange St., Lakeland, Florida 33801** 14b. Tel. No. EXT: **863-686-1625** 14c. Fax No.: **863-583-3327**
14d. Cell No.: _____ 14e. e-Mail: **ufcwlocal1625@aol.com**

15. Full name of national or international labor organization of which Petitioner is an affiliate or constituent (to be filled in when petition is filed by a labor organization): **United Food & Commercial Workers International Union**

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name (Print): **Glenn Harris** Signature: *Glenn Harris* Title (if any): **Director of Organizing**

Address (street and number, city, state, and ZIP code): **705 E Orange St., Lakeland, Florida 33801** Tel. No.: **863-686-1625** Fax No.: **863-583-3327**
Cell No.: **727-365-1169** e-Mail: _____

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)
PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

RK

EXHIBIT B

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12**

LAKELAND HEALTH CARE
ASSOCIATES, LLC., d/b/a
WEDGEWOOD HEALTHCARE CENTER

Employer

and

Case 12-RC-9426

UNITED FOOD AND COMMERCIAL
WORKERS, LOCAL 1625

Petitioner

DECISION AND DIRECTION OF ELECTION

Lakeland Health Care Associates, LLC., d/b/a Wedgewood Healthcare Center (the Employer) operates a nursing home in Lakeland, Florida.¹ The Petitioner, United Food and Commercial Workers, Local 1625 (the Union), seeks to represent a unit composed of licensed practical nurses (LPNs).² There are 28 full-time LPNs³ in the petitioned-for unit, including 8 PRN LPNs.⁴ The Employer contends that all 28 LPNs are supervisors within the meaning of Section 2(11) of the National Labor Relations Act, as amended (the Act).⁵ The Employer argues

¹ The parties stipulated that the Employer is a limited liability corporation incorporated or licensed to do business in Florida, with an office and place of business located at 1010 Carpenter's Way, Lakeland, Florida, where it is engaged in the business of operating a single-facility nursing home, and that during the past 12 months, it has derived gross revenues exceeding \$100,000, and has purchased and received at its Lakeland, Florida facility goods and materials valued in excess of \$50,000 directly from points located outside the State of Florida.

² The petition identifies the unit as "all full-time and regular part-time" LPNs. The petition excludes "all other employees, guards, and supervisors as defined in the Act."

³ The Employer has no regular part-time LPNs.

⁴ The Petition was amended to include the PRN LPNs.

⁵ The parties agree that if I find that the LPNs are not supervisors, then the voting eligibility of PRN LPNs should be determined by the formula set forth in Sisters of Mercy Health Corp., 298 NLRB 483 (1990).

that LPNs supervise certified nursing aides (CNAs). There are 96 CNAs, including 42 PRN and part-time CNAs.⁶

A hearing officer of the Board conducted a hearing, and both parties submitted briefs. I have considered the evidence and arguments presented by the parties at the hearing and in their respective briefs. As explained below, I conclude that the Employer has failed to demonstrate, by a preponderance of the evidence, that LPNs are statutory supervisors.

I will first provide a brief overview of the Employer's facility, and describe the duties of the CNAs and LPNs. I will then set forth the basic framework of analysis that the Board uses in deciding supervisory status, after which I will set forth the evidence as to those supervisory indicia that the Employer argues are applicable to LPNs. Finally, I will apply the Board's current case law to this evidence and explain my conclusion.

1. Overview of the Facility

The Employer's facility consists of 120 beds divided into two units, each with 60 beds. The Rosewood unit (also known as Northside) houses residents⁷ for short-term stays of roughly 25 to 28 days. These residents are usually undergoing rehabilitation after surgery, and upon departing the facility, return to family or an assisted living facility. The Southway unit (also known as Southside unit) is for long-term care residents, and includes 18 beds in a secured area set

⁶ The record does not reflect the breakdown between part-time CNAs and PRN CNAs.

⁷ All residents are patients, but for consistency, I shall use "residents."

aside for residents with Alzheimer's disease or dementia.⁸ Residents with Alzheimer's or dementia require more attention than other residents. Access to and from the secured area is controlled via combination locked doors.

The west side of the facility includes the main dining room,⁹ kitchen, maintenance and housekeeping departments,¹⁰ central supply department, and laundry department. The administrator and the director of nursing each have an office directly off the lobby. In addition, the lobby provides access to the business office,¹¹ the admissions office, the social services office, the payroll office,¹² and the life enrichment office.¹³

The Union already represents a unit of the Employer's nonprofessional employees. The parties' current collective-bargaining agreement (cba) runs from September 30, 2009, until February 28, 2012. The unit as described in the cba includes all full-time and regular part-time employees in the following positions: cook, dietary aide, activities assistant, maintenance assistant, nursing assistant,¹⁴ janitor, laundry aide, and housekeeping aide.¹⁵

⁸ The halls comprising the Rosewood unit have room numbers in the 200s, 300s, 400s, and some in the 500s. The halls comprising the Southway unit have room numbers in the 600s, 700s, 800s, and some in the 500s. The dementia unit rooms are in the 600s hall.

⁹ Dementia residents have their own dining area.

¹⁰ The Employer refers to the housekeeping, maintenance, and laundry departments as the department of environmental services.

¹¹ The business office oversees payroll, billing and collections.

¹² The medical records director shares an office with the payroll employee.

¹³ The life enrichment director oversees volunteers from the community who work with residents, as well as organizing birthday parties for residents, and performing related functions.

¹⁴ This is the same position as certified nursing aide.

¹⁵ The cba excludes from the unit the following positions: administrator, director of nursing, assistant director of nursing, nursing supervisor, charge nurses, all registered nurses, all licensed practical nurses, activities director, social service director, maintenance supervisor, staff development coordinator, bookkeepers, administrative secretary/personnel specialist, all office clerical associates, medical records secretary, licensed physical therapy assistants, professional associates" and "technical supervisors as defined in" the Act. There is no explanation of the term "technical supervisor."

The Employer refers to LPNs and RNs who are assigned to specific rooms as team leaders.¹⁶ All of the LPNs at issue in this proceeding are team leaders. At the hearing, the Employer and its witnesses referred to LPN team leaders as charge nurses, while the Union and its witnesses maintained that LPNs are referred to in the workplace as team leaders but not charge nurses. The director of nursing testified that she uses “team leader” rather than “charge nurse” because the latter connotes a bull charging at someone. LPNs are issued identification badges with the words “LPN team leader,” but not “charge nurse” or “supervisor.” However, the record includes the job description for LPNs, which identifies the position as “charge nurse (LPN/LVN).” Various documents in the record refer to LPNs as “team leaders,” “team leader/supervisor/department head,” and by other rubrics. For the sake of clarity, I shall use the titles LPN and LPN team leader.¹⁷

LPN team leaders and CNAs work in three shifts: 6:45 a.m. until 3:15 p.m. (the first shift); 2:45 p.m. until 11:15 p.m. (the second shift); and 10:45 p.m. until 7:15 a.m. (the third shift). In the Rosewood unit, there are generally three LPNs and six CNAs scheduled on both the first and the second shifts,¹⁸ and two LPNs and four CNAs scheduled on the third shift. In the Southway unit, there are two or three LPNs and eight CNAs scheduled on the first shift, two LPNs and seven

¹⁶ Two LPNs and two RNs work in the MDS department (MDS stands for “minimum data set”). The MDS LPNs and RNs mainly track data about residents using a national data base. They do not perform patient care duties. The Union does not seek to represent the MDS LPNs, and at the hearing the parties agreed to their exclusion.

¹⁷ Neither party contends that the RN team leaders belong in the LPN unit. The record does not reflect how many RN team leaders are employed at this facility. It appears from the record that PRN RNs work as team leaders when LPNs are scheduled off, but that there are no full-time RN team leaders.

¹⁸ Staffing varies with the census, or number of occupied beds, as I will explain below in discussing the duties of the staffing coordinator.

to eight CNAs scheduled on the second shift, and two LPNs and five CNAs scheduled on the third shift. The Employer uses PRN LPNs when a scheduled LPN calls off or is on vacation.

The director of nursing works Monday through Friday from about 7:15 a.m. until about 5:30 p.m.¹⁹ Each unit has a unit manager²⁰ who works from Monday through Friday.²¹ An RN works as a nursing supervisor from 3:00 p.m. until 11:00 p.m. on weekdays, and another RN works as a nursing supervisor from noon until 8:00 p.m. on weekdays.²² There is also an RN who works as the "weekend supervisor;" she works from 7:00 a.m. until 11:00 p.m. on Saturdays and Sundays. The unit managers and nursing supervisors report to the director of nursing.²³ Although the LPN job description states that the LPN reports to the nursing supervisor, the record reflects that the LPNs report to the unit managers until 3:00 p.m. on weekdays, and then to the nursing supervisor who works from 3:00 p.m. until 11:00 p.m. On weekends, LPNs report to the weekend supervisor. There is no RN supervisor or unit manager in the facility on the third shift, from 11:00 p.m. until 7:00 a.m. seven days a week.²⁴ The director of nursing testified she is on call 24 hours per day, seven days per week, should there be an emergency.

¹⁹ There is no one in the position of assistant director of nursing.

²⁰ The unit manager job description states that the unit manager can be an RN or LPN. The current unit managers are RNs. An LPN worked briefly as a unit manager in 2005.

²¹ The director of nursing testified that the unit managers work from roughly 7:15 a.m. until 5:30 p.m. The Southway unit manager testified that she works until late in the evening, sometimes the middle of the night.

²² The RN supervisor working from noon until 8:00 p.m. is primarily responsible for admissions.

²³ The director of nursing and other department heads report to the administrator.

²⁴ At the hearing, the parties agreed, and I find based upon the record as a whole, that the following positions are excluded because they exercise supervisory authority within the meaning of Section 2(11) of the Act: director of nursing, unit manager, nursing supervisor (weekdays, 3:00 p.m. until 11:00 p.m. and weekdays, 12:00 noon until 8:00 p.m.), and weekend supervisor.

Every weekday at roughly 7:30 a.m., the director of nursing meets with the two unit managers to review significant resident care issues that have arisen over the past 24 hours. At approximately 8:30 a.m., the director of nursing conducts rounds with the social services director and the MDS coordinator. At 9:30 a.m. every weekday, she attends a meeting with the administrator, the business office manager, the MDS coordinator, the admissions coordinator, the housekeeping director, the dietary director, the therapy director, the director of medical records, and the life enrichment director. LPNs do not attend this meeting.²⁵

CNAs receive a wage rate between \$8.75 per hour and \$10.70 per hour.²⁶

LPNs receive a wage rate between \$15.50 per hour and \$19.00 per hour.²⁷

CNAs and LPNs are eligible for the Employer's basic health insurance plan, while CNAs are eligible only after one year for the more comprehensive health insurance plan that the Employer makes available to management upon hire.

2. The CNAs' Duties²⁸

CNAs perform a range of personal nursing care functions. They assist residents with bathing, dental and mouth care, hair care, and shaving. They help residents dress and undress, lift and turn residents to avoid bed sores, and assist in transferring residents from their beds to chairs, bathtubs, the dining room, etc. CNAs keep residents dry, changing linen and clothing when wet or soiled. They change bed pans and monitor and record bowel routines. CNAs take residents'

²⁵ An LPN team leader employed for 10 years at the Employer's facility has never attended a management meeting.

²⁶ PRN CNAs start at \$9.25 per hour and top out at \$11.20 per hour.

²⁷ PRN LPNs start at \$16.00 per hour and top out at \$19.50 per hour.

²⁸ Both this section and the next, concerning LPN duties, contain evidence relevant to the supervisory indicia at issue. I will point out such evidence in my analysis.

vital signs. They prepare residents for medical procedures, social programs, family visits, and other activities.

The record includes copies of a one-page document titled "unit shift assignment sheet" (to be discussed in depth below). At the bottom of this document, there is a list of "C.N.A. Duties," which includes "turn and position residents frequently," "clean and cut fingernails PRN,"²⁹ "foleys and drainage bags in covered bags," "report nutrition and bowel movements," and "beds stripped daily Mon-Fri and weekends if needed."

The record also includes a large binder titled "Nursing Procedure Manual" detailing how to perform hundreds of nursing procedures. Each procedure is described on a separate sheet with sections for "purpose," "equipment," and "procedure." CNAs are responsible for knowing how to perform 15 of these procedures, including "hip precautions" and "nail care."

CNAs document their daily activities caring for each resident on a form known as the Activities of Daily Living (ADL).³⁰ CNAs also follow instructions contained in the resident's care card, which is maintained at the nurse's station in the book with ADL sheets. The care card contains information specific to the care of the resident, such as whether the resident requires a special diet and whether transferring him requires two CNAs because of the risk of fall.³¹

²⁹ It appears from the record that this use of the letters "PRN" refers to the nursing practice procedures manual.

³⁰ Each nurse's station has an ADL book with sheets for each resident on the halls assigned to that station. CNAs make daily entries in the ADL book.

³¹ It appears from the record that the MDS staff oversees care cards, adding or removing information based upon input mainly from CNAs and LPNs. For example, a CNA testified that she contacted the MDS director and received permission to add to a resident's care card a warning that the resident trips and should not be given pads.

CNAs must be certified by the State of Florida and maintain current certification.

The job description for CNA states that the position is supervised by “charge nurse.” The LPN team leader meets with the CNA at the end of her shift to update the LPN on the status of the CNA’s assigned residents.³²

3. The LPN’s Duties as Set Forth in the Job Description And a Unit Manager’s List of Team Leader Duties

The LPN team leader begins each shift by receiving report on residents from the LPN team leader coming off of the prior shift. The LPN team leader coming on duty finds out what new treatments have been ordered for residents³³ and what medications must be administered.³⁴ Early in the shift, the LPN team leader meets with CNAs to tell them to prepare their assigned residents for any special treatments,³⁵ physician appointments, family visits, etc. The LPN team leader monitors the CNAs throughout the shift to ensure that they perform assigned tasks.³⁶

According to the LPN’s job description,³⁷ the LPN is required to perform various “administrative functions” including: “direct the day-to-day functions of the nursing assistants in accordance with current rules, regulations, and guidelines that govern the long-term care facility;” “assure that all assigned nursing

³² A CNA who works on the overnight shift testified that he has little communication with his LPN team leader regarding resident care because the residents sleep during much of his shift.

³³ For example, a resident may require more frequent turning in bed than usual.

³⁴ This information is contained in the Employer’s computer system, which the LPN team leader uses. The record does not reflect whether CNAs have direct access to the computer.

³⁵ For example, the CNA could be responsible for checking a resident’s vital signs more frequently than usual or collecting a stool specimen.

³⁶ LPN team leaders have the authority to change the priorities for tasks performed by CNAs. For example, if a resident has a medical emergency the LPN team manager may instruct the CNA to stop doing whatever he was doing and help with the resident.

³⁷ As mentioned above, the title on the job description is “charge nurse (LPN/LVN).”

personnel comply with the written policies and procedures established by the facility;" "meet with assigned nursing staff, as well as support personnel, in planning the shift's services, programs, and activities;" and "ensure that all nursing personnel comply with the procedures set forth in the Nursing Service Procedures Manual."

The job description also requires the LPN to perform certain "charting and documentation" functions, such as: "transcribe physician's orders to resident charts, cardex, medication cards, treatment/care plans as required;" and "chart nurses' notes in an informative and descriptive manner that reflects the care provided to the resident, as well as the resident's response to the care."

In addition, the job description requires the LPN to perform certain "drug administration functions," including: "prepare and administer medications as ordered by the physician;" "notify the nurse supervisor of all drug and narcotic discrepancies noted on your shift," and "ensure that prescribed medication for one resident is not administered to another."

The LPN job description additionally sets forth numerous "personnel functions." These include: "inform the nurse supervisor of staffing needs when assigned personnel fail to report to work;" "report absentee call-ins to the nurse supervisor;" "provide leadership to nursing personnel assigned to your unit/shift;" "make daily rounds of your unit/shift to ensure that nursing services personnel are performing their work assignments in accordance with acceptable nursing standards. Report problem areas to the nurse supervisor;" "meet with your shift's nursing personnel, on a regularly scheduled basis, to assist in identifying and

correcting problem areas and/or to improve services;" and "ensure that departmental disciplinary action is administered fairly and without regard to race, color, creed, national origin, age, sex, religion, handicap, or marital status."

The job description lists numerous "nursing care functions," including: "ensure that rooms are ready for new admissions;" "make rounds with physicians as necessary;" "consult with resident's physician in providing the resident's care, treatment, rehabilitation, etc., as necessary;" "make periodic checks to ensure that the prescribed treatments are being properly administered by certified nursing assistants and to evaluate the resident's physical and emotional status;" "ensure that direct nursing care be provided by a licensed nurse, certified nursing assistant, and/or nurse aide trainee qualified to perform the procedure;" "administer professional services such as: catheterization, tube feedings, suction, applying and changing dressings/bandages, packs, colostomy, and drainage bags, taking blood...;"³⁸ and "ensure that personnel providing direct care to residents are providing such care in accordance with the resident's care plan and wishes."

The LPN job description also contains a small section titled "leadership," which states that the LPN "supervises" CNAs, and possesses "supervisory authority" to "**report[] performance related issues of CNAs to nursing supervisor**" (emphasis added).

The record includes four-page exhibit setting forth the "team leader expectations" as prepared by one of the unit managers. The first page of the

³⁸ LPNs are all IV certified so they can start intravenous medications. The record does not reflect whether the Employer requires this.

exhibit is a sign-in sheet indicating that the unit manager reviewed these expectations with 10 LPN team leaders on August 9, 2010, two days before the instant petition was filed. The exhibit includes a single-page list of expectations for each shift.

The expectations for the third shift include: "work as a team instruct CNA in expectations. Remind them of side duties, especially cleaning wheel chairs as assigned;" "complete skin sweeps (have your CNA tell you when that person is awake);" "follow up with CNA jobs. Chart BM's;" and "be ready to give report @ 6:45 a.m." The expectations for the first and second shifts include: "after receiving report and count, you need to give report to your CNA with your expectations vs. [sic] appointments and baths;" "follow up with CNA duties. Showers completed, men are shaven, residents dressed properly, rooms looking good;" and "ready for report [15 minutes before the end of shift]."

4. Legal Framework

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

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

To meet the definition of a supervisor set forth in Section 2(11) of the Act, a person needs to possess only one of the 12 specific criteria listed, or the authority to effectively recommend such action. *Oakwood Healthcare*, 348 NLRB 686, 687 (2006). The exercise of that authority, however, must involve the use of

independent judgment. *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000). Thus, the exercise of “supervisory authority” in merely a routine, clerical, perfunctory or sporadic manner does not confer supervisory status. *Chrome Deposit Corp.*, 323 NLRB 961, 963 (1997); *Feralloy West Corp. and Pohng Steel America*, 277 NLRB 1083, 1084 (1985); see also *Oakwood Healthcare*, 348 NLRB at 687.

Possession of authority consistent with any of the indicia of Section 2(11) of the Act is sufficient to establish supervisory status, even if this authority has not yet been exercised. See, e.g., *Pepsi-Cola Co.*, 327 NLRB 1062, 1063 (1999); *Fred Meyer Alaska*, 334 NLRB 646, 649 at n.8 (2001). The absence of evidence that such authority has been exercised may, however, be probative of whether such authority exists. See, *Michigan Masonic Home*, 332 NLRB 1409, 1410 (2000); *Chevron U.S.A.*, 308 NLRB 59, 61 (1992).

Proving supervisory status is the burden of the party asserting that such status exists, here the Employer. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-712 (2001); *Oakwood Healthcare*, 348 NLRB at 687. As a general matter, I note that for a party to satisfy the burden of proving supervisory status, it must do so by “a preponderance of the credible evidence.” *Dean & Deluca*, 338 NLRB 1046, 1047 (2003); *Star Trek: The Experience*, 334 NLRB 246, 251 (2001). Any lack of evidence in the record is construed against the party asserting supervisory status. See, *Williamette Industries, Inc.*, 336 NLRB 743 (2001); *Michigan Masonic Home*, 332 NLRB at 1409. Moreover, “[w]henver the evidence is in conflict or otherwise inconclusive on particular

indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Consequently, mere inferences or conclusory statements without detailed specific evidence of independent judgment are insufficient to establish supervisory status. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991).

The Employer argues that LPNs possess supervisory authority to discipline, suspend, effectively recommend discharge, assign, and responsibly direct CNAs. Accordingly, I will examine the evidence as to these indicia of supervisory status.

5. Evidence as to Whether LPNs Have Authority to Discipline, Suspend, or Effectively Recommend Discharge

The Employer’s Handbook establishes two levels of “customer service standards.” If a CNA violates Level One,³⁹ he receives a “coaching plan” form, which documents that he and his “direct supervisor”⁴⁰ have developed a “corrective action/coaching plan” to assist the employee in meeting the customer service standards that the CNA breached. Level One coaching plans are active for 12 months from the date of issue, but remain permanently in the employee’s personnel file.

An employee who fails to satisfactorily complete his coaching plan by the required deadline receives another Level One coaching plan, unless this would

³⁹ Level One standards include, “work expectations” such as “clock in and out on time,” and “quality expectations” such as “always act professional, respectful, and have a positive attitude.”

⁴⁰ The Handbook does not identify direct supervisory positions.

create a fourth active coaching plan, in which case the employee is automatically terminated. The record does not reflect any examples of such terminations.

Employees who violate Level Two customer service standards⁴¹ are immediately suspended, pending investigation.⁴² If the investigation shows that the employee violated the Level Two standard, the employee may be terminated, or may be reinstated subject to termination for the next violation of a Level One or Level Two standard within a rolling 12-month period.⁴³ While the record contains examples of CNAs who were discharged for violating Level Two standards, it does not reflect any examples of the discharge of a CNA for violation of a Level One standard.

The only individuals with authority to discharge employees are the administrator and the director of nursing. The director of nursing testified that either she or the administrator reviews each discharge of an employee represented by the Union to ensure that it complies with the collective-bargaining agreement.⁴⁴

The job description for unit manager lists the unit manager's "personnel functions," the first of which is: "day to day supervision of licensed and non-licensed staff, including counseling/disciplinary action, evaluations, one-to-one inservice, suspension/terminations." As mentioned above, the LPN job

⁴¹ Level Two standards include, "physical or verbal abuse or neglect of a resident, patient, visitor, or other employee" and "refusal to perform job assignment."

⁴² The Handbook does not specify who suspends the employee, pending investigation.

⁴³ The investigation can also disclose that the employee did not commit either a Level One or Level Two violation, in which case he is returned to his position and paid for any missed time and any reference to the matter is cleared from his record.

⁴⁴ The record does not reflect any specific requirement for such review in the collective-bargaining agreement.

description states that the LPN "report[s] performance related issues of CNAs to nursing supervisor."⁴⁵

The director of nursing testified that during the two-day orientation for new LPNs, the Employer stresses that they hold leadership roles and that part of that role is the authority to coach CNAs if necessary.⁴⁶ The record includes documentation of three inservice training sessions attended by LPN team leaders in 2007 and 2009. A class on March 4 and March 6, 2007, attended by 19 LPNs and RNs, covered Level One and Level Two customer service standards and coaching review forms. An inservice training session on December 18, 2009, attended by five LPNs and RNs addressed clinical programs, team leadership and supervision of CNAs. A 55-minute class covered their authority to coach CNAs when necessary.

With respect to time and attendance violations (Level One), the record reflects that while LPN team leaders issue coaching plans, they exercise virtually no discretion.

The staffing coordinator tracks the attendance records of CNAs. They are assessed an "occurrence" if they are tardy, leave early, or call in sick. They automatically receive a Level One coaching write-up upon accumulating three occurrences within 30 days. When a CNA accrues the third occurrence within 30 days, the staffing coordinator gives copies of the CNA's attendance sheet to

⁴⁵ The unit manager for the Rosewood unit testified that notwithstanding this language, the LPN team leader is supposed to report CNA performance problems "via a coaching," and that "if they don't use a coaching form, then it's a he said/she said..."

⁴⁶ A nursing supervisor who worked in 2007- 2008 as a second shift LPN team leader testified that during her orientation, the Employer explained that LPNs were responsible for ensuring that CNAs performed their duties and that this included the authority to issue coaching plans without consulting higher supervision.

the director of nursing, the unit manager, and the payroll department. The unit manager then notifies the LPN team manager and instructs the LPN team leader to issue a Level One discipline. The LPN team leader writes out the Level One coaching form and hands it to the CNA, at which point both sign it.

Additionally, each morning, the staffing coordinator retrieves the daily assignment sheets and unit shift assignment sheets. She then gets together with the payroll employee and compares the daily assignment sheets with a printout of the time records maintained on each LPN and CNA the previous day.⁴⁷ If there are any discrepancies, such as evidence that an employee forgot to punch in after lunch or upon returning for a double shift, the payroll employee processes a document called a time clock adjustment slip. The CNA and her LPN team leader sign off on the adjustment slip, after which the payroll employee first adjusts the CNA's time records and then forwards the adjustment slip to the unit manager and the administrator for their signatures; she does not wait for the unit manager and administrator to sign before making the payroll adjustment.

The face of each adjustment slip states that employees are expected to clock in and out correctly, and that any employee incurring more than two adjustments within a pay period or three within 30 days will receive a verbal coaching, followed by a Level 1 coaching upon the next occurrence. The payroll employee tracks the number of missed time clock punches for each employee, and if an employee incurs more than the permitted number of adjustments, she notifies that employee's unit manager. The unit manager then notifies the LPN team manager, who issues the appropriate discipline.

⁴⁷ The payroll department provides this printout.

All coaching plan forms (Level One and Level Two) are processed through the payroll office. The payroll employee⁴⁸ testified that she receives the coaching plan form after the LPN team leader and the CNA have signed and dated it. She then brings Level One coaching forms to the administrator for signature, after which she files them.⁴⁹ She testified that in her experience,⁵⁰ most of the Level One coaching forms issued to CNAs are issued by LPN team leaders, and that unit managers coach LPN team leaders, but only infrequently coach CNAs.

The Rosewood unit manager testified that when she started working for the Employer in December 2007, the director of nursing explained “[t]hat the immediate supervisors needed to be the ones to do the coachings; as far as their disciplinary action, they had to be [sic] follow-up with the chain of command.”

The record includes several documented Level One and Level Two coaching plans from 2008 through early 2010. They are signed by LPN team leaders on the line designated “supervisor signature” or “coach’s signature” depending on the form.⁵¹ None of the LPN team leaders who signed these coaching plans testified at the hearing.

While it appears from the record that in each of these cases, the LPN team leader involved prepared and physically conveyed these coaching plans to

⁴⁸ This witness identified her position as “payroll/human resources.” I will refer to her as the payroll employee.

⁴⁹ It is not clear from the record what happens to the Level Two forms after the “supervisor” signs and while the Employer is investigating the case. Ultimately, they are returned to the payroll employee for filing.

⁵⁰ She has been in the position since 2007.

⁵¹ The record contains two types of Level One coaching plan forms. One form has a line for the “coach” to sign immediately below the employee’s signature line, and lines for the “department head” and “administrator” to sign below the coach. The other form has a line for the “supervisor” to sign immediately below the employee’s signature line, and a line for the administrator (but not the department head) to sign below the supervisor. The record reflects that the form with a line for “supervisor” replaced the other form, apparently in late 2008. The Level Two coaching plan forms in the record have signature lines similar to the Level One forms currently in use.

the CNA involved, witnesses for the Employer testified that the LPN team leader also initiated them and decided upon or effectively recommended the level of discipline, as opposed to merely carrying out the unit manager's instructions to administer the discipline or following the Employer's standard procedure.⁵² However, much of this testimony was conclusory and generalized.

Thus, the director of nursing and a nursing supervisor identified the LPN's handwriting on several Level Two coaching plans signed by LPN team leaders. The Level Two coaching plan form has a sub-title as follows: "This form is to be completed when an employee is being suspended for suspected violation(s) of Customer Service Standards – Level 2." The director of nursing and the nursing supervisor testified that the LPN made the decision to suspend the CNA in each case. Yet nothing on the coaching plan form indicates whether the LPN team leader suspended the CNA on her own or after conferring with the unit manager, nursing supervisor, or director of nursing. When the director of nursing was asked how she knew that the LPN made the decision to issue one CNA a warning rather than discharging him, the director of nursing stated that she relied upon the LPN's signature combined with the fact that that LPN was the team leader of the CNA receiving discipline. In another case, the nursing supervisor admitted that she could not recall what the LPN team leader involved had told

⁵² For example, the director of nursing testified that LPN team leaders are responsible for disciplining CNAs, that they initiate coaching plans and make recommendations which are adopted regarding the appropriate level of coaching, and that they make final decisions with respect to discipline other than discharge.

her as regards who suspended the CNA.⁵³

Moreover, at one point during the hearing, the hearing officer asked the director of nursing: "Can you give me a specific example where an LPN team leader has suspended an employee for a Level Two infraction?" The director of nursing answered: "I can't just, you know, give a name and a date." The hearing officer asked: "Okay. So you don't have a specific example?" The director of nursing responded: "No, I don't." The unit manager for the Rosewood unit testified that she was aware of only one instance when a team leader issued a Level Two coaching plan.⁵⁴

Similar problems beset the testimony by the director of nursing and the same nursing supervisor that the LPNs who initiated these Level Two coaching plans investigated and made recommendations as to whether to discharge the CNA involved. The record contains no investigatory notes or reports, and fails to reflect the steps taken by the LPN (or others) during any Level Two investigation or how and to what extent the LPN and others participated. The director of nursing testified that the LPN "was involved in" one investigation and "conducted" another, but she did not explain how the LPN participated in these investigations,

⁵³ The CNA conduct described in these Level Two coaching plans flagrantly violated Level Two standards. One CNA allowed a resident to smoke while the resident was hooked to oxygen, causing severe burns; another ignored the resident's care card instruction that two CNAs transfer the resident; and another left a resident lying on the dining room floor.

⁵⁴ This unit manager testified that the Level Two discipline came about when a CNA informed her that another CNA was sleeping on the job. The unit manager and LPN team leader went to observe this for themselves and actually woke up the CNA. The unit manager testified that she informed the LPN "that's a Level Two coaching." Thus, this incident does not appear to illustrate that LPN team leaders initiate Level Two coaching plans.

and there is nothing specific about this in the documentary record.⁵⁵ In another case, the director of nursing testified that she did not recognize the handwriting in the box titled "brief description of violation and investigation," and the coaching plan does not on its face reflect a recommendation by an LPN.

A current RN supervisor, who formerly held a position as an LPN team leader, testified that in 2008, as LPN team leader on the second shift, she started to prepare a coaching plan for a CNA for insubordination and failure to do her assigned job. The CNA became belligerent, started screaming, and "got in [the LPN's] face." At that point, the LPN told the CNA to go home and the CNA threatened her. The LPN then wrote up the incident for the director of nursing, recommending that the CNA be discharged. The director of nursing adopted this recommendation.⁵⁶

The unit manager for the Rosewood unit identified several Level One coaching plans that she signed, that she says reflect occasions on which she received complaints about a CNA's performance from a resident or his family, and communicated the complaint to the LPN team leader along with the instruction to issue the coaching plan.⁵⁷ The unit manager testified that upon receipt of the complaint, she talked to the resident and/or family, as well as the CNA involved, to see whether there was a misunderstanding, or whether the

⁵⁵ The coaching plan forms in the record do not contain a space for recommended discipline, and none of the completed coaching plan forms in the record contain narrative descriptions reflecting an LPN's recommendations.

⁵⁶ The nursing supervisor also testified that in April 2009, the LPN team leader told her that she had asked the director of nursing to discharge a CNA because of the CNA's conduct. The CNA was discharged. The CNA had allowed a resident to smoke while taking a walk in the facility's courtyard, even though the resident was hooked to oxygen, and the resident suffered burns.

⁵⁷ These included some of the current Level One coaching plan forms, which have no line for the department head's signature. The unit manager signed these forms between the signature of supervisor and the administrator.

CNA should be disciplined. It appears from the record that the LPN team leader was not asked for input into these coaching plans.⁵⁸ The unit manager also initiates Level One coaching plans upon observing CNAs violate a Level One customer service standard.

The same unit manager further testified that she prepares coaching plans only in cases she investigates, that this represents only about 30 per cent of the coaching plans issued to CNAs, and that the remaining 70 per cent are prepared solely by LPN team leaders without input from the unit manager. She identified several Level One coaching plans that she did not sign or prepare, involving conduct that she did not witness. In each case, the unit manager testified that she recognized the handwriting of the LPN team leader on the signature line and in the box titled "description of violation," although she did not observe the LPN complete the document.⁵⁹

The record contains testimony by the same unit manager concerning two additional Level One coaching plans of the type currently in use.⁶⁰ The Employer offered these additional documents and the Hearing Officer rejected them as both duplicative and outside the scope of redirect of the unit manager during

⁵⁸ This unit manager also identified Level One coaching plans that resulted from complaints by other employees or supervisors, in which the unit manager investigated and determined that discipline was warranted and conveyed this to the LPN team leader.

⁵⁹ For example, according to one Level One coaching plan, issued on July 23, 2009, an LPN asked a CNA for the vital signs for her residents and the CNA replied that she had not taken them, adding "what are you going to do, beat me?" The LPN issued a Level One coaching plan for "poor work quality/productivity." On July 24, 2009, an LPN issued a Level One coaching plan to a CNA who was texting on her cell phone in a residential area while not on break.

⁶⁰ These two documents together comprise Employer Exh. 20.

which the Employer sought their introduction.⁶¹ Since these two additional Level One coaching plans are cumulative, I find that the Hearing Officer's ruling rejecting them was correct.

When asked about one of the documents, the unit manager testified that it concerned an occasion when an LPN team leader told her that a CNA had given a resident a bed bath incorrectly. On that occasion, the LPN told the unit manager that she was dissatisfied with such care and that the CNA needed to be coached. Apparently without saying anything about whether a coaching was appropriate, the unit manager told the LPN to use the unit manager's office, and later saw the Level One coaching plan with the employee's and the LPN's signatures. When asked about the other Level One coaching plan in the rejected exhibit, the unit manager testified that she did not recall the incident, but that she recognized the LPN team leader's signature and handwriting, and that the document reflected that the LPN had decided to discipline a CNA for "rough" treatment of a resident. The unit manager acknowledged that she did not observe the incident or see the LPN writing up the coaching plan.

An LPN team leader testified that the weekend supervisor instructed her to prepare and issue the only coaching plan she issued in ten years, which was for a Level One violation.⁶² This LPN team leader testified that although she could not recall the exact circumstances (the discipline was issued in January 2009),

⁶¹ The Hearing Officer noted that that the Employer had introduced, through a different witness, a voluminous exhibit (Employer Exh. 14) containing Level One coaching plan forms, and that the additional documents would be duplicative. Employer Exh. 14 consists of more than 50 Level One coaching plans.

⁶² The CNA receiving discipline had refused another CNA's request for assistance in the Alzheimer's unit.

she believes she first talked with the CNA and then consulted the weekend supervisor to decide whether to issue discipline.

A CNA testified that she has received one Level One coaching plan form from her LPN team leader. She testified that the director of nursing saw that she had a wet resident and informed her that this would result in a Level One coaching. Ten minutes later, the LPN team leader, who had not been present when the director of nursing found the wet resident, told the CNA, "I need to write you up. Can you tell me what happened? [The director of nursing] told me to write you up, and that's all I know."

6. Evidence as to Whether LPNs Have Authority to Assign CNAs

In general, CNAs are assigned to the same rooms each day. Some CNAs are designated as "floats" and receive room assignments that change regularly depending upon the census and the daily schedule. The Employer uses PRN floats, part-time floats, and full-time floats.⁶³

The staffing coordinator⁶⁴ prepares the schedule on a monthly basis. Two weeks beforehand, she prepares the daily schedule, which reflects whether anyone has received leave or otherwise will not be working on the day in question. The staffing coordinator later adjusts the daily schedule according to each day's census (number of occupied beds). In essence, the staffing coordinator multiplies the census times 2.8 to calculate the state-mandated total number of hours that must be worked that day. She then allocates those hours among the three shifts.

⁶³ The record does not reflect the number of CNAs who float.

⁶⁴ This position is also referred to as scheduler. This position reports to the director of nursing.

Each weekday, the staffing coordinator fills out a portion of a document called the unit shift assignment sheet. There is a different unit shift assignment sheet for each team. The staffing coordinator completes the section that sets forth the unit, date, shift, room assignments for the LPN team leader and the CNAs on his team, break and lunch times for each CNA on the team,⁶⁵ any doctor's appointments scheduled for residents in the assigned rooms, and whether any of the CNAs on the team have Starlight responsibilities.⁶⁶ The staffing coordinator completes this portion of the unit shift assignment sheet for all LPNs and CNAs on the first and second shifts every weekday. Copies of the unit shift assignment sheets are then distributed to the appropriate units.

LPN team leaders occasionally add information on the unit shift assignment sheet during the shift, such as additional resident vital signs that have been taken, resident weights (which must be taken monthly), and whether a particular resident was able to eat in the dining room. The LPN team leader also notes whether room assignments were changed within the team for that shift.⁶⁷ The LPN team leader is the only individual who signs off at the bottom of the unit shift assignment sheet. The next day (or Monday in the case of weekend shifts), the staffing coordinator picks up all unit assignment sheets and files them.

On weekends and on third shift during the week, the LPN team leaders are responsible for completing the entire unit shift assignment sheet, including

⁶⁵ Although the director of nursing testified that LPNs postpone lunch breaks for CNAs as needed, the record contains no examples.

⁶⁶ Starlight is a program for residents at high risk of falling. Residents perform various activities with a CNA in a separate room.

⁶⁷ For example, a nursing supervisor who formerly worked as an LPN team leader testified that she sometimes changed assignments to accommodate residents who did not want to be cared for by their assigned CNAs.

the portion designating room assignments and break times. They do so based on the information the staffing coordinator has placed on the daily assignment sheets,⁶⁸ which show the room assignments for each LPN and CNA. An LPN team leader testified that he writes the names of his CNAs onto the unit shift assignment sheet based on the information on the daily assignment sheet, and that the unit shift assignment sheet already has the room numbers and break times inserted.

LPN team leaders are assigned to particular halls.⁶⁹ When an LPN team leader is on leave or does not report for a scheduled shift, he is replaced by a PRN LPN or PRN RN. The staffing coordinator maintains the list of PRN LPNs and PRN RNs, and determines whom to call on the list. The record does not reflect whether the staffing coordinator follows a particular procedure when calling PRN LPNs and PRN RNs.

The staffing coordinator testified that all CNAs start as floats, and that the only way a CNA becomes allocated permanently to a specific hallway is upon request of the LPN team leader responsible for that hall.⁷⁰ The staffing coordinator testified that she complies with LPN requests for particular CNAs because the LPN knows best how well she works with each CNA and how well the CNA works with particular residents.

⁶⁸ The staffing coordinator leaves the daily assignment sheet on a clipboard at the nurse's station, where CNAs and LPNs view it upon arriving.

⁶⁹ The director of nursing testified that LPN openings are posted by shift and hallway, and that the Employer tries to assign LPNs to the same hallways "for continuity of care."

⁷⁰ However, the staffing coordinator also testified that CNA positions assigned to permanent halls are normally posted within the facility, and that the director of nursing decides among CNAs seeking the assignment. The Employer's Facility Employee Handbook has a small section on "transfers," which states, in part: "The Facility may transfer employees from one position to another or alter job responsibilities at management's discretion...If interested in applying for a posted position, you should initially discuss this matter with your supervisor."

For example, the staffing coordinator reassigned a floating CNA after that CNA's LPN team leader complained that the CNA had given a resident a bed bath with a wet towel.⁷¹ The staffing coordinator replaced this CNA with one specifically requested by the LPN team leader. The staffing coordinator did not confer with the unit manager or any other supervisor before taking these actions. The staffing coordinator testified that when assigning CNAs who float, she usually complies with LPN requests either to assign or not assign particular CNAs.⁷² She testified that, on a weekly basis, she grants requests by LPN team leaders to assign particular CNAs to them. The record does not reflect why other LPN team leaders request specific CNAs.⁷³ However, the staffing coordinator also testified that once CNA room assignments are made, they are "set" and do not change regularly.⁷⁴

LPN team leaders occasionally reassign CNAs to additional rooms on a given shift for purposes of equalizing the work loads of the CNAs, without consulting the unit manager, RN supervisor or director of nursing. For example, if there have been several discharges from rooms assigned to a CNA, the LPN team leader will assign her additional occupied rooms previously assigned to a different team member.

⁷¹ The LPN also issued the CNA a Level 1 coaching discipline, as explained above.

⁷² For example, when a CNA was out for several weeks because of an injury, her LPN team leader requested a specific floating CNA to be permanently assigned to replace her because that CNA kept up better with the workload, and the staffing coordinator complied.

⁷³ When asked on direct examination why she agrees to make staffing changes requested by LPNs, the staffing coordinator answered: "It's expected of me. They are the nurses."

⁷⁴ The director of nursing testified that most CNAs who are not PRN have the same room assignments every day, and that PRN CNAs float. The staffing coordinator testified that CNAs who float can be PRN or full-time.

LPN team leaders on the third shift sometimes reassign CNAs without consulting the staffing coordinator, RN supervisor, unit manager, or director of nursing. For example, when a CNA assigned to the Southway unit fell ill about two hours into the third shift, the LPN team leader reassigned a third shift CNA from the Rosewood unit to replace the CNA who became ill.⁷⁵

A nursing supervisor who worked as a second shift LPN team leader in 2007-2008 testified that when she was an LPN team leader, she occasionally reassigned a CNA to a different resident without obtaining prior approval, to accommodate the resident's request not to be attended to by that CNA. The same nursing supervisor also testified that when she was an LPN team leader, team leaders sometimes redistributed the resident load when a CNA called in sick.⁷⁶ The nursing supervisor also testified that while the staffing coordinator is responsible for the weekday first and second shift unit assignment sheets, LPN team leaders have the authority to transfer CNAs between units, change room assignments and reassign tasks from one CNA to another.⁷⁷ An LPN testified that in 2009, before assigning a CNA who had just joined her team (apparently from another hall in the Employer's facility) to any rooms, she asked the CNA where she felt comfortable.

A CNA who will not be able to work as scheduled is supposed to contact the staffing coordinator at least four hours before the start of the scheduled

⁷⁵ This occurred about three weeks prior to the hearing. The staffing coordinator did not have first-hand knowledge as to who reassigned the CNA from Rosewood, but concluded it was the LPN because LPNs are the highest authorities at the facility on third shift.

⁷⁶ The record does not reflect the frequency of such occurrences.

⁷⁷ However, an LPN team leader testified that she has to contact her nursing supervisor before reassigning a CNA from one room to another.

shift.⁷⁸ The staffing coordinator determines whether to replace the CNA who called off, based on the census. The staffing coordinator also chooses the CNA to use as a substitute. If a CNA fails to report for work or call in advance (“no call, no show”), the LPN team leader notifies the staffing coordinator, who decides whether to replace the CNA and whom to use.⁷⁹

The staffing coordinator testified that when a Southway unit CNA on third shift does not call or show, the LPN team leader sometimes reassigns a CNA from the Rosewood unit, apparently because state law requires at least three CNAs be assigned to a unit that includes secured beds. The LPN team leader does so without consulting the staffing coordinator. The staffing coordinator also testified that if there is a no call, no show during third shift, the LPN team leaders “should” contact her to find a replacement, but that the LPN team leaders don’t generally do so and instead reassign a CNA from elsewhere in the facility. The record does not reflect what, if any, criteria the LPN team leaders apply in making such reassignments, other than that there must be at least three CNAs on duty in Southway.

The staffing coordinator also determines whether to send scheduled CNAs home during their shifts because of the census. For example, on one occasion, the staffing coordinator directed two CNAs to be sent home on third shift and three to be sent home on first shift due to the census.

⁷⁸ The LPN job description states that the LPN informs the nurse supervisor of staffing needs when assigned personnel fail to report to work, and reports absentee call-ins to the nurse supervisor.

⁷⁹ If there is a no call, no show on the weekend, the LPN team leaders, unit managers or nursing supervisors send the staffing coordinator a text message or call her cell phone.

Although the director of nursing testified that LPN team leaders can require a CNA to work overtime, the record does not contain any examples. CNAs asking to leave work before the end of their shift must confer with the LPN team leader. On first and second shifts, the LPN makes a recommendation to the unit manager, who has ultimate authority to approve or deny the request. On third shift, the LPN exercises this authority. It appears from the record that the same procedure is followed whether the CNA's request is based on an emergency or not. There is no record evidence of instances in which an LPN team leader has denied permission for a CNA to leave early.⁸⁰

LPN team leaders have no authority to grant CNA vacation requests or requests for other leave.

7. Evidence as to Whether LPNs Responsibly Direct CNAs

There is no evidence in the record that LPN team leaders have been disciplined or held accountable for deficiencies in the performance of the CNAs under their direction. The director of nursing and the unit manager for the Rosewood unit testified that if a CNA fails to properly perform an assigned duty, the CNA's team leader is not written up.⁸¹ An LPN team leader testified that she has never been held responsible for the actions of a CNA or told by her unit manager or a nursing supervisor that a CNA on her team is not performing CNA duties correctly, or that she needed to "get on" a CNA. She testified that no

⁸⁰ A CNA working third shift testified that when she had to leave early upon receiving a call about a gravely ill family member, her LPN team leader called the unit manager, who spoke directly to the CNA and authorized her to leave.

⁸¹ The director of nursing testified that an LPN would be written up if she observed a CNA doing something wrong and did nothing to correct it. The record does not contain any evidence that this has occurred.

CNAs on her team have refused assignments, but that if this occurred, she would inform her supervisor and ask for guidance, and possibly perform the task herself if it was necessary.

There is also no evidence in the record that LPN team leaders have been rewarded for the performance of CNAs on their team.

An LPN team leader testified that patient care takes up the majority of her shift. She testified that although she occasionally has to remind a CNA on her team to answer a resident's call light, take a resident's vital signs, weigh residents at the beginning of the month, or perform some other routine task, she generally does not have to tell her CNAs what to do because they have years of experience. For example, she has not had to show CNAs how to feed a resident. While CNAs on her team are informed of their break and lunch times on the daily assignment sheet, they notify this LPN team leader when they are leaving the nursing floor so she can find them if a resident needs them.

8. Evidence as to Evaluations of CNAs

The Employer evaluates CNAs upon completion of their 90-day probationary period⁸² and annually thereafter. Evaluations do not affect the CNA's rate of pay, which are established by the collective-bargaining agreement.⁸³

⁸² The Employer considers newly hired employees "introductory" employees until they have completed 90 days and received a satisfactory performance evaluation.

⁸³ The director of nursing and the unit manager for Rosewood testified that CNA evaluations improve the Employer's patient care.

Until early August, 2010, the Employer used an evaluation form rating the CNA in six categories,⁸⁴ each on a scale from one to five, with one corresponding to “unsatisfactory” and five corresponding to “outstanding.” The old form was called “performance evaluation form.” It included a section titled, “areas of improvement, developmental plans and/or upcoming objectives” that the evaluator completed.

The evaluation form now in use is called “development feedback.” It does not rate the CNA numerically but has a section in which the CNA evaluates herself in a series of “core values” and “teammate skills,” marking for each category whether it is a “strength” or “opportunity.” The new form also has a section that the CNA and evaluator complete together, identifying the top three areas for continued development and a plan to accomplish them.⁸⁵

When the Employer began using the new form, it also switched from completing annual evaluations on the CNA’s anniversary date to completing all CNA evaluations at one time.

The record reflects that LPN team leaders have evaluated the CNAs on their team using both forms, going back at least to 2008. For CNAs who float, any LPN team leader that has worked with the CNA may evaluate him. The unit manager for the Rosewood unit writes the same goals for all CNAs⁸⁶ on each evaluation form, and asks the LPN team leaders to meet with each CNA

⁸⁴ These are “customer service,” “work quality,” “work quantity/productivity,” “compliance and adherence to policies,” “core values,” and “leadership skills.” The leadership skills category says it is only applicable to “RNs, LPNs, charge/unit RNs, department heads, etc.”

⁸⁵ The director of nursing testified that the new form is meant to embody a more “positive” approach by involving the employee and supervisor working together to identify strengths and opportunities.

⁸⁶ She stated them as “no customer service complaints, no holes in their ADL (activities of daily living) books, completion of their job assignments.”

individually to address concerns specific to the CNA, which are then documented on the CNA's evaluation form that the CNA and team leader sign. The form is then given to the unit manager who also signs it.

The record contains some completed evaluations using the prior evaluation form and some using the current form.⁸⁷ Evaluations using the prior form contain comments, apparently from LPN team leaders, both complimentary and critical of the CNA.⁸⁸ Evaluations using the current form contain various comments in the section identifying areas for continued development, such as reminders to update the care cards once a month and to discuss any changes with the team leader.

There is no evidence that any CNA has received discipline because of a failure to comply with directives or suggestions in evaluations.

ANALYSIS

Whether LPNs Have Authority to Responsibly Direct CNAs

The Employer maintains that LPNs exercise independent judgment when they responsibly direct CNAs.

The Board finds that an individual has the authority to responsibly direct an employee only if that individual is answerable for failing to do so. The preponderance of the evidence must show that the individual is "held fully accountable and responsible for the performance and work product of the

⁸⁷ The unit manager for Rosewood acknowledged that she was not present at any of these evaluation meetings and did not see the LPN complete the form.

⁸⁸ For example, on one form, in the section titled "areas of improvement, developmental plans and/or upcoming objectives," the evaluator wrote "absenteeism and tardy needs improvement. Wear gait belt at all times." On another form, in the section titled "evaluator comments," the evaluator wrote "[name of CNA] is always willing to help out wherever needed. Even if not her assignment, she will assist all residents when needed."

employee.” *Oakwood Healthcare*, 348 NLRB at 691, citing *NLRB v. KDFW-TV*, 790 F.2d 1273, 1278 (5th Cir, 1986).

To establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.” *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). Thus, it is not sufficient to show that the putative supervisor has the authority to direct an employee and to take corrective action; the party seeking to establish supervisory status must also prove that the putative supervisor faces the prospect of adverse consequences.

The record establishes that the LPN team leaders have the authority to direct CNAs. The LPN team leaders “oversee the CNA’s job performance and act to correct the CNAs when they are not providing adequate care.” *Golden Crest Healthcare Center*, 348 NLRB at 730. For instance, an LPN occasionally reminds CNAs to take vital signs, weigh residents, or perform other tasks.

The record is less clear as to whether the LPN has the authority to take corrective action if a CNA fails to perform an assigned task, as I will explain in discussing whether LPNs have authority to discipline. However, even assuming that LPNs have authority to take corrective action, the record fails to establish that they face the prospect of adverse action if they fail to correct the performance of CNAs.

In *Golden Crest Healthcare Center*, the employer offered evidence that it evaluated charge nurses on their performance in directing CNAs. However, the employer failed to establish that any action, positive or negative, has been or might be taken as a result of the charge nurse's evaluation in this factor. The Board concluded that the employer had failed to show responsible direction. *Id.* at 731.

Here, there is no evidence in the record to suggest that any LPN "has experienced any material consequences to her terms and conditions of employment, either positive or negative, as a result of his/her performance in directing CNAs." *Golden Crest Healthcare Center*, 348 NLRB at 731. In fact, the director of nursing and the unit manager for Rosewood testified that the LPN team leader is not disciplined when a CNA on his/her team fails to properly perform.

Based upon the foregoing and the record as a whole, I find that the Employer has failed to establish, by a preponderance of the evidence, that LPN team leaders possess the supervisory authority to responsibly direct CNAs.⁸⁹

Whether LPNs Have Authority to Assign CNAs

The Employer contends that LPNs exercise independent judgment when they assign or reassign the work of CNAs.

The Board in *Oakwood Healthcare* defined assigning work as "the act of designating an employee to a place (such as a location, department, or wing),

⁸⁹ The Employer cites testimony by the director of nursing that an LPN could face discipline if she failed to properly supervise a CNA and by a nursing supervisor that she would discipline an LPN if she observed the LPN failing to supervise an assigned CNA. However, "the Board has long recognized that purely conclusory evidence is not sufficient to establish supervisory status." *Golden Crest Healthcare Center* at 731; *Avante at Wilson*, 348 NLRB 1056, 1057 (2006).

appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” *Oakwood Healthcare*, 348 NLRB at 689. The Board stated that “assign” for purposes of Section 2(11) “refers to the ... designation of significant overall duties to an employee, and not to the ... ad hoc instruction that the employee perform a discrete task.” *Id.*

The Board cited an example of its interpretation: “In the health care setting, the term “assign” encompasses the charge nurses’ responsibility to assign nurses and aides to particular patients... [I]f a charge nurse designates an LPN to be the person who will regularly administer medications to a patient or a group of patients, the giving of that overall duty to the LPN is an assignment. On the other hand, the charge nurse’s ordering an LPN to immediately give a sedative to a particular patient does not constitute an assignment. In sum, to “assign” for purposes of 2(11) refers to the charge nurse’s designation of overall duties to an employee, not to the charge nurse’s ad hoc instruction that the employee perform a discrete task.” *Id.*

Moreover, the authority to assign is supervisory only if it involves the use of “independent judgment.” In *Oakwood Healthcare*, the Board found that “a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement. Thus, for example, a decision to staff a shift with a certain number of nurses would not involve independent judgment if it is determined by a fixed nurse-to-patient ratio.” *Id.* at 693. On the other hand, “if the [nurse] weighs the individualized condition

and needs of a patient against the skills of special training of available personnel, the nurse's assignment involves the use of independent judgment." *Id.*

To begin with, the record reflects that LPNs routinely assign CNAs routine duties such as taking additional vital signs, preparing residents to visit doctors, etc. Assignments of these "discrete task[s]" in these circumstances is closer to "the charge nurse's ad hoc instruction that the employee perform a discrete task," *Oakwood Healthcare*, 348 NLRB at 689, than to the designation of overall duties. See also, *Croft Metals*, 348 NLRB 717, 721 (2006) (switching of tasks by lead persons among employees assigned to their line or department was insufficient to confer supervisory status).

It is clear from the record that the staffing coordinator has authority to assign CNAs with respect to shift, room, and resident. During first and second shifts on weekdays, the staffing coordinator determines shift and room assignments, break times, and lunch. Although the third shift and weekend LPN team leaders prepare their own unit assignment sheets, the record reflects that they do so mainly by transferring the information that the staffing coordinator has placed on the daily assignment sheets for these shifts.

I recognize that the staffing coordinator frequently grants requests by LPNs to assign (or not to assign) specific CNAs to their team, including some assignments on a permanent basis. However, the record fails to establish that in making such requests, the LPNs consider "the individualized condition and needs of a patient against the skills or special training of available personnel." *Oakwood Healthcare*, 348 NLRB at 693; accord *Children's Farm Home*, 324

NLRB 61, 64 (1997). Thus, while the staffing coordinator testified that she automatically grants LPN requests because LPNs know best how well they work with particular CNAs, and how well CNAs work with particular residents, the examples she provided did not involve weighing a particular CNA's skills and training against a specific patient's needs.⁹⁰ Instead, they appeared to reflect the personal preferences of the LPNs involved.⁹¹ Furthermore, no current LPN who has made such a request testified.⁹²

There is also insufficient evidence as to the criteria applied by LPNs in reassigning rooms to warrant a conclusion that LPNs exercise independent judgment. Thus, while there is some evidence that LPNs modify room assignments on the basis of patient requests, the record fails to demonstrate that LPNs exercise independent judgment when doing so, as opposed to simply satisfying the resident. Moreover, the record fails to establish the frequency with which this occurs.⁹³ The fact that an LPN asked a CNA who was new to her unit where she felt most comfortable before assigning her rooms similarly fails to show that this LPN exercised independent judgment.⁹⁴

Similarly, although there is some evidence that night shift LPNs determine which CNA to reassign when a CNA is a no call, no show, the record does not

⁹⁰ For example, the LPN who asked the staffing coordinator not to assign her a CNA after observing that CNA administer a bed bath with a wet towel did not indicate that this CNA lacked skills and training, but rather that the CNA had violated standard procedures.

⁹¹ Thus, these requests lacked independent judgment, which requires, "at minimum ... form[ing] an opinion or evaluation by discerning and comparing data." *Oakwood Healthcare*, 348 NLRB at 693.

⁹² I note that the only current LPN who testified stated that she has to contact her supervisor before changing CNA room assignments.

⁹³ Thus, a former LPN testified that she did so based on patient requests, but this was in 2007-2008 and there are no examples of such reassignments within the past year.

⁹⁴ Assuming that an LPN team leader from the Rosewood unit reassigned a CNA from Southway on one shift to replace a CNA who was ill, the record does not reflect the factors she considered in selecting the CNA she chose.

reflect the criteria applied by the LPNs in making such reassignments. In this regard, when a Rosewood unit LPN reassigned a Southway unit CNA to replace a no call, no show in order to comply with an apparent state or policy requirement that at least three CNAs be assigned to each shift on the Southway unit, she was not exercising independent judgment. *Oakwood Healthcare*, 348 NLRB at 693.

While there is evidence that LPNs reassign CNAs to different or additional rooms to balance the workload, “[a]ssignments made solely to equalize the quantity of workloads are routine and do not require independent judgment.” *Golden Crest Healthcare Center*, 348 NLRB at 730 fn. 9.

Finally, the Employer cites the fact that LPNs are the highest ranking employees on site during third shift. However, the “status of being the highest ranking employee on site falls within the category of secondary indicia of supervisory authority.” *Golden Crest Healthcare Center*, 348 NLRB at 730 fn. 10. Secondary indicia are insufficient to establish supervisory status where the putative supervisors are not shown to possess any of the primary indicia. *Id.*; *Ken-Crest Services*, 335 NLRB 777, 779 (2001). “Moreover, this factor is even less probative when management is available after hours.” *Golden Crest Healthcare Center*, 348 NLRB at 730 fn. 10. The record reflects that the director of nursing is on call 24 hours per day, seven days per week.⁹⁵

While the director of nursing testified that LPNs can require CNAs to work overtime, there is no record evidence of such an occurrence, and no evidence that any CNA has been disciplined for refusing to work overtime. Similarly, there

⁹⁵ I also note that the unit manager was available on the phone when a third shift LPN received notice of a family emergency and had to leave.

is no record evidence as to examples of, or the frequency with which, LPNs require CNAs to postpone breaks or lunch.

Based upon the foregoing and the record as a whole, I find that the Employer has failed to establish, by a preponderance of the evidence, that LPN team leaders possess the supervisory authority to assign CNAs.

***Whether LPNs Possess Authority to Discipline, Suspend,
or Effectively Recommend Discharge***

The Employer argues that LPNs exercise independent judgment when they decide whether to initiate discipline, suspend, and recommend the discharge of a CNA.

The evidence with respect to the LPN's authority to initiate discipline, suspend and effectively recommend discharge essentially falls into two areas. First, there is evidence that LPNs may initiate discipline by issuing Level Two coaching plans to CNAs, suspending CNAs and making recommendations as to whether the CNAs should be discharged. Second, there is evidence that LPNs may discipline by issuing Level One coaching plans to CNAs. I will address these separately.

The evidence as to the LPN's authority to initiate discipline by issuing Level Two coaching plans, suspending CNAs and making effective recommendations as to whether to discharge or warn CNAs, is "in conflict or otherwise inconclusive," *Phelps Community Medical Center*, 295 NLRB 486, 490 (1985). The Level Two coaching plan form sub-title does not indicate whether the LPN completing the form is the one who suspends the CNA, or whether the LPN does so independently or needs the approval of a nursing supervisor or unit

manager. None of the LPNs who purportedly completed the Level Two coaching plan forms in the record testified. The director of nursing admitted that she was unable to provide a single example of an LPN team leader suspending a CNA. She testified that she inferred that because an LPN signed a Level Two form involving a CNA on this LPN's team, that LPN must have made the decision as to the ultimate discipline (a warning in that case). Inferences without detailed, specific evidence of independent judgment are insufficient to establish supervisory status. *Sears Roebuck & Co.*, 304 NLRB 193, 194 (1991). I therefore find that there is insufficient evidence to show that LPNs possess supervisory authority when they initiate the Level Two disciplinary process or suspend CNAs for Level Two violations.

Similarly, there is insufficient evidence as to how the Employer investigates Level Two violations reported by LPNs, or how LPNs participate and what weight is given to their input. The testimony of the director of nursing that particular LPNs were "involved in" or "conducted" an investigation is conclusory and of little weight. *Id.* at 193. The Level Two coaching plan form does not have a space for any recommendation by the LPN completing the form, and the Level Two coaching plans in the record do not discuss the LPN's recommendation.

Even assuming that LPNs issue Level Two coaching plans for CNAs, it appears from the record that the LPN's main role is to identify the Level Two violation to the CNA and report it to the nursing supervisors, unit managers, and the director of nursing, after which the Employer conducts an independent investigation to determine the appropriate discipline. The Board holds that the

mere reporting of a violation does not demonstrate supervisory disciplinary authority: "Where oral and written warnings simply bring to an employer's attention substandard performance by employees without recommendations for future discipline, the role of those delivering the warnings is nothing more than a reporting function." *Willamette Industries*, 336 NLRB 743, 744 (2001); *Ohio Masonic Home*, 295 NLRB 390 (1989); *Waverly-Cedar Falls Health Care Center*, 297 NLRB 390, 392 (1989), *enfd.* 933 F.2d 626 (8th Cir. 1991). Thus, while the LPNs may have authority to cite CNAs for Level Two violations, this is not sufficient evidence of authority to discipline, suspend, or effectively recommend discharge:

[t]he power to 'point out and correct deficiencies' in the job performance of other employees 'does not establish authority to discipline.' Reporting on incidents of employee misconduct is not supervisory if the reports do not always lead to discipline, and do not contain disciplinary recommendations. To confer 2(11) status, the exercise of disciplinary authority must lead to personnel action, without the independent investigation or review of other management personnel.

Oak Park Nursing Care Center, 351 NLRB 27, 31 (2007) (Member Walsh dissenting), quoting *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002).

In *Illinois Veterans Home*, 323 NLRB 890 (1997), the RNs completed "Personnel Action" forms to describe incidents involving problems with employees and the RNs discussed the incident with the employee after which the employee and the RN signed the form. The forms did not reflect any recommendations by RNs as to discipline. The director of nursing determined the ultimate discipline. The Board reversed the Regional Director, and found that the RNs' duties with respect to discipline were merely reportorial. *Id.* at 890.

I recognize that there have been isolated occasions on which an LPN has apparently suspended and recommended the discharge of a CNA and the Employer has agreed. In 2008, an LPN suspended a CNA and recommended her discharge for threatening and screaming at the LPN, and the CNA was discharged. In April 2009, the Employer agreed with an LPN's recommendation to discharge a CNA who had negligently taken a resident on oxygen into the courtyard and allowed her to smoke, resulting in injuries to the resident. However, "the exercise of some 'supervisory authority' in a merely ... sporadic manner does not confer supervisory status on an employee." *Wilshire at Lakewood*, 343 NLRB 141, 144 (2004) (quoting *Browne of Houston, Inc.*, 280 NLRB 1222, 1223 (1986)).⁹⁶

LPNs automatically issue Level One coaching plans for attendance violations. When a CNA accrues a third occurrence within 30 days, the staffing coordinator forwards documentation to the unit manager, who instructs the LPN to prepare and issue the coaching. The LPN does not exercise independent judgment in such cases. *Anamag*, 284 NLRB 621, 622 (1987) (team leaders do not exercise independent judgment in disciplining employees for attendance violations where warnings are automatically generated when employee accumulates a set number of occurrences).

The record reflects that the unit manager initiates some Level One coaching plans when directly contacted by a complaining resident or family

⁹⁶ Further, given the overtly inappropriate nature of the CNA's conduct in both cases, it appears that the LPNs did not exercise independent judgment in preparing Level Two coaching plans. "The Board has found that in cases of flagrant offenses, the offenses are obvious violations of the employer's policies and speak for themselves, no independent judgment is involved." *Children's Farm Home*, 324 NLRB at 67; see also *Northcrest Nursing Home*, 313 NLRB 491, 497 (1993).

member, or when she observes a CNA violate a Level One customer service standard, and that LPNs also initiate Level One coaching plans for a variety of Level One violations. Some of the testimony in this regard was vague, such as the unit manager's testimony about a Level One coaching plan stating that a CNA gave "rough" treatment to a resident. Moreover, an LPN testified that she consulted the weekend supervisor before issuing her only Level One coaching plan in ten years.

Even assuming that the record establishes the LPN's authority to initiate Level One coaching plans, the record does not establish a nexus between a Level One violation and possible future disciplinary action, other than the policy in the Handbook stating that a CNA who accumulates four active Level One coaching plans is discharged. The record contains no evidence that this has occurred. Thus, there is insufficient evidence that the LPN possesses supervisory authority to discipline when issuing Level One coaching plans.

This conclusion is reinforced by the testimony of the unit manager for Rosewood that, when she was hired, the director of nursing informed her "[t]hat the immediate supervisors needed to be the ones to do the coachings; as far as their disciplinary action, they had to be [sic] follow-up with the chain of command." This suggests that Level One coaching plans are not, in themselves, disciplinary documents, and that discipline can only issue through the "chain of command" – nursing supervisors, unit managers, and the director of nursing, so that LPNs coach but don't discipline CNAs.

The job descriptions for LPN and unit manager further support my conclusion. The unit manager's job description says she has "day to day supervision of licensed and non-licensed staff, including counseling/disciplinary action, evaluations, one-to-one inservice, suspension/terminations." By contrast, the LPN's job description directs her to report performance related issues of CNAs to a nursing supervisor.

Finally, although it appears that the signature of an LPN on a CNA's time clock adjustment slip suffices to generate the adjustment in the CNA's payroll record and thus her pay, "the Board has consistently held that the authority to verify employees' time cards is routine and clerical and does not indicate supervisory authority." *Golden Crest Healthcare*, 348 NLRB at 730, fn. 10.

Based upon the foregoing and the record as a whole, I find that the Employer has failed to establish, by a preponderance of the evidence, that LPN team leaders possess authority to initiate discipline of CNAs by issuing Level One or Level Two coaching plans, or to suspend CNAs or to effectively recommend their discharge.

Evaluations

The Employer contends that the performance evaluations completed by LPNs on CNAs are an indicium of supervisory status because they instruct or direct CNAs to change their job performance.

A putative supervisor's authority to evaluate employees only indicates that he has supervisory authority if the evaluations have a demonstrable impact on employees' terms and conditions of employment or job status. *Williamette*

Industries, 336 NLRB at 744; *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1139 (1999).

The Employer has failed to establish that the evaluations of CNAs performed by LPN team leaders have an impact on the CNAs' job status or terms and conditions of employment. Evaluations have no impact on wage rates. Although the evaluations instruct CNAs as to improvements needed in their work performance, "there is no evidence that the Employer has taken any action in response to an employee's failure to follow an evaluation's recommendation." *Willamette Industries*, 336 NLRB at 744.

Based upon the foregoing and the record as a whole, I find that the Employer has failed to establish, by a preponderance of the evidence, that LPNs' authority to evaluate CNAs indicates that they possess supervisory authority.

CONCLUSIONS AND FINDINGS

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Union claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and 2(7) of the Act.

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

All licensed practice nurse team leaders⁹⁷ employed at the Employer's facility located at 1010 Carpenter's Way, Lakeland, Florida, excluding all other employees, guards, and supervisors as defined in the Act.

Direction of Election

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by United Food and Commercial Workers, Local 1625. The date, time, and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in military

⁹⁷ The eligibility of PRN LPNs shall be determined by the formula set forth in *Sisters of Mercy Health Corp.*, 298 NLRB 483 (1990). PRN LPNs shall be eligible if they regularly averaged at least four hours per week during the calendar quarter immediately preceding the election eligibility date.

service of the United States may vote if they appear in person at the polls. Ineligible to vote are (1) employees who have quit or have been discharged for cause since the designated payroll period; (2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date; and (3) employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

Employer to Submit List of Eligible Voters.

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

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list containing the full names and addresses of all eligible voters. North Macon Health Care Facilities, 315 NLRB 359 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized. Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, 201 East Kennedy Blvd., Suite 530, Tampa, FL 33602, on or before **October 1, 2010**. No extension of time to file this list will be granted except in extraordinary

circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. Since the lists will be made available to all parties to the election, please furnish two copies of the list.⁹⁸

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of three full working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the Election Notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the Election Notice.

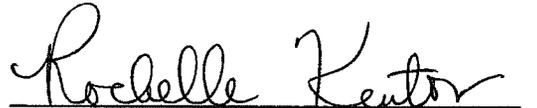
Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by **October**

⁹⁸ The lists may be submitted by facsimile transmission to (813) 228-2874, or electronically to Region12@nrlb.gov, as well as by hard copy. See www.nrlb.gov for instructions about electronic filing. Only one copy of the list should be submitted if it is sent electronically or by facsimile.

8, 2010. The request may not be filed by facsimile, but may be filed electronically.⁹⁹

DATED at Tampa, Florida, this 24th day of September, 2010.



Rochelle Kentov, Regional Director
National Labor Relations Board,
Region 12
201 E. Kennedy Blvd., Suite 530
Tampa, FL 33602-5824

⁹⁹ See www.nlr.gov for instructions about electronic filing and the Board's Rules and Regulations with respect to filing requirements generally.

EXHIBIT C

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**IN THE UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION TWELVE**

**LAKELAND HEALTHCARE
ASSOCIATES, LLC d/b/a
WEDGEWOOD HEALTHCARE
CENTER,**

Employer,

AND

**UNITED FOOD & COMMERCIAL
WORKERS, LOCAL 1625,**

Petitioner.

§
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§

CASE: 12-RC-9426

**THE EMPLOYER’S REQUEST FOR REVIEW OF DECISION AND DIRECTION OF
ELECTION AND REQUEST TO STAY ELECTION**

I. INTRODUCTION

Pursuant to Section 102.67 of the National Labor Relations Board’s (“NLRB” or “Board”) Rules and Regulations, Lakeland Healthcare Associates, LLC d/b/a Wedgewood Healthcare Center (hereinafter, “Wedgewood” or “Employer”) respectfully submits this Request for Review of Regional Director Rochelle Kentov’s Decision and Direction of Election (the “Decision”)¹ in the above-captioned case. Compelling reasons exist for granting this Request for Review based on the following grounds: (1) the Regional Director’s decision on substantial factual issues was clearly erroneous on the record, and such error prejudicially affected the rights of the Company; and (2) substantial questions of law and policy were raised because of the

¹ References herein to the Decision and Direction of Election will be abbreviated as “Dec.”.

Regional Director's departure from officially reported Board precedent. For these reasons, discussed below, the NLRB should grant the Employer's Request for Review.

II. RELEVANT PROCEDURAL HISTORY

On August 11, 2010, United Food and Commercial Workers International Union, Local 1625, (the "Union") filed a Petition seeking to represent a proposed bargaining unit to include all full-time and part-time licensed practical nurses ("LPN") and excluding all other employees, including supervisors, as defined in the Act.² (Bd. Ex. 1.) A hearing was held on the petition before a Hearing Officer of the National Labor Relations Board on August 25-27 and 30, 2010 (the "Hearing"). During the Hearing, the parties agreed that the proposed unit would be amended to consist of 20 full-time LPNs and eight PRN LPNs, who are employed on an "as needed" basis. (Tr. pp. 307-308.) The parties also agreed that whether or not the eight PRN LPNs were eligible to participate in the election, should the Regional Director determine that such a unit was proper, would be governed by Sisters of Mercy Health Corp. 298 NLRB 483 (1990). The parties also agreed that the two LPNs employed in the MDS department (Christy Albert and Susan Nesmith) are excluded from the unit. (Tr. p. 14-15.)

On September 24, 2010, the Regional Director issued the Decision. The Regional Director found that the Employer failed to demonstrate that LPNs are statutory supervisors.

The Regional Director directed an election in the petitioned-for unit to occur on October 21, 2010 from 6:30 a.m. to 7:00 a.m. and 2:30 to 4:00 p.m. in the Facility's Restorative Dining Room. The Company now files this Request for Review of the Decision and Direction of Election and Stay of Election.

² Citations to the hearing transcript will be denoted as "(Tr. p. ____)." Citations to Joint Exhibits will be denoted as "(Jt. Ex. ____)." Citations to Employer Exhibits will be denoted as "(E. Ex. ____)." Citations to Union Exhibits will be denoted as "(P. Ex. ____)." Citations to Board Exhibits will be denoted as "(Bd. Ex. ____)."

III. STATEMENT OF FACTS

A. THE EMPLOYER'S BUSINESS, THE UNION, THE PETITION, AND THE BARGAINING UNITS

Lakeland Healthcare Associates, LLC d/b/a Wedgewood Healthcare Center ("Wedgewood" or the "Employer"), is a 120-bed skilled nursing and long-term care facility in Lakeland, Florida. (Tr. p. 19.)³ Wedgewood respectfully disagrees with the Regional Director's decision and maintains that all LPNs in the petitioned-for bargaining unit are statutory supervisors and consequently, the Regional Director's decision is erroneous.

B. WEDGEWOOD'S ORGANIZATIONAL STRUCTURE

Wedgewood is a one-story building comprised of two units—the Rosewood/Northside Unit and the Southway/Southside Unit, with a total of 120 resident beds. (E. Ex. 1, Tr. pp. 19-26.) The Rosewood Unit (also referred to as Northside) is a short-term rehabilitation unit in which residents are recovering from a variety of surgeries, including orthopedic procedures, coronary artery bypass, skin grafts, and laminectomies. (Tr. p. 21.) The Rosewood Unit is comprised of the 200, 300, 400, and part of 500 halls. (Tr. p. 20.) The Rosewood Unit is an "intense" unit because the risk of life threatening complications are prevalent for residents recovering from serious surgeries. (Tr. p. 22.) There are up to approximately 60 residents in the Rosewood Unit for short-term stays. (Tr. p. 23.)

The Southway Unit (also referred to as Southside) consists of the other half of the 500 hall and halls 600, 700, and 800. The Southside Unit contains 60 beds which house long-term residents who reside at Wedgewood on a permanent basis and any over flow residents from the Rosewood Unit. (Tr. p. 24.) The Southway Unit also contains a secure dementia unit with 18

beds for residents at risk of elopement. The secured unit is encompassed in the 600 hall. (Tr. pp. 24-25.)

The Administrator (also referred to as the Executive Director) of Wedgewood is Cara Roland. Prior to Ms. Roland, Kelly Davis was the Administrator of Wedgewood. (Tr. pp. 278, 831.) The Administrator is ultimately responsible for the overall operations of Wedgewood. All department heads report directly to the Administrator. (Tr. p. 37.)

Several departments exist within Wedgewood, including the Business Office, Admissions, Dietary, Social Services, Environmental Services (Housekeeping, Laundry and Maintenance), Life Enrichment, Medical Records, Therapy, and Nursing. A department head is responsible for each department and each department head has an office located off of the lobby area. (E. Ex. 1; Tr. pp. 23-28.) The department heads report to the Administrator. (Tr. p. 37-38.)

C. THE NURSING DEPARTMENT

1. Structure and Organization

The Nursing Department is comprised of: the Director of Nursing ("DON"), two Unit Managers, a Day Shift Supervisor, a 3-11 p.m. Supervisor, a Weekend Supervisor, Licensed Practical and Registered Charge Nurses/Team Leaders ("LPN" or "RN"), a Central Supply, clerk, a Scheduler, the MDS Department, and Certified Nursing Assistants ("CNAs") (E. Ex. 2, Tr. pp. 42-43.) The DON, Gartha Swearingen, is responsible for overseeing the Nursing Department. (E. Ex. 2, Tr. pp. 18, 576.) Swearingen is a RN, with regular hours of 7:15 a.m. to 5:30 p.m., Monday through Friday and she reports to the Administrator. (Tr. p. 18.)

Reporting to the DON are two Unit Managers –Linda Bowden and Carol Hiner. (Tr. pp. 50-51, 639, E. Ex. 2.) The Unit Managers are responsible for overseeing the care for the 60 residents in their unit and are the direct supervisors of the LPN/RN Charge Nurses. (E. Ex. 18;

Tr. p. 640.) Linda Bowden, RN is the Unit Manager for Southway and Carol Hiner, RN is the Unit Manager for Rosewood. (Tr. pp. 50-51.) The Unit Managers' regular hours are Monday through Friday, approximately 7:15 a.m. to 5:30 p.m. (E. Ex. 2, Tr. pp. 18, 53-55, and 409.) Tammy Baxter is employed as the Day Shift Supervisor who works Monday through Friday from 12:00 p.m. until 8:00 p.m., primarily assisting with admissions; Ms. Baxter reports to the DON. (E. Ex. 2, Tr. p. 803.) Elaine Mason is employed as the 3-11 p.m. Supervisor who works Monday through Friday from 3:00 p.m. until 11:00 p.m.; Ms. Mason reports to the DON. (E. Ex. 2, Tr. pp. 47, 53-55.) Ms. Mason is responsible for both the Rosewood and Southway units when she is in the facility. (Tr. p. 46.) Sharon Stein is the weekend supervisor who works Saturdays and Sundays from 7:00 a.m. through 11:00 p.m. and is responsible for both the Rosewood and Southway Units, including all 120 residents. (E. Ex. 2, Tr. pp. 53-54.) There is no night shift unit manager or supervisor any night of the week from 11:00 p.m.- 7:00 a.m. As a result, the Team Leaders/Charge Nurses are the highest ranking supervisor in the facility seven nights a week. (Tr. pp. 54, 101, 188-190, E. Ex 2.)

Also reporting to the DON is Christy Merced, the Staffing Coordinator, who is responsible for scheduling all nursing personnel consistent with state requirements for appropriate levels of staffing for the number of residents in the facility. The appropriate number of staff to residents is commonly referred to as the "census" and fluctuates on a daily basis. (Tr. p. 477.) Michelle McCaslin is employed as the Central Supply clerk and reports to the DON. (Tr. p. 401 and E. Ex. 2.)

Reporting directly to the Unit Managers are 20 full-time Charge Nurse/Team Leader LPNs and eight PRN Charge Nurse/Team Leader LPNs, *i.e.*, working in an on call/as needed

basis. (Tr. pp. 32-33;)⁴ Charge Nurses are responsible for a particular hall in the unit they are assigned to and ultimately the care residents receive on that hall during the Charge Nurse's shift, including overseeing and disciplining CNAs. (E. Exs. 2,4, Tr. p. 68-72, 82.) Wedgewood chose to employ a Team Leader designation for all Charge Nurses because it determined the use of the term Team Leader projected a more positive image to residents and their families than the use of title "Charge Nurse." However, there is no difference between the responsibilities of a Charge Nurse and a Team Leader at Wedgewood and the terms are used interchangeably. (Tr. pp. 54, 852, E. Ex. 4.) Charge Nurses generally work eight and a half hour shifts--first shift is 6:45 a.m. to 3:15 p.m., second shift is 2:45 p.m. to 11:15 p.m., and third shift is 10:45 p.m. to 7:15 a.m. (Tr. p. 47.)

A new full-time LPN would be compensated at \$15.50 per hour and a PRN LPN would receive \$16.00 per hour, approximately twice the amount of hourly compensation a CNA would earn. The difference between the hourly rates is because the full-time LPN would be entitled to benefits, while the PRN LPN is not. As a result, the LPN PRN is compensated at a higher hourly rate. (Tr. 509-512, E. Ex. 12.) LPNs, similar to the Unit Managers, Day Shift Supervisor, 3-11 Supervisor, and the DON, are entitled to a premium benefits package not initially offered to floor staff such as CNAs. (Tr. pp. 513-514, E. Ex. 13.)

At new hire orientation for Charge Nurses, Charge Nurses are instructed that they are the direct supervisor of the CNAs working on their halls and have the responsibility to discipline and evaluate the CNAs to ensure resident's receive the highest quality care. (Tr. pp. 809-815.) During orientation, the Charge Nurses receive a copy of their job description, which sets forth

⁴ Wedgewood also employs RNs in a Charge Nurse/Team Leader capacity and there is no difference between LPN Charge Nurses' and RN Charge Nurses' supervisory authority over CNAs. (Tr. p. 52, 67.) Additionally, all LPNs and RNs are employed as Charge Nurses/Team Leaders, with the exception of the higher level nursing supervisors such as the day shift supervisor, 3:00 p.m. to 11:00. p.m. supervisor,

Wedgewood's "chain of command" dictating that CNAs report to the Charge Nurses. (Tr. pp. 58, E. Exs. 3, 4.) Further, new hire Charge Nurses/Team Leaders attend an in-service meeting in which the DON specifically reviews the disciplinary process for CNAs by Team Leaders and discusses how to properly complete disciplinary write ups, *i.e.*, coaching forms. (E. Ex. 5, Tr. pp. 91-96.) Only Charge Nurses attend these in-services, including LPNs and RNs, where their supervisory responsibilities are outlined. (E. Ex. 5.)

As confirmed by their job descriptions, the CNAs report directly to the Charge Nurses/Team Leaders. (E. Exs. 3 and 4; Tr. pp. 57, 642.) Wedgewood employs approximately 96 CNAs, 54 full-time and 42 part-time/PRN. (Tr. p. 508.) Some CNAs are assigned to a permanent hall while others are considered "floaters" who work different halls each scheduled shift that they work. (Tr. pp. 410-411.) The CNAs are responsible for providing direct resident care. These duties include assisting residents with bathing, dressing, grooming, changing, repositioning, and providing whatever other personal care residents need for daily living. (E. Ex. 3; Tr. pp. 39, 362.) They also perform non-resident care duties, such as washing wheelchairs, cleaning the supply rooms, and cleaning the utility room. (E. Ex. 3.) The CNAs are represented for collective bargaining purposes by the UFCW. Joint Exhibit 1 is the current Collective Bargaining Agreement between Wedgewood and the UFCW. (Jt. Ex. 1.) A new full-time CNA would be paid \$8.75 per hour and a PRN CNA would receive \$9.25 per hour because a PRN CNA is not eligible for benefits. (Tr. p. 512; E. Ex. 12.) CNAs are not initially entitled to participate in the premium benefits package offered to supervisory nursing personnel, including Charge Nurses/Team Leaders. (Tr. p. 513, E. Ex. 13.) During CNA orientation, CNAs are

weekend supervisor, unit managers and the DON. (E. Ex. 2, Tr. p. 52.)

provided with a copy of their job description and told that Charge Nurses are their supervisors. (Tr. p. 58.)

2. The Nursing Department's Disciplinary Process

Wedgewood has an Employee Handbook applicable to all nursing department employees, including Charge Nurse LPNs and CNAs. (Tr. pp. 144-145, E. Ex. 9.) The Handbook contains work rules and a progressive discipline system entitled "Employee Coaching Program." (Tr. pp. 144-145, E. Ex. 9.) Under Wedgewood's disciplinary coaching program, employees can receive either a "Level 1 coaching", for minor infractions, such as attendance violations or a "Level 2 coaching" for serious infractions, such as sleeping on the job or resident abuse. (E. Ex. 9, Tr. p. 142.) For attendance issues, if an employee has three occurrences in thirty days, the employee would receive a Level 1 coaching conducted by their Team Leader. (Tr. pp. 142, 460-462.) If an employee receives four Level One coachings in one year the employee is automatically terminated. (E. Ex. 9.) If an employee receives a Level 2 coaching, the employee is automatically suspended pending investigation by the supervisor issuing the coaching. (E. Ex. 9, Tr. p. 142, 242.) Following investigation of a Level 2 coaching, an employee can be terminated or permitted to return to work depending on the circumstances. (Tr. p. 141-145, E. Ex. 9.)

With the exception of customer complaints that are reported directly to a higher level nursing supervisor or egregious instances witnessed by a higher level supervisor, CNA coachings are initiated and implemented by the CNA's direct supervisor, the Team Leader/Charge Nurse. (Tr. pp. 145, 574-575, 772, 781-785, E. Ex. 9.) Charge Nurses have full authority to issue coaching at their own discretion and without the involvement of another supervisor, including a Unit Manager or the DON. (Tr. pp. 145, 149, 574-575, 767, 781-786.) Team Leaders/Charge Nurses are apprised of Wedgewood's coaching program and its required procedures during their

new hire orientation process and subsequent in-service educational sessions conducted on site at the facility. (Tr. pp. 91-96, 808-810, 813-815, E. Ex. 5.) In contrast to the Regional Director's conclusion, Charge Nurses, as set forth in greater detail below, are fully authorized to issue Level 1 and Level 2 coachings and do issue such coachings, including suspensions, based on their own independent judgment and discretion. (Tr. pp. 82, 94-97, 145-147, 731-739, 810-12, 781-785, E. Exs. 8 and 14.)

D. THE DUTIES OF THE CHARGE NURSES

1. The Job Descriptions Sets Out The Nursing Department Reporting Hierarchy, Including the LPN Charge Nurses' Supervisory Duties

Wedgewood's job descriptions establish the hierarchy and "chain of command" in the Nursing Department. The CNA job description states that the CNA is to report to and is supervised by the Charge Nurse, including reporting changes in resident conditions to the Charge Nurse, reporting resident and visitor concerns or complaints to the Charge Nurse, following instructions from the Charge Nurse, and performing other duties as assigned by the Charge Nurse. (E. Ex. 3.) The Charge Nurse LPN job description, entitled "Charge Nurse (LPN/LVN)" demonstrates that this position reports to the nursing supervisor and is responsible for supervising CNAs. (E. Ex. 4.) In particular, Charge Nurse LPN's essential functions and duties are to "direct the day-to-day functions of the nursing assistant." (E. Ex. 4.) The Charge Nurse LPNs, among other things, have the authority to make daily work assignments, direct work, reassign employees, issue discipline, and prepare written evaluations for CNAs. (E. Ex. 4.) The Unit Manager job description, entitled "Unit Manager, RN or LPN" shows that this position reports to the DON. (E. Ex. 18.) Job descriptions are disseminated upon hire to new employees at orientation (Tr. pp. 58, 678, 816.)

In addition, Charge Nurses attend orientation and in-service educational classes conducted by Unit Managers and the DON in which their supervisory responsibilities as a Team Leader/Charge Nurse are explained. The coaching program is discussed in detail and the Charge Nurses are explicitly advised that they are responsible for supervising, disciplining, and evaluating CNAs as part of their Team Leader responsibilities. (E. Ex. 5, Tr. pp. 90-92, 813-815.) For instance, in December 2009, the DON presented a section during the in-service program for Charge Nurses in which she reviewed the coaching forms and discussed the importance of proper coachings for CNAs in the role of providing excellent patient care. (E. Ex. 5, Tr. pp. 90-92.)

2. Scheduled Staffing in the Nursing Department

The scheduled staffing on the Rosewood and Southway units varies each day by patient census, but is approximately as follows. On Rosewood during the 6:45 a.m. to 3:15 p.m. shift, there are three Charge Nurses/Team Leaders directly supervising six CNAs, two CNAs per Charge Nurse. (Tr. p. 406.) On Southway during the 6:45 a.m. to 3:15 p.m. shift there are three Charge Nurses/Team Leaders working Saturday, Sunday, Monday and Tuesday and two Charge Nurses/Team Leaders working Wednesday, Thursday and Friday. (Tr. p. 406.) There are eight CNAs working on the day shift at Southway—two in the secured dementia unit, five remaining to be divided among the other halls, and one CNA assigned to the Starlight Program, a fall prevention program. (Tr. p. 406.)

For the 2:45 to 11:15 p.m. shift on Rosewood there are three Charge Nurses/Team Leaders and six CNAs. (Tr. p. 407.) For the same shift on Southway, there are two Team Leader/Charge Nurses and nine CNAs, three in the secured unit, five on the floor, and one Starlight CNA. (Tr. p. 407.) For the 10:45 p.m. to 7:15 a.m. shift on Rosewood there are two

Charge Nurses/Team Leaders and four CNAs. (Tr. p. 408.) For the night shift on Southway, there are two Charge Nurses/Team Leaders and five CNAs—two in the secured unit and three on the floor. (Tr. p. 408.) With the exception of the Team Leaders, no other supervisory personnel are present in the facility during the night shift. (Tr. p. 101.) On the weekends, the staffing of Team Leaders and CNAs is the same as during the week, with the exception that the DON, unit managers, day shift supervisor, and 3:00 p.m.-11:00 p.m. supervisor are not on the premises. (Tr. p. 408.) Sharon Stein, the weekend supervisor is only present at the facility from 6:45 a.m. until 11:15 p.m. on Saturdays and Sundays and while she is at the facility she is responsible for the care provided to all 120 residents. (Tr. p. 408.)

Christy Merced, Staffing Coordinator, is responsible for preparing monthly and daily schedules for the Charge Nurses and CNAs along with shift specific unit assignment sheets. (Tr. p. 399.) Monthly work schedules are issued two weeks in advance of the upcoming month. For example, October 2010's monthly schedule of Charge Nurses and CNAs would be posted approximately on September 15, 2010. (Tr. 419.) Ms. Merced completes a daily schedule of what nursing personnel are working on each shift in each unit. (Tr. p. 420, E. Ex. 15.) Ms. Merced places the daily schedules at each unit prior to her departure from the facility each day to allow the night shift Charge Nurses to know who is working on their shift that night. (Tr. p. 589-590.)

When preparing the monthly and daily schedules, Ms. Merced schedules floater CNAs in accordance with Charge Nurses' staffing instructions. (Tr. 410-412.) In this regard, Ms. Merced testified that she routinely has Charge Nurses tell her not to assign a particular floater CNA to their hall due to performance issues and the CNAs ability to care for particular residents' needs. This is not simply "personal preference" on the nurse's part, but rather a consideration of the

CNAs skills with the resident's needs. Indeed, Ms. Merced honors the Charge Nurses' directives because the Charge Nurses are the most knowledgeable and in the best position to assess which CNAs have the best skills to provide the care to the residents the Charge Nurses are responsible for. (Tr. pp. 411, 417, 418, 490-493.) Ms. Merced abides by the Charge Nurses' instructions for CNA staffing preferences and does not involve the Unit Managers or the DON in making the changes directed by the Charge Nurse. Ms. Merced explained that it is well-established that the Charge Nurses have the authority to make such staffing mandates and do make such staffing mandates depending on the residents' specific needs. (Tr. pp. 491.)

Further, Ms. Merced recounted a recent incident in which April DeLollis, LPN Charge Nurse, came to Ms. Merced and explicitly advised her that she never wanted CNA Rose Deguerre working on her hall again. (Tr. pp. 412, 490-493.) Ms. DeLollis explained to Ms. Merced that she had observed CNA Deguerre giving a resident a bed bath with a partially wet towel and that she had to write up the CNA for her improper conduct. (E. Ex. 20, Tr. pp. 412-413, 494.)⁵ Ms. DeLollis further instructed that she wanted Stacey Jackson to be assigned as a CNA floater in her hall when a floater CNA was required. (Tr. p. 414.) Ms. Merced honored

⁵ Employer Exhibit 20, the Level One Coaching issued by Charge Nurse DeLollis to CNA Rose Deguerre was introduced and rejected as an exhibit by the Employer in conjunction with Carol Hiner's testimony. (Tr. pp. 780-785.) During the direct examination of Ms. Hiner, the Employer only elicited testimony from Ms. Hiner regarding performance evaluations. In contrast, during his questioning of Ms. Hiner, the Hearing Officer elicited extensive testimony from Ms. Hiner regarding the coaching process. After the Hearing Officer concluded his questioning, the Employer sought to introduce the additional coaching issued by Charge Nurse DeLollis since Ms. Hiner provided new testimony to the Hearing Officer on the coaching process and testimony regarding her direct knowledge of the disciplinary action taken by Charge Nurse DeLollis against CNA Deguerre. The Hearing Officer rejected Exhibit 20 and the Regional Director upheld this decision in the decision, contending that it was "outside of the scope" of the Employer's direct examination. However, pursuant to the Hearing Officer Manual, Section III entitled "Evidentiary Matters" at page 37 limiting parties' questions to the scope of direct examination is improper and inapplicable in an R-Case proceeding. Therefore, given the undisputed fact that this incident was addressed in Ms. Merced's and Ms. Hiner's testimony and is relevant to the Charge Nurses' supervisory responsibilities, the Employer requests that the decision to reject the exhibit be reversed and Exhibit 20 be considered.

Charge Nurse DeLollis' instructions because "she is a nurse and she can ask me to do that." (Tr. 414.)

Ms. Merced also described a similar situation, in which Charge Nurse Mary Ann Thomas, who works on the 400 Hall of the Rosewood Unit, came to Ms. Merced to tell her that she wanted CNA Sherenette McNeal to be assigned to her hall when possible. Charge Nurse Thomas told Ms. Merced that she was pleased with CNA McNeal's performance and determined that she had the necessary skills to keep up with the hectic pace of the 400 hall. Again, Ms. Merced honored Charge Nurse Thomas' instructions and schedules CNA McNeal on the 400 hall when possible. Ms. Merced made no further inquiries about Charge Nurse Thomas' instructions, because, as the Charge Nurse, Nurse Thomas was the most knowledgeable as to whether or not CNA McNeal possessed the requisite skills to successfully perform the duties required on the 400 Hall of the Rosewood Unit. (Tr. pp. 414-416.)

As part of her duties, Ms. Merced distributes unit assignment sheets upon her arrival in the morning for the first and second shifts Monday through Friday; the weekend and night shift nurses are responsible for preparing their own daily unit assignment sheets. (Tr. p. 409, E. Ex. 11.) The unit assignment sheet memorializes the shift's daily assignments for the CNAs and is completed, for first and second shift Monday through Friday, in part by Ms. Merced, who lists the names of the nurses working, names of the CNAs assigned to what resident rooms, the unit, break times, and extra tasks being assigned to CNAs, such as wheelchair cleaning, and any doctor's appointments residents must attend. (Tr. p. 421.) The Charge Nurses are responsible for completing the balance of the unit assignment sheets in which the Charge Nurses assign CNAs additional patient care tasks, depending on resident needs, and make any necessary adjustments to the CNA room assignments, depending on resident preferences and/or workload.

(Tr. pp. 421, 805-807.) Charge Nurses will assign additional duties or change a CNA's unit/room assignments based on the Charge Nurse's individual determination of what is required to provide proper patient care in light of resident needs. (Tr. pp. 79-80, 805-806.) Before making these changes, the Charge Nurse is not required to obtain the approval of anyone else. (Tr. pp. 79-80, 805-806.)

While the facility tries to assign the same CNAs to the same residents daily, due to call offs, new hires, and the daily arrival of newly admitted residents, a Charge Nurse does not always have the same CNAs working on her hall or the same residents for whom to provide care. (Tr. pp. 410-411.) In this regard, Ms. Merced recalls numerous occasions where Charge Nurses have made changes to the initial CNA room assignments, depending on CNA staffing issues that arose during the shift. For example, during August 2010, Ms. Merced arrived to work at approximately 6:00 a.m. and observed CNA Edward Robinson, who was finishing up the night shift, working on the Southway unit. Mr. Robinson is normally scheduled to work on the Rosewood unit, but told Ms. Merced that he was transferred to the Southway unit to cover for another CNA who had gotten ill and left early. Mr. Robinson's Charge Nurse, Talae Thomas had authority to move him into the other unit to provide adequate coverage. (Tr. pp. 425-426.)

Tammy Baxter, RN, the current Day Shift Supervisor and prior Charge Nurse/Team Leader on the 3:00 p.m. to 11:00 p.m. shift on the 200 hall in the Rosewood Unit, testified that while she worked as a Team Leader during 2008, she frequently (not occasionally as the Regional Director erroneously referred to her testimony) made changes to the unit assignment sheets when she changed CNA resident assignments due to resident preferences or needs. (Tr. pp. 805-807.)

Similarly, if a CNA does not show up for work (no/call no/show), Charge Nurses have the authority to move CNAs to other assignments to provide adequate coverage when another CNA has not shown up for work. (Tr. pp. 427, 805-807.) In such a situation, Charge Nurses do not need Ms. Merced's or any other supervisor's permission to change CNA resident assignments. Ms. Baxter specifically recalled when she was working as a Charge Nurse she did have instances where a CNA failed to report for work and she would coordinate with other Charge Nurses to adjust CNA assignments to maintain adequate resident coverage. She recalls that she had authority to change CNA room assignments without any supervisory approval, exercised that authority and changed CNA room assignments per residents' needs, and that the process remains the same for Charge Nurses working at Wedgewood today. (Tr. p. 806.) Further, during seven nights a week, there is no higher level supervisor, other than the Team Leaders, on site at the facility and the Charge Nurses must use their own discretion in deciding how to provide adequate CNA coverage. Night shift Charge Nurses are not required to obtain prior approval from a higher level supervisor before making internal adjustments to CNA staffing. (Tr. pp. 101, 806.)

Similarly, Ms. Merced testified that Charge Nurses have changed initial CNA room assignments when a resident is not comfortable with the CNA or prefers a CNA with a different gender. (Tr. p. 431.) Again, Charge Nurses do not contact Ms. Merced or another supervisor to make such changes—they simply change the CNA assignment based on resident needs. (Tr. pp. 429, 806.) In addition, Ms. Merced is aware that Charge Nurses will adjust room assignments between CNAs to maintain an even work load. For instance, she recalls a recent situation where Mary Ann Thomas, LPN Charge Nurse on 400 hall, requested that one of her CNAs, Delores Powell, pick up an additional room from her other CNA Sherenette McNeal due to a resident

discharge that had occurred. (Tr. pp. 430-431.) Once again, Ms. Merced is not involved in any of these shift/resident specific changes. (Tr. p. 431.) Ms. Merced explained that since she has been employed with Wedgewood, no Charge Nurse has ever contacted her for permission to transfer a CNA from one hall/unit assignment to another. (Tr. p. 428.)

In addition to making any necessary changes to resident room assignments, Charge Nurses are responsible for assigning CNAs with additional tasks such as vital signs, weighing residents, taking residents to the Starlight fall prevention program that particular shift, or obtaining specimens from residents and memorializing these additional assignments on the unit assignment sheets. (E. Ex. 11, Tr. pp. 421, 804.) After the assignments are made, one of the Charge Nurses on the shift is responsible for signing the unit assignment sheet and Ms. Merced collects the sheets the following morning when she arrives at the facility at approximately 6:00 a.m. on the weekdays. She collects the weekend unit sheets the following Monday. (Tr. pp. 423-424.)

3. Charge Nurses Regularly Assign, Reassign and Responsibly Direct the Work of the CNAs

Wedgewood residents are generally elderly persons whose conditions change daily. (Tr. p. 28, 393, 640.) Additionally, while CNAs may be assigned to the same halls, the residents on the hall can change daily, especially in the Rosewood unit where many of the residents are short-term surgery recovery stays. (Tr. p. 22.) At the beginning of each shift, the Charge Nurses receive oral reports from the prior shift's Charge Nurses concerning the status of residents on their respective units. (Tr. pp. 69, 804.) The report consists of the off-going Charge Nurse telling the oncoming Charge Nurse about changes in resident conditions, new residents, unusual resident events that occurred during that shift, and any other information necessary to assure

operation of the shift. (Tr. p. 69, 804.) The Charge Nurses need this information to direct the care provided by CNAs to the residents. (Tr. pp. 71, 234-235, 804.)

After receiving report, the Charge Nurse checks the scheduled staffing for her unit and makes any necessary changes. (See Section D2.) Charge Nurses also provide oral instruction to the CNAs before they begin their shifts. These oral instructions are based on the report the Charge Nurse receives from the off-going Charge Nurse and the day to day needs of the residents. (Tr. pp. 71, 804.) For example, if the Charge Nurse determines that a resident should be assigned to the Starlight fall prevention program, the LPN Charge Nurse may instruct a CNA to take the resident to Starlight. (Tr. pp. 79-80.) If a Charge Nurse knows that a resident has a doctor's appointment or is scheduled for dialysis, she can direct the CNA to ensure the resident is ready to leave for the appointment on time. (Tr. p. 72, 236.)

CNA assignments can also be changed by the Charge Nurses mid-shift. CNA rest and lunch breaks are prescheduled and listed on the unit assignment sheets. (E. Ex. 11; Tr. p. 486.) In the course of a shift, it is possible that the need to postpone or reschedule a CNA lunch break will arise due to a resident emergency or due to the unit being short staffed because a CNA left early. The Charge Nurse has the authority to reschedule or postpone CNA lunch or rest breaks when the Charge Nurse determines such action is necessary. (Tr. pp. 88-89.) The Charge Nurse does not consult with anyone before postponing CNA lunch breaks. (Tr. pp. 79, 88-89.) A Charge Nurse, using her nursing judgment, can tell a CNA to stop performing her assigned duties and to do something else. (Tr. p. 78.) The Charge Nurse can also redirect a CNA to perform a task that the Charge Nurse deems is a higher priority, such as in an emergency situation. (Tr. p. 78.) In a healthcare setting such as this, a Charge Nurse is required to constantly assess the resident's condition, and using her judgment, evaluate what care needs to be

provided. (Tr. pp. 79-80, 804-805.) She then instructs the CNA accordingly and follows up throughout every hour of every shift to ensure CNAs have complied with her directives. (Tr. pp. 234, 805.) If a CNA has failed to fulfill his required tasks determined by a Charge Nurse/Team Leader, the CNA will face disciplinary action, up to and including termination. (Tr. pp. 238, 808, 810.)

After assigning CNA duties, Charge Nurses pass medications and complete their "rounds" on their respective halls. (Tr. pp. 70-71, 807-808.) Charge Nurses provide treatment to residents, pass medications, assess resident conditions, and at all times monitor the care provided to residents by the CNAs. (E. Ex. 4.) Charge Nurses must determine, based on their hourly observations of the residents, whether additional or different care is required, and whether the care being provided by the CNAs is sufficient. (Tr. p. 808, E. Ex. 4.) While performing rounds and giving treatments, Charge Nurses redirect the CNAs to perform additional or different tasks, as warranted, including redoing work improperly performed or providing additional care to residents. (Tr. pp. 72, 808.) The Charge Nurse has complete authority to assign, reassign and direct the work of the CNAs without the approval of anyone. In fact, the Charge Nurses are obligated to monitor and assure that the care provided by CNAs meets certain standards, because it is the Charge Nurses who are responsible and accountable for all care provided to the residents on their units. (E. Ex. 4, Tr. p. 82.) Charge Nurses who fail to adequately supervise their CNAs are subject to discipline. (Tr. p. 842.)⁶

⁶ The Regional Director's decision erroneously concludes that the interaction between the CNAs and Team Leaders is minimal and routine in nature because all CNAs know how to do their job and do not need anyone delegating any tasks to them. Common sense dictates that such a conclusion is absurd, especially in light of the fact that this facility is not an assembly line in a warehouse, but rather a healthcare facility providing care for residents recovering from life threatening surgeries whose conditions change by the hour. A CNA can not walk into a facility of this nature and perform her responsibilities without any input or direction from the licensed nursing staff.

The Charge Nurse is responsible for enforcing the facility's policies, and ensuring that CNAs follow these policies. (E. Exs. 3, 4, 9.) The policies do not tell the Charge Nurses how to assign duties, to whom to assign work, or how to prioritize a CNA's duties. The Charge Nurse uses her medical judgment to responsibly direct the CNAs in compliance with facility policies and procedures and standards of care. (Tr. p. 82.)

In the event the CNA wishes to leave early due to illness or emergency, she must see the Charge Nurse on her unit before going home. On the night shift when the Charge Nurses are the only supervisors in the facility, the Charge Nurse is responsible for determining whether the CNA is permitted to leave and can tell the CNA that she is not permitted to leave. (Tr. pp. 101, 223-226.) If the Charge Nurse determines the CNA must go home, the Charge Nurse can send the CNA home without seeking the authority of upper-level management, assuming adequate staffing requirements are met. (Tr. p. 101.)

The CNA receives direction as to assignment or duty changes from the Charge Nurse. (E. Ex. 3,4, Tr. p. 82.) Union witness Rebecca Ward, LPN Charge Nurse explicitly admitted that as a Charge Nurse if a CNA fails to comply with proper facility procedures, it is her responsibility to tell the CNA and ensure she corrects her behavior. (Tr. pp. 902-904, 944.) Charge Nurse Ward also admitted that if a CNA fails to provide the appropriate direct patient care, she, as the LPN is ultimately responsible. (Tr. p. 936.) Charge Nurse Ward further testified that she instructs CNAs in the performance of their duties, such as answering call lights and making resident beds. (Tr. 903-905.) Union witness CNA Alverson testified that she takes direction from Charge Nurse LPNs on a regular basis and as part of her responsibilities she would comply with requests from a Charge Nurse LPN. (Tr. p. 995.)

When a Charge Nurse observes a problem with a CNA's performance, she has several options, none of which detract from the undisputed fact that she has supervisory authority over the CNAs. Indeed, she can verbally instruct the CNA as to the proper way to perform the task; she can ignore the problem; she can address the issue in a performance evaluation, or she can initiate the formal disciplinary process, including issuing a Level 2 coaching which results in automatic suspension of a CNA. (Tr. pp. 94, 95, 111, 145-146, 702, 713, 808, E. Ex 9.) It is the Charge Nurse who decides, using her judgment, which option to follow, depending on the severity of the situation. (Tr. p. 721, 723, 808.) Each option is an example of responsible direction of CNAs. The Charge Nurse does not need to obtain approval from anyone before pursuing any of these options. (Tr. p. 171, 785, 827, E. Exs. 8, 14, 20.)

Employer Exhibits 6, 7, and 16 contain numerous examples of CNA performance evaluations completed by Charge Nurses. In some, the Charge Nurse who completed the evaluation acknowledges her supervisory role or her role in assigning work by issuing directives for improvements to CNAs within the evaluations. For instance, at page 2 of Exhibit 6, LPN Charge Nurse Thomas, notes that CNA Dickens is a good worker except for the use of cell phone during working hours. At page 4 of Exhibit 6, Charge Nurse LaPorte, LPN evaluates Irene Corea as an "outstanding employee...the main area of improvement/development that I will encourage would be for Irene to continue her education."

Tammy Baxter testified that when she was a Charge Nurse she took the responsibility for evaluating her CNAs seriously because the evaluations had a direct impact on patient care. Ms. Baxter also testified that if one of her CNA's performance was deficient she would be required to spend more time evaluating that CNA in an attempt to raise the CNA's performance to a satisfactory level. (Tr. pp. 817-819.)

Additionally, in Employer Exhibits 8 and 14, there are numerous examples of CNAs that were disciplined by Charge Nurses/Team Leaders for violation of company policies. (E. Exs. 8, 14.) Further, Supervisor Baxter, testified that when she worked as a Team Leader she had full authority to discipline CNAs by issuing Level 1 and Level 2 coachings. In this regard, she cited an example where a CNA was insubordinate to her and she issued a Level 2 coaching, immediately suspending the employee and recommending her termination to the DON, which such recommendation was accepted and adopted by the DON. (Tr. p. 810.) As set forth in greater detail below in the section concerning discipline, the disciplinary authority of LPN Team Leaders is another example of how they responsibly direct the work of the CNAs. Based on the overwhelming evidence of disciplinary actions initiated and implemented by Charge Nurses, (not simply reported as the Regional Directory concluded) there can be little doubt that, on a regular basis, Wedgewood's Charge Nurses assign and responsibly direct the work of CNAs, using independent judgment and discretion, and do so in the interest of Wedgewood.

4. Charge Nurses Are Held Accountable For Their Supervisory Skills

A Charge Nurse who fails to perform her supervisory duties over CNAs could be subject to discipline. As stated by Ms. Baxter during her testimony if she observed a Charge Nurse/Team Leader failing to supervise a CNA on her hallway she would issue a coaching to the Charge Nurse. Likewise, the DON also testified that if a Charge Nurse failed to properly supervise her CNA she could face disciplinary action. (Tr. p. 87.) Thus, Charge Nurses face the prospect of being held responsible for the performance of CNAs and "responsibly" direct CNAs.

5. Charge Nurses Prepare and Issue CNA Performance Evaluations

Charge Nurses prepare written performance evaluations for CNAs. (E. Exs. 6,7 and 16.) The evaluation is intended to direct a CNA on how to become a better employee. CNAs are expected to improve their performance based on the evaluations. The Charge Nurse establishes

the CNA's point score in each of several categories, using the Charge Nurse's own discretion. Prior to August 2010, Charge Nurses compiled evaluation ratings of the CNA in the following categories: customer service, work quality, work quantity and productivity and core values. (E. Exs. 6, 16.)

Each Charge Nurse uses her own judgment in determining each score. Charge Nurses base CNA evaluation scores on the Charge Nurse's observation of the CNA's work performance, attitude and the Charge Nurse's overall assessment of the CNA. (Tr. p. 649-650.) Following completion of the evaluation and prior to August 2010, the Charge Nurse met with the CNA to review the evaluation, had the CNA sign the evaluation, and then forwarded the evaluation to the appropriate unit manager to forward to payroll for retention in the CNAs personnel file. Currently, under the recently adopted system, the Charge Nurse and CNA complete the development feedback evaluation together, and upon completion, the Charge Nurse forwards the evaluation to payroll for inclusion in the personnel files. (E. Ex. 7.) The Charge Nurse completes the evaluations as the CNA's direct supervisor based solely on her own judgment of the CNA's performance—she is not told how to complete any section of the evaluation by a higher level supervisor. (Tr. pp. 669, 721-723.)

6. Charge Nurses Discipline, Suspend, and Recommend Termination for CNAs

The Employer presented overwhelming testimony and documentary evidence that Charge Nurses have the undisputed authority to take disciplinary action against CNAs by issuing Level 1 or Level 2 disciplinary coachings to CNAs. Such evidence was completely and erroneously disregarded by the Regional Director.

In this regard, the record demonstrates that Charge Nurses have the authority to issue discipline without obtaining prior approval of a higher level supervisor because they are deemed the "direct supervisor" of the CNAs. (E. Ex. 9, Tr. pp. 82, 94, 95, 147-148, 572-574, 731, 826,

827.) A Charge Nurse's decision to initiate the disciplinary process against a CNA becomes a permanent part of the CNA's personnel file and could lead to the CNA's immediate suspension and ultimate termination under Wedgewood's coaching policy. (E. Exs. 8, 9,14, and 20.) Moreover, Carol Hiner, Unit Manager, testified that Charge Nurses on the Rosewood Unit frequently request to use Ms. Hiner's office for their coaching sessions and conduct such meetings without Ms. Hiner being present. (Tr. pp. 784-785.) Ms. Hiner also testified that 70% of the coachings initiated on her unit are directly initiated by the Charge Nurses and do not involve her. (Tr. 784-785.) This testimony was blatantly ignored by the Regional Director because the unit manager admitted she did not actually see all the coachings in question, the coaching forms did not specify who actually initiated the coaching, and LPNs who prepared coachings in the record failed to testify. Dec. pg. 21-23.

Alternatively, if a Charge Nurse chooses to involve a higher level manager in her decision to issue a coaching, as described by Union witness Ward, this decision does not detract from the undisputed fact that the Charge Nurse is fully vested with the authority to issue such coachings on her own, but rather that this Charge Nurse has made the independent decision to involve her supervisor in the disciplinary action. (Tr. pp. 572-574, 826-827.) Regardless of whether or not the Charge Nurse's supervisor initiates the counseling or is involved in the counseling, it is the Charge Nurse who meets with the CNA to discuss what the CNA did wrong and what is expected of her in the future. (Tr. 785-786, P. Ex. 1.)

Under the current process, Charge Nurses issue the Level 1 coachings to the CNAs and return the form to Angela Popple in payroll for inclusion into the employee's personnel file—no additional supervisory signatures are needed for the coaching to become effective. (Tr. pp. 534-539, 572-573.) Once the coaching reaches Ms. Popple, the custodian of the personnel files, Ms.

Popple, presents the coaching to the Administrator for her signature, with the exception of a Level 2 coachings which must be investigated to ensure they are substantiated. The presentation of the Level 1 coaching to the Administrator for signature has no substantive effect on the issuance of the coaching whatsoever and it immediately becomes part of the CNAs disciplinary history. (Tr. pp. 572-573.) Further, Ms. Popple has no knowledge that the Administrator has ever reversed a Level 1 coaching issued by a Charge Nurse LPN. (Tr. pp. 572-573.) Following investigation of the Level 2 coaching and determination as to the outcome, the Administrator also would sign the coaching acknowledging that the coachings have been received by Ms. Popple for inclusion into the personnel files. (Tr. pp. 572-573.)

Admitted into evidence are copies of numerous Level 1 and Level 2 coachings, along with Employer's rejected Exhibit 20, a copy of the Level 1 coaching issued by Charge Nurse DeLollis against Rose Deguerre (at her own initiative and without any involvement of her unit manager Carol Hiner) which resulted in CNA Deguerre being banned from working on Charge Nurse DeLollis' hall. (E. Exs. 8, 14, 20, Tr. 412-414, 780-785, E. Ex. 20, .) Level 1 coachings by Charge Nurses are issued for less serious infractions such as failure to adhere to the dress code or failure to perform duties as directed by the Charge Nurses. (Tr. pp. 823, 824 and Exhibit 14 xx.) Employer Exhibit 14 provides examples of Level 1 coachings issued to CNAs by Charge Nurses that were admitted into evidence through the custodian of records Angela Popple. Contrary to the Regional Director's decision, the fact that LPNs who issued the coachings in these exhibits were not present to testify is irrelevant and does not call into the question the authenticity of these legitimate business records.

Level 2 coachings are for more serious infractions that mandate an immediate suspension pending investigation. (E. Exs. 8, 9, Tr. p. 142, 242.) Following investigation of a Level 2

coaching, an employee can be terminated or permitted to return to work depending on the circumstances. (Tr. p. 141-145, E. Exs. 8, 9.) Charge Nurses routinely recommend, not simply just report, that CNAs the LPN issued a Level 2 Coaching to be terminated and such recommendations are routinely adopted. (E. Ex. 8.)

For instance in Exhibit 8a, LPN Charge Nurse Smith issued a Level 2 coaching to Tracie Stevens, CNA, after CNA Stevens allowed a resident to smoke with oxygen on, resulting in nasal burns to the resident. (Tr. pp. 146-149, 827-834.) Upon learning of the incident, Ms. Smith herself, without any involvement of another supervisor, immediately suspended the CNA and told the DON that the CNA should be terminated. (Tr. pp. 146-149, 827-834.) The DON adopted Ms. Smith's recommendation and delegated the authority to terminate the CNA to Charge Nurse Smith who met with the CNA, along with Tammy Baxter as a witness, and advised the CNA she was terminated. (Tr. pp. 147, 827-834.) Exhibit 8a was admitted into the record as the Employer's business record and several witnesses corroborated the fact that Charge Nurse Smith suspended and recommend the termination of the CNA. Contrary to the Regional Director's conclusion, simply because Charge Nurse Smith was not present to testify at the hearing does not render this exhibit irrelevant or meaningless.

Similarly, in Exhibit 8b, Charge Nurse Jones, LPN observed CNA Mendoza leave a resident alone in the dining room and issued a Level 2 coaching to the CNA immediately suspending her. (Tr. pp. 150-151.) Although the CNA was not ultimately terminated, the Level 2 coaching initiated by Charge Nurse Jones remains a permanent part of CNA Mendoza's personnel file. (Tr. pp. 150-151.)

In Exhibit 8d, Charge Nurse LaPorte, LPN, issued a Level 2 coaching to CNA Rodriguez after she refused to assist a resident in room 401. Charge Nurse LaPorte suspended CNA

Rodriguez and recommended that she be terminated. (Tr. pp. 157-158.) The DON adopted Charge Nurse LaPorte's recommendation and the CNA was terminated. (Tr. 158-159.)

In Exhibit 8e, LPN Charge Nurse Conor received numerous resident complaints about Amber Parsons, CNA on February 13, 2010. Specifically, CNA Parsons had failed to properly care for the residents she was assigned to on the 200 hall that day, including failing to clean a bowel movement off a resident's sheets, failing to provide oral care in a timely manner for another resident, and failing to make another resident's bed and tidy his room in preparation for the resident's family visit. CNA Parsons was further observed leaving for her lunch break at 10:30 a.m. without properly completing the care for her assigned residents. As a result of the multiple resident complaints to Charge Nurse Conor, Charge Nurse Conor determined that the egregiousness of CNA Parson's neglect of her duties warranted a Level 2 coaching. CNA Parsons was immediately suspended by Charge Nurse Conor and Charge Nurse Conor recommended she be terminated. Following an investigation into the events in which the CNA's conduct was substantiated, and a review of her prior disciplinary history was considered, the DON adopted the Charge Nurse's recommendation and terminated the CNA. (Tr. pp. 159-160, 837-838.) The Union did not introduce any evidence establishing that these coachings were not initiated by the LPN team leaders. Further, the fact that LPNs who issued the coachings failed to testify about their specific preparation of the coaching and the fact that completion of each coaching was not witnessed by any of the Employer's witnesses does not detract from the authenticity of such admissible business records--no evidence was presented to indicate that any one other than the LPN Charge Nurses who signed these coachings prepared them at their own initiative.

Likewise, day shift supervisor Baxter testified that when she was a Charge Nurse in 2008, she had authority to issue coachings and suspend CNAs without seeking the approval of her supervisor or the DON. Specifically, during the summer of 2008, Ms. Baxter testified that she issued, not simply started to issue as the Regional Director erroneously states on page 20 of the Decision, a Level 2 Coaching to an insubordinate and threatening employee who she told to immediately clock out because she was suspended. (Tr. 810-814.) That same night Charge Nurse Baxter, at the time, contacted the DON and apprised her that she had suspended the CNA for being threatening and insubordinate. Ms. Baxter also told the DON that she wanted the employee terminated. The next day, the DON advised Ms. Baxter that, as she requested, the CNA had been terminated. (Tr. pp. 810-814.) Supervisor Baxter further confirmed that the Charge Nurses under her supervision have the same authority to issue coachings and suspend CNAs now as she had while she was a Charge Nurse and they are responsible for doing so. (Tr. 829-830.)

While all Charge Nurses possess the authority to discipline CNAs, some Charge Nurses choose not to exercise this authority. (Tr. pp. 868-869.) Charge Nurses have the discretion to decide whether to ignore improper conduct, verbally counsel an employee, educate an employee, or issue written discipline. (E. Ex. 9, Tr. pp. 94, 95, 808, 820, 868-869) There is no book or set of guidelines to instruct a Charge Nurse when a particular activity engaged in by a CNA rises to the level of a discipline situation. The Charge Nurse must make that decision. Some Charge Nurses may choose to ignore particular conduct, whereas another Charge Nurse may find that the same conduct rises to the level of a discipline situation. Thus, two Charge Nurses observing the same conduct may choose two different courses of action. Significantly, all Charge Nurses are vested with the authority to make the fundamental decision, using their own independent

judgment, whether to commence the formal disciplinary process by either themselves filling out a coaching form, or going to the Unit Manager or other supervisor for instruction. (Tr. pp. 94-97, 572-574, 826-827.)

7. Charge Nurses Authorize Payment of Time Clock Adjustments

If a CNA forgets to punch in or out for lunch, or otherwise works other than her scheduled hours, a Time Clock Adjustment Slip form must be completed by the employee and signed by the employee's "Supervisor." (E. Ex. 10.) Only Charge Nurses are authorized to sign a CNA's Time Adjustment Slip form because they are deemed the direct supervisor of a CNA and responsible for knowing what hours they worked throughout the shift. (E. Ex. 10, Tr. p. 562-564.) Completion of this form authorizes payment of wages to CNAs. (Tr. pp. 562-564.) If the Charge Nurse does not sign the form, the CNA does not receive compensation for the time recorded on the Time Clock Adjustment Slip. (Tr. pp. 562-564.)

At Wedgewood, there are times where an employee calls-off for her shift and a replacement employee cannot be found, leaving the facility below state mandated minimum staffing regulations. In those circumstances, Charge Nurses have the authority to mandate a CNA from a previous shift to fill the open shift. Charge Nurses do not need to obtain authority to mandate. At times, CNAs are mandated to stay even if such mandate will result in the CNA receiving overtime pay. (Tr. pp. 85, 86.) The Charge Nurses are not required to obtain authorization to mandate even when such mandation will result in the payment of overtime. (Tr. pp. 85, 86.)

IV. ARGUMENT

A. Legal Standard

The Board may grant review of a Regional Director's unit determination in certain circumstances. Specifically, review may be granted where:

1. a substantial question of law or policy is raised because of: (i) the absence of; or (ii) departure from, officially reported Board precedent;
2. the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the right of a party;
3. the conduct of a hearing or any ruling made in connection with the proceeding has resulted in prejudicial error; or
4. there are compelling reasons for reconsideration of an important Board rule or policy.

See NLRB RULES & REGULATIONS § 102.67(c). The Company's Request for Review in this case is premised on the first two grounds: (1) substantial questions of law are raised because of the Regional Director's departure from officially reported Board precedent; and (2) the Regional Director's decisions on substantial factual issues are clearly erroneous on the record, and such errors prejudicially affect the rights of the Employer.

B. The Regional Director's Conclusion that the Licensed Practical Nurses are Not Statutory Supervisors is Clearly Erroneous In Light of the Overwhelming Evidence Presented at the Hearing

The Regional Director erroneously determined that the LPNs should be included in the proposed bargaining unit because the Employer failed to demonstrate by a preponderance of the evidence that the LPNs exercise supervisory authority as defined by the Act. In doing so, the Regional Director blatantly ignored and improperly questioned the authenticity of a multitude of disciplinary coachings issued by LPNs, despite the fact that there was no evidence in the record to question the authenticity of the Employer's business records. Further, the Regional Director improperly mischaracterized the testimony of the Employer's witnesses in an effort to minimize the scope and breadth of the LPNs independent supervisory authority, clearly relying on only

those statements by the Union's witnesses intended to result in the conclusion that LPNs were not supervisors. For these reasons, the Employer requests review be granted.

Section 2(11) of the Act defines the term "supervisor" in the following manner:

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

The Board consistently has held that because "the statutory indicia set forth in Section 2(11) . . . (are) stated in the disjunctive . . . only one need exist to confer supervisory status . . ." Albany Medical Center Hosp., 273 NLRB 485, 486 (1984) (emphasis added); see also Oakwood Healthcare, Inc., 348 NLRB 686, 688 (2006) ("If the individual has authority to exercise . . . at least one of those functions, 2(11) supervisory status exists . . .").

The party claiming an employee is a supervisor bears the burden of proving the employee's supervisory status under the Act. NLRB v. Kentucky River Cmty. Care, Inc., 532 U.S. 706, 711-712 (2001). When analyzing whether an employee possesses supervisory authority, the focus is on whether the employer has vested in the individual the authority to undertake any of the supervisory responsibilities, **not on how frequently the individual exercises the authority, or if it is exercised at all.** Barstow Community Hospital, 352 NLRB No. 125, slip op. at 2 (August 18, 2008) ("Section 2(11) requires only possession of authority to carry out an enumerated supervisory function, not its actual exercise . . .").

Wedgewood presented copious testimony and documentation that fully establishes the supervisory responsibilities of its LPN Charge Nurses, including their authority to assign, reassign, responsibly direct, discipline, suspend and recommend the discharge of CNAs.

However, such evidence was rejected or downplayed by the Regional Director because the LPNs, in her conclusion, only exercised those responsibilities “occasionally.” Because the existence of any one of these indicia alone, without regard to frequency of performance or even actual performance, will support a finding of supervisory status, Wedgewood maintains that all of its LPN Charge Nurses/Team Leaders are supervisors.

In Kentucky River, the Supreme Court allowed that “the statutory term ‘independent judgment’ is ambiguous with respect to the degree [not what kind] of discretion required for supervisory status.” Id. at 713. Subsequently, the Board clarified the meaning of “independent judgment” in Oakwood Healthcare. There, the Board provided that, at a minimum, a person must “act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” Id. at 693. However, judgments are not independent if the judgment is “dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” Id. (citing Dynamic Science, Inc., 334 NLRB 391, 391 (2001); Beverly Enterprises v. NLRB, 148 F.3d 1042, 1047 (8th Cir. 1998); NLRB v. Meenan Oil Co., 139 F.3d 311, 321 (2d Cir. 1998)). The Board explained that “the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices.” Oakwood Healthcare, 348 NLRB at 693 (citing NLRB v. Quinnipac College, 256 F.3d 68, 78 (2d Cir. 2001); Glenmark Associates, Inc. v. NLRB, 147 F.3d 333, 341 (4th Cir. 1998); B&B Insulation, Inc., 272 NLRB 1215 fn. 1 (1984)).

Supervisors exercise independent judgment when they exercise discretion that is more than merely routine or clerical. Id. (citing J.C. Brock Corp., 314 NLRB 157, 158 (1994) (quoting Bowne of Houston, 280 NLRB 1222, 1223 (1986) (“[T]he exercise of some supervisory

authority in a merely routine, clerical, perfunctory, or sporadic manner does not confer supervisory status”). For example, if there is only one obvious choice or if an assignment is based solely on the need to equalize workloads, independent discretion is not exercised because the assignment is routine or clerical. Oakwood Healthcare, 348 NLRB at 693. Again, the existence of applicable policies does not necessarily preclude the exercise of independent judgment so long as the policies allow room for discretionary choices by the supervisor and the “degree of discretion exercised rises to the requisite level[.]” Barstow Community Hospital, 352 NLRB No. 125, slip op. at 2 (citing Oakwood Healthcare, 348 NLRB at 693).

Charge Nurses, who perform similar, if not identical duties to the Wedgewood Charge Nurses, have been found to be statutory supervisors. See Oakwood Healthcare, 348 NLRB at 694 (finding that some Charge Nurses were statutory supervisors because they exercised independent judgment in assigning staff to patients); Oak Park Nursing Care Center, 351 NLRB No. 9, slip op. at 2-3 (September 26, 2007) (finding that LPNs were statutory supervisors because they had the authority to exercise independent judgment in whether to initiate the progressive disciplinary process).

Wedgewood urges the Board to review the Regional Director’s decision, stay the election and follow the Board’s decisions in Oakwood Healthcare and Oak Park to find that the Charge Nurses at Wedgewood are statutory supervisors.

C. Contrary to the Decision, The Charge Nurses Possess and Exercise, Using Independent Judgment, Multiple Indicia of Supervisory Authority

The undisputed record evidence demonstrates that the LPN Charge Nurses at Wedgewood regularly exercise supervisory authority using independent judgment in the interest of Wedgewood.

1. Charge Nurses Exercise Independent Judgment When They Decide Whether To Initiate The Disciplinary Process, Suspend a CNA and Recommend Termination

The most compelling reason why review should be granted is the Regional Director's blatant disregard for the undisputed evidence that the Charge Nurses, using their own independent judgment and discretion, initiate discipline, suspend and recommend terminations of CNAs, and are, therefore, supervisors for purposes of section 2(11) of the Act.

In determining that Charge Nurses do not discipline, suspend or recommend discharge of CNAs, the Regional Director emphasized that the Charge Nurse's job description fails to specifically state that the Charge Nurse has the authority to discipline the CNAs, but rather, that the Charge Nurse should report CNA infractions to the nurse supervisor. Such an erroneous reliance on the absence of specific language, in light of the other language contained within the job description and the other evidence presented by the Employer, must be rejected. Dec. pg. 14-15. Indeed, the Regional Director's Decision elevates form over substance and disregards relevant language of both the CNA's and Charge Nurse's job descriptions that state that Charge Nurses supervise CNAs. In addition, the reliance on the absence of language from the Charge Nurse's job description fails to consider the undisputed evidence that Charge Nurses are apprised at orientation, and throughout their employment during in-service education training sessions, that they are indeed responsible for disciplining CNAs. (E. Ex. 5, Tr. pp. 91-96.) Undoubtedly, a job description can not take precedent over the Charge Nurse's actual responsibilities and the Regional Director's reliance on the absence of specific language in the Charge Nurse's job description is gravely misplaced.

Similarly, in another example of improperly elevating form over substance, the Regional Director concluded that the Employer's Exhibit 8, which contained numerous examples of level 2 coachings issued by LPNs, was inconclusive because the level 2 coaching forms did not

specifically state that the LPN who completed the form was actually the individual who suspended the CNA and no LPNs, whose signatures were on the Exhibit 8 coachings, testified. Once again, such a conclusion completely contradicts the balance of the Employer's witnesses' testimony. As set forth in detail in the statement of facts, numerous witnesses, including the DON and Supervisor Baxter, testified that the level 2 coachings contained within Exhibit 8 were initiated by the LPNs who signed the coaching forms. For example, in Exhibit 8a, both the DON and Supervisor Baxter testified that they were personally aware that LPN Charge Nurse Smith issued a Level 2 coaching to Tracie Stevens, CNA, after CNA Stevens allowed a resident to smoke with oxygen on, resulting in nasal burns to the resident. (Tr. pp. 146-149, 827-834.) Both the DON and Supervisor Baxter testified that Charge Nurse Smith herself, without any involvement of another supervisor, immediately suspended the CNA and told the DON that the CNA should be terminated. (Tr. pp. 146-149, 827-834.) The DON adopted Charge Nurse Smith's recommendation and delegated the authority to terminate the CNA to Charge Nurse Smith. Shortly thereafter, Charge Nurse Smith met with the CNA, along with Tammy Baxter as a witness, and advised the CNA she was terminated. (Tr. pp. 147, 827-834.) The Regional Director's decision fails to consider any of this evidence and such a significant omission warrants a review of this Decision. Exhibit 8 was admitted as the Employer's legitimate business records authenticated by Angela Popple. As such, the Employer was not required to produce every LPN Charge Nurse as a witness to authenticate these documents and the Regional Director's Decision insinuating it failed to do so should be reviewed.

In addition to ignoring the testimony surrounding Exhibit 8, the Decision minimizes Ms. Baxter's testimony that when she was a Charge Nurse she had authority to issue level two coachings and did, in fact, issue a level 2 coaching to a CNA, immediately suspended her, and

sent her home. Charge Nurse Baxter explained that she contacted the DON and advised the DON that she wanted the CNA to be immediately terminated. The next day the DON adopted Charge Nurse Baxter's recommendation and terminated the CNA. Ms. Baxter further explained that the process for issuing level two coachings by LPNs remains the same today as when she was a Charge Nurse, including the fact that Charge Nurse's immediately suspend CNAs when they issue level 2 coachings.

Further, the Regional Director advises that the Employer failed to establish that LPN Charge Nurses initiate level 2 coachings because the record was devoid of any evidence as to how they were involved in the investigation into a level 2 violation. Such a requirement is irrelevant and misplaced—all that matters for purposes of whether or not an LPN is a supervisor under the Act is whether or not the LPN initiated the discipline, suspended the employee and ultimately made a recommendation for discharge that was adopted. The Employer provided ample evidence in Exhibit 8 and through the DON's, Unit Managers' and Supervisor Baxter's testimony fully supporting the LPNs' authority to initiate level two coachings, suspend employees and recommend discharge. The absence of evidence regarding the specifics of each investigation into Exhibit 8's level 2 coachings does not reduce or eliminate this authority.

The Regional Director also improperly characterizes the Charge Nurse's LPN role in issuing level 2 coachings as merely a "reporting" function, which is not indicative of supervisory authority because the reports do not always lead to discipline. There is absolutely no evidence in the record to support such an erroneous conclusion. Undoubtedly, there is no question from the coachings that were provided in Exhibit 8, and corroborated by the DON and Supervisor Baxter, that it is the LPN who initially decides whether the CNA's conduct warrants immediate suspension and removal from the facility. This is an uncontroverted disciplinary action that

occurs every time a level 2 coaching is issued. The LPN also discusses her recommendations for the future of the suspended employee with the DON. The LPN is not required to report the infraction to the nursing supervisor who then decides to suspend the employee and there is no testimony in the record to support such a mischaracterization of Wedgewood's operations. If a level 2 coaching is issued by an LPN, the CNA is immediately terminated by the LPN. Accordingly, the Regional Director's conclusion that LPNs merely "report" level two infractions and they do not always lead to disciplinary action is wrong—they always result in immediate suspension. Dec. p. 41.

Moreover, the Regional Director contended only that there were "isolated" occasions where LPNs suspended and recommended the discharge of CNAs, but the exercise of this authority was isolated and sporadic and therefore, did not impart supervisory authority. It is important to note that level 2 coachings are issued for serious infractions—they do not occur on a daily basis, or at least one would hope at a well-run healthcare facility such infractions do not occur on a daily basis. Therefore, the Regional Director's attempts to minimize the LPNs' admitted authority to issue level 2 coachings, suspend and recommend dismissal as sporadic is erroneous. It is well established that for purposes of determining whether or not an employee is a supervisor under the Act, the focus is on whether the employer has vested in the individual the authority to undertake any of the supervisory responsibilities, **not on how frequently the individual exercises the authority, or if it is exercised at all.** Barstow Community Hospital, 352 NLRB No. 125, slip op. at 2 (August 18, 2008) ("Section 2(11) requires only possession of authority to carry out an enumerated supervisory function, not its actual exercise . . .").

Finally, although the Regional Director admits that the LPNs have the ability to initiate level 1 coachings to CNAs, she concludes that: "the record does not establish a nexus between a

level one violation and possible future disciplinary action, other than the policy in the Handbook stating that a CNA who accumulates four active level one coaching plans is discharged. The record contains no evidence that this has occurred.” Dec. pg. 43. In contrast, the record does indeed contain such evidence in Employer’s Exhibit 14, which memorializes examples of level 1 coachings issued to CNAs from an LPN. (Emp. Ex. 14, HH.) For example, on January 22, 2009, Paulette Lambert received her fourth level one coaching from her LPN Charge Nurse and was terminated. Upon review of the coaching, it specifically notes in the upper right hand corner it is her 4th coaching and she is “terminated per policy.” Consequently, the Regional Director’s conclusion that the Employer provided no evidence of CNA terminations for four level 1 coachings is erroneous and contradicts the admitted evidence in this proceeding, further warranting review. See Oak Park, 351 NLRB No. 9, slip op. at 2 (“[C]ounseling forms are a form of discipline because they lay a foundation, under the progressive disciplinary system, for future discipline against an employee.”).

2. Wedgewood’s Charge Nurses Exercise Independent Judgment When They Assign And Reassign The Work of CNAs

The Regional Director improperly determined that Wedgewood Charge Nurses do not exercise independent discretion and judgment when they assign and reassign CNAs. Assignment references “the act of designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or overtime period) or giving significant overall duties, i.e. tasks, to an employee.” Oakwood Healthcare, 348 NLRB at 689. “In the health care setting, the term ‘assign’ encompasses the charge nurses’ responsibility to assign nurses and aides to particular patients.” Id.

First, the Regional Director concluded that the Charge Nurses simply assign “routine” tasks to CNAs that are insignificant and do not vary on a daily basis. As a result, the Regional

Director determined that the Charge Nurses do not engage in assignment of tasks using independent discretion and judgment to confer supervisory status. (Dec. p. 36.) However the record evidence more than established that Wedgewood Charge Nurses assign daily tasks to CNAs that are not routine --they are medical in nature-- and change on an hourly basis depending upon the resident's individual medical needs and any emergencies that arise. It is important to note that Wedgewood is a healthcare facility, not an industrial assembly line, and residents' needs change hourly. Indeed, each witness who testified, including Union witnesses, acknowledged that Charge Nurses assign additional tasks to CNAs that are not part of the pre-assigned duties set out in the daily schedules or unit assignment sheets, depending on resident's needs. Specifically, as demonstrated in the statement of facts above, when Charge Nurses assign additional tasks to CNAs they consider the number of CNAs available, their relative skill levels, the number of residents to whom care is to be provided, the residents' acuity levels, CNA preferences and personalities, and resident preferences.

Additionally, the Regional Director noted that there are times when the staffing coordinator grants requests by the LPNs to assign or not assign a specific CNA to her hall, but such consideration did not weigh in favor of conferring supervisory authority because they were based on the LPNs "personal preferences" and not the resident's individual needs. (Dec. pg. 36.) Again, such a conclusion completely misconstrues the record evidence—the LPNs personal preferences are a direct result of the residents' needs on her assigned hall. In this regard, Ms. Merced, the staffing coordinator provided an example in which Charge Nurse Thomas specifically directed her to assign CNA McNeal to her hall when possible because she was a good performer who was able to meet the individual patient needs of her hall, which were more demanding than other halls. Ms. Merced testified that she complies with such patient specific

directives because the Charge Nurses are in the best position to assess the CNA's skills in comparison to the specific resident needs for their hall. (Tr. pp. 414-417.) These are the types of assignments the Board contemplated would qualify under Section 2(11) when it issued its decision in Oakwood Healthcare because these assignments affect the work day of the CNAs. Oakwood Healthcare, 348 NLRB at 689 ("Certainly, in the health care context, the assignment of a nurse's aide to patients with illnesses requiring more care rather than to patients with less demanding needs will make all the difference in the work day of that employee.") Charge Nurses are directly responsible for resident care in their assigned hall. Charge Nurses are further responsible for ensuring that CNAs provide residents the best care possible. To do this, Charge Nurses are sometimes faced with the need to reassign a CNA from one patient to another, or assign a CNA additional tasks, or assign a group of residents to different CNAs than those to whom the resident was originally assigned. When making these assignments or reassignments, the record demonstrates that the Charge Nurse "weighs the individualized condition and needs of a patient against the skills or special training of available nursing personnel." Oakwood Healthcare, 348 NLRB at 693. For these reasons, the Regional Director's conclusions warrant review.

3. The Charge Nurses Exercise Independent Judgment When They Direct CNAs and Their Direction is Responsible

The Regional Director's Decision explicitly admits that the Charge Nurses direct the work of CNAs, but erroneously concludes that because the Employer was unable to present any evidence of disciplinary actions taken against the Charge Nurses for such infractions, they are not supervisors for purposes of the Act. The Regional Director's decision misconstrues Board precedent and disregards applicable evidence presented by the Employer.

Responsible direction requires that “the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly.” Oakwood Healthcare, 348 NLRB at 692. To establish accountability, Wedgewood was simply required to demonstrate “that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a **prospect** of adverse consequences for the putative supervisor if he/she does not take these steps.” Id. The Regional Director improperly determined that the Employer failed to demonstrate there is a prospect of adverse consequences because it did not present evidence of actual consequences. Therefore, the LPNs could not be considered supervisors for purposes of the Act.

Admittedly, no evidence was introduced to show that a Charge Nurse at Wedgewood has been disciplined or discharged because of her failure to supervise CNAs. However, a showing of accountability requires only a showing of “a *prospect* of consequences,” and not a showing of actual consequences as erroneously mandated by the Regional Director. Golden Crest, 348 NLRB at 731 (citing Oakwood Healthcare, 348 NLRB at 692) (emphasis in original). The Employer’s evidence established that a Charge Nurse who fails to perform her supervisory duties over CNAs could be subject to discipline. Indeed, as stated by Ms. Baxter during her testimony if she observed a Charge Nurse Team Leader failing to supervise a CNA on her hallway she would issue a coaching to the Charge Nurse, but she has not had occasion to do so. (Tr. p. 842.) Likewise, the DON also testified that if a Charge Nurse failed to properly supervise her CNA, she could face disciplinary action. (Tr. p. 87.) Thus, the Employer did present testimony of a

prospect of consequences and the Regional Director's decision contradicts Board precedent and warrants review.

4. Charge Nurses Exercise Independent Judgment When They Evaluate CNAs

The Regional Director also incorrectly found that LPNs failed to exercise independent judgment in performance evaluations because there was no record evidence that CNAs were disciplined for failing to comply with directives for improvement in the performance evaluations. (Dec. pg. 44-45.) Once again, the Regional Director's interpretation of Board precedent places improper evidentiary burdens on the Employer that should be reviewed.

Performance evaluations are indicia of supervisory status if they instruct or direct the employees being evaluated to change their job performance, *i.e.*, directs their work. Caremore, Inc. d/b/a Altercare of Hartville v. NLRB, 129 F.3d 365, 369-70 (6th Cir. 1997). There is no requirement that evidence be submitted to demonstrate additional disciplinary action was taken against a CNA for failing to follow the directives in a performance evaluation. The Employer presented extensive performance evaluations to CNAs who were advised of areas that they needed to improve upon or they could face additional disciplinary action. (Tr. pp.702, 818-819.)

For example, in Exhibit 16, there is a 90 day performance evaluation for Rosaline Leger by Charge Nurse Meyer dated June 7, 2010. Ms. Hiner confirmed that this evaluation was completed by Charge Nurse Meyer in its entirety, with the exception of where Ms. Hiner filled out the CNA's name and other identifying information to advise the Team Leader that CNA Leger was up for her annual evaluation. (Tr. p. 657.) In the evaluation, Charge Nurse Meyer, LPN explicitly directed the CNA to remember vitals by 4:00 p.m., meals by 6:00 p.m. and alert nurse when leaving the floor. (E. Ex. 16.) Exhibit 16 also contains additional instructions for CNAs from a variety of LPN Charge Nurses about improving the CNA's performance, including

completing additional education and care cards in a timely manner. Accordingly, the evaluation process of CNAs by Team Leaders at Wedgewood should be considered an additional indicator of the LPN Charge Nurses' ability to direct the work of a CNA.

5. Inordinately Low Supervisor/Employee Ratios Also Support A Finding That The Charge Nurses Are Supervisors

Finally, the Regional Director failed to consider any analysis of the supervisor/nursing employee ratios at the facility because she concluded there were no primary indicia of supervisory authority, so she was not obligated to consider secondary indicia. (Dec. p. 38.) However, in light of the errors in the Regional Director's decision above, such secondary indicia should be considered in granting review and demonstrating Charge Nurses are supervisors for purposes of the Act. Foremost, on the night shift seven days a week, if the Charge Nurses are statutory employees, as they contend, the ratio of supervisors to statutory employees would be 0-13 (*i.e.*, non-existent) any night of the week. (Facts Section D2; E. Ex. 2, Tr. p. 101.) No nursing home facility would remain in business for even one day if they left residents and employees without supervision on an eight and a half hour shift.

Alternatively, if the Charge Nurses are deemed supervisors, then the night shift ratio becomes 1 Charge Nurse to 4 CNAs on Rosewood and 1 Charge Nurse to 5 CNAs on Southway—an obviously more realistic ratio for the night shift supervision of a nursing home housing 120 residents, some of whom are recovering from critical surgical procedures. (Section D2.)

On the weekends during the day shift, assuming Charge Nurses are statutory employees, there would be 1 supervisor for 20 Charge Nurses and CNAs, and on the weekend 3:00 p.m. to 11:00 p.m. shift, the ratio would be 1 supervisor to 22 Charge Nurses and CNAs. (Section D2.) Such a ratio that envisions one supervisor supervising 20-22 employees and 120 residents is

preposterous. Indeed, as explained by Unit Manager Bowden, it would be physically impossible for the weekend supervisor to supervise that many employees and residents and provide adequate resident care. Further, such scant upper level supervision on the weekends is yet another indicator that the Charge Nurse LPNs are responsible for supervising the CNAs. (Tr. pp. 1056-1057.)

If the Charge Nurses are considered to be supervisors on the weekend day and mid shift, the ratio for day shift for Rosewood is a ratio of 3 Team Leaders to 6 CNAs, and 3:00 p.m. 11:00 p.m. would be 3 Team Leaders to 6 CNAs. (Section D2.) For Southway, the ratio where Charge Nurses are included as supervisors would be 3 Charge Nurses to 8 CNAs for both day and mid shift. Therefore, analysis of the staffing ratios and the resulting inordinately low (or in the case of the night shift non-existent) ratios when Charge Nurses are deemed employees further supports the Employer's position that the LPN Charge Nurses are supervisors for purposes of the Act. Albany Medical Center Hosp., 273 NLRB at 486, (1984)(noting that low supervisor to employee ratio supports conclusion that assistant head nurses were supervisors under the Act).

V. THE BOARD SHOULD STAY FURTHER PROCESSING OF THE PETITION AND HOLDING THE ELECTION UNTIL IT GRANTS THE EMPLOYER'S REQUEST FOR REVIEW AND DETERMINES THAT THE REGIONAL DIRECTOR'S DECISION WAS ERRONEOUS

An analysis of the record evidence under Board precedent compels the conclusion that the Regional Director wrongfully determined that LPN Charge Nurses are statutory employees for purposes of the Act. It is thus imperative that the Board stay the further processing of the Petition and the holding of the election until the Board grants the Employer's Request for Review and determines that the Regional Director's Decision was inaccurately decided. A stay would prevent the waste of time and money of both the Union and the Employer until this issue is resolved. Therefore, for all the foregoing reasons, the election should be stayed. See

Piscataway Assocs., 220 NLRB 730 (1975) (Board granted Employer's request for review and stayed the election pending decision on review after Regional Director issued Decision and Direction of Election finding that six building superintendents were not supervisors within the meaning of the Act); Angelica Healthcare Servs. Group, 315 NLRB 1320 (1995) (Board granted Union's request for review and stayed the election).

VI. CONCLUSION

As set forth above, review of the Regional Director's decision is warranted. When analyzing whether or not LPNs discipline CNAs, the Regional Director disregarded or minimized critical evidence which unequivocally demonstrated that all of the LPN Charge Nurses/Team Leaders at Wedgewood have the authority, using independent discretion and judgment, to issue disciplinary coachings, suspend and recommend terminations of CNAs and therefore, meet the indicia of supervisory status in Section 2(11). In addition, LPN Charge Nurses at Wedgewood assign, reassign and responsibly direct the work of the CNAs through their daily observations of the CNAs and the annual performance evaluation process providing further evidence of their supervisory status. Finally, the inordinately low and/or non-existent supervisor to staff ratios when the Charge Nurses are considered statutory employees further demonstrates that review of the Decision is warranted.

In light of the foregoing, Wedgewood respectfully requests that the Board grant its Request for Review of the Regional Director's Decision and Direction of Election. The Employer further respectfully requests that the Board grant its Request to Stay the Election pending consideration of the Company's Request.

Dated: October 8, 2010

Respectfully submitted,

/s/ Christine S. Tenley

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Attorneys for the Employer
Lakeland Healthcare Associates, LLC d/b/a
Wedgewood Healthcare Center

CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2010, I electronically filed the foregoing THE EMPLOYER'S REQUEST FOR REVIEW OF DECISION AND DIRECTION OF ELECTION AND REQUEST TO STAY ELECTION with the National Labor Relations Board via www.nlr.gov, and forwarded a true and correct copy of the same to the following person **via facsimile**:

Glenn Harris
705 East Orange Street
Lakeland, Florida 33801
Facsimile: 863-583-3327

/s/ Christine S. Tenley
Christine S. Tenley

Firmwide:97933387.1 052395.1149

EXHIBIT D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LAKELAND HEALTH CARE
ASSOCIATES, LLC., d/b/a
WEDGEWOOD HEALTHCARE CENTER.
Employer

and

Case 12-RC-9426

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 1625
Petitioner

ORDER

Employer's Request for Review of the Regional Director's Decision and Direction of Election is denied as it raises no substantial issues warranting review. Employer's request to stay the election is also denied as moot.

WILMA B. LIEBMAN, CHAIRMAN

CRAIG BECKER, MEMBER

Member Hayes, dissenting:

I would grant review. The Employer contends that its licensed practical nurses in the petitioned-for unit possess supervisory authority with reference to discipline, assignment, and direction. The Employer further contends that the nurses exercise independent judgment when they evaluate nursing assistants, and that if the nurses at issue were found not to be supervisors, there would be an inordinately low ratio of supervisors to employees. In my view, these contentions raise factual and legal issues that warrant fuller examination.

BRIAN E. HAYES, MEMBER

Dated, Washington, D.C., December 6, 2010.

EXHIBIT E

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

LAKELAND HEALTHCARE ASSOCIATES, LLC.,
D/B/A WEDGEWOOD HEALTHCARE CENTER

Employer

and

UNITED FOOD AND COMMERCIAL WORKERS,
LOCAL 1625

Petitioner

Case: 12-RC-9426

Date Filed 8/11/2010

Date Issued OCTOBER 21, 2010

Type of Election:
(Check one:)

- Stipulation
- Board Direction
- Consent Agreement
- RD Direction
Incumbent Union (Code)

(If applicable check
either or both:)

- 8 (b) (7)
- Mail Ballot

TALLY OF BALLOTS

The undersigned agent of the Regional Director certifies that the results of the tabulation of ballots cast in the election held in the above case, and concluded on the date indicated above, were as follows.

- 1. Approximate number of eligible voters..... 25
- 2. Number of Void ballots 0
- 3. Number of Votes cast for.....PETITIONER..... 13
- 4. Number of Votes cast for.....
- 5. Number of Votes cast for.....
- 6. Number of Votes cast against participating labor organization(s)..... 8
- 7. Number of Valid votes counted (sum of 3, 4, 5, and 6) 21
- 8. Number of Challenged ballots 1
- 9. Number of Valid votes counted plus challenged ballots (sum of 7 and 8) 22
- 10. Challenges are (not) sufficient in number to affect the results of the election.
- 11. A majority of the valid votes counted plus challenged ballots (item 9) has ~~not~~ been cast for

PETITIONER

For the Regional Director
Region 12

Rebecca S. Costello

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For EMPLOYER

[Signature]

For PETITIONER

[Signature]

For

For

EXHIBIT F

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

LAKELAND HEALTHCARE ASSOCIATES, LLC., d/b/a WEDGEWOOD HEALTHCARE CENTER Employer	TYPE OF ELECTION (CHECK ONE)	(ALSO CHECK BOX BELOW WHEN APPROPRIATE)
and	<input type="checkbox"/> CONSENT	<input type="checkbox"/> 8(b)(7)
UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1625	<input type="checkbox"/> STIPULATED	
Petitioner	<input checked="" type="checkbox"/> RD DIRECTED	
	<input type="checkbox"/> BOARD DIRECTED	
	CASE 12-RC-9426	

CERTIFICATION OF REPRESENTATIVE

An election has been conducted under the Board's Rules and Regulations. The Tally of Ballots shows that a collective-bargaining representative has been selected. No timely objections have been filed.

As authorized by the National Labor Relations Board, it is certified that a majority of the valid ballots has been cast for UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1625 and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All licensed practice nurse team leaders employed at the Employer's facility located at 1010 Carpenter's Way, Lakeland, Florida; excluding all other employees, guards, and supervisors as defined in the Act.



Signed at Tampa, Florida on
the 6th day of January, 2011

Handwritten signature of Rochelle Kentov in cursive script.

Rochelle Kentov
Regional Director, Region 12
National Labor Relations Board
201 East Kennedy Boulevard, Suite 530
Tampa, Florida 33602-5824

EXHIBIT G

INTERNET
FORM NLRB-501
(2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

FORM EXEMPT UNDER 44 U.S.C 3512

DO NOT WRITE IN THIS SPACE	
Case 12-CA-27044	Date Filed 2-9-11

INSTRUCTIONS:

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT	
a. Name of Employer Wedgewood Healthcare Center	b. Tel. No. 863-815-0488
	c. Cell No.
	f. Fax No. 863-815-0580
d. Address (Street, city, state, and ZIP code) 1010 Carpenter's Way, Lakeland, Fl. 33809	e. Employer Representative Cara Roland - Administrator
	g. e-Mail
	h. Number of workers employed 28
i. Type of Establishment (factory, mine, wholesaler, etc.) Nursing Home	j. Identify principal product or service Health Care
k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (1st subsections) 8(a)5 of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.	
2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices) The above named employer refuses to bargain with the LPN's certified bargaining agent, United Food & Commercial Workers, Local 1625.	
3. Full name of party filing charge (if labor organization, give full name, including local name and number) United Food & Commercial Workers, Local 1625	
4a. Address (Street and number, city, state, and ZIP code) 705 E Orange St., Lakeland, Florida 33801	4b. Tel. No. 863-686-1625
	4c. Cell No.
	4d. Fax No. 863-583-3327
	4e. e-Mail
5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization) United Food & Commercial Workers International Union	
6. DECLARATION	
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.	
By  (signature of representative or person making charge)	Glenn Harris/Director of Organizing (Print type name and title or office, if any)
705 E. Orange St., Lakeland, Florida 33801 Address	Tel. No. 863-686-1625
	Office, if any, Cell No.
	Fax No. 863-583-3327
	e-Mail
	2/9/2011 (date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

PK

EXHIBIT H



United States Government
NATIONAL LABOR RELATIONS BOARD
Region 12
201 E. Kennedy Boulevard, Suite 530
Tampa, Florida 33602-5824

Telephone 813-228-2641
Facsimile 813-228-2874
www.nlr.gov

February 10, 2011

Cara Roland, Administrator
Wedgewood Healthcare Center
1010 Carpenter's Way
Lakeland, FL 33809

Re: Wedgewood Healthcare Center
Case: 12-CA-27044

Dear Ms. Roland:

This is to inform you that a charge, a true copy of which is enclosed, was filed in the above-entitled matter. Also enclosed is a statement (Form NLRB-4541) briefly setting forth our investigation and voluntary adjustment procedures.

I would appreciate receiving from you a full and complete written account of the facts and a statement of your position with respect to the allegations of the charge. Also, please complete and return one copy of the enclosed questionnaire regarding commerce information (Form NLRB-5081).

The case has been assigned to the office shown below. When the Board agent solicits relevant evidence from you or your counsel, I request and strongly urge you or your counsel to promptly present to the Board agent any and all evidence relevant to the investigation. It is my view that a refusal to fully cooperate during the investigation might cause a case to be litigated unnecessarily. Full and complete cooperation includes, where relevant, timely providing all material witnesses under your control to a Board agent so that witnesses' statements can be reduced to affidavit form, and providing all relevant documentary evidence requested by the Board agent. The submission of a position letter or memorandum, or the submission of affidavits not taken by a Board agent, does not constitute full and complete cooperation. **Further, please be advised that we cannot accept any limitations on the use of any evidence or position statements that are provided to the Agency. Thus any claim of confidentiality cannot be honored except as provided by Exemption 4 of FOIA, 5 U.S.C. Sec. 552(b)(4), and any material submitted may be subject to introduction as evidence at any hearing that may be held before an administrative law judge. In this regard, we are required by the Federal Records Act to keep copies of documents used in furtherance of our investigation for some period of years after a case closes. Further, we may be required by the Freedom of Information Act to disclose such records upon request, absent some applicable exemption such as those that protect confidential financial information or personal privacy interests (e.g., Exemption 4 of FOIA, 5 U.S.C. Sec. 552(b)(4)). Accordingly, we will not honor any request to place limitations on our use of position statements or evidence beyond those prescribed by the foregoing laws, regulations and policies. Please state the case name and number on all correspondence.**

FILING DOCUMENTS WITH REGIONAL OFFICES: The Agency is moving toward a fully electronic records system. (Please see the enclosed brochure, NLRB E-Filing System.) To facilitate this important initiative, the Agency strongly urges all parties to submit documents and other materials (except unfair labor practice charges and representation petitions) to Regional Offices through the Agency's E-filing system on its website: <http://www.nlr.gov> (See Attachment to this letter for instructions). Of course, the Agency will continue to accept timely filed paper documents.

It would be helpful if you would furnish this office with your or your representative's e-mail address for use by the Region for casehandling.

Attention is called to your right, and the right of any party, to be represented by counsel or other representative in any proceeding before the National Labor Relations Board and the courts. In the event that you choose to have a representative appear on your behalf, please have your representative complete Form NLRB-4701, "Notice of Appearance," and forward it promptly to this office. Please note that NLRB Form 4701 may be executed by your designated representative. Also enclosed is NLRB Form 4541, which explains some basic unfair labor practice case procedures, including regarding service of documents for represented parties.

Assistance is available for persons with limited English proficiency. Requests for such assistance should be communicated to the assigned office, as listed below, as early as possible.¹

Please be advised that, under the Freedom of Information Act, unfair labor practice charges and representation petitions are subject to prompt disclosure to members of the public upon request. In this regard, you may have received a solicitation by organizations or persons who have obtained public information concerning this matter and who seek to represent you before our Agency. You may be assured that no organization or person seeking your business has any "inside knowledge" or favored relationship with the National Labor Relations Board; their information regarding this matter is only that which must be made available to any member of the public.

Customer service standards concerning the processing of unfair labor practice cases have been published by the Agency and are available upon request from the Regional Office. Your cooperation in this matter is invited so that all facts of the case may be considered.

Very truly yours,



Rochelle Kentov
Regional Director

Enclosures

**Assigned To: Tampa, FL 33602 Tel. No.: 813-228-2641, Address: 201 E. Kennedy Blvd.,
Ste. 530,**

¹ The National Labor Relations Board will provide assistance to individuals with limited English. If you or anyone involved in this case is in need of assistance due to their limited English, please advise this Office as soon as possible.

La Junta Nacional de Relaciones de Trabajo proveerá asistencia a personas con ingles limitado. Si uno necesita asistencia debido a su ingles limitado, debe avisar a esta Oficina tan pronto posible.

Attachment

**ELECTRONIC FILINGS THROUGH THE AGENCY'S WEBSITE AND
EMAIL COMMUNICATION WITH BOARD AGENTS**

ELECTRONIC FILING OF DOCUMENTS WITH THE AGENCY: All Regional Offices are in the process of creating an electronic investigative case file that contains electronic copies of all documents in the paper case file. This electronic case file initiative is a central component of the Agency's development of a new case management system called NxGen. When the NxGen system is deployed throughout the Agency, this system will provide parties greater access to public information about pending cases. To facilitate this important initiative, the Agency strongly urges all parties to submit documents and other materials (except unfair labor practice charges and representation petitions) through the Agency's E-Filing system on its website: <http://www.nlr.gov>.

On the home page of the Agency's website, click on the "E-Gov" tab, select **E-Filing**, and follow the detailed instructions. The following documents may be filed electronically through the Agency's website:

- Answer to Complaint or Compliance Specification. However, if the electronic version of an Answer to a Complaint or a Compliance Specification is not in a pdf format that includes the signature of the party or its representative, the original answer containing the required signature must be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing.
- Appeal Filings to the Office of the General Counsel
- Briefs
- Disclaimer of Interest
- EAJA Applications
- Evidence
- *Excelsior* List
- Exceptions or Cross Exceptions
- Extension of Time Request
- Motions and Oppositions to Motions
- Notice of Appearance
- Objections to an Election
- Petition to Revoke a Subpoena or Response
- Position Statement
- Request for Review
- Request for Special Permission to Appeal
- Request to Proceed
- Withdrawal Request

E-FILINGS MUST BE TIMELY: The Agency will accept electronic filings up to 11:59 p.m. in the time zone of the receiving office on the due date. Filings accomplished by any other means must comply with the requirements of HUSection 102.111 of the Board's Rules and Regulations.

- A document will be considered timely filed if the E-Filing receipt reflects that the entire document was received by the Agency's E-Filing system before midnight local time on the due date. (Midnight is considered the beginning of a new day.) Filings accomplished by any other means such as mail, personal delivery, or facsimile (if allowed), must be received by the close of business in the receiving office on the due date.
 - Unlike the Federal Courts, the Agency does not add 3 days to any due date regardless of the manner the document to which the filer is responding was served.
 - Although the Agency's E-Filing system is designed to receive filings 24 hours per day, parties are strongly encouraged to file documents in advance of the filing deadline and during the normal business hours of the receiving office, in the event problems are encountered and alternate means of filing become necessary.
-
- The receiving office's staff will respond to non-technical questions regarding the E-Filing system during normal business hours. For technical problems, please refer to the E-Filing FAQ or send an email to e-filing@nlrb.gov. If you wait until after the close of business to attempt to E-File and encounter problems, no one will be available to assist you.

- **Technical Failure.** If the Agency's E-Filing system is unable to receive documents for a continuous period of more than 2 hours after 12 noon (Eastern Time), the site will be declared to be in technical failure. Notice of the technical failure determination will be posted on the website as soon as possible. Scheduled service, system maintenance or upgrades, or when the system will be unavailable to receive filings, will also be posted. If the system is determined to be in technical failure on the due date for the filing of a document and the failure prohibited a party from E-Filing, the document must be filed by 5:00 p.m. (Eastern Time) on the next business day.
- **User Problems.** Problems with a user's telephone lines, internet service provider, hardware, or software; user problems in understanding or following the E-Filing instructions; or rejection of a document because it contains a virus do not constitute a technical failure and will not excuse an untimely filing. A filer who cannot E-File a document because of any of these user problems must file conventionally and timely. The Agency's offices have no lobby facilities for filing after the close of business. Thus, a user who waits until after close of business on the due date to attempt to E-File does so at his/her peril. If you are unsure whether the problem is a technical failure or a user problem, assume it is a user problem.
- If a timely, conventional filing is impossible because a user problem developed after close of business on the due date, the user should attempt to E-File using another computer with internet access, such as another computer in the office, a home computer, a computer at a public library, or a computer at a commercial business service center.

ELECTRONIC FILING IS A THREE-STEP PROCESS: Electronic filing is not complete until all three steps of the process are completed: (1) entering your data and uploading your document(s); (2) reviewing and confirming your submission; and (3) receiving your receipt with confirmation number.

PREFERRED DOCUMENT FORMAT IS PDF: The preferred format for submitting documents using E-Filing is Adobe's Portable Document Format (*.pdf). However, in order to make the Agency's E-Filing system more widely available to the public, persons who do not have the ability to submit documents in PDF format may submit documents in Microsoft Word format (*.doc). Persons who do not have the ability to submit documents in either PDF or Microsoft Word format may submit documents in simple text format (*.txt). Regardless of the format, all documents E-Filed with the Agency must be submitted in a "read-only" state.

DOCUMENTS MUST BE VIRUS-FREE: Users are responsible for taking all reasonable steps to prevent sending any material to the Agency that contains computer viruses. All submissions using this E-Filing Form will be scanned for viruses. Any submission that contains a virus will automatically be deleted by the Agency's computer system and thus will not be processed. Rejection of a filing because it contains a virus will not excuse a late filing and is considered to be a user problem, not a technical failure as defined herein.

DOCUMENTS MUST BE COMPLETE: Any document submitted electronically to the Agency must be complete. Any attachments must be converted into electronic form and included as part of the document. No attachments may be filed (either electronically or by service of hardcopy) separately from the electronic document under any circumstances. Exception: Position statements or documentary evidence submitted to a Regional Office during an unfair labor practice investigation or documents relating to appeals pending before the Office of Appeals may be filed as separate attachments.

CERTAIN DOCUMENTS MUST INCLUDE STATEMENT OF SERVICE: All documents submitted to a Regional, Subregional or Resident Office, which under the Board's Rules and Regulations must be served on other parties to the case, must include a statement of service showing how that document was served on other parties in accordance with the service requirements of Section 102.114(i) of the Board's Rules and Regulations. This rule provides: "In the event the document being filed electronically is required to be served on another party to a proceeding, the other party shall be served by electronic mail (email), if possible. If the other party does not have the ability to receive electronic service, the other party shall be notified by telephone of the substance of the transmitted document and a copy of the document shall be served by personal service no later than the next day, by overnight delivery service, or, with the permission of the party receiving the document, by facsimile transmission."

OFFICIAL BUSINESS: Outside parties may send electronic communications to Regional, Subregional and Resident Offices dealing only with official Agency business.

E-MAIL COMMUNICATIONS WITH BOARD AGENTS: To encourage and facilitate the exchange of case handling information between the parties or their representatives and Board agents, individual Board agents' E-mail addresses will be made available to the parties. We encourage parties and/or their representatives to provide the Regional, Subregional

or Resident Office with their E-mail addresses. E-mail communications with a represented party generally will be through the party's attorney or other representative. If an outside party and/or its representative provides its E-mail address, Board agents will accept and send E-mail messages to arrange appointments, schedule witnesses and exchange other case-relevant information. If a party and/or its representative requests that communications not be sent by E-mail, Board agents will honor such request after receipt of the request in the Regional, Subregional or Resident Office.

Please note that Board agents may, on occasion, be out of the Regional office and unable to receive time-sensitive E-mails. It is critically important that all substantive E-mails and any documents listed above should be filed with the Regional Office through the Agency's website (<http://www.nlr.gov>) as outlined above.

QUESTIONS: Any questions about the Agency's E-filing policies may be directed to an NLRB Information Officer during regular business hours.

EXHIBIT I

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WEDGEWOOD HEALTHCARE CENTER

Employer

and

UNITED FOOD & COMMERCIAL WORKERS, LOCAL 1625

Charging Party

Case: 12-CA-27044

DATE OF
MAILING

February 10, 2011

AFFIDAVIT OF SERVICE OF

Charge Against Employer

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by mail upon the following persons, addressed to them at the following addresses:

Cara Roland, Administrator
Wedgewood Healthcare Center
1010 Carpenter's Way
Lakeland, FL 33809

Glenn W Harris, Director of Organizing
United Food and Commercial Workers, Local 1625
705 E. Orange Street
Lakeland, FL 33801



Latoria Grinder

Subscribed and sworn to before me on

February 10, 2011

DESIGNATED AGENT

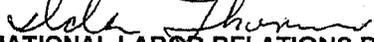

NATIONAL LABOR RELATIONS BOARD

EXHIBIT J

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12**

LAKELAND HEALTH CARE ASSOCIATES, LLC.,
d/b/a WEDGEWOOD HEALTHCARE CENTER

and

Case 12-CA-27044

UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL 1625

COMPLAINT AND NOTICE OF HEARING

United Food and Commercial Workers Union, Local 1625, herein called the Union, has charged that Lakeland Health Care Associates, LLC., d/b/a Wedgewood Healthcare Center, herein called Respondent, has been engaging in unfair labor practices as set forth in the National Labor Relations Act, 29 U.S.C. §151 et seq., herein called the Act. Based thereon, the Acting General Counsel, by the undersigned, pursuant to Section 10(b) of the Act and Section 102.15 of the Rules and Regulations of the National Labor Relations Board, herein called the Board, issues this Complaint and Notice of Hearing and alleges as follows:

1.

The charge in Case 12-CA-27044 was filed by the Union on February 9, 2011, and a copy was served by regular mail on Respondent on February 10, 2011.

2.

(a) At all material times, Respondent, a Florida limited liability company with an office and place of business located in Lakeland, Florida, herein called its Lakeland facility, has been engaged in the business of operating a nursing home.

(b) During the past 12 months, Respondent, in conducting its business operations described above in paragraph 2(a), derived gross revenues in excess of \$100,000.

(c) During the past 12 months, Respondent, in conducting its business operations described above in paragraph 2(a), purchased and received at its Lakeland, Florida facility, goods and materials valued in excess of \$50,000 directly from points outside the State of Florida.

(d) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and has been a health care institution within the meaning of Section 2(14) of the Act.

3.

At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

4.

At all material times, Ken Hawkins has held the position of Senior Vice President of Human Resources and Labor Relations of Genoa Healthcare Consulting, LLC, a consultant to Respondent, and has been an agent of Respondent within the meaning of Section 2(13) of the Act.

5.

(a) The following employees of Respondent, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All licensed practice nurse team leaders employed at Respondent's facility located at 1010 Carpenter's Way, Lakeland, Florida; excluding all other employees, guards and supervisors as defined in the Act.

(b) On January 6, 2011, the Union was certified as the exclusive collective-bargaining representative of the Unit.

(c) At all times since January 6, 2011, based on Section 9(a) of the Act, the Union has been the exclusive bargaining representative of the Unit.

6.

On about January 12, 2011, the Union, by letter, requested that Respondent bargain collectively with the Union as the exclusive collective-bargaining representative of the Unit.

7.

Since on about January 13, 2011, Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit.

8.

By the conduct described above in paragraph 7, Respondent has been failing and refusing to bargain collectively with the exclusive collective-bargaining representative of its employees, in violation of Section 8(a)(1) and (5) of the Act.

9.

The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

WHEREFORE, as part of the remedy for Respondent's unfair labor practices alleged above, the Acting General Counsel seeks an Order requiring Respondent to bargain in good faith with the Union, on request, for the period required by *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962), as the recognized bargaining representative of the Unit. The Acting General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

ANSWER REQUIREMENT

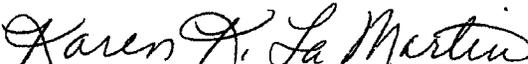
Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must each file an answer to the complaint. The answer must **be received by this office on or before March 8, 2011, or postmarked on or before March 7, 2011**. Respondent should file an original and four (4) copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically by using the E-filing system on the Agency's website. In order to file an answer electronically, access the Agency's website at <http://www.nlr.gov>, click on **File Case Documents** and then follow the directions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. A failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the website was off-line or unavailable for some other reason. When an answer is filed electronically, an original and four paper copies must be sent to this office so that they are received no later than three business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, the Board may find, pursuant to Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT commencing on a date and at a time and place to be later designated, and on consecutive days thereafter until concluded, a hearing will be conducted before a duly designated Administrative Law Judge of the Board. At the hearing, Respondent and any other party to this proceeding will have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

DATED at Tampa, Florida, this 22nd day of February, 2011.


Karen K. LaMartin, Acting Regional Director
National Labor Relations Board, Region 12
201 East Kennedy Boulevard, Suite 530
Tampa, FL 33602-5824

Attachments

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
NOTICE

Case: 12-CA-27044

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end. An agreement between the parties, approved by the General Counsel, would serve to cancel the hearing.

However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated.

Postponements **will not be granted** unless good and sufficient grounds are shown **and** the following requirements are met:

(1) The request must be in writing. An original and two copies must be filed with the General Counsel and with the Chief Administrative Law Judge in Washington, D.C.

(2) Grounds must be set forth in **detail**;

(3) Alternative dates for any rescheduled hearing must be given;

(4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; **and**

(5) Copies must be simultaneously served on all other parties (*listed below*), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

Cara Roland, Administrator
Wedgewood Healthcare Center
1010 Carpenter's Way
Lakeland, FL 33809

Glenn W Harris, Director of Organizing
United Food and Commercial Workers
Union, Local 1625
705 E. Orange Street
Lakeland, FL 33801

Gregory S. Richters, Esq.
Shareholder
Littler Mendelson, P.C.
3344 Peachtree Road NE, Suite 1500
Atlanta, GA 30326

EXHIBIT K

FORM NLRB-877
(4-84)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LAKELAND HEALTH CARE ASSOCIATES, LLC., d/b/a
WEDGEWOOD HEALTHCARE CENTER

Case: 12-CA-27044

and

UNITED FOOD & COMMERCIAL WORKERS UNION,
LOCAL 1625

DATE OF MAILING February 22, 2011

AFFIDAVIT OF SERVICE OF COMPLAINT AND NOTICE OF HEARING

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by mail upon the following persons, addressed to them at the following addresses:

Cara Roland, Administrator
Wedgewood Healthcare Center
1010 Carpenter's Way
Lakeland, FL 33809

Glenn W Harris, Director of Organizing
United Food and Commercial Workers
Union, Local 1625
705 E. Orange Street
Lakeland, FL 33801

(Certified Mail 7008 1140 0001 1871 2678)

Gregory S. Richters, Esq.
Littler Mendelson, P.C.
3344 Peachtree Road NE, Suite 1500
Atlanta, GA 30326

Alola Thomas

Subscribed and sworn to before me on
22nd day of February, 2011

DESIGNATED AGENT
NATIONAL LABOR RELATIONS BOARD

[Signature]

EXHIBIT L

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION TWELVE**

LAKELAND HEALTH CARE ASSOCIATES, LLC,)	
D/B/A WEDGEWOOD HEALTHCARE CENTER)	
)	
Respondent,)	
)	
AND)	CASE 12-CA-27044
)	
UNITED FOOD & COMMERCIAL WORKERS)	
UNION, LOCAL 1625,)	
)	
Petitioner.)	

RESPONDENT’S ANSWER TO COMPLAINT

Respondent Lakeland Health Care Associates, LLC, d/b/a Wedgewood Healthcare Center (“Respondent”), through counsel and pursuant to §§ 102.20 and 102.21 of the Rules and Regulations of the National Labor Relations Board, for its Answer to Complaint and Notice of Hearing (“Complaint”) admits, denies and avers as follows:

ANSWER AND FIRST DEFENSE

1. Respondent admits that the charge in Case 12-CA-27044 was filed and served on or about the dates alleged in Paragraph 1 of the Complaint. Except as expressly admitted in the foregoing sentence, Respondent denies the allegations of Paragraph 1 of the Complaint.
2. Respondent admits the allegations of Paragraph 2(a), 2(b), 2(c) and 2(d) of the Complaint.
3. Respondent admits the allegations of Paragraph 3 of the Complaint.
4. Respondent admits the allegation of Paragraph 4 of the Complaint.
5. Respondent admits that the Union was certified as the exclusive collective bargaining representative of the Unit as alleged in Paragraph 5(b). Except as expressly admitted

in the foregoing sentence, Respondent denies the allegations in of Paragraph 5(a)-(c).

6. Respondent admits the allegations of Paragraph 6 of the Complaint.
7. Respondent admits the allegations of Paragraph 7 of the Complaint.
8. Respondent denies the allegations of Paragraph 8 of the Complaint.
9. Respondent denies the allegations of Paragraph 9 of the Complaint.

AFFIRMATIVE DEFENSES

1. The allegations of the Complaint are barred by Section 10(b) of the Act.
2. The Certification of Representative issued by the Board as referenced in Paragraph 5(b) is invalid.
3. Respondent incorporates by this reference as though fully set forth herein Respondent's Post Hearing Brief and Request for Review, all of which were filed in Case 12-CA-27044.

Respectfully submitted,

LITTLER MENDELSON, P.C.

By: /sChristine S. Tenley
Gregory S. Richters
Christine S. Tenley
Attorneys for the Employer

Gregory S. Richters
Christine S. Tenley
LITTLER MENDELSON, P.C.
3344 Peachtree Road N.E.
Suite 1500
Atlanta, Georgia 30326-4803
Telephone: 404.233.0330
E-mail: grichters@littler.com
E-mail: ctenley@littler.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the below
by Federal Express overnight delivery, this 7th day of March 2011.

Glenn W. Harris
Director of Organizing
United Food and Commercial Workers Union, Local 1625
705 E. Orange Street
Lakeland, FL 33801

/s Christine S. Tenley
Christine S. Tenley

Firmwide:100483915.1 052395.1165