Oral Argument Not Yet Scheduled

Nos. 15-2143, 15-2221

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PALMETTO PRINCE GEORGE OPERATING, LLC, d/b/a
PRINCE GEORGE HEALTHCARE CENTER

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Palmetto Prince George Operating, LLC, d/b/a Prince George Healthcare Center ("the Center") to review, and the cross-application of the National Labor Relations Board to enforce, a final Board Decision and Order (363 NLRB No. 5) issued against the Center on

September 8, 2015. (A. 515-17.)[1] The Board had subject matter jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act,[2] as amended ("the Act"), which empowers the Board to prevent unfair labor practices affecting commerce. The Charging Party before the Board was the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Union ("the Union").

The Board's Order is final with respect to all parties, and the Court has jurisdiction over this case pursuant to Section 10(e) and (f) of the Act,[3] because the unfair labor practice occurred in Georgetown, South Carolina. The Center's petition for review and the Board's cross-application for enforcement were timely; the Act places no time limit on such filings.

Because the Board's Order is based in part on findings made in the underlying representation proceeding, the record in that proceeding (Case No. 10-RC-144239) is also before the Court under Section 9(d)[4] of the Act.[5] Section 9(d) does not give the Court general authority over the representation proceeding.

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[1] "A" references are to the joint appendix. "Br" references are to the Center's brief. Where applicable, references preceding a semicolon are to the Board's decision; those following are to the supporting evidence.

[2] 29 U.S.C. §§ 151, 160(a).

[3] 29 U.S.C. § 160(e) and (f).

[4] 29 U.S.C. § 159(d).

[5] *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964).

Rather, it authorizes review of the Board's actions in that proceeding for the limited purpose of deciding whether to enforce, modify, or set aside the Board's unfair-labor-practice Order in whole or in part. The Board retains authority under Section 9(c) of the Act[6] to resume processing the representation case in a manner consistent with the Court's ruling.[7]

STATEMENT OF THE ISSUES

The ultimate issue in this case is whether substantial evidence supports the Board's finding that the Center violated the Act by refusing to bargain with the Union as the exclusive collective-bargaining representative of the Center's 23

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[6] 29 U.S.C. § 159(c).

[7] *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999). *Contra NLRB v. Lundy Packing Co.*, 81 F.3d 25, 26-27 (4th Cir. 1996). *Lundy*'s holding that the Board lacks the authority to resume processing the representation case rests on inapposite cases dealing not with Section 9(d)'s limitations on judicial control over representation cases but with Section 10(e)'s limitations on the Board's authority to revisit unfair labor practice issues once a reviewing court has considered them. *See Mine Workers v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 339-44 (1945) (absent fraud or mistake, Board is not entitled to have court's enforcement order vacated so Board can enter new remedial order that, in retrospect, it decides is more appropriate); *W.L. Miller Co. v. NLRB*, 988 F.2d 834, 835-38 (8th Cir. 1993) (once court enforces Board's order in unfair-labor-practice proceeding, Board lacks authority to reopen proceeding to award additional relief); *George Banta Co. v. NLRB*, 686 F.2d 10, 16-17 (D.C. Cir. 1982) (rejecting employer's argument that Board lacked jurisdiction to adjudicate charges of post-strike unfair labor practices while a case against same employer concerning pre-strike unfair labor practices was pending in court); *Serv. Emps. Local 250 v. NLRB*, 640 F.2d 1042, 1044-45 (9th Cir. 1981) (Board lacks jurisdiction to adjudicate union's unfair-labor-practice claim when earlier court decision implicitly rejected that claim).

charge nurses ("the nurses"). Resolution of this issue turns on the subsidiary issue of whether substantial evidence supports the Board's finding that the Center did not carry its burden of proving that the nurses are statutory supervisors within the meaning of Section 2(11) of the Act.

STATEMENT OF THE CASE

The Board found that the Center violated Section 8(a)(5) and (1) of the Act[8] by refusing to recognize and bargain with the Union after its employees voted in favor of union representation in a Board-conducted election. The Center does not dispute its refusal. Instead, it claims that the Board erred in the underlying representation proceeding by finding that the Center failed to meet its burden of proving that the nurses are statutory supervisors. The relevant factual and procedural background and the Board's conclusions and Order are summarized below.

I. THE BOARD'S FINDINGS OF FACT

A. The Center's Operations and Organizational Structure

The Center operates a 148-bed nursing home in Georgetown, South Carolina, which provides inpatient and outpatient-medical services, 24 hours a day, 7 days per week. (A. 386; 18-19, 255-57.) The facility comprises three units: the Magnolia unit, the Indigo unit, and the Palmetto unit. (A. 386; 18-19.)

[8] 29 U.S.C. § 158(a)(5) and (1).

The Center's Administrator provides oversight of the entire facility and is the top onsite-management official. (A. 386-87; 21, 258-59.) The nursing department's management team is the Directing of Nursing ("DON"), Assistant Director of Nursing ("ADON"), and three Unit Managers ("UMs"), who each oversee a unit. (A. 387; 23-24, 258-59.) The DON reports directly to the Administrator and, *inter alia*, monitors and evaluates the quality and appropriateness of nursing care; supervises the nursing staff; and ensures that: the nursing staff is providing quality patient care, employee performance meets or exceeds expectations, and all required records are maintained. (A. 387; 21, 258-59, 266-68.) The ADON reports directly to the DON, and assists the DON by scheduling, performing the DON's duties in her absence, directly supervising the three UMs, and ensuring that the nursing staff is providing quality patient care. (A. 387; 36-38, 258-59, 269-73.) The UMs, *inter alia*, implement and evaluate all nursing procedures and systems relative to unit programming, participate in daily-quality-assurance activities, and directly supervise the nurses. (A. 387; 39, 272-73.) The management team's regular schedule is 8:00 a.m. to 5:00 p.m., Monday through Friday, and the DON and ADON rotate "on-call duties" each week. (A. 387; 26-29, 103.) Additionally, UMs have specifically instructed nurses to call them after hours if they need assistance. (A. 387; 164-65, 181-84, 189-90.)

The remainder of the Center's nursing staff are the 23 nurses—17 licensed practical nurses (LPNs) and 6 registered nurses (RNs) — and 40 certified nursing assistants (CNAs), including 2 restorative aids who report directly to the ADON. (A. 388; 24-25, 116-18.) RNs and LPNs functionally hold the same position, with the only exception being that, pursuant to state law, LPNs cannot sign assessments or administer small doses of intravenous medications. (A. 388; 41-43.) All nurses assess patients, answer call lights, administer non-intravenous medications, and perform general patient-care duties similar to those that CNAs perform. (A. 388, 395; 45, 101-02, 157, 165, 177-78, 194-98, 275-78.) If a nurse sees that a patient's call light is on, the nurse answers it rather than directing a CNA to do so. (A. 396; 157, 177-78, 197-98.)

The CNAs are familiar with their job duties and perform them in accordance with their job descriptions. CNAs provide general overall care to residents, including bathing them, providing them assistance in using the restroom and turning over in their beds, and other routine, daily tasks. (A. 388, 397; 82, 101-02, 157, 165, 177-78, 194-98.) They respond to evacuations and emergency situations, which have only occurred twice in the past sixteen years, pursuant to the training they have received and established procedures. (A. 396; 165-74, 203, 205-06.)

B. Job Assignments and Scheduling

The nurses are hourly employees and work 12-hour shifts — either dayshift (7:00 a.m. to 7:00 p.m.) or nightshift (7:00 p.m. to 7:00 a.m.). (A. 388; 32.) The UMs make the shift and unit assignments for the nurses and CNAs. (A. 388; 104-05, 116-17, 194-95.) The three UMs ordinarily assign one or two nurses and two to five CNAs to a unit for each shift (A. 388; 117, 176-77), and also assign them to specific resident rooms within the unit. (A. 388; 102, 104, 194-95.) These assignments control the CNAs' daily assignments, because they provide care for the residents who are in their assigned rooms. (A. 388, 396; 81-82, 157, 177, 194.)

C. The Center's Progressive-Discipline System

The Center maintains a progressive-discipline system, which is set forth in the 2008 handbook, which applies only to CNAs, and the new handbook, which applies to all other employees. (A. 392; 49-52, 284-89, 292-97.) The system categorizes infractions as Category I, II, or III offenses, and provides that discipline ranges from a written warning to discharge, with various levels of written warnings and suspension available in between depending on whether the offense involves a recurring issue and whether it is classified as a Category I, II, or III offense. (A. 392; 49-52, 284-89, 292-97.) Category I offenses, which include infractions such as violating the Center's dress code, are the least serious and ordinarily begin with initial written warnings and progress to more serious

disciplinary action for repeated violations. (A. 285-86, 293-94.) Category II offenses, which include failing to report a Category II or III offense that one has witnessed and failing to adhere to training on lifting, transferring or moving residents, "may result in a final warning for the first violation even though an initial written warning has not been issued." (A. 286-87, 295-96.) Finally, Category III offenses, which include insubordination/refusing a job assignment, being under the influence of drugs or alcohol, and sleeping while on the Center's premises, are the "most serious and may lead to termination." (A. 287-88, 295-96.)

The Center uses disciplinary action record ("DAR") forms to both document and issue discipline. (A. 391; 64-74; 341.) That form includes the following: employee's name, job title, department, incident date, and an incident account. (A. 391; 121, 341.) The Company entered into evidence three DAR forms submitted by nurses. (A. 390-94; 59-72, 322-34.) It is unclear whether other employees have utilized the form to report fellow employees' misconduct, but the Center's progressive-discipline policy states that any employee who witnesses a Category II or III offense commits a Category II offense by failing to report it, and the DON testified that any employee can report improper conduct to management. (A. 391; 101; 286-88, 294-95.)

A nursing department manager investigates all incidents that nurses report; nurses do not participate in the investigation, have access to personnel files, or determine what, if any, discipline should issue. (A. 391-92; 67, 121-26.) The investigating manager often seeks witness statements, accesses the CNA's personnel file to determine if the CNA received previous discipline, and ultimately determines what, if any, discipline should issue. (A. 391; 67, 71-73, 100-01, 120-25.) If a manager decides discipline is warranted, she completes the DAR form by noting the level of corrective action and signing it, and issues the discipline. (A. 392; 61-62, 98-99, 121-26.)

II. THE PROCEDURAL HISTORY

A. The Representation Proceeding

On January 12, 2015, the Union filed an election petition with the Subregion 11 of the Board, seeking to represent a unit of RNs and LPNs. (A. 384-85; 240, 439-41.) In response, the Center asserted that all employees in the petitioned-for unit are supervisors under Section 2(11), and therefore had no right to organize. (A. 285; 9-11, 344-61.) The Region held a pre-election hearing on the supervisory issue on January 23. (A. 2, 430.) On February 4, the Board's Regional Director issued a Decision and Direction of Election finding the Center had not met its burden of establishing supervisory status. (A. 384-98.) The Regional Director therefore directed a *Sonotone* election, which is a two-part election in which

professional employees (here, the RNs) vote on whether they wish to be included in a collective-bargaining unit with non-professional employees (here, the LPNs), and all employees vote on whether they desire union representation.[9] (A. 398-402, 515; 431.) Thereafter, on February 23, the Center filed a Request for Review of the Regional Director's Decision with the Board. (A. 403-427, 430.)

On March 6, the Region held the *Sonotone* election. (A. 515; 431.) The Regional Director impounded the ballots pending the Board's decision on the Center's Request for Review, which the Board denied on March 30 because it raised "no substantial issue warranting review." (A. 487, 515; 428, 431.) The next day, the Region counted the ballots. (A. 431-32.) The tally of ballots showed that the 4 participating RNs voted for inclusion in the unit with the LPNs, and that the nurses voted 17-0 in favor of representation. (A. 515; 431-32, 489-90.) On April 13, the Acting Regional Director certified the Union as the nurses' exclusive-bargaining representative.[10]

B. The Unfair-Labor-Practice Proceeding: The Center Refuses To Bargain with the Union

On June 2, 2015, the Union requested that the Center recognize and bargain with it as the nurses' representative. (A. 516; 433, 497.) The Center refused that

[9] *See Sonotone Corp.*, 90 NLRB 1236 (1950).

[10] On May 30, the Regional Director corrected the prior certification's error of listing the RNs and LPNs as two separate units by issuing a corrected certification. (A. 515; 432, 491-94.)

request. (A. 516; 433, 498.) The Board's General Counsel issued a complaint, based on the Union's charge, alleging that the Center's refusal violated Section 8(a)(5) and (1) of the Act. (A. 515; 499-507.) In its Answer, the Center admitted its refusal but denied that it was unlawful, contending that the nurses are supervisors because they have Section-2(11) authority to discipline and/or responsibly direct CNAs, or effectively recommend those actions, and therefore the Board's certification of the Union was improper. (A. 515-16; 508-10.)

The General Counsel filed a motion for summary judgment and to transfer the case and to continue proceedings before the Board. (A. 515-16; 429-510.) The Board issued an Order granting the transfer and directing the Center to show cause why the motion should not be granted. The Center filed a response. (A. 515-16; 511-14.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On September 8, 2015, the Board (Chairman Pearce and Members Hirozawa and McFarren) issued its Decision and Order in the unfair-labor-practice case, granting the General Counsel's motion for summary judgment. (A. 515-17.) The Board found that all representation issues that the Center raised were or could have been litigated in the prior representation proceeding, and that the Center did not offer to adduce any newly-discovered and previously-unavailable evidence, or allege any special circumstances that would require the Board to reexamine its

representation-proceeding decision. Accordingly, the Board found that the Center violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union.

The Board's Order requires the Center to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.[11] Affirmatively, the Board's Order requires the Center, upon request, to bargain with the Union and post a remedial notice. (A 516-17.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Center failed to establish that nurses are statutory supervisors under Section 2(11) of the Act, because the Center failed to satisfy its evidentiary burden of proof with regard to its claim that the nurses can discipline or responsibly direct CNAs, or effectively recommend those actions. Accordingly, the Board properly certified the Union as the nurses' collective-bargaining representative, and the Center violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with it.

1. Discipline: The Center failed to meet its evidentiary burden of establishing that the nurses have the authority to discipline or effectively recommend discipline within the meaning of Section 2(11), because it did not

[11] 29 U.S.C. § 157.

establish that they exercised independent judgment by reporting certain conduct to management. Specifically, because the record evidence regarding independent judgment is conflicting, insufficient, and/or inconsistent, the Center cannot, as a matter of law, meet its burden of proof. Notably, there is no testimony that nurses consider any factors when deciding whether to orally counsel a CNA or report the CNA's misconduct to management. Additionally, nurses testified that management never informed them that they had such disciplinary authority, never gave them training or any instructions on how to discipline, and never showed them the very form that the Center asserts nurses use to initiate the discipline process. Furthermore, the Center's progressive-discipline policy requires that any employee report certain offenses or they will face disciplinary action for failing to report them, and each of the three incidents detailed in the DAR forms that the Center introduced into evidence to establish the nurses' purported discretion involved conduct that all employees are required to report. The Center also failed to establish that nurses have the Section-2(11) authority to effectively recommend discipline because there is no record evidence that any nurse has made a disciplinary recommendation, let alone one that the Center followed without management's independent investigation or review.

2. Responsible direction: The Center failed to establish that nurses exercise independent judgment when directing CNAs, because the CNAs' work is routine

and the nurses provide no more than minimal guidance when directing them. If nurses direct the CNAs in more complicated tasks, they do not exercise independent judgment in doing so because state regulations and the Center's training, rules, policies, and procedures govern those directions.

Further, the Center's evidence was insufficient to establish that it holds nurses accountable for CNAs' misconduct or performance, because the two disciplinary forms that the Center relied upon do not clearly provide that it disciplined the nurse for the CNA's, rather than the nurse's, misconduct or performance. Moreover, because the nursing department management team decides what, if any, discipline is warranted when the nurses report misconduct, the nurses do not have the authority to take any meaningful corrective action if CNAs fail to follow instructions. Additionally, the Center errs in asserting that the DON's conclusory testimony, which she gave in response to leading questions, and mere "paper" or "theoretical" authority — position descriptions and vague, conclusory statements contained in mandatory in-service meeting notes — satisfy its evidentiary burden.

Finally, because the Center failed to prove that nurses have authority to perform any Section-2(11)-enumerated function with independent judgment, the Board properly rejected its reliance on secondary indicia of supervisory status.

ARGUMENT

THE BOARD CORRECTLY FOUND THAT THE CENTER VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO RECOGNIZE AND BARGAIN WITH THE UNION

Section 8(a)(5) and (1) of the Act[12] prohibits an employer from refusing to bargain collectively with the representative of its employees.[13] Here, although the Center's nurses chose the Union as their representative in a Board-supervised election, the Center, admittedly, has refused to recognize or bargain with it. (A. 515-16; 508-10, 512-14.) The Center contends that its refusal is lawful because the nurses are statutory supervisors. (A. 515-16; 508-10; 512-14.) Therefore, if the Board properly rejected that claim in the representation proceeding, the Center's refusal to bargain with the Union violates Section 8(a)(5) and (1) of the Act.[14] As shown below, the Center's admitted refusal violates Section 8(a)(5) and (1).

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[12] 29 U.S.C. § 158(a)(5) and (1).

[13] A violation of Section 8(a)(5) produces a derivative violation of Section 8(a)(1) by interfering with employees' collective-bargaining rights. *See, e.g., NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 778 (1990); *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

[14] *See, e.g., NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946).

A. Applicable Principles and Standard of Review

1. The Act's definition of employee is broad, and the Board's supervisory-status findings are entitled to great deference

The Act's protections extend to all workers who meet its definition of "employee."[15] As the Supreme Court has repeatedly observed, that definition is strikingly broad.[16] Moreover, the Supreme Court has cautioned "that [the Board] and reviewing courts must take care to assure that exemptions from [the Act's] coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach."[17]

One exemption from the definition of "employee" is "any individual employed as a supervisor."[18] Section 2(11) of 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.[19]

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[15] *See* Section 2(3) of the Act (29 U.S.C. § 152(3)) ("The term 'employee' shall include any employee . . . .").

[16] *See, e.g.*, *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 711 (2001); *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 91 (1995); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984).

[17] *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996).

[18] 29 U.S.C. § 152(3).

[19] 29 U.S.C. § 152(11).

Thus, as relevant here, the Act dictates that individuals are not supervisors unless (1) they have the authority to engage in at least one of the twelve specified supervisory functions, and (2) their exercise of that authority requires the use of independent judgment.[20]

In enacting Section 2(11), Congress intended "to distinguish truly supervisory personnel, who are vested with "genuine management prerogatives," from employees — such as "straw bosses, leadmen, set-up men, and other minor supervisory employees" — who enjoy the Act's guarantees although they perform "minor supervisory duties."[21] Drawing the distinction "between gradations of authority . . . infinite and subtle" is a matter that "fall[s] within the special expertise of the Board . . . over which it has a wide discretion."[22]

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[20] *See, e.g.*, *Kentucky River*, 532 U.S. at 713; *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006).

[21] *NLRB v. Bell Aerospace Co. Div. of Textron*, 416 U.S. 267, 280-83 (1974) (quoting Sen. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947)); *accord Pac-Tell Group, Inc. v. NLRB*, 2015 WL 9310689, at *3 (4th Cir. 2015) (unpublished decision); *NLRB v. Pilot Freight Carriers*, 558 F.2d 205, 207 (4th Cir. 1977); *Oakwood*, 348 NLRB at 688.

[22] *Methodist Home v. NLRB*, 596 F.2d 1173, 1177 & 1178 n.4 (4th Cir. 1979) (citation and internal quotations omitted); *accord NLRB v. S. Seating Co.*, 468 F.2d 1345, 1348 (4th Cir. 1972); *see also NLRB v. Labor Ready, Inc.*, 253 F.3d 195, 199 (4th Cir. 2001) ("We extend considerable deference to the [Board's] interpretation of [Section 2(3) of the Act] and its application of [that] provision to a particular worker or class of workers").

Accordingly, the Board's findings regarding supervisory status are entitled to "great deference,"[23] and must be upheld as long as they are supported by substantial evidence.[24] "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,' that is, more than a scintilla of evidence, but less than preponderance.'"[25] More generally, under the substantial-evidence standard, a reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*."[26]

2. Section 2(11) requires that putative supervisors exercise independent judgment when performing one of the twelve enumerated functions

To exercise independent judgment, an individual must "'act, or effectively recommend action, free of the control of others and form an opinion or evaluation

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[23] *Methodist Home*, 596 F.2d at 1177.

[24] *See, e.g.*, *NLRB v. Diversified Enter., Inc.*, 438 F. App'x 244, 245 (4th Cir. 2011); *S. Seating*, 468 F.2d at 1348.

[25] *Pac-Tell*, 2015 WL 9310689, at *2.

[26] *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *see also Pac-Tell*, 2015 WL 9310689, at * 2 ("We will defer to the Board's factual determinations even if we might have reached a different result in the first instance."); *Holly Farms Corp. v. NLRB*, 48 F.3d 1360, 1369 (4th Cir. 1995) ("Regardless of how we . . . might have resolved the question as an initial matter, we must give appropriate weight to the judgment of the Board, whose special duty is to apply the Act's broad statutory language to an almost unlimited variety of fact patterns"), *aff'd*, 517 U.S. 392 (1996).

by discerning and comparing data.'"[27] Further, "[j]udgment is not independent under the Act 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.'"[28] Judgment must also involve a degree of discretion that rises above the "routine or clerical."[29]

3. The Center must establish Section 2(11) supervisory status by a preponderance of the evidence

The burden of demonstrating supervisory status rests with the party asserting it.[30] To meet its burden, the asserting party must establish Section 2(11) status by a preponderance of the evidence.[31] It must support its claim with specific examples,

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[27] *Pac-Tell*, 2015 WL 9310689, at *3, quoting *Oakwood*, 348 NLRB at 692-93; *accord Diversified Enter., Inc.*, 355 NLRB 492 (2010), *incorporating by reference*, 353 NLRB 1174, 1180 (2009), *enforced*, 438 F. App'x 244 (4th Cir. 2011).

[28] *Pac-Tell*, 2015 WL 9310689, at *3, quoting *Oakwood*, 348 NLRB at 693; *see also Kentucky River*, 532 U.S. at 713-14 ("the degree of judgment that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer").

[29] *Oakwood*, 348 NLRB at 693 & n.42; *see also Kentucky River*, 532 U.S. at 713-14 ("Many nominally supervisory functions may be performed without the exercis[e of] such a degree of . . . judgment or discretion . . . as would warrant a finding of supervisory status under the Act").

[30] *See, e.g.*, *Kentucky River*, 532 U.S. at 710-12; *Oakwood*, 348 NLRB at 687.

[31] *See, e.g.*, *Pac-Tell*, 2015 WL 9310689, at *2; *Oakwood*, 348 NLRB at 694; *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006).

based on record evidence; conclusory or generalized testimony does not suffice.[32] Nor can a party satisfy its burden with inconclusive or conflicting evidence.[33] Any lack of evidence is construed against the party asserting supervisory status.[34] Further, paper authority, such as job titles, position descriptions, and statements regarding merely theoretical power cannot establish supervisory status.[35]

B. The Center Errs in Relying on Court Decisions that Predate *Kentucky River* and *Oakwood*

The Center (Br. 27-30, 33-35) heavily relies on decisions of this Court and the Sixth Circuit that predate pivotal developments in the law concerning supervisory status. Its principal arguments regarding discipline and responsible

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[32] *See, e.g.*, *Avista Corp. v. NLRB*, 496 F. App'x 92, 93 (D.C. Cir. 2013); *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 305, 312 (6th Cir. 2012); *NLRB v. Atl. Paratrans of N.Y.C., Inc.*, 300 F. App'x 54, 57 (2d Cir. 2008); *Golden Crest Healthcare Ctr.*, 348 NLRB 727, 731 (2006).

[33] *See, e.g.*, *Pac-Tell*, 2015 WL 9310689, at *4 (inconclusive or ambiguous evidence insufficient to establish the employer's burden); *Salem Hosp. Corp. v. NLRB*, 808 F.3d 59, 69 (D.C. Cir. 2015) (citing *Phelps Cmty. Med. Ctr.*, 295 NLRB 486, 490 (1989)) ("[W]henever the evidence is in conflict or otherwise inconclusive on a particular indicia of supervisory authority, we will find that supervisory status has not been established."); *Frenchtown*, 683 F.3d at 315.

[34] *See, e.g.*, *Dean & Deluca N.Y., Inc.*, 338 NLRB 1046, 1048 (2003); *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535, 536 n. 8 (1999).

[35] *See, e.g.*, *NLRB v. S. Bleachery & Print Works, Inc.*, 257 F.2d 235, 239 (4th Cir. 1958) (an "employer cannot make a supervisor out of a rank and file employee simply by giving him the title and theoretical power to perform one or more of the enumerated statutory functions."), *cert. denied*, 359 U.S. 911 (1959); *Frenchtown*, 683 F.3d at 305 & 310; *Rochelle Waste Disposal, LLC v. NLRB*, 673 F.3d 587, 589& 596 (7th Cir. 2012); *Golden Crest*, 348 NLRB at 731.

direction rely upon Fourth and Sixth Circuit cases that preceded *Kentucky River*, where the Supreme Court rejected the Board's interpretation of the term "independent judgment" as it applied to nurses.[36] Following *Kentucky River*, the Board abandoned its distinctive analysis of nurses' supervisory status and revisited the issue more broadly in *Oakwood*,[37] and two companion cases, *Croft Metals*,[38] and *Golden Crest Healthcare Center*.[39] In the *Oakwood* trilogy, the Board clarified and refined its interpretation of the terms "independent judgment," "assign," and "responsibly to direct," and made them applicable to all workers.

As shown below, the Board's *Oakwood* triology changed the landscape in this area by redefining the statutorily-ambiguous terms "independent judgment," "responsibly direct," and "assign" in a reasonable manner that is entitled to deference. Therefore, the cases the Center relies upon, which are premised upon a rejection of the Board's pre-*Oakwood* standards, are no longer viable precedent.

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[36] 532 U.S. at 713-15.

[37] 348 NLRB 686 (2006).

[38] 348 NLRB 717 (2006).

[39] 348 NLRB 727 (2006).

1. The Center errs by relying upon Fourth Circuit cases that are premised on the Court's rejection of the Board's prior definitions of "independent judgment," "assign," and "responsibly direct"

The Center errs in relying on this Court's pre-*Kentucky River* and pre-*Oakwood* decisions. Accordingly, the Center does not help itself by citing (Br. 24-25, 27-29, 33-34) *Beverly Enterprises, Virginia, Inc. v. NLRB,*[40] *Beverly Enterprises, West Virginia, Inc. v. NLRB,*[41] *Glenmark Associates, Inc. v. NLRB,*[42] and *NLRB v. St. Mary's Home, Inc.*,[43] where the Court declined to defer to the Board's resolution of supervisory status issues. The language in those cases is no longer viable because it was based on perceived faults in a bygone period of Board-decision making, including the Board's former, nurse-specific analysis that it abandoned more than fourteen years ago. Moreover, because all the decisions that the Center cites predate the *Oakwood* trilogy, the Court plainly was not considering the Board's current interpretation of the statutory terms "independent judgment," "assign," and "responsibly to direct" — a difference that the Center has fatally ignored.

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[40] 165 F.3d 290, 295 (4th Cir. 1999).

[41] 165 F.3d 307 (4th Cir. 1999).

[42] 147 F.3d 333 (4th Cir. 1998) (en banc).

[43] 690 F.2d 1062, 1067 (4th Cir. 1982).

This Court has yet to pass upon whether its pre-*Oakwood* and *Kentucky River* decisions remain valid precedent in a published decision.[44] But recently in *Pac Tell Group, Inc. v. NLRB*, the Court found that where, as here, the employer did not challenge the reasonableness of the Board's *Oakwood* interpretation of "independent judgment," "assign," and "responsibly direct," it was unnecessary to determine whether its pre-*Kentucky River* and pre-*Oakwood* cases "remain[] controlling,"[45] and instead applied *Oakwood* and its progeny's definitions of those terms.[46] Accordingly, the Court should similarly apply the *Oakwood* here.

The Center not only failed to challenge the *Oakwood* standards' soundness or applicability, but also uncritically relied upon them. (A. 423.) And it is those standards that control this case because they represent the Board's reasonable construction of ambiguous statutory terms, and they postdate the Fourth Circuit decisions that the Center cites. "If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* [*U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984)] requires a federal court to accept the agency's construction . . . even if [it] differs from what the court

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[44] In *Diversified Enter.*, 438 F. App'x 244 (4th Cir. 2011), however, the Court enforced a Board decision and order, 355 NLRB 492 (2010), that discussed and applied the *Oakwood* interpretations of "independent judgment," "assign," and "responsibly to direct."

[45] 2015 WL 9310689, at *3 n.3.

[46] *Id.*

believes is the best statutory interpretation."[47] And, crucially, a "court's prior judicial construction of [the] statute trumps [the agency's] construction . . . only if the prior court decision holds that its construction follows from the unambiguous terms of the statute."[48] This Court has never held that the pertinent Section 2(11) terms are unambiguous.

Moreover, the Supreme Court has squarely recognized that "independent judgment" and "responsibly to direct" are ambiguous statutory terms.[49] And, the Board's *Oakwood* construction of those terms is unassailably "a permissible construction" of Section 2(11) under *Chevron*.[50] Reviewing courts have unanimously applied the Board's *Oakwood* standards,[51] and the Center has not asserted — let alone articulated why — they do not represent a reasonable

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[47] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (citing *Chevron*, 467 U.S. at 843-45).

[48] *Brand X*, 545 U.S. at 980.

[49] *Kentucky River*, 532 U.S. at 713 ("the statutory term 'independent judgment' is ambiguous with respect to the degree of discretion required . . . [and] [i]t falls clearly within the Board's discretion to determine, within reason, what scope of discretion qualifies"); *NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 579 (1994) ("no doubt true" that the Board "needs to be given ample room" to apply the ambiguous term "responsibly to direct").

[50] 467 U.S. at 843-45.

[51] *See, e.g.*, *Entergy Miss., Inc. v. NLRB*, _ _ _ F.3d _ _ _ _ , 2015 WL 8228998, at *3 (5th Cir. 2015); *NLRB v. NSTAR Elec. Co.*, 798 F.3d 1 (1st Cir. 2015); *Avista Corp. v. NLRB*, 496 F. App'x 92 (D.C. Cir. 2013); *Frenchtown*, 683 F.3d 298; *Rochelle Waste Disposal*, 673 F.3d 587; *Mars Home for Youth v. NLRB*, 666 F.3d 850 (3d Cir. 2011); *Atl. Paratrans*, 300 F. App'x 54.

interpretation of the Act. Thus, under *Chevron* and *Brand X*, the Board's *Oakwood* standards govern here.[52]

2. The Center errs by relying on pre-*Kentucky River* and pre-*Oakwood* Sixth Circuit cases

With the exception of *Extendicare Health Serv., Inc. v. NLRB*,[53] the Center relies on "historic"[54] Sixth Circuit cases that predate *Kentucky River* and *Oakwood*. Its reliance is woefully misplaced for two reasons. First, in *Kentucky River*, the Supreme Court determined that the Board had appropriately allocated the burden of establishing supervisory status to the asserting party.[55] Prior to that, the Sixth Circuit was the only circuit that required "the Board to prove that employees are not supervisors."[56] The Supreme Court recognized the significant impact that the burden allocation can have, noting that it is easier for the employer to prove the

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[52] The Center's reliance (Br. 29-30) on the Third Circuit cases *Passavant Retirement & Health Care Center v. NLRB*, 149 F.3d 243, 248 (3d Cir. 1998), and *Warner Co. v. NLRB*, 365 F.2d 435, 439 (3d Cir. 1966) also fails because those cases also applied a more restrictive, pre-*Oakwood* definition of "independent judgment," which is contrary to the Third Circuit's adoption of *Oakwood*'s independent judgment definition in *Mars Home*, 666 F.3d at 853-54.

[53] 182 F. App'x 412 (6th Cir. 2006).

[54] *Frenchtown*, 683 F.3d at 307 (citing pre-*Oakwood* Sixth Circuit cases).

[55] 532 U.S. at 711-12; *accord NLRB v. Dole Fresh Vegetables, Inc.*, 334 F.3d 478, 485 (6th Cir. 2003) (recognizing that *Kentucky River* overruled this Circuit's prior burden allocation).

[56] *Integrated Health Servs. of Mich. at Riverbend, Inc. v. NLRB*, 191 F.3d 703, 713 (6th Cir. 1999) (citing cases).

exercise of one supervisory function than for the Board to disprove all twelve.[57] Indeed, the Sixth Circuit itself has recognized that *Kentucky River*'s burden allocation undercut its prior supervisory-status decisions' applicability.[58]

Second, these pre-*Oakwood* Sixth Circuit cases are premised on that court's rejection of pre-*Oakwood* definitions of independent judgment and responsible direction. Since then, the Sixth Circuit's *Frenchtown* decision determined that those terms are ambiguous and that the Board's *Oakwood* definitions of those terms are reasonable and entitled to deference.[59]

C. Substantial Evidence Supports the Board's Finding that the Center Failed to Carry Its Burden of Proving that the Nurses are Statutory Supervisors

The Center concedes that the nurses do not have the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or adjust grievances, or effectively recommend those actions. (A. 133-35, Br. 5-6, 17, 26.) It, however, contends that its nurses have the Section-2(11) authority to discipline and/or responsibly direct CNAs, or effectively recommend these actions, and are thus supervisors under the Act. As shown below, substantial evidence supports the Board's rejection (A. 390) of Center's contention that the record evidence

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[57] *Kentucky River*, 532 U.S. at 711.

[58] *Frenchtown*, 683 F.3d at 305 n.2.

[59] *Id.* at 304 n.1 & 314.

establishes that the nurses "exercise independent judgment when they purportedly discipline and responsibly direct the CNAs on its behalf," because the Center failed to carry its evidentiary burden.

1. The Center failed to prove that the nurses discipline CNAs, or effectively recommend such action, using independent judgment

The Board properly rejected (A. 390-94) the Center's claim that the nurses possess Section-2(11) authority to discipline or effectively recommend discipline of CNAs. Instead, substantial evidence supports the Board's determination that, at most, the nurses' role in the Center's disciplinary process is to report certain "improper conduct observed on their shifts or, at most, issue oral counselings and, therefore, there is insufficient evidence to establish their 2(11) status." (A. 391.)

As the Board explained, when a nurse reports a CNA's improper conduct, a nursing department manager, who supervises the nurses, investigates the incident without the nurse's involvement, and reviews applicable disciplinary records in the CNA's personnel files (which nurses do not have access to). (A. 391-92; 67.) That manager also determines "what, if any, level of discipline should issue," signs the form, and issues the discipline. (A. 393-94; 60-61, 66-72, 98-100, 121-26.)

Moreover, the evidence, including the three DAR forms that the Center entered into evidence in support of its claim that nurses discipline CNAs using independent judgment, establishes that although nurses have reported two incidents regarding a CNA's refusal to perform work assignments and one incident of a

CNA sleeping on the job, any employee, including a CNA, can report improper conduct to management. (A. 391; 101, 286-88, 294-96.) Indeed, the Center's progressive-discipline policy provides that *any* employee who witnesses a Category II or III offense, which includes sleeping while on the Center's premises, insubordination/refusing a job assignment, being under the influence of drugs or alcohol, and abusing or neglecting a resident, commits a Category II offense by failing to report it.[60] (A. 287-88, 295-96.) The offenses implicated on the three DAR forms are all Category III offenses.[61] (A. 287-88, 323-34.)

Furthermore, there is no specific record evidence that the Center has trained the nurses, formally or otherwise, on disciplining CNAs. (A. 101, 110-11, 160, 184.) And two nurses testified that, even in egregious situations such as a CNA

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[60] *See, e.g.*, *Pac-Tell*, 2015 WL 9310689, at *4 (no independent judgment where management instructed putative supervisors to fill out warning forms each time that employee violated certain infractions and all warnings were subject to management's approval before issuance) (citing *Shaw, Inc.*, 350 NLRB 354, 356-57 (2007) (no independent judgment where putative supervisor had no "discretion to decide which incidents to record" or determine whether to complete a "write-up" form at all)); *Dole Fresh Vegetables*, 334 F.3d at 486-87 (putative supervisor did not exercise independent judgment in completing, signing, and delivering warning forms pursuant to manager's instructions).

[61] Although the DAR form for CNA Waterman does not cite any rule, the attached note indicates that she likely violated Category III Rules 38 and 58, because she refused a job assignment and violated state law. (A. 287-88, 332-34.) The note provides that a resident in a room that she was assigned to had body odor and needed a bath, she "fussed" over the nurse's request that she bathe residents, and ignored the nurse's request that she tend to her assigned residents. (A. 333-34.) And, South Carolina law requires that residents are neat and clean, which includes "being free of offensive body odors." S.C. Code Ann. Reg. 61-17, §1001(F).

abusing or neglecting a resident or arriving to work inebriated, they can only call the DON and/or 911, and ask (but not tell) the CNA to leave. (A. 397; 161-62, 169, 170-72, 180-84.) They also testified that if they encountered a performance issue, then, pursuant to their respective UMs' instructions, they would call the UM or the on-call manager. (A. 397; 163-65, 180-85, 188-90.) The nurses' testimony, the lack thereof of other record evidence, and the Center's rule requiring any employee to report Category II and III offenses or face disciplinary action, all refute the Center's contention that the nurses exercise or possess disciplinary authority. Therefore, because court-enforced Board law provides that conflicting evidence precludes an asserting party from satisfying its burden of proof,[62] the Center's assertion (Br. 12) that the nurses' testimony is "self-serving" and "not entitled to any weight" is fatally flawed. Accordingly, the Board's conclusion is consistent with well-established case law holding that simply reporting factual information is insufficient to demonstrate supervisory status under the Act.[63]

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[62] *See Pac-Tell*, 2015 WL 9310689, at *4; *accord Salem Hosp.*, 808 F.3d at 69; *Frenchtown*, 683 F.3d at 315; *Veolia Transp. Servs.*, 2016 WL 245559, at * 3 & 9 (Jan. 20, 2016); *The Republican Co.*, 2014 WL 3887221, at *7-*8 & *11 (Aug. 7, 2014).

[63] *See, e.g.*, *Loparex LLC v. NLRB*, 591 F.3d 540, 550 (7th Cir. 2009); *NLRB v. St. Clair Die Casting, L.L.C.*, 423 F.3d 843, 850 (8th Cir. 2005); *Hosp. Gen. Menonita v. NLRB*, 393 F.3d 263, 268 (1st Cir. 2004); *Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260, 265-66 (2d Cir. 2000); *NLRB v. Hilliard Dev. Corp.*, 187 F.3d 133, 147 (1st Cir. 1999); *Highland Superstores, Inc. v. NLRB*, 927 F.2d 918,

In addition to the reasons stated in Section B, above, the Center errs (Br. 27, 29) in arguing that *Glenmark Associates, Inc. v. NLRB*[64] and *Beverly Enterprises, Virginia, Inc. v. NLRB*[65] are applicable here because both cases are factually distinguishable. As the Center admits (Br. 29), this Court's *Beverly Enterprises, Virginia* decision was also premised on its finding that nurses exercised discretion in deciding what, if any, discipline to issue,[66] and the Center has not established that nurses have such discretion here. And, although the *Beverly* decision states that a nurse "sent a nursing assistant home for misbehavior,"[67] the decision later states that the nurse in question actually "suspended a nursing assistant — without any guidance from management — and then effectively recommended that nursing assistant's discharge."[68] By contrast, here, the DON decided to suspend the CNA, and the nurse made no disciplinary recommendation.

Glenmark is factually distinguishable for three reasons. First, the employer, Glenmark, established that its nurses had the authority to independently decide

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922 (6th Cir. 1991); *Veolia Transp.*, 2016 WL 245559, at * 12 (citing *Jochims v. NLRB*, 480 F.3d 1161, 1170 (D.C. Cir. 2007)).

[64] 147 F.3d 333 (4th Cir. 1998) (en banc).

[65] 165 F.3d at 297.

[66] *Id.*

[67] *Id.* at 293 (LPN "sent a nursing assistant home for misbehavior and, solely on the recommendation of the LPN, that nursing assistant was discharged.")

[68] *Id.* at 297.

whether to suspend an employee, and it is undisputed that the nurses here have no such authority.[69] (A. 393-94; 61, 122-23, 325-31.) Second, unlike here, Glenmark established that its nurses had the *discretion* to orally counsel the CNA rather than filing a verbal correction report and had the authority to suspend an employee.[70]

Third, the Center's progressive-discipline policy does not mention sending an employee home as a form of discipline and the DON confirmed that the Center has no other form of discipline other than what is listed in that policy. In similar circumstances, the Board and courts have found that actions, such as the nurse's *mere request* that the CNA go home, cannot constitute Section-2(11) discipline, because those actions are not listed in the employer's disciplinary policy.[71] (A. 100, 284-89, 292-97.)

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[69] 147 F.3d at 343.

[70] *Id.* at 342-43.

[71] *See, e.g.*, *Frenchtown*, 683 F.3d at 306 (rejecting employer's argument that "in-services" were discipline based in part on fact that in-services were not mentioned in progressive-discipline policy); *Veolia Transp.*, 2016 WL 245559, at *3 & 9 (finding conflicting evidence that purported counseling "discipline" constituted discipline where, *inter alia*, notwithstanding employer witnesses' contrary testimony, collective-bargaining agreement referred to "counseling" as discipline only with respect to attendance infractions and putative supervisors were not involved with attendance-based discipline, and therefore that employer failed to carry evidentiary burden); *see also Atl. Paratrans*, 300 F. App'x at 57 (putative supervisors' ability to temporarily remove drivers from route was not discipline, because managers decided whether drivers would receive discipline).

a. The Center's evidence does not establish that nurses exercised independent judgment when they reported Category III offenses

The Center incorrectly asserts (Br. 26) that the "undisputed record evidence" demonstrates that nurses exercise independent judgment by reporting infractions to management. In so doing, the Center not only mischaracterizes record testimony, but also ignores other conflicting or inconsistent evidence that it presented, so it has not, as a matter of law, satisfied its evidentiary burden.[72]

More specifically, the Center incorrectly asserts (Br. 27) that the DON's testimony regarding what she *expects* nurses to do when they encounter CNA performance or conduct issues establishes that nurses consider whether they have "previously counseled a CNA regarding the same infraction and/or the seriousness of the infraction" in determining whether to report the CNA's conduct or merely orally counsel the CNA. But, there is no evidence that *any* nurse has evaluated these factors when deciding to report a CNA's conduct to management or that any manager conveyed these expectations to the nurses.[73] Indeed, contrary to the Center's assertion, as set forth on pp. 28-29, two nurses testified that management had never communicated to them that they had the authority to issue any

[72] *See, e.g.*, *Pac-Tell*, 2015 WL 9310689, at *4; *Salem Hosp.*, 808 F.3d at 69; *Frenchtown*, 683 F.3d at 315; *Republican Co.*, 2014 WL 3887221, at *7-*8 & *11.

[73] *See, e.g.*, *Frenchtown*, 683 F.3d at 312 (employer's failure to provide concrete evidence of factors actually considered in adjusting assignments precluded a finding of independent judgment).

discipline, including documented oral counseling/reprimands or written warnings, and had never even seen the DAR form. (A. 158-61, 179-81.)

Additionally, the DON's testimony that *she* completed the entire DAR form after a nurse called her to report that a CNA was sleeping during work time (A. 393-94; 71-72, 123-24, 325-31) and the nurses' use of forms that are clearly intended to document resident injuries and incidents (A. 326-28), constitutes further evidence that nurses do not know to use a DAR form — the very form that the Center asserts (Br. 8, 20-21, 26) initiates the disciplinary process.

Next, the Center's own exhibits conflict with its assertion that the testimony and three DAR forms that it entered into evidence to support its claim that nurses possess Section-2(11)-disciplinary authority establish that the nurses exercised discretion when reporting that misconduct. Specifically, the three DAR forms involve Category III offenses and Center's progressive-discipline policy requires any employee who witnesses a Category II or III offense to report it. In light of this rule, the DON's testimony that the nurses exercised independent judgment by deciding to report these Category III offenses is no more than saying that any employee — even a nonsupervisory employee — should be designated a supervisor because the Center obligates them to perform this function. This proves too much and falls far short of establishing that the nurses exercised independent judgment when they reported these Category III offenses. As such, its reliance

(Br. 27-29) on *Lakeland Health Care Associates v. NLRB*,[74] and *Extendicare Health Care Services, Inc. v. NLRB*[75] — cases where the respective courts found that the putative supervisors had the discretion to correct the issue without using formal discipline — is misplaced.

Finally, the Board's conclusion (A. 393) that one example of a nurse *asking* a CNA who she witnessed sleeping on the job to go home did not constitute Section 2(11)-disciplinary authority is supported by well-established case law, because requesting that a CNA go home in such egregious circumstances does not involve the exercise of independent judgment as the Board defined that term in *Oakwood*.[76] And even if one nurse disciplined a CNA using independent judgment (which she did not), the Board correctly proceeded with caution in assessing this one example, because the proof of supervisory authority here is scant and clearly outweighed by contrary evidence.[77] Indeed, Board and court cases provide that

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[74] 696 F.3d 1332, 1339 (11th Cir. 2012)

[75] 182 F. App'x at 416.

[76] *See Frenchtown*, 683 F.3d at 309 ("Sending employees home for egregious misconduct does not require independent judgment."); *Lakeland*, 696 F.3d at1339-40 (independent judgment not required to determine that someone is sleeping on the job); *Highland*, 927 F.2d at 922 ("solitary instance" of sending an employee home could not confer supervisory status as a matter of law); *Vencor Hosp.-L.A.*, 328 NLRB 1136, 1139 (1999) (sending employee home did not show supervisory status when authority was "limited to situations involving egregious misconduct").

[77] *See, e.g.*, *NLRB v. Orr Iron, Inc.*, 508 F.2d 1305, 1307 (7th Cir. 1975) (although foreman once "told one of the steel handlers to do his work or go home," this was

"the nearly total lack of evidence of [supervisory] authority actually exercised negates its existence,"[78] notwithstanding one or two isolated examples.[79]

b. The Center failed to establish that the nurses effectively recommend discipline using independent judgment

Under established Board law, effective recommendation of discipline requires a showing that nurses submit actual recommendations that are regularly followed "without independent investigation or review by others."[80] The Center failed to make such a showing. There is no record evidence, including on any of

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an "extraordinary exception[] to [the] regular practice, and when looked against a total background" did not show disciplinary authority).

[78] *Oil, Chem. & Atomic Workers v. NLRB*, 445 F.2d 237, 244 (D.C. Cir. 1971).

[79] *See, e.g.*, *Frenchtown*, 683 F.3d at 309, 310, 312 (upholding Board's finding that one or two "isolated instances" of Section-2(11) activities were "not enough to support a finding of supervisory status"); *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1467 (7th Cir. 1983) ("with very little evidence in the record" of supervisory authority, "the Board did not have to be persuaded by a single incident in which a recommendation for discharge was made and followed"). *Accord Republican Co.*, 2014 WL 3887221, at *11; *Kanawha Stone Co., Inc.*, 334 NLRB 235, 237 (2001); *Highland Tel. Coop.*, 192 NLRB 1057, 1058 (1971).

[80] *Waverly-Cedar Falls Health Care Ctr., Inc. v. NLRB*, 933 F.2d 626, 630 (8th Cir. 1991) (citing *Passavant Health Ctr.*, 284 NLRB 887, 890 (1987)); *see also Frenchtown*, 683 F.3d at 309; *Republican Co.*, 2014 WL 3887221, at *7 (effective recommendation generally requires that recommended actions are taken without independent investigation); *Nymed, Inc.*, 320 NLRB 806, 812 (1996) (nursing supervisor or ADON spoke the parties involved before any action was taken).

the three DAR forms, that the nurses recommended that management give the CNA a certain level of discipline.[81] (A. 322-34.)

The Center's reliance on *Glenmark* (Br. 28) is again misplaced. In *Glenmark*, the Court's determination that nurses could effectively recommend discipline was premised on finding that the nurses had the *discretion* to orally counsel CNAs rather than filing a verbal correction report.[82] As the Center admits (Br. 27), the Court made that finding in conjunction with its finding that a nurse exercised the authority to suspend an employee.[83]

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[81] *Frenchtown*, 683 F.3d at 309 (employer did not establish that the nurses effectively recommended discipline where there was no record evidence that a nurse made a single written-disciplinary recommendation).

[82] 147 F.3d at 342-43.

[83] *Id.* at 343. Moreover, *Glenmark*'s reliance on *ITT Lighting Fixtures v. NLRB*, 712 F.2d 40, 44-45 (2d Cir. 1983), a case where a purported supervisor made disciplinary recommendations to her superior, strongly suggests that the Court's conclusion that nurses effectively recommended discipline cannot be divorced from its additional finding that nurses could suspend CNAs. The disciplinary recommendation in *ITT* is pertinent because the Second Circuit has also consistently held that "a putative supervisor does not discipline an employee if the putative supervisor is merely a conduit for information for those who make the disciplinary decisions." *NLRB v. Saint Mary Home*, 358 F. App'x 255, 257-58 (2d Cir. 2009) (internal quotation marks omitted) (nurses were not supervisors where they could only informally reprimand CNAs); *Schnurmacher*, 214 F.3d at 265-66 (referring aide misconduct to nurse managers without recommendation is not supervisory); *NLRB v. Meenan Oil Co.*, 139 F.3d 311, 322 (2d Cir. 1998) ("[Employee] acting as a conduit for information . . . exercises no judgment in passing the knowledge along to management.") (citations omitted).

The Center's reliance (Br. 28-29) on *Extendicare Health Services, Inc. v. NLRB*,[84] an unpublished Sixth Circuit opinion, is also misplaced. First, as discussed on pp. 27-35, the Center has not established by a preponderance of the evidence that nurses use independent judgment when reporting misconduct. Second, and more importantly, in *Frenchtown*, a published post-*Oakwood* case, the Sixth Circuit clarified its decision in *Caremore, Inc. v. NLRB*[85] — the very same case and language that *Extendicare* relied on[86] — in concluding that the absence of even one example of a nurse making a written-disciplinary recommendation constituted substantial evidence that the nurses did not effectively recommend discipline.[87] Specifically, the court found that its ruling in *Caremore* "that a manager's independent investigation does not *preclude* a finding of supervisory status is a far cry from holding that the existence of that investigation does not matter," because "whether a manager independently investigates before acting on a recommendation is a key factor that must be considered when undertaking the

[84] 182 F. App'x at 416-17.

[85] 129 F.3d 365, 470 (6th Cir. 1997).

[86] 182 F. App'x at 417.

[87] *Frenchtown*, 683 F.3d at 309.

highly fact-intense inquiry to determine whether an alleged supervisor effectively recommends discipline."[88]

2. The Center failed to meet its burden of establishing that nurses responsibly direct CNAs

Substantial evidence supports the Board's conclusion (A. 395) that "there is insufficient evidence to demonstrate that the nurses exercise independent judgment when they direct CNAs in their daily duties; are held accountable for the CNAs' performance; or possess the authority to take meaningful corrective action in directing the CNAs." The Center's failure to establish any of these three elements is detailed below.[89]

In its *Oakwood* trilogy, the Board clarified the ambiguous statutory term "responsible direction." *Oakwood*'s first requirement is that the putative supervisors must "direct" employees by, for example, deciding "'what job shall be undertaken next or who shall do it.'"[90] Next, a putative supervisor's authority to direct another's work does not indicate supervisory status unless it is both "responsible" and requires the use of independent judgment.[91] To be "responsible"

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[88] *Id.* at 309, n. 7, citing *Caremore*, 129 F.3d at 370.

[89] As the Center notes (Br. 24, n.3), the Board does not dispute that, to the extent that nurses direct CNAs, it is "in the interest of the employer." *See Health Care & Ret. Corp*, 511 U.S. at 577.

[90] *Frenchtown*, 683 F.3d at 313, quoting *Oakwood*, 348 NLRB at 691.

[91] *Oakwood*, 348 NLRB at 691.

under Section 2(11), the putative supervisor must direct and oversee the employee, and the employer must hold him or her "'accountable for the performance of the task' by the employee 'such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly,'"[92] and delegate him or her the authority "'to take corrective action, if necessary.'"[93] Merely asserting, as the Center does (Br. 31-35), that nurses are "responsible" in the ordinary sense that the Center has imparted them with a particular "duty or trust," is insufficient. Moreover, mere evidence that nurses "direct" the CNAs "is not dispositive," because, as with all supervisory duties, nurses must use independent judgment when directing CNAs.[94] Here, the Center ignores *Oakwood*'s clarification of "responsible direction," and therefore, as discussed in Section B, above, also fails to acknowledge that this Court's and the Sixth Circuit's cases predating *Oakwood* and *Kentucky River* can no longer be assumed to be good law.

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[92] *Pac-Tell*, 2015 WL 9310689, at *5, quoting *Oakwood*, 348 NLRB at 690-92; *accord Diversified*, 355 NLRB at 492.

[93] *Entergy*, 2015 WL 8228998, at *4, quoting *Oakwood*, 348 NLRB at 692.

[94] *Pac-Tell*, 2015 WL 9310689, at *5-6; *accord Oakwood*, 348 NLRB at 691 (direction must be "both 'responsible' . . . and carried out with independent judgment" to be supervisory).

a. The Center failed to establish that nurses direct CNAs with independent judgment or with the requisite accountability

i. The nurses do not use independent judgment when directing CNAs

Substantial evidence supports the Board's conclusion (A. 395) that, although the Center's evidence established that nurses direct CNAs, it did not establish that they did so using independent judgment. Notably, nurses spend very little time directing CNAs, because the CNAs are familiar with their job duties. (A. 397; 101-02, 157, 165, 177-78, 193-97.) This finding is consistent with Court-enforced Board law that putative supervisors do not exercise independent judgment when the employees they direct perform work that is "'routine and repetitive' and does not require 'more than minimal guidance.'"[95] Indeed, because "it only takes common sense if a [resident] is not properly cleaned or dressed to then instruct the aide to rectify the situation,"[96] a nurse does not exercise independent judgment by making such a request.

Contrary to the Center's contention (Br. 35-36), CNA Gardner's testimony does not establish that the nurses exercise independent judgment when directing

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[95] *Pac-Tell*, 2015 WL 9310689, at *6, quoting *Shaw*, 350 NLRB at 356; *accord Croft Metals*, 348 NLRB at 722 n.14 ("The degree of independent judgment is reduced when directing employees in the performance of routine, repetitive tasks") (citation omitted).

[96] *VIP Health Servs., Inc. v. NLRB*, 164 F.3d 644, 649 (D.C. Cir. 1999).

CNAs.[97] She testified that a nurse could require her to answer a call light, follow directions during fire alarms and evacuations, and follow corrections regarding turning or lifting a resident; correct a CNA who is providing improper resident care; and ask a CNA to stop providing potentially-neglectful or abusive care to a resident. This testimony proves too much, because independent judgment is not established where directions are "'dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority,'"[98] which is the case here. First, the Center states (Br. 12-13) that the nurses' directions involve following and applying "laws, rules, and regulations," "protocols," and "procedures." Second, the Center has policies about and has provided specific instructions and training for numerous resident-care issues.[99]

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[97] *See, e.g.*, *Frenchtown*, 683 F.3d at 312 (employer's failure to provide concrete evidence of factors actually considered in adjusting assignments precluded finding of independent judgment); *Republican Co.*, 2014 WL 3887221, at *7 (inconclusive evidence insufficient to satisfy burden of party asserting supervisory status); *Lynwood Manor*, 350 NLRB 489, 490 (2007) (declining to find supervisory status absent specific evidence of factors weighed or balanced in performing allegedly supervisory function); *Austal USA, LLC*, 349 NLRB 561, 561 n.6 (2006) (quoting examples of conclusory statements); *Avante at Wilson, Inc.*, 348 NLRB 1056, 1056-57 (2006) (citing examples of generalized or inconclusive testimony). See also pp. 19-20.

[98] *Frenchtown*, 683 F.3d at 304, quoting *Oakwood*, 348 NLRB at 693.

[99] Managers have provided training and/or instructions on hand washing (A. 80-82, 306, 308), proper body mechanics (A. 308), bathing residents (A. 307), wiping techniques (A. 310), toileting residents (A. 301), preventing pressure wounds and repositioning residents (A. 304, 312), isolation and contact precautions (A. 306, 308), "gentle care" (A. 300), caring for incontinent residents (A. 301, 319), and

Third, South Carolina law requires the Center to provide specific training[100] and to maintain policies and procedures for, *inter alia*, patient care,[101] emergency and fire evacuations,[102] and resident elopement.[103] Indeed, it conducts fire, emergency evacuation, and resident elopement drills, and because of these drills and the Center's detailed emergency procedures, the CNAs already know how to respond to these emergencies. (A. 396; 166-70, 172-73, 203, 205-06, 300, 312.)

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appropriate hygiene-related care (A. 81, 317). The Center has policies regarding abuse and neglect of residents (A. 300, 306), safety (A. 294), and lifting, transferring, and moving residents (A. 286, 295.)

[100] *See* S.C. Code Ann. Reg. 61-17, § 607(C) (nursing homes must train employees provide the care, treatment procedures, and/or services delineated in §1000).

[101] *See, e.g., id.* at § 501(A) (requiring written policies and procedures to meet "the requirements of this regulation[.]"); *id.* at § 607(F)(2)(a)-(d) (aseptic techniques, such as handwashing and scrubbing, management/care of individuals with contagious and/or communicable disease, prevention of pressure-related wounds); *id.* at §1001 (F) (residents must be kept neat and clean).

[102] *See, e.g., id.* at § 607(F)(1)(a) (employers must train staff members on emergency procedures and disaster preparedness); *id.* at § 1502(A) (requiring development of a written disaster and emergency-evacuation plan in consultation with emergency-preparedness agency, which must be updated as needed and rehearsed annually); *id.* at § 1502(B) (setting forth detailed evacuation-plan requirements); *id.* at § 607(F)(1)(b) (employers train all employees on fire response); *id.* at § 1603 (nursing homes must provide employees with training, addressing, *inter alia*, each employee's "[s]pecific responsibilities, tasks, or duties" when a fire occurs, and must also have an evacuation plan providing for procedures and routes out of the facility," which it posts throughout the facility); *id.* at § 1604 (providing, *inter alia*, that "[a]n unannounced fire drill shall be conducted at least quarterly for all shifts.").

[103] *See, e.g., id.* at § 501(B)(2) (resident exit-seeking and elopement).

Finally, managers' assignment of nurses and CNAs to specific rooms and residents within those rooms (A. 388, 396; 157, 177, 194), state law,[104] and a rule that the first employee who sees a call light is supposed to answer it (A. 198-99), control or influence a nurse's rare instruction that a CNA answer a call light. Indeed, if a nurse sees that a patient's call light is on, the nurse answers it rather than directing a CNA to do so. (A. 396; 157, 177-78, 197-98.)

ii. The Center's evidence does not establish that the nurses are held accountable for the CNAs' performance

Contrary to the Center's assertion (Br. 36-40), substantial evidence supports the Board's finding (A. 395-97) that the Center did not meet is evidentiary burden of establishing that it holds nurses accountable for the CNAs' conduct, because it was not clear from the disciplinary forms that it was holding the nurses accountable for the respective CNA's action rather than for the respective nurse's failure to perform her *own* duties.[105]

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[104] *See id.* at § 1001 (D) (requiring prompt response to call lights).

[105] *Compare Frenchtown*, 683 F.3d at 314-15 (disciplinary records did not establish requisite accountability where not clear that nurse being disciplined for aide's conduct rather than own conduct and errors), and *NSTAR*, 798 F.3d at 18 (disciplinary record did not establish requisite accountability where it appeared that putative supervisor was disciplined for own failure to properly perform responsibilities prior to ordering employee to execute order rather than for the employee's execution of order) *with Croft Metals*, 348 NLRB at 722 (lead persons received written warnings when their crews did not meet production goals).

Specifically, the Center asserts (Br. 36) that its documentary evidence established that it held two nurses accountable for CNA misconduct by disciplining the nurses. The first DAR form provides that it disciplined the nurse for violating Rule 3, which provides that "employees must perform position responsibilities in an appropriate manner and at assigned times." (A. 286, 336.) Thus, the very rule it cited indicates that it disciplined the nurse for failing to perform *her* duties.

The second DAR form cites Rule 55, which states that "[e]mployees may not violate location or resident/patient care standards," and states in the narrative section that the "nurse instructed unit secretary who is a CNA to administer a suppository to a resident and then signed MAR that she administer [sic] it." (A. 288, 337.) Thus, the cited rule provides that the nurse herself violated patient care standards, and the narrative confirms this by stating that she improperly instructed the unit secretary and later falsified documentation. Additionally, because the Center does not contend that nurses responsibly direct unit secretaries within the meaning of Section 2(11), it is immaterial whether or not it held the nurse accountable for the unit secretary's conduct. Therefore, the record evidence is, at best, conflicting, and does not establish that nurses are held accountable for CNAs' performance.[106] And even if a rare instance can be established, the Board's long-

[106] *See, e.g.*, *Veolia Transp.*, 2016 WL 245559, at *9.

standing position is that occasional, irregular, or ad hoc instructions of supervisory indicators, including assignment and direction, are insufficient.[107]

The Center relies heavily on conclusory evidence (Br. 32-33), namely its handbook and position descriptions, which include a host of inaccurate information, in arguing (Br. 37-39) that it "has made a 'more-than-merely-paper' showing" that nurses direct CNAs. It also asserts that managers have reminded employees during mandatory in-service meetings that nurses are responsible for ensuring that CNAs provide appropriate care to residents and directed CNAs to report directly to nurses in certain circumstances, including informing them that they are leaving the hall (A. 89-90), giving them their activity of daily living (ADL) books (A. 90), and reporting issues with a resident. (A. 91.) But, this documentary evidence is very type of "paper authority" that is insufficient to show supervisory authority.[108]

In *Frenchtown*, the Sixth Circuit found that the employer's disciplinary forms did not clearly indicate that the nurse was being disciplined for the CNA's misconduct, and that its "theoretical" or "paper power" — position descriptions

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[107] *See, e.g.*, *Croft Metals*, 348 NLRB at 722; *Franklin Home Health Agency*, 337 NLRB 826, 829 (2002); *Kanawha Stone*, 334 NLRB 235 (2001). See also pp. 34-35.

[108] *See, e.g.*, *Rochelle Waste Disposal*, 673 F.3d at 596 ("'paper accountability'" is "insufficient to establish supervisory authority") (quoting *Golden Crest*, 348 NLRB at 731); *see also S. Bleachery*, 257 F.2d at 239.

stating that nurses disciplined employees and responsibly directed aides, as well as the statements "use leadership" and "supervise," which were contained in the nurses' performance appraisals — did not establish accountability.[109] The court also noted that the employer's failure to discipline nurses for the incidents of aide misconduct and errors, which the employer used as evidence of nurses' purported disciplinary authority, underscored its failure to establish that it held nurses accountable.[110] Similarly, here, just as there is no evidence that the Center disciplined the nurses for the instances of CNA misconduct detailed in the three DAR forms, there is also no evidence clearly indicating that the Center disciplined the two nurses for the respective CNA's performance or misconduct.

Moreover, as explained above, pp. 19-20, 40-41, and 45, management's conclusory statements are insufficient to show supervisory status in the absence of any specific examples showing the exercise of such authority.[111] Furthermore, the

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[109] 683 F.3d at 308, 310, 314.

[110] *Id.* at 315, citing *Rochelle Waste Disposal*, 673 F.3d at 596 (where the putative supervisor is not held accountable when a "lower level employee performs inadequately," it is likely "that the purported supervisor is not actually at risk of suffering adverse consequences.")

[111] *See, e.g.*, *Frenchtown*, 683 F.3d at 314 (conclusory and general testimony that putative supervisors held responsible is insufficient); *Atl. Paratrans*, 300 F. App'x at 57 (conclusory testimony that adverse consequences were likely is insufficient); *Beverly Enters.-Mass., Inc. v. NLRB*, 165 F.2d 960, 963 (D.C. Cir. 1999) ("beyond [the employer's] statements or directives themselves, what the statute requires is evidence of actual supervisory authority visibly translated into tangible examples") (citation omitted); *Res-Care*, 705 F.2d at 1467 ("general assertions" of an

Center admits that many of the very same documents it relies on contain numerous inaccuracies regarding the nurses' authority. For example, the LPN-position description inaccurately states that the Center employs licensed vocational nurses (LVNs) and that LPNs can independently sign assessments and supervise other LPNs. (Br. 4, nn. 1-2, A. 42-43, 45, 278.) It also states "N/A" under supervisory responsibilities (A. 45, 278), which the Center conveniently asserts is inaccurate. Similarly, the RN-position description inaccurately states that RNs supervise LPNs, LVNs, and student nurses. (A. 44-45, 119, 276.)

The Center further errs (Br. 39-39) in arguing that the Eleventh Circuit's decision in *Lakeland*[112] requires this Court to find its evidence of supervisory authority sufficient. The evidence in *Lakeland*, which included the putative supervisors' job descriptions and managers' testimony — including a supervisor's testimony that there were no disciplinary records showing that the employer held putative supervisors accountable for the actions of the employees they directed, because the incidents that she testified she would discipline them for had never arisen[113] — was uncontested and much stronger than Center's evidence. Thus, the

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administrator insufficient to show that LPN has supervisory authority); *Cent. Freight Lines, Inc. v. NLRB*, 653 F.2d 1023, 1025 (5th Cir. 1981) (the Board "was not required to defer to conclusory testimony" about supervisory duties).

[112] 696 F.3d at 1344-46.

[113] *Id.* at 1346.

Center strains credibility by requesting that this Court find that it satisfied its evidentiary burden with its paltry evidence, because its RN and LPN- job descriptions contain numerous inaccuracies, the DON's testimony regarding the nurses' purported accountability for CNA misconduct was conclusory and inconsistent,[114] and no witness or the Center ever alleged that, because certain disciplinary issues have never arisen, there were no disciplinary records showing that nurses were held accountable for that CNA misconduct. And, in any event, as discussed pp. 19-20 and 40-41, *Lakeland*'s conclusion is contrary to that of every other court of appeals that has addressed whether such evidence is sufficient.[115]

Finally, because the nursing department management team decides what, if any, discipline is warranted when nurses report CNA misconduct, such as a CNA's failure to accept a job assignment or follow directions,[116] the nurses do not have

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[114] Specifically, although the DON testified in response to the employer counsel's leading questions that the nurses were disciplined for the respective CNA's performance (A. 93-96, 113), her responses to the hearing officer and union counsel's questions regarding the same incidents indicated that the nurse was just disciplined for her own conduct. (A. 106, 131-32.)

[115] *See, e.g.*, *NSTAR*, 798 F.3d at 18 (manager's testimony that putative supervisors "'can and have been held accountable'" was "'simply a conclusion without evidentiary value.'"); *Atl. Paratrans*, 300 F. App'x at 57 (manager's conclusory testimony that adverse consequences were likely was insufficient). See also *supra* notes 32-34 & 111.

[116] *See, e.g.*, *Loparex*, 591 F.3d at 550 (shift leaders could not take corrective action, because "the shift leader's only option [was] to submit a factual reporting detailing the issue to her team manager for consideration").

the authority to take any meaningful corrective action in order to ensure that CNAs comply with the nurses' directions.

3. The Center errs by relying on secondary indicia of supervisory authority

The Center does not salvage its claim of supervisory status by relying on "secondary indicia" of supervisory status — that is, "indicia not included in the statutory definition of supervisor but that often accompany the status of supervisor"[117] — most prominently (Br. 33-35), the fact that the nurses are the highest-ranking-nursing-department employees in the building for most of the Center's operating hours. It is well established that such "secondary indicia" are not dispositive where, as here, the asserting party fails to prove a putative supervisor's authority to perform at least one of Section 2(11)'s enumerated functions with independent judgment.[118] As the Sixth Circuit recently explained, the fact that employees may be "the highest-ranking employees on-site at a given time" does not "ipso facto ma[k]e them into supervisors simply because of their presence" or relieve the asserting party of its burden of proving Section 2(11) status.[119] This is especially true where, as here, managers are on-call when they

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[117] *Pub. Serv. Co. of Colo. v. NLRB*, 405 F.3d 1071, 1080 (10th Cir. 2005).

[118] *See, e.g.*, *Frenchtown*, 683 F.3d at 315; *735 Putnam Pike Operations, L.L.C. v. NLRB*, 474 F. App'x 782, 784 (D.C. Cir. 2012); *Oil Workers*, 445 F.2d at 242.

[119] *Frenchtown*, 683 F.3d at 315; *accord 735 Putnam Pike*, 474 F. App'x at 784; *Shaw*, 350 NLRB at 356 n.15; *Dean & Deluca*, 338 NLRB at 1047-48 n.13 & n.15.

are not at the facility, and the evidence establishes that nurses call them when they need to.[120] Additionally, because including nurses as supervisors would result in a ratio of 1 supervisor per 1.5 CNAs and a 2:1-ratio or lower is "suspect," the resulting ratio is secondary indicium supporting the Board's conclusion that nurses are not supervisors.[121] *Glenmark*, *Beverly Enterprises, Virginia*, and *Beverly Enterprises, West Virginia*, cited by the Center (Br. 33-34), are not to the contrary, because the Court found that the nurses in those cases possessed one or more of the indicia set forth in Section 2(11).[122]

STATEMENT REGARDING ORAL ARGUMENT

This case involves the application of widely accepted Board law governing determinations of supervisory status to facts that are largely undisputed. Nevertheless, because this Court has not issued a published opinion on the issue since the Supreme Court decided *Kentucky River* and the Board issued the *Oakwood* trilogy, the Board believes that oral argument may assist the Court.

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[120] *See, e.g.*, *Frenchtown*, 683 F.3d at 315; *Golden Crest*, 348 NLRB at 730 n.10.

[121] *Frenchtown*, 683 F.3d at 315, quoting *Highland*, 927 F.2d at 923.

[122] *See Beverly Enters., W.Va.*, 165 F.3d at 310 (nurses exercised discretion in assigning and disciplining CNAs, and assessed whether new CNAs were "sufficiently trained to accept full assignment"); *Beverly Enters., Virginia*, 165 F.3d at 297 (nurses assigned, directed, effectively recommended discipline of, and suspended assistants); *Glenmark*, 147 F.3d at 340-44 (nurses exercised independent judgment when disciplining and suspending employees).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the petition for review and enforcing the Board's Order in full.

Respectfully submitted,

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National Labor Relations Board

February 2016

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 15-2143 **Caption:** PALMETTO PRINCE GEORGE v. NLRB

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PALMETTO PRINCE GEORGE OPERATING, LLC	*	
d/b/a PRINCE GEORGE HEALTHCARE CENTER	*	
	*	
Petitioner/Cross-Respondent	*	Nos. 15-2143
	*	15-2221
	*	
v.	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	10-CA-154373
	*	
Respondent/Cross-Petitioner	*	

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I hereby certify that on February 5, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

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Dated at Washington, DC
this 5th day of February, 2016