

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of)	
)	
SOUTHERN MONTEREY COUNTY MEMORIAL)	
HOSPITAL, INC. D/B/A GEORGE L. MEE)	Case 32-RC-090886
MEMORIAL HOSPITAL,)	
)	
Employer,)	
)	
and)	
)	
NATIONAL UNION OF HEALTHCARE)	
WORKERS,)	
)	
Petitioner.)	
)	
)	
)	
)	

EMPLOYER GEORGE L. MEE MEMORIAL HOSPITAL'S BRIEF
IN OPPOSITION TO THE UNION'S EXCEPTIONS TO THE HEARING OFFICER'S
REPORT AND RECOMMENDATIONS ON CHALLENGED BALLOT

MUSICK PEELER & GARRETT LLP
Robert M. Stone
Michael R. Goldstein
Christopher R. Woo
One Wilshire Boulevard, Suite 2000
Los Angeles, California 90017

Attorneys for Employer
SOUTHERN MONTEREY COUNTY
MEMORIAL HOSPITAL, INC. D/B/A
GEORGE L. MEE MEMORIAL HOSPITAL

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. SUMMARY OF FACTS	2
A. Mee Memorial Hospital	2
B. Activities Coordinators	2
C. Certified Nursing Assistants	4
III. LEGAL STANDARD.....	5
IV. LEGAL ARGUMENT.....	6
A. The Board Should Refuse to Consider the Union’s Exceptions Because the Union Failed to Serve the Exceptions and Supporting Brief on the Employer.....	6
B. The Union Failed To Prove That Perez Has Authority To Hire, Transfer, Suspend, Promote, Discharge, Lay Off, Or Recall Employees	7
C. The Union Failed To Prove That Perez Has The Authority To Discipline Other Employees.....	8
D. The Union Failed To Prove That Perez Has Authority To Reward Or Effectively Recommend Rewards Or Promotions Through The Employer’s Performance Evaluation Process	10
E. The Union Failed To Prove That Perez Had Authority To Responsibly Direct Other Employees’ Work	10
F. The <i>Clark Manor</i> Decision Is Inapposite to this Case and its Holding Has Been Rejected by the Board.....	13
G. Secondary Indicia Proffered By The Union Does Not Establish Supervisory Authority By Perez	15
V. CONCLUSION.....	17

TABLE OF AUTHORITIES

Page

CASES

Avante at Wilson, Inc.,
348 NLRB 1056 (2006)6, 16

Brown & Root, Inc.,
314 NLRB 19 (1994)14

Clark Manor Nursing Home Corp.,
671 F.2d 657 (1982).....1, 2, 13, 14, 15

Dean & Deluca New York, Inc.,
338 NLRB 1046 (2003)6

Golden Crest Healthcare Ctr.,
348 NLRB 727 (2006)6, 12

Int’l Longshoremen’s Assoc. v. Davis,
106 S.Ct. 1904 (1986).....6, 16

Int’l Transp. Serv., Inc.,
344 NLRB 279 (2005)16

Jochims v. NLRB,
480 F.3d 1161 (D.C. Cir. 2007).....9

Lakeview Health Ctr.,
308 NLRB 75 (1992)11, 12

NLRB v. Chicago Metallic Corporation,
794 F.2d 527 (9th Cir. 1986)17

NLRB v. Kentucky River Cmty. Care, Inc.,
525 U.S. 706 (2001).....5

NLRB v. Wilson-Crissman Cadillac,
659 F.2d 728 (6th Cir. 1981)11

NLRB v. Yuba Natural Resources, Inc.,
824 F.2d 706 (9th Cir. 1987)17

Oakwood Healthcare, Inc.,
348 NLRB 686 (2006)5, 6, 14, 15

<u>Pac. Coast M.S. Indus., Inc.,</u> 355 NLRB No. 226 (2010)	14
<u>Passavant Health Center,</u> 284 NLRB 887 (1987)	9
<u>Phelps Cmty. Med. Ctr.,</u> 295 NLRB 486 (1989)	6, 9
<u>S. Monterey County Hosp. dba George L. Mee Mem'l Hosp.,</u> 348 NLRB 327 fn. 3 (2006).....	16
<u>Springfield Terrace Ltd.,</u> 355 NLRB No. 168, 2010 WL 3463867 *1 (2010)	15
<u>Training Sch. at Vineland,</u> 332 NLRB 1412 (2000)	6, 16
<u>Williamette Indus.,</u> 336 NLRB 743 (2001)	10

OTHER AUTHORITIES

National Labor Relations Act	
Section 2(11).....	passim
NLRB Rules & Regulations	
Rule 102.114 (i)	6
Rule 102.114 (a).....	6
Rule 102.114 (c) (1).....	7

I. INTRODUCTION

The sole issue for determination is whether one of Southern Monterey County Memorial Hospital, Inc. dba George L. Mee Memorial Hospital's ("the Employer") Activities Coordinators, Henrietta Perez ("Perez"), is a supervisor within Section 2(11) of the National Labor Relations Act ("the Act"). National Union of Healthcare Workers ("the Union") carries the heavy burden of proving supervisory status and has failed to meet this burden.

The Hearing Officer correctly concluded that the Union failed to prove that Perez was a supervisor. Perez has none of the indicia of supervisory status identified in Section 2(11) of the Act--she does not have the power to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, nor does she responsibly direct employees, adjust grievances, or recommend any of the above.

The Union has filed Exceptions to the Hearing Officer's findings, but as set forth below, has failed to serve the Employer with these Exceptions. For that reason alone, the Exceptions should be rejected and the Hearing Officer's Report should be adopted. In any event, the Union's Exceptions present no substantive basis for reversing the Hearing Officer's conclusions.

The Union's brief in support of its Exceptions mistakenly asserts that the First Circuit's decision in another case, Clark Manor Nursing Home Corp., 671 F.2d 657 (1982), concerning an activities director at a nursing home, requires that Perez be found to be a supervisor. This case is inapposite. The decision was based on clear admissions by the employee in question that she exercised supervisory duties in terms of hiring, firing, and responsibly directing a subordinate employee; Perez made no such admissions, and the record in

this case does not support such conclusions. Further, as recognized by the Hearing Officer, subsequent NLRB decisions have rejected the holding in Clark Manor.

The Union's brief also contends that the Employer held out Perez as an "Activities Director," which somehow confers supervisory status upon her. The Union's contention is without any merit. The Regional Director of Region 32 issued a Report and Recommendations on Challenged Ballots on December 4, 2012, ruling that Perez's title was Activities Coordinator, not Activities Director. (Hearing Officer's Report, page 2, fn. 3.) The Union never filed exceptions to this report; therefore the Union has waived its right to challenge the title of Perez. Regardless, longstanding Board precedent holds that job titles and job descriptions are not determinative of supervisory status.

The Employer requests that the Board uphold and adopt the Hearing Officer's Report and Recommendations.¹

II. SUMMARY OF FACTS

A. Mee Memorial Hospital

The Employer operates a 119-bed hospital in Southern Monterey County. The hospital also has a Skilled Nursing Facility ("SNF") on its premises, which provides skilled nursing care for the aged and those in need of rehabilitation.

B. Activities Coordinators

Within the SNF, the Employer has two Activities Coordinators, Perez and Michelle Pina ("Pina"). Their duties include, but are not limited to, interviewing residents of the SNF to determine their desired social activities, implementing and conducting activity programs

¹ The Employer is filing the Declarations of Robert M. Stone ("Stone Dec."), Michael R. Goldstein ("Goldstein Dec."), and Christopher R. Woo ("Woo Dec.") concurrently herewith.

(which includes field trips, bingo contests, worship services, pet therapy sessions, parties, and other social activities), preparing care plans, coordinating activity schedules, and ordering supplies for the activities. (Tr. 136:15-24, 196:20-197:1; UX-1; EX-2.)² Perez and Pina work in collaboration and perform the same duties. (Tr. 138:8-16, 150:16-20, 180:4-6, 197:4-17, 198:20-199:2; 203:20-22; UX-1; EX-2.)

While Perez, who has worked for the Employer for over 24 years, is more senior than Pina, Perez does not have the authority to direct Pina's work, assign Pina's shifts, make decisions about Pina's employment status, discipline Pina, evaluate Pina's performance, or reward Pina for her performance, nor does she have authority to make any recommendations concerning these actions. (Tr. 136:2-3, 137:19-23, 138:17-20, 140:1-141:25, 149:22-150:4, 180:14-17, 180:21-23, 188:19-23, 197:25-198:7, 198:15-199:15, 200:15-201:11, 202:7-8, 202:11-12, 202:23-203:3.) In addition, Perez is not held accountable for Pina's work. (Tr. 153:11-12, 202:2-4.)

Both Pina and Perez report to Janeel Welburn ("Welburn"), the SNF Manager. Welburn supervises Perez and Pina, completes their performance evaluations, and is responsible for instituting any discipline against them. (Tr. 202:23-203:3.) Perez and Pina share the same office at the hospital. (Tr. 147:2-8.) Perez is an hourly employee who receives the same benefits as other bargaining unit employees. (Tr. 180:7-12.)³

² The original record is cited as follows: The reporter's transcript is designated ("Tr."), followed by citation to the appropriate page and line numbers, the Employer's exhibits are cited as ("EX"), the Union's exhibits are cited as ("UX"), and the Board's exhibits are cited as ("BX").

³ While Perez's job title has changed from Activities Coordinator to Activities Director (and back to Activities Coordinator) over the years due to an inadvertent misclassification, it is undisputed that her duties have never changed. (Tr. 186:22-187:4, 230:14-231:1; UX-1; UX-2; UX-3.) In addition, the Board has already determined that Perez is appropriately classified as an Activities Coordinator. (BX-1(d), p. 8-9.)

C. Certified Nursing Assistants

Several of the Employer's Certified Nursing Assistants ("CNAs") also report to Welburn. (Tr. 33:1-5, 85:3-16.) Welburn is responsible for making decisions affecting the CNAs' employment status (such as hiring, firing, suspensions, promotions, compensation), completing their performance evaluations, approving their overtime, and issuing discipline for any performance deficiencies. (Tr. 33:19-21, 34:25-35:1, 93:4-8, 124:8-10, 126:4-5; EX-1.) The CNAs' schedules are determined by the Employer's Schedule Coordinator, Consuelo Hernandez ("Hernandez"), and the nursing staff. (Tr. 36:1-5, 184:25-186:3, 186:19-21, 202:13-19.)

Perez has no supervisory duties or responsibilities over the CNAs. (Tr. 173:14-16, 200:12-14.) She does not participate in the CNAs' performance evaluations in any way. (Tr. 93:13-15, 141:22-142:2, 180:13-17, 202:9-10, 226:9-12.) She also has no authority to issue or recommend any disciplinary action against the CNAs. (Tr. 33:25-34:11, 93:16-94:3, 124:11-12, 126:9-11, 141:7-14, 141:20-21, 146:21-23, 151:1-8, 151:20-22, 152:10-14, 180:21-23, 199:13-15, 201:5-8, EX-1.) Furthermore, she has no input on Welburn's decision(s) to hire, fire, suspend, promote, or make other changes to the status or compensation of the CNAs or any other employees. (Tr. 139:23-25, 140:1-6, 141:15-19, 198:4-7, 198:17-18, 200:15-4, 201:9-11.)

Perez also does not direct the CNAs' work assignments. (Tr. 57:14-15, 146:16-18, 201:12-14, 202:5-6.) Since the Employer's primary concern is the welfare of its residents, Welburn expects all of her staff, including the Activities Coordinators and the nurses, to communicate with one another about the residents' needs, such as appropriate grooming and hygiene issues. (Tr. 201:12-23.) Accordingly, while working with the CNAs (or when residents are being taken to their activity programs by the CNAs), Perez may occasionally ask the CNAs to perform routine and expected tasks, such as transporting the residents to the activities room at a certain time so that they can commence their scheduled activities, seating residents in certain

locations for their activity programs, or ensuring that the residents are appropriately groomed and/or dressed for their activities out of respect for the residents' dignity. (Tr. 49:1-7, 63:4-6, 63:25-64:9, 64:11-19, 69:11-22, 70:21-24, 78:4-20, 80:1-14, 109:15-25, 112:12-19, 143:2-8, 150:21-25, 152:21-25.)

Perez does not work on the weekends, so a CNA is assigned by the nursing staff to cover the activity programs over the weekends. (Tr. 179:17-21.) In addition, on rare occasions, the Activities Coordinators may need assistance from the CNAs, such as when the Activities Coordinators are short staffed. (Tr. 167:2-9, 168:10-24.) Perez merely asks the SNF supervisors for assistance, and the supervisors assign a CNA to assist the Activities Coordinators. (Tr. 36:14-20, 146:8-11, 167:2-5.)

III. LEGAL STANDARD

The party asserting that individuals are supervisors under the Act bears the lofty burden of proving their supervisory status. NLRB v. Kentucky River Cmty. Care, Inc., 525 U.S. 706, 711 (2001). Section 2(11) of the Act describes a supervisor as one who possesses “authority in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly 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.” Under Board and Supreme Court precedent, in order to be a statutory supervisor, an individual must have the authority to effectuate or effectively recommend at least one of the supervisory indicia in Section 2(11), using independent judgment in the interest of the employer. Oakwood Healthcare, Inc., 348 NLRB 686, 687 (2006) (citing NLRB v. Kentucky River Cmty. Care, Inc., 525 U.S. at 723.)

Supervisory status must be established by a preponderance of the evidence. Oakwood Healthcare, Inc., 348 NLRB at 694. Lack of evidence is construed against the party asserting supervisory status. Dean & Deluca New York, Inc., 338 NLRB 1046, 1048 (2003). “[W]henver the evidence is in conflict or otherwise inconclusive on particular indicia or supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia.” Phelps Cmty. Med. Ctr., 295 NLRB 486, 490 (1989). Mere inference or conclusory statements, without detailed, specific evidence of independent judgment, are insufficient to establish supervisory authority. Golden Crest Healthcare Ctr., 348 NLRB 727, 731 (2006); Avante at Wilson, Inc., 348 NLRB 1056, 1057 (2006). Moreover, job titles and descriptions are only “paper authority” and are not given any controlling weight by the Board. Avante at Wilson, Inc., 348 NLRB at 1057; Training Sch. at Vineland, 332 NLRB 1412, 1416 (2000). The proper focus for determining statutory supervisor status is on the putative supervisor’s actual duties and not the job title or classification. Int’l Longshoremen’s Assoc. v. Davis, 106 S.Ct. 1904, 1915 fn. 13 (1986).

IV. LEGAL ARGUMENT

A. The Board Should Refuse to Consider the Union’s Exceptions Because the Union Failed to Serve the Exceptions and Supporting Brief on the Employer

Service of exceptions and a supporting brief is to be made “in the same manner as that utilized in filing the document with the Board, or in a more expeditious manner.” NLRB Rules & Regulations Rule 102.114 (a). If the exceptions are electronically filed, the filing party must (1) notify the other party of the substance of the filed document and (2) provide a copy of the document by personal service, overnight mail, or facsimile (if agreed to by the other party) by no later than the next day. NLRB Rules & Regulations Rule 102.114 (i). The Board may

reject any documents that do not comport with these service requirements. NLRB Rules & Regulations Rule 102.114 (c) (1).

Here, the Union failed to comply with any of these requirements. According to the Proof of Service accompanying the filing, the Union filed its Exceptions and supporting brief electronically on February 14, 2013, and served on the Employer's counsel by facsimile and mail, but not by electronic mail. As of today, the Employer's counsel has not received a copy of the Exceptions or brief from the Union. The Union also failed to otherwise make the Employer's counsel aware of the filing or contents of the exceptions, or to seek and obtain an agreement for service by facsimile. (Stone Dec. ¶¶ 2-5; Goldstein Dec. ¶¶ 2-3; Woo Dec. ¶¶ 2-3.) The Employer's counsel obtained a copy of the Union's Exceptions and brief *from Region 32* on February 15, 2013, when the Employer's counsel inquired to see if the Region had received them, since the Employer's counsel had not received the Exceptions and brief from the Union. (Stone Dec. ¶ 2, Exhibit A.)

The Union failed to serve the Employer in the "same manner" or in a "more expeditious manner" as required by the NLRB's Rules and Regulations. Indeed, the Union failed to serve the Employer at all. The Board should therefore reject the Union's Exceptions on this basis alone and adopt the Hearing Officer's determination that Perez was an eligible voter.

B. The Union Failed To Prove That Perez Has Authority To Hire, Transfer, Suspend, Promote, Discharge, Lay Off, Or Recall Employees

The Union failed to establish by a preponderance of the evidence that Pina has actual supervisory authority and, instead, relies on the speculative inferences of a handful of bargaining unit employees. Both Perez and Welburn credibly testified Perez does not have the authority to hire, transfer, suspend, promote, terminate, lay off, or recall any other employees, including Pina and the CNAs. (Tr. 137:19-23, 139:23-25, 140:1-6, 140:1-141:25, 197:25-198:7,

198:17-18, 200:15-201:11.) They also testified that Perez could not recommend that such action be taken. The Union did not proffer any direct evidence to the contrary.

The Union presented evidence that Perez participated in the interviews for an open Activities Coordinator position. (Tr. 42:10-14.) Perez explained that she was present at the interviews merely to inform the applicants about what the position entailed. (Tr. 138:1-3.) More importantly, both Perez and Welburn testified that it was Welburn, and not Perez, who had the sole authority to make the hiring decision. (Tr. 137:11-25, 197:25-198:18.) In fact, Welburn testified that Perez could have given her opinion about an applicant to Welburn, but her opinion would not have affected Welburn's decision. (Tr. 198:4-7.)

Thus, it is undisputed that Perez lacked the authority to make any decisions affecting other employees' employment status.

C. The Union Failed To Prove That Perez Has The Authority To Discipline Other Employees

Under Section 2(11) of the Act, another primary indicia of supervisory status is the ability to discipline subordinate employees, or effectively recommend that such action be taken. At the hearing, Perez credibly denied that she ever disciplined any employees. She further testified that she lacked the authority to institute or recommend any disciplinary action against employees. (Tr. 141:7-14, 141:20-21, 146:21-23, 149:22-150:4, 151:1-8, 151:20-22, 152:10-14, 180:21-23.) Welburn confirmed that Perez had never taken such action and lacked authority to discipline employees. (Tr. 199:13-15, 201:5-8.)

The Union failed to introduce any documentary evidence showing that Perez had participated in the discipline of any employee. The Union's witnesses also admitted that they were never formally disciplined by Perez. (Tr. 33:25-34:11, 93:16-94:3, 124:11-12, 126:9-11.) One of these witnesses, Emy Sanchez ("Sanchez"), was the only witness who testified about an

incident where disciplinary action was actually taken against her. (Tr. 124:20-22, 126:4-5; EX-1.) Sanchez and the Corrective Action Counseling form that was issued to her confirm that it was Welburn, and not Perez, who disciplined her for absenteeism. As such, there was no evidence showing that Perez ever disciplined any employees.

Miguel Villareal (“Villareal”), claimed that Perez “like reprimand[ed]” him by yelling at Villareal after he brought a resident who was “soaking wet” with urine to an activity sometime in 2006 or 2007. (Tr. 78:7-20.) Nonetheless, Villareal admitted that this conversation with Perez did not result in any written warnings or changes in his employment status or compensation. (Tr. 93:19-94:3.) Even if Perez’s conversation is somehow construed as a warning, it is well settled that warnings “that do not alone affect job status or tenure” do not evince supervisory authority. Passavant Health Center, 284 NLRB 887, 889 (1987).

Villareal also testified that no written notes were placed in his personnel file to document the incident. (Tr. 93:22-24.) Thus, there is no evidence that his conversation with Perez was considered for any future disciplinary action. “[F]or the issuance of reprimands or warnings to constitute statutory supervisory authority, the warning must not only initiate, or be considered in determining future disciplinary action, but also it must be the basis of later personnel action without independent investigation or review by other supervisors.” Jochims v. NLRB, 480 F.3d 1161, 1170 (D.C. Cir. 2007) (quoting Phelps Cmty. Med. Ctr., 295 NLRB at 490.) The Union failed to produce any evidence that Perez’s discussion with Villareal was or will be considered in future disciplinary action(s) taken against Villareal.

More importantly, Villareal conceded that Perez’s concern was legitimate because CNAs were “never” supposed to allow a resident to remain in soiled clothing. According to Villareal, the resident “could get a sore or something,” and such an incident could be considered

resident abuse or neglect. (Tr. 94:4-22.) In addition, while Perez could not recall this alleged exchange, Welburn testified that such a discussion would have been consistent with her instruction to all staff to keep one another informed of the residents' needs. (Tr. 201:12-23.)

Based on the above, the Union failed to prove that Perez had the authority to institute or recommend disciplinary action against other employees.

D. The Union Failed To Prove That Perez Has Authority To Reward Or Effectively Recommend Rewards Or Promotions Through The Employer's Performance Evaluation Process

The ability to evaluate an employee's performance is not one of the primary indicia of supervisory status set forth in Section 2(11). Williamette Indus., 336 NLRB 743 (2001). Regardless, the Union failed to produce any evidence that Perez was involved in rewarding employees by evaluating their performance.

Perez unequivocally testified that she has no involvement in Pina's performance evaluation. (Tr. 141:22-25, 180:14-17.) She also testified that she does not participate in the CNAs' performance evaluations in any way. (Tr. 141:22-142:2, 180:13-17.) Her testimony was confirmed by Welburn and two CNAs who testified for the Union (Villareal and Gabriela Montoya). (Tr. 33:19-21, 93:13-15, 202:7-10, 202:23-203:3, 226:9-12.) Put simply, the Union did not offer any evidence showing that Perez was involved in the performance evaluation process or had the ability to reward other employees.

E. The Union Failed To Prove That Perez Had Authority To Responsibly Direct Other Employees' Work

Section 2(11) also defines a statutory supervisor as an individual who uses independent judgment when responsibly directing the work of other employees, which does not include direction for "merely routine or clerical" tasks. The Board has determined that the exercise of some supervisory authority in a routine, clerical, perfunctory, or sporadic manner

does not elevate an employee to a supervisor. Lakeview Health Ctr., 308 NLRB 75, 78 (1992). The “test must be the significance of [the individual’s] judgment and directions.” NLRB v. Wilson-Crissman Cadillac, 659 F.2d 728, 729 (6th Cir. 1981). Consequently, an employee does not become a supervisor merely because he gives some instructions or minor orders to other employees. Id.

Here, Perez does not direct the work of Pina, the other Activities Coordinator. Rather, they work collaboratively in creating the schedule for activities, implementing the activity programs, and coordinating their work schedules. (Tr. 138:8-20, 188:19-23, 198:15-199:15.) They share the same job duties in running the activity programs. (Tr. 203:20-22; UX-1; EX-2.) Furthermore, as addressed above, Perez does not have any authority to recommend or make any decisions affecting Pina’s employment status or compensation, nor does she have any authority to discipline Pina. Also, Perez is not accountable for Pina’s performance. (Tr. 153:11-12, 202:2-4.)

A Licensed Vocational Nurse, Barbara Marquez Pacheco, testified about a single incident where Pina called Perez to ask if a group of musicians could perform for the residents. (Tr. 59:1-62:23.) A CNA, Gabriela Montoya, also testified about a similar incident involving a religious group that wanted to pray with the residents, and Pina indicated that she would confer with Perez about the group’s request. (Tr. 22:4-22.) While these are merely isolated incidents, they do not demonstrate that Perez had any supervisory direction over Pina. Perez explained that the two Activities Coordinators likely conferred about these incidents because it deviated from the scheduled activities for the day, which they planned in collaboration. (Tr. 150:8-20.) As such, the Activities Coordinators were merely ensuring that the activities that they had planned together could proceed with the additional activities sought by these outside groups.

The Union's witnesses also testified that Perez occasionally instructs the nursing staff to transport residents to the activities room by a certain time, to seat residents in certain locations for their activity programs, and to ensure that the residents are appropriately groomed and/or dressed for their activities out of respect for the residents' dignity. (Tr. 49:1-7, 63:4-6, 63:25-64:9, 64:11-19, 69:11-22, 70:21-24, 78:4-20, 80:1-14, 109:15-25, 112:12-19, 143:2-8, 150:21-25, 152:21-25.) These are routine and mundane tasks that are necessary to allow the residents to participate in their scheduled activities. It is well settled that an individual's instructions to other employees concerning quality of care in connection with the treatment of residents does not establish supervisory status. Lakeview Health Ctr., 308 NLRB at 79.

Furthermore, in order to connote supervisory status, the individual directing the task must be accountable for the subordinate employee's performance. This means that the directing individual has the authority to take action, if necessary, to ensure that the task is performed correctly by the employee, and that there is a real prospect of material consequences to the directing individual's terms and conditions of employment, either positive (e.g., a merit increase or bonus) or negative (e.g. a demotion or termination), if the task is or is not performed correctly by the employee. Golden Crest Healthcare, 348 NLRB 727, 731 fn. 13 (2006). Perez testified that she has no recourse and faces no consequences if the CNAs ignore her instructions concerning the aforementioned tasks. (Tr. 143:13-15, 144:9-12, 146:21-23, 151:1-11, 152:10-14, 153:1-2, 172:20-23, 173:7-19.) Welburn confirmed that Perez is not held responsible for any work performed by Pina and that Perez has no supervisory responsibility over the CNAs. (Tr. 200:12-14, 202:2-4.) The Union did not present any evidence to the contrary.

In addition, there is no evidence that Perez directs the CNAs' work by creating their schedules. It is without dispute that the CNAs' schedules are determined by the Employer's

Schedule Coordinator, Hernandez, and the nursing staff. (Tr. 36:1-5, 202:13-19.) Further, when a CNA is needed to help run the scheduled activities for residents (i.e. over the weekends or when the Activities Coordinators are short staffed), the nursing staff or the Schedule Coordinator assign a CNA for coverage. (Tr. 36:14-20, 146:8-11, 167:2-5, 179:17-21.) Perez has absolutely no input in the CNAs' schedules. (Tr. 184:25-186:3, 186:19-21, 202:11-12.)

The Union also tries to rely on Sanchez's testimony that CNAs were recently assigned to fill out the residents' meal menus, which was previously a task performed by the Activities Coordinator, to infer that Perez has some input in the CNAs' work assignments. (Tr. 121:10-24.) Sanchez's testimony is based on erroneous speculation, as she merely assumed Perez may have had input in the change simply because Perez no longer was tasked with this duty. Perez credibly testified that this change in menu duties was made by Welburn, and such testimony was not refuted by the Union. (Tr. 147:25-148:8.)

In the end, other than misguided speculation, the Union failed to present any evidence proving that Perez exercised independent judgment in directing other employees' work, other than possibly for routine and ordinary tasks that are necessary for the residents' scheduled activities, which do not evince supervisory authority under Section 2(11).

F. The Clark Manor Decision Is Inapposite to this Case and its Holding Has Been Rejected by the Board

The Union's brief relies heavily on Clark Manor Nursing Home Corp., 254 NLRB 456 (1981), and asserts that similar facts have been presented in this matter to establish Perez's supervisory status. (Brief at p. 4.) The Clark Manor decision is factually distinguishable. There, while the Administrative Law Judge determined that the Activities Director was a statutory supervisor, his decision was driven by the Activities Director's admissions that (1) she provided feedback on another employee's performance that ultimately resulted in that

employee's termination, (2) she recommended the hiring of an employee as the activities assistant, and (3) she directed the activities assistant's work on a "day-to-day basis," unilaterally made decisions about what tasks she would perform, and had the authority to give reports about the assistant's performance to management. Clark Manor, 254 NLRB at 477.

As addressed in detail above, the Union has not presented such crucial evidence or admissions that are capable of establishing any alleged supervisorial authority of Perez. There was no evidence to dispute Perez's and Welburn's credible testimony that Perez did not have any input in Pina's, or any other employees', performance evaluations or disciplinary actions. Moreover, there was no evidence to dispute Perez's and Welburn's testimony that Perez had no input in Welburn's decision to hire Pina. The only testimony offered by the Union on this subject was that Perez may have introduced Pina to Welburn, but any inference that Perez had authority to recommend Pina's hiring was refuted by Welburn's unequivocal testimony that Perez's opinion of the candidate had no bearing on Welburn's hiring decision.

Moreover, NLRB decisions after Clark Manor have consistently held that candidacy suggestions and mere participation in the interview process do not connote supervisory status. See, e.g., Brown & Root, Inc., 314 NLRB 19, 21 (1994); Pac. Coast M.S. Indus., Inc., 355 NLRB No. 226 (2010).

In addition, in order to qualify as a statutory supervisor, Perez must have been held accountable for these others employees' performance. Oakwood Healthcare, Inc., 348 NLRB at 692. As previously addressed, there was no evidence that Perez responsibly directed the work of Pina or any other employees. Rather, the only evidence presented by the Union was the speculative conclusions drawn by a handful of bargaining unit employees concerning routine and mundane tasks that Perez allegedly assigned. Importantly, even if these employees' suspect

testimony is credited, there was no evidence that Perez faced any consequences for these employees' performance of any tasks directed by Perez, an element which is necessary to establish supervisory status. Thus, even if Perez directed other employees' work, she did not responsibly give instructions. As recognized by the Hearing Officer, the Clark Manor decision on this issue is questionable given that it preceded Oakwood Healthcare and it did not analyze whether the supervisor "responsibly" directed other employees. (Hearing Officer's Report and Recommendation on Challenged Ballot, p. 10, fn. 10.)

A more recent Board case involving someone with the title of "Activity Director" is more on point with the facts of this case. Springfield Terrace Ltd., 355 NLRB No. 168, 2010 WL 3463867 *1 (2010). There, the Board affirmed the Regional Director's decision that the employer's Activity Director was not a statutory supervisor. As in the present case, while there was testimony that the Activity Director may have directed the work of CNAs, there was no evidence that the Activity Director was subject to discipline or faced consequences for the CNAs' performance. Id. at *16. Further, there was no evidence that the Activity Director disciplined or terminated any CNA. Id. Also, like this case, while the Activity Director participated in the interview of a prospective employee and reported to the administrator that the prospect "looked okay," there was no evidence that the administrator took the Activity Director's comments into account in deciding to hire the prospect. Id. at *17.

G. Secondary Indicia Proffered By The Union Does Not Establish Supervisory Authority By Perez

Secondary indicia, without more, is insufficient to establish supervisory status. Int'l Transp. Serv., Inc., 344 NLRB 279, 285 (2005). Here, there is nothing more, so any secondary indicia are irrelevant. Nonetheless, even the secondary indicia proffered by the Union are incapable of suggesting that Perez has supervisory authority.

The Union's brief argues that documentation relating to a Plan of Correction, where Perez is referred to as the Activities Director, and the CMS guidelines, which list an Activities Director's responsibilities, show that Perez had supervisory status. (Brief at p. 9-10.) These assertions are without any merit. First, the Region has already determined that Perez is an Activities Coordinator and not an Activities Director. (See December 4, 2012 Report and Recommendations on Challenged Ballots and Notice of Hearing.) The Union did not file any exceptions to the Region's decision, which is now binding.

Second, even if Perez's title were Activities Director during the relevant time periods, job titles are not determinative of supervisory authority, and the focus must be on Perez's actual duties. Avante at Wilson, Inc., 348 NLRB at 1057; Int'l Longshoremen's Assoc., 106 S.Ct. at 1915 fn. 13. The Board also previously ruled that Perez was eligible to vote in 1999, where her job title actually was "Activities Director." S. Monterey County Hosp. dba George L. Mee Mem'l Hosp., 348 NLRB 327, 342 fn. 3 (2006). It is undisputed that her job duties have remained unchanged and were identical under either job title. Moreover, as previously addressed, the Union failed to establish that Perez exercised any actual supervisory duties. While the CMS' guidelines list the responsibilities that the government expects Activities Directors to perform, this is simply a job description, which is not determinative of supervisory status. Avante at Wilson, Inc., 348 NLRB at 1057; Training Sch. at Vineland, 332 NLRB at 1416. Therefore, Perez's title and the responsibilities listed by CMS have no bearing on determining whether Perez is a statutory supervisor.

The Union also presented testimony from witnesses who believed that the CNAs "worked under" Perez, despite the fact that they later admitted that they reported to Welburn and the nursing staff supervisors. (Tr. 13:10-14, 32:21-23, 33:1-5, 85:3-5, 85:17-21.) These CNAs'

misperceptions about Perez’s role do not establish supervisory status. Similar contentions were rejected in NLRB v. Yuba Natural Resources, Inc., 824 F.2d 706, 709-710 (9th Cir. 1987), where employees alleged that they “worked under” a co-worker and believed that he was their “boss.” The court noted that such employee perceptions may weigh in favor of supervisory status only in “borderline cases,” such as in NLRB v. Chicago Metallic Corporation, 794 F.2d 527, 531-532 (9th Cir. 1986), where the putative supervisor trained employees, directed their work assignments, signed the employees’ written warnings (under the title of “Supervisor”), and completed their evaluation forms. As previously addressed, there is no evidence that Perez’s actual duties involve directing other employees’ work assignments, evaluating their performance, or making decisions affecting their employment status (including discipline), or even recommending any of the aforementioned actions. There is thus no evidence to support the Union’s witnesses’ misperceptions that Perez was their supervisor.

Moreover, other evidence strongly suggests that Perez is a bargaining unit employee. As addressed, she has the same job title and performs the same duties as Pina. Perez and Pina share the same office, and they are both supervised by Welburn. (Tr. 147:2-8, 202:23-203:3.) Perez also receives the same benefits as other bargaining unit employees. (Tr. 180:7-12.) There is simply no evidence that distinguishes Perez’s role from Pina’s, and the latter was undisputedly named on the Excelsior list and eligible to vote. (Tr. 229:1-6.)

Accordingly, any reliance by the Union on Perez’s former job title or its witnesses’ misperceptions is misplaced.

V. CONCLUSION

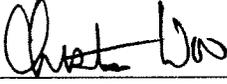
The Union bears the burden of establishing by a preponderance of the evidence that Perez is a statutory supervisor as defined under Section 2(11) of the Act. It has failed to

meet this burden. The Union failed to produce any credible evidence that shows that Perez has the power to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, nor any evidence that she responsibly directs employees, adjusts grievances, or recommends any of the above, and its brief does not raise any errors justifying a reversal of the Hearing Officer's recommendations.

Accordingly, the Employer requests that the Board uphold the Hearing Officer's determination that Perez is not a supervisor.

DATED: February 20, 2013

MUSICK, PEELER & GARRETT LLP

By: 

Robert M. Stone
Michael R. Goldstein
Christopher R. Woo
Attorneys for Employer
SOUTHERN MONTEREY COUNTY
MEMORIAL HOSPITAL, INC. D/B/A
GEORGE L. MEE MEMORIAL HOSPITAL

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

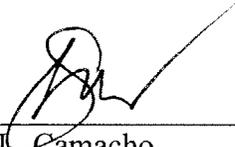
At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is One Wilshire Boulevard, Suite 2000, Los Angeles, California 90017-3383.

On February 20, 2013, I served true copies of the following document(s) described as **EMPLOYER GEORGE L. MEE MEMORIAL HOSPITAL'S BRIEF IN OPPOSITION TO THE UNION'S EXCEPTIONS TO THE HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON CHALLENGED BALLOT** on the interested parties in this action as follows:

- BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Musick, Peeler & Garrett LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.
- BY FAX TRANSMISSION:** I faxed a copy of the document(s) to the persons at the fax numbers listed in the Service List. The telephone number of the sending facsimile machine was 213-624-1376. No error was reported by the fax machine that I used.
- BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the document(s) to be sent from e-mail address p.bell@mpglaw.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 20, 2013, at Los Angeles, California.



Georgina L. Camacho

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SERVICE LIST
NUHW/Mee Memorial
32-RC-090886

Jonathan H. Siegel, Esq.
Latika Malkani, Esq.
Siegel, Lewitter & Malkani
1939 Harrison Street, Suite 307
Oakland, CA 94612
bsiegel@sl-employmentlaw.com
lmalkani@sl-employmentlaw.com
T: (510) 452-5000
F: 510 452-5004

Ernest Gonzales
Organizer
National Union of Healthcare Workers
5801 Christie Ave., Ste. 525
Emeryville, CA 94608-1986
egonzales@nuhw.org
T: (510) 834-2009
F: (510) 834-2019