

Nos. 16-1330 and 16-1505

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

v.

**SUB ACUTE REHABILITATION CENTER AT KEARNY, LLC d/b/a
BELGROVE POST-ACUTE CARE CENTER**

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR
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STATEMENT OF JURISDICTION

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce, and the cross-petition of Sub Acute Rehabilitation Center at Kearny, LLC d/b/a Belgrove Post-Acute Care Center (“the Company”) to review, a Board Order issued against the Company on December 9,

2015, and reported at 363 NLRB No. 61. (A. iv-vii.)¹ The Board found that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act (“the Act”) (29 U.S.C. §§ 151, 158(a)(5) and (1)) by refusing to recognize and bargain with District 1199J, NUHHCE, AFSCME, AFL-CIO (“the Union”) as the duly certified collective-bargaining representative of a unit of Licensed Practical Nurses (“LPNs”) at the Company’s Kearny, New Jersey nursing facility. (A. vi-vii.)

The Board had jurisdiction over the unfair-labor-practice proceeding under Section 10(a) of the Act (29 U.S.C. 160(a)), which empowers the Board to prevent unfair labor practices affecting commerce. The Board’s Order is final with respect to all parties under Section 10(e) and (f) of the Act (29 U.S.C. §160(e) and (f)). The Court has jurisdiction under the same Section of the Act because the unfair labor practice occurred in Kearny, New Jersey. The Board’s application and the Company’s cross-petition were timely because the Act places no time limit on such filings.

Because the Board’s Order is based, in part, on findings made in an underlying representation proceeding, the record in that proceeding (Board Case

¹ “A” references are to the Joint Appendix filed by the Company. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

No. 22-RC-080916) is also before the Court under Section 9(d) of the Act (29 U.S.C. § 159(d)). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964); *Terrace Gardens Plaza, Inc. v. NLRB*, 91 F.3d 222, 225 (D.C. Cir. 1996). Section 9(d), does not give the Court general authority over the representation proceeding. Rather, the Court may review the Board's actions in the representation proceeding for the limited purpose of deciding whether to enforce, modify, or set aside the Board's unfair-labor-practice order in whole or part. The Board retains authority under Section 9(c) of the Act (29 U.S.C. § 159(c)) to resume processing the representation case in a manner consistent with the ruling of the Court. *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999) (citing cases).

STATEMENT OF THE ISSUE PRESENTED

The ultimate issue in this case is whether the Board reasonably found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union. Resolution of this issue turns on the subsidiary question of whether substantial evidence supports the Board's finding that the Company failed to carry its burden of proving that its LPNs are statutory supervisors, and that therefore the bargaining unit was appropriate.

STATEMENT OF RELATED CASES

This case has not been before this Court previously, and the Board is unaware of any related case as defined in L.A.R. 28.1(a)(2).

STATEMENT OF THE CASE

The Board found that the Company refused to recognize and bargain with the Union after a majority of the Company's LPNs at its Kearny, New Jersey nursing facility selected the Union as their collective-bargaining representative in a Board-conducted representation election. (A. vi-vii.) The Company does not dispute that it refused to recognize and bargain with the Union, but instead contests the Board's findings in the underlying representation proceeding, that the Company failed to meet its burden of proving that the LPNs are statutory supervisors. The Board's findings in the representation and unfair-labor-practice proceedings are summarized below.

I. THE BOARD'S FINDINGS OF FACT

A. The Company's Operations and Organizational Structure

The Company operates a 120-bed, long-term care and sub-acute nursing facility in Kearny, New Jersey. (A. 424; 6-7, 20-21.) Residents are housed on three floors of the five-story facility. The first and third floors are sub-acute units that house short-term stay residents who have transferred to the facility from hospitals to complete rehabilitation and therapy. (A. 425; 181-82.) The second floor houses long-term care residents. (A. 425; 41, 43.) The facility operates 24 hours a day, 7 days a week, on three shifts. The day shift runs from 7:00 a.m. to

3:00 p.m., the evening shift from 3:00 p.m. to 11:00 p.m., and the overnight shift from 11:00 p.m. to 7:00 a.m. (A. 424; 24-26, 40.)

Administrator Jacqueline Baumrind oversees the entire facility. (A. 424; 20-22.) The Director of Nursing (“DON”) oversees the entire nursing department. Reporting to the DON are the Assistant Director of Nursing (“ADON”), two house supervisors, and three unit managers. (A. 424; 23-24, 78, 92, 135.) House supervisors monitor the building to make sure that everything runs smoothly during the shift, and that staff members show up as scheduled and properly perform their jobs. (Tr. 35.) Unit managers assign work to LPNs and make sure that they do their jobs. (Tr. 49.) (A. 431 n.16; 151, 250.) The facility must have a Registered Nurse (“RN”) on site at all times, and permanent unit managers and house supervisors must be RNs. (A. 431 n.17; 137, 163, 241-42, 249-50.)

During the day shift from Monday to Friday, the DON and/or ADON are at the facility along with the three unit managers, one for each floor. The evening, overnight, and weekend shifts have one house supervisor who is responsible for the entire 120-bed facility, although the DON stops in periodically during those shifts. (A. 424-25; 23-24, 35, 40-43, 49-51, 78, 91-94, 134, 142-43, 153-54, 192, 196-97.)

The Company employs approximately 30 LPNs who work as floor nurses, and 75 Certified Nursing Assistants (“CNAs”). (A. 425 n.7; 73.) The day shift includes two LPNs and four CNAs on the first floor, two LPNs and five CNAs on

the second floor, and three LPNs and five CNAs on the third floor. (A. 425; 41-43.) LPNs distribute medications, perform treatments on residents, and ensure that their needs are met. CNAs provide basic care to residents and assist with daily living functions, such as feeding, bathing, grooming, dressing, hygiene, and walking. (A. 425, 427; 38, 53, 75, 168, 175, 179, 191, 220-21, 226, 223-24, 244.)

B. Scheduling and Assignment of Resident Rooms

The staffing coordinator, in conjunction with the DON, ADON, and unit managers, creates pre-printed daily assignment sheets for LPNs and CNAs for each floor and shift. These assignment sheets contain columns listing the shift number and room assignments. The sheets also contain additional predetermined CNA tasks, such as fire and pantry duty, and scheduled break times. (A. 425, 433; 66, 68-69, 91, 138-40, 267-98.) LPNs slot specific CNAs into the pre-designated break times. LPNs also fill in the names of CNAs assigned to posts and note their predetermined tasks, which any CNA can perform. (A. 425-26 & n.8, 434; 66, 139-40, 75-78, 139-40, 163-76, 218, 220-22, 245, 299.) In addition, quality assurance CNAs fill out the assignment sheets to reflect the hygienic and ambulation needs of certain residents on a designated shift, make appointments for residents, and arrange their transportation needs. (A. 426 & n.9; 107.)

LPNs can temporarily reassign CNAs to different rooms in response to resident or family complaints. LPNs forward these complaints to either the unit

manager or house supervisor, who would then consult with the administrator about any need to permanently reassign a CNA. (A. 426, 435-46; 143-44, 190-91, 229-30, 248.) In one instance, LPN Josefina Naglieri moved a CNA to a different resident after a resident told her that the CNA had said something mean and expressed a desire not to have care from that CNA for that shift. (A. 191.)

When CNA staff adjustments are needed based on resident census, absences, or someone leaving early, either the unit manager or the staffing coordinator move CNAs from other units, or call CNAs not scheduled to work. (A. 426; 24-26, 34-35, 94-95, 143, 237-38.) For coverage needed on the evening, night, or weekend shifts, the house supervisor has responsibility for finding a replacement. The Company follows the same procedure for authorizing overtime work to ensure compliance with the facility's minimum staffing levels. (A. 426 & n.10; 25-26.)

C. Resident Care and Direction of CNAs

At the beginning of each shift, outgoing shift nurses provide reports to the incoming LPNs on patient changes, such as new admissions/discharges, and changes in condition/medications to ensure continuity of care. LPNs then report this information to CNAs. (A. 427; 167-70.) LPNs also inform the CNAs of residents' schedules regarding family visits, medical appointments, and discharges to ensure that residents are timely toileted and groomed. (A. 427 and n.11, 428, 435; 53-58, 173-75, 179, 222-24, 226, 243-46.) LPNs also inform the CNAs of

more specific tasks to complete during their shift, such as conveying doctors' orders regarding the collection of specimens and dietary restrictions based on an upcoming medical test. In addition, LPNs can tell CNAs to clean up vomit, and to prepare isolation carts if a resident is exposed to a contagion. (A. 427, 435; 53, 58, 176, 185, 223-25, 228-29, 245.)

When new residents are admitted, LPNs may ask the CNAs to take their weight, height, and make a list of belongings. (A. 244-45.) LPNs also review the residents' condition with the CNAs. For example, a resident with a cast cannot get it wet, a resident on bed rest needs movement at regular intervals, and a resident in isolation needs signs placed outside the room. (A. 54-55, 182-84, 243.) When residents are discharged, the LPNs inform the CNAs, who may assist with packing, paperwork, and escorting the resident out of the building. (A. 186.)

D. Discipline and Transfer

Employees can receive warning notices that state, "any repetition of the[] unsatisfactory performance or any other act of misconduct may lead to further disciplinary action . . . including . . . termination from employment." (A. 263.) In the 18 months prior to the hearing, no LPN working as a floor nurse issued any disciplinary notices. (A. 440.) However, on one occasion, LPN Naglieri, in her capacity as a floor nurse, told a CNA to keep her voice down. (A. 430, 442-43; 209-10.) When she was temporarily serving as an acting unit manager, Naglieri

issued two warnings to LPNs, and one to a CNA. (A. 430; 136, 145, 196-99, 233-36, 263, 300-01).

In her capacity as a floor nurse, Naglieri once temporarily moved a CNA in response to a resident's request. (A. 189-91.) However, only house supervisors and unit managers can permanently transfer CNAs. (435-36; 143-44, 229-30, 248.)

E. LPNs Occasionally Serve as Acting House Supervisors and Unit Managers

As noted above at p. 5, only RNs can serve as permanent unit managers and house supervisors. (A. 442; 163, 249-50.) When those RNs are on vacation or sick, or have left the Company's employment, LPNs can temporarily act in their place. LPNs are not required to accept those acting positions, and only about seven of them have done so. (A. 430-31; 90, 100-02.) When acting as unit managers and house supervisors, LPNs receive the same hourly rate of pay and benefits that they earn as floor nurses. (A. 249.)

LPN Naglieri served as the acting unit manager on the third floor from approximately July 22, 2011, through early December 2011, and then on the second floor until late February 2012. She did so because the previous unit managers had left the facility. In addition, in April and May 2012, she served as an acting house supervisor on 10 different shifts. (A. 431; 38, 82, 86-88, 113-14, 128-29, 231-32, 241, 267-99.) LPN Natalie Watkins served as an acting unit manager

twice in January and March 2012, and for 18 shifts in May 2012. (A. 431; 38, 82-83, 85, 128, 130, 267-99.) Between January and May 2012, five other LPNs served as either acting unit manager or acting house supervisor between 5 and 19 times. (A. 431; 39-40, 80-81, 108-09, 128-29, 267-99.)

II. Procedural History

A. The Representation Proceeding

On May 14, 2012, the Union filed an election petition to represent LPNs at the Company's Kearny, New Jersey facility. (A. 126-27.) In response, the Company asserted that all employees in the petitioned for unit are supervisors under Section 2(11) of the Act (29 U.S.C. § 152(11)), and therefore that the unit was inappropriate. Following a hearing, the Board's Regional Director issued a Decision Direction and Election in which he found that the Company failed to meet its burden of proving that the LPNs are statutory supervisors, and ordered a secret-ballot election in the petitioned-for unit. (A. 422-46.) The Company sought review of that decision, reiterating its claim that the LPNs are statutory supervisors. The Board (Chairman Pearce, and Members Hayes and Block) denied the Company's request for review. (A. 447-49.) After the Union won an election by a vote of 12 to 2, the Board's Regional Director certified the Union as the exclusive bargaining representative of the LPNs. (A. 448-49.) Thereafter, the

Union requested that the Company recognize and bargain with it, but the Company refused. (A. 450-51, 457.)

B. The Unfair Labor Practice Proceeding

Based on the Union's unfair-labor-practice charge, the Board's Acting General Counsel issued a complaint alleging that the Company violated the Act by refusing to recognize and bargain with the Union. The Acting General Counsel also filed a Motion for Summary Judgment and a Notice to Show Cause why the motion should not be granted. The Company admitted its refusal to bargain, but contested the Board's finding in the underlying representation proceeding that the LPNs are not supervisors and that the bargaining unit is therefore appropriate. (A. 472-73.) On March 13, 2013, the Board (Chairman Pearce and Members Griffin and Block) issued a Decision and Order rejecting the Company's claim. (A. 473-75.)

Thereafter, the Board filed an application for enforcement with this Court. On June 26, 2014, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), holding that three recess appointments to the Board in January 2012 were invalid, including those of Members Griffin and Block. Both members had served on the Board panel that issued the March 2013 Decision and Order. Accordingly, the Court remanded the case to the Board for further proceedings consistent with Supreme Court's decision. (A. 544.)

C. The Board's Consolidated Decision on Remand

On November 25, 2014, a properly constituted Board (Chairman Pearce, and Members Hirozawa and Schiffer) issued a Decision, Certification of Representative, and Notice To Show Cause, which is reported at 361 NLRB No. 118. (A. 544-46.) In view of the Supreme Court's decision in *Noel Canning*, the Board considered de novo the Company's request for review of the Regional Director's Decision and Direction of Election. The Board found that the Company's argument regarding the supervisory status of the LPNs had no merit. Accordingly, the Board affirmed the decision to deny the request for review and issued a Certification of Representative. (A. 544.)

Regarding the unfair-labor-practice proceeding, the Board—recognizing that the circumstances concerning the Company's refusal to bargain might have changed—granted the General Counsel leave to amend the complaint to conform with the current state of the evidence, and gave the Company additional time to show why summary judgment should not be granted. (A. iv.) Thereafter, the Company filed a response to the show cause notice, and an opposition to the summary judgment motion. The General Counsel then moved to amend the complaint, and the Company opposed. On May 26, 2015, the Board issued an Order Granting the Motion To Amend the Complaint and Further Notice To Show Cause, accepting the amended complaint and directing the Company to file an

answer and response to as to why summary judgment should not be granted. (A. iv.) In response, the Company admitted its refusal to bargain, but claimed that it had no duty to do so because the Board had erred in certifying the Union. As relevant here, the Company reiterated its claim that the LPNs are supervisors, an argument the Board had rejected in its November 25, 2014 Decision, Certification of Representative, and Notice To Show Cause. (A. iv-v.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On December 9, 2015, the Board (Chairman Pearce and Members Hirozowa and McFerran) issued its Decision and Order, granting the General Counsel's motion for summary judgment, and finding that the Company's refusal to recognize and bargain with the Union violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (A. iv-vii.) The Board concluded that all representation issues raised by the Company in the unfair-labor-practice proceeding were, or could have been, litigated in the underlying representation proceeding, and that the Company did not allege any special circumstances that would require it to reexamine that decision. (A. iv-v.)

The Board's Order requires the Company to cease and desist from refusing to recognize and bargain with the Union, and in any like or related manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights (29 U.S.C. § 157). (A. vi-vii.) Affirmatively, the Board's Order directs

the Company, on request, to bargain with the Union, and to embody any resulting understanding in a signed agreement. (A. vii.) The Order also requires the Company to post a remedial notice. (A. vii-viii.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Company failed to carry its burden of proving that the Company's LPNs are statutory supervisors. Therefore, the Board is entitled to affirmance of its finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union.

1. Assigning Work: The Board reasonably found that the Company failed to show that LPNs assign work to CNAs using independent judgment. LPNs do not assign CNAs to times or places, or give them significant overall duties under the Board's standard articulated in the *Oakwood* trilogy and approved by this Court in *Mars Home for Youth*. Rather, LPNs merely give CNAs discrete tasks, an action that does not confer Section 2(11) status. As the Board further found, even if the LPNs assigned work they did not do so using independent judgment. Simply put, the record failed to show any significant difference in the skill levels of CNAs, who have no specialized training. Accordingly, it cannot be said that LPNs analyze their abilities in assigning them tasks, or moving them to a different resident during a shift.

2. Responsible Direction: Again applying the judicially-approved standard articulated in the *Oakwood* trilogy, the Board reasonably found that the Company failed to prove that LPNs responsibly direct CNAs. The record does not demonstrate that LPNs are held accountable for CNAs' work such that some adverse consequence may befall the LPNs if CNAs fail to perform properly. Moreover, under settled principles, generalized assertions of such accountability and paper job descriptions do not suffice for the Company to carry its burden.

3. Discipline/Suspension: Substantial evidence supports the Board's further finding that the Company failed to carry its burden of establishing that LPNs possess supervisory disciplinary authority. Although it claimed the LPNs possess such authority because they initiate progressive discipline, the Company failed to present specific evidence of such a system and the role played by LPNs. The Company did not introduce any documents on the subject, and specific testimony was limited to a single instance where an LPN told a CNA to quiet down, with no evidence that it led to any formal discipline. As for the Company's claim that LPNs could suspend CNAs in hypothetical situations involving egregious conduct, it fails to establish that LPNs actually have such authority, given the absence of specific evidence that such authority was granted or exercised.

4. Adjusting grievances and transferring employees: The Board

reasonably found that the Company failed to carry its burden of establishing that LPNs adjust grievances because there is no evidence that they resolve disputes between CNAs. Moreover, to the extent that an LPN once resolved a patient complaint by temporarily moving a CNA, the incident, even if it constituted resolving an employee grievance, did not require independent judgment because the LPN simply accommodated the resident's request. Likewise, the limited authority to temporarily move a CNA at a resident's request does not constitute transfer authority. Moreover, the record shows that only higher-level management can make permanent transfers.

5. Temporarily Serving as Acting Unit Managers and House

Supervisors: The Board reasonably found that the Company failed to carry its burden of establishing that LPNs are supervisors because some of them have temporarily served as acting house supervisors and unit managers. Under settled law, including *Oakwood*, sporadically filling in for supervisors to cover vacations and sickness does not establish a "regular" pattern or schedule of occupying a supervisory position. For the same reason, the Board also reasonably discounted LPNs sporadically filling such roles for more extended periods because those situations involved the unusual occurrence of positions being temporarily open after supervisors left the Company.

ARGUMENT**THE BOARD REASONABLY FOUND THAT THE COMPANY 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 prohibits an employer from refusing to bargain with the duly certified bargaining representative of an appropriate unit of its employees. (29 U.S.C. § 158(5) and (1)). The Company admits that it refused to recognize and bargain with the Union in order to challenge the Board's certification of the Union. (Br. 6.) As set forth below, substantial evidence supports the Board's finding that the Company did not carry its burden of proving that the LPNs are statutory supervisors. Accordingly, the Board reasonably found that that the Company's refusal to recognize and bargain with the Union violated Section 8(a)(5) and (1) of the Act. *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 329-30 (1946).²

A. Applicable Principles and Standard of Review

“To be entitled to the Act's protections and includable in a bargaining unit, one must be an ‘employee’ as defined by the Act.” *Mars Home for Youth v. NLRB*, 666 F.3d 850, 853 (3d Cir. 2011). Section 2(3) of the Act (29 U.S.C. § 152(3))

² A violation of Section 8(a)(5) produces a derivative violation of Section 8(a)(1). *Citizens Publ'g & Printing Co. v. NLRB*, 263 F.3d 224, 233 (3d Cir. 2001).

excludes from the definition of the term “employee” any individual employed as a “supervisor.” In turn, the Act defines a supervisor as follows:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, 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.

29 U.S.C. § 152(11).

In enacting Section 2(11), Congress sought to distinguish between truly supervisory personnel vested with “genuine management prerogatives” and workers—such as “straw bosses, leadmen, and set-up men, and other minor supervisory employees”—who enjoy the Act’s protections even though they perform “minor supervisory duties.” *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81 (1974) (quoting Sen. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947)).

The Supreme Court has explained that individuals are statutory supervisors “if (1) they have the authority to engage in any 1 of the 12 listed supervisory functions, (2) their ‘exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,’ and (3) their authority is held ‘in the interest of the employer.’” *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 712 (2001) (citation omitted); accord *Mars Home*, 666 F.3d at 853-54. Thereafter, in *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), and two

companion cases, *Croft Metals, Inc.*, 348 NLRB 717 (2006), and *Golden Crest Healthcare Center.*, 348 NLRB 727 (2006), the Board refined and clarified its interpretation of the statutory phrases “assign,” “independent judgment,” and “responsibly direct,” discussed in detail below. This Court, and other reviewing courts have, without exception, approved the Board’s *Oakwood* standard.³

The party asserting supervisory status bears the burden of proving that status by a preponderance of the evidence. *Kentucky River*, 532 U.S. at 711-12; *Mars Home*, 666 F.3d at 854. The party must support its assertion with specific examples, based on record evidence. Conclusory or generalized testimony fails to establish that individuals actually possess supervisory authority. *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 305 (6th Cir. 2012); *Golden Crest Healthcare*, 348 NLRB at 731. Likewise, theoretical or “paper power”—as in a job description—fails to prove supervisory status. *Beverly Enters.-Mass., Inc. v. NLRB*, 165 F.3d 960, 962-63 (D.C. Cir. 1999); *New York Univ. Med. Ctr. v. NLRB*, 156 F.3d 405, 414 (2d Cir. 1998).

Whether an individual is a statutory supervisor is a question of fact particularly suited to the Board’s expertise and therefore subject to limited judicial

³ See *Mars Home*, 666 F.3d at 854-55 & nn. 2, 3; *Securitas Critical Infrastructure Servs., Inc. v. NLRB*, 817 F.3d 1074, 1079 (8th Cir. 2016); *NLRB v. NSTAR Elec. Co.*, 798 F.3d 1, 10-11 & n.5 (1st Cir. 2015) (and cases cited); *Avista Corp. v. NLRB*, 496 F. App’x 92, 93 (D.C. Cir. 2013); *NLRB v. Atl. Paratrans of N.Y.C., Inc.*, 300 F. App’x 54, 56 (2d Cir. 2008).

review. *Mars Home*, 666 F.3d at 853. The Court must uphold the Board’s supervisory-status finding as long as it is supported by substantial evidence, “even if [the Court] would have made a contrary determination had the matter been before [it] *de novo*.” *Citizens Publ’g & Printing Co. v. NLRB*, 263 F.3d 224, 232 (3d Cir. 2001).

Further, where, as here, statutory terms like “assign,” “responsibly to direct,” and “independent judgment” are ambiguous, under the familiar principles of *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984), reviewing courts must accept the agency’s construction if it is reasonably defensible. *Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). *See Kentucky River*, 532 U.S. at 713 (“independent judgment” is an ambiguous statutory term); *Mars Home for Youth*, 666 F.3d at 854n.3 (same for “assign” and “responsibly to direct”).

B. Substantial Evidence Supports the Board’s Finding that the Company Failed To Prove Supervisory Status

The Company claims (Br. 27-59) that its LPNs are statutory supervisors because they assign CNAs and responsibly direct their work, discipline and suspend them, adjust their grievances, transfer them, and temporarily serve as acting unit managers and house supervisors. Substantial evidence supports the Board’s findings that the Company failed to prove those claims.

1. LPNs lack authority to assign employees using independent judgment

As shown below, “assign” under Section 2(11) means designating an employee to a place or time, or giving an employee significant overall duties. Here, the Board reasonably found (A. 434) that the Company failed to establish that LPNs have such authority, and that even if they did, they lack independent judgment.

a. LPNs do not assign CNAs to times or places, or give them significant overall duties

In *Oakwood*, the Board clarified that “assign” under Section 2(11) means “the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” 348 NLRB at 689-90. By contrast, individuals are not supervisors simply because they instruct an “employee [to] perform a discrete task.” *Id.* at 689; *accord Mars Home*, 666 F.3d at 855; *Frenchtown Acquisition*, 683 F.3d at 311. Further, in the health care setting, “the term ‘assign’ encompasses the . . . responsibility to assign nurses and aides to particular patients.” *Oakwood Healthcare*, 348 NLRB at 689. Moreover, the putative “supervisor must have the power to require that these duties be undertaken.” *Mars Home*, 666 F.3d at 855 (citing *Golden Crest Healthcare*, 348 NLRB at 729).

Here, the record reflects that LPNs do not assign CNAs to a particular place or time. Rather, the evidence establishes that the staffing coordinator, in conjunction with the DON, ADON, and unit managers, prepares daily assignment sheets that schedule the CNAs' hours and designate their break times.

The record also fully supports the Board's finding that the staffing coordinator or unit manager assigns CNAs to a particular place—i.e., to patients' rooms. (A. 434.) Contrary to the Company's claim (Br. 31-32), it is not the LPNs who assign CNAs to specific rooms. Neither Administrator Baumrind's conclusory testimony (A. 71) that LPNs "assign" CNAs, nor the two occasions when LPN Naglieri responded to residents' requests by temporarily moving a CNA, establishes that LPNs have overall responsibility for assigning CNAs to particular patient rooms. In one of those instances, a resident simply asked for a Portugese-speaking CNA, and in the other, a resident sought a replacement for a CNA who purportedly made an inappropriate remark. (A. 190-91.) To the extent Naglieri temporarily moved those CNAs to a different resident for the remainder of their shift, her isolated actions do not constitute assignment under Section 2(11), as the Board found (A. 435). *See Frenchtown*, 683 F.3d at 312 ("routine adjustments to patient assignments, such as pulling an aide from a resident because the resident requests it" does not constitute assignment under Section 2(11)).

Contrary to the Company's further claim (Br. 32), the Board appropriately described the two instances when Naglieri moved a CNA to a different resident as "temporary," and reasonably found that only higher-level management can "permanently transfer" CNAs to another floor. (A. 426, 435-36.) Far from being incorrect, the Board's finding regarding the LPNs' limited authority to move a CNA is fully supported by the record. Thus, LPN Naglieri acknowledged that as a floor nurse she could only temporarily, but not permanently, reassign CNAs in response to residents' requests. In addition, she acknowledged the need to inform the unit managers. (A 229-30.) Administrator Baumrind, in turn, acknowledged that not even unit managers have authority to permanently reassign CNAs to different floors or shifts. (A. 144.) In these circumstances, the Company is in no position to claim (Br. 32) that "nothing in the record" supports the Board's finding regarding LPNs' limited authority to move CNAs.

The record also establishes that LPNs have no role in finding replacement CNAs when their absences cause a staffing shortage. Rather, the staffing coordinator, unit manager, or house supervisor has such responsibility. As for overtime, the Company, as the Board found, offered "[n]o specific record evidence" that LPNs have any authority to approve overtime work for CNAs, and the record is "silent" regarding LPNs' "authority to mandate CNAs to stay over to provide additional coverage." (A. 434.)

The Board further reasonably found that LPNs' "assignment of discrete tasks to the CNAs is insufficient to confer supervisory status." (A. 435.) Thus, the LPNs may modify the order in which CNAs bathe or groom residents to accommodate family visits and medical appointments, and direct CNAs to clean up vomit and prepare isolation carts, but these are merely discrete tasks. And under *Oakwood*, 348 NLRB at 689, choosing the order of such tasks does not constitute assignment. In addition, although LPNs assign CNAs predetermined tasks such as pantry and fire duty, any CNA can perform those tasks, as the Company conceded. (A. 434; 174.) Such discrete and ad hoc assignments of routine matters, and the reordering of tasks, are insufficient to establish assignment authority. See *Frenchtown*, 683 F.3d at 312 (adjusting the order that employees perform "discrete tasks" does not demonstrate assignment authority); *Croft Metals, Inc.*, 348 NLRB at 722 (relocating and giving temporary assignments to employees was "switching of tasks" and not assignment of significant overall duties).

In sum, the Board reasonably found that "the CNAs' overall tasks are largely defined by the routine nature of the daily living functions with which they assist" and do "not require continuous supervision." (A. 427, 438-39.) Accordingly, the Board was fully warranted in finding that the LPNs' assignment of tasks "do[es] not involve a 'degree of discretion that rises above routine or clerical.'" (A. 439, quoting *Oakwood*, 348 NLRB at 693.)

b. Even if LPNs assign CNAs, the Company failed to show they exercise independent judgment in doing so

As with all supervisory functions, to confer supervisory status the putative supervisor must exercise authority using independent judgment. As the Supreme Court recognized long ago, “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.” *Kentucky River*, 532 U.S. at 713 (citation omitted). Accordingly, for a putative supervisor to make an assignment with independent judgment, he or she must act “free of the control of others and form an opinion or evaluation by discerning and comparing data,” and must exercise a degree of discretion that rises above the “routine or clerical.” *Oakwood*, 348 NLRB at 692-93. Thus, a judgment is not independent “if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement.” *Id.* at 693. In the healthcare setting, the putative supervisor must select employees to perform specific tasks based on the needs of a patient against the skills, ability, or special training of staff, rather than based on routine or ministerial considerations. *Id.* at 692-93.

Applying these principles in *Oakwood*, the Board found that charge nurses who worked in the emergency room did not exercise independent judgment when assigning nurses because the evidence did not show “discretion to choose between

meaningful choices on the part of the charge nurses in the emergency room.” *Id.* at 689, 696-98. The Board further found that charge nurses who worked outside the emergency used independent judgment when assigning nurses because they assigned nurses with particular skills in chemotherapy, orthopedics, or pediatrics to patients with those needs, and decided whether to assign a mental health nurse or an RN to a psychiatric patient. *Id.* at 696-97.

Here, substantial evidence support the Board’s finding (A. 437-39) that the Company failed to carry its burden of proving that the LPNs assign CNAs using independent judgment. As the Board explained (A. 438), the initial scheduling of CNAs to particular shifts and predetermined room rosters constrains the LPNs’ role. Thereafter, the assignment of CNAs to particular posts, break times, or predetermined tasks, such as pantry and fire alarm duty, “are largely defined by the routine nature of the daily living functions with which they assist.” (A. 438.) Similarly, to the extent that CNAs are asked to perform tasks in a different order, the variation is based on routine considerations such as the residents’ particular schedules. (A. 427-28 and n.11, 53-58, 179, 226.) Thus, although LPNs delegate tasks to CNAs and ensure that they provide proper care to residents, the Company failed to show that LPNs “perform a detailed analysis of CNAs abilities and residents’ needs” when making any assignments, as the Board found. (A. 437-38.)

In these circumstances, the Board reasonably concluded (A. 434), the LPNs' role in room assignments stands in sharp contrast with *Oakwood*, where the Board found that certain charge nurses were supervisors, in part because they assigned nursing staff to patients at the beginning of each shift based on a "myriad of factors." 348 NLRB at 695. Here, the CNAs' assignments are "based on their title, rather than on any particular expertise." (A. 438.) Therefore, even if the LPNs' role in assigning CNAs is considered more than a routine task, it "does not require the use of independent judgment." (A. 438.) *See Frenchtown*, 683 F.3d at 311-12 (no independent judgment in assigning aides where assignment sheets designate their daily duties); *Beverly Enters.-Penn., v. NLRB*, 129 F.3d 1269, 1270 (D.C. Cir. 1997) (nurse's instructions to CNAs as to what CNAs needed to do for patients during the shift, such as "monitoring vital signs more frequently or cleaning up a mess," was "merely routine" and did not involve exercise of independent judgment); *see also Croft Metals*, 348 NLRB at 722 (independent judgment not shown where employer "adduced almost no evidence regarding the factors weighed or balanced" by the putative supervisors).

c. The Company's further contentions are without merit

The Company's remaining challenges to the Board's finding that it failed to show LPNs assign work using independent judgment are likewise unavailing. To begin, even if LPNs gave CNAs their overall room assignments, which they do not

(see p. 22 above), there is simply no evidence that the CNAs' skill levels vary such that independent judgment would be needed to determine those assignments. *See Pac Tell Group, Inc. v. NLRB*, 817 F.3d 85, 92 (4th Cir. 2015) (entering employees' names on work schedules prepared by manager did not involve assigning them with independent judgment).

In finding that LPNs do not use independent judgment, the Board (A. 438) also reasonably rejected the Company's reliance (Br. 31-33, 36-37) on LPN Naglieri's testimony (A. 189-91) that LPNs assess CNAs' performance and skills in assigning them tasks. As the Board explained (A. 438), her testimony consisted of "vague assertion[s] regarding consideration of CNA skill sets," and examples that "fail to satisfy the evidentiary threshold for use of independent judgment." For instance, Naglieri asserted that she would move a CNA to a different assignment if she saw he was not performing up to standards. (A. 190-91.) Her testimony, however, contains only two examples, and as shown above at p. 22, both demonstrate that she was simply responding to resident requests. Thus, reassigning a CNA based on factors such as a resident's native language does not involve the use of independent judgment. *Oakwood*, 348 NLRB at 694.

The Company likewise errs in relying (Br. 31-32), as evidence of independent judgment, on Naglieri's claim that she might have a more experienced CNA help a new CNA prepare an isolation cart. (A. 428; 184.) Aside from this hypothetical

example, which fails to show independent judgment, Naglieri offered no specific evidence that she or other LPNs distinguished among CNAs when they took care of residents. *See generally Shaw Inc.*, 350 NLRB 354, 356 (2007) (assigning a task based on an employee’s “known skills” is “essentially self-evident” and not evidence of supervisory status). Accordingly, the Board reasonably declined to “extinguish LPNs’ Section 7 rights on the basis of Naglieri’s testimony regarding consideration of CNA skill sets.” (A. 438.)

Likewise, given Naglieri’s acknowledgement that any CNA can perform any of the predetermined tasks, such as pantry duty (A. 426; 174), the Company is in no position to dispute (Br. 34) the Board’s finding (A. 437-38) that such assignments do not require independent judgment. That is particularly true here, where the Company offered no evidence as to how often, if at all, predetermined tasks are rotated. Similarly, given the absence of specific evidence showing how LPNs slot CNAs into previously designated break times, the Company’s contention (Br. 36-37) that LPNs exercise independent judgment in filling the slots has no merit.

Finally, the LPNs’ role of informing CNAs about new residents’ medical conditions and scheduled discharges does not establish that LPNs assign CNAs work using independent judgment, contrary to the Company’s claim (Br. 37-38). *See, e.g., Oakwood*, 348 NLRB at 689 (charge nurse ordering LPN to

accommodate change in patient's condition by immediately giving sedative does not constitute assignment). Moreover, the evidence indicates that CNAs essentially follow certain protocols for resident conditions. For example, residents with casts cannot get them wet, and residents being discharged may need help with packing. Although residents' needs may change, and LPNs may inform CNAs of those changes, those factors do not, as the Company suggests (Br. 37-38), detract from the Board's finding that the CNAs, who lack extensive medical training and specialized skills, merely implement set procedures for particular medical conditions relayed by the LPNs. (A. 438.)

2. LPNs do not responsibly direct CNAs

In *Oakwood*, the Board “ascribe[d] a distinct meaning” to the statutory phrase “responsibly to direct.” 348 NLRB at 689. An individual has the authority “responsibly to direct” under Section 2(11) if that individual “has ‘[people] under him,’ and . . . decides ‘what job shall be undertaken next or who shall do it,’ . . . provided that the direction is both ‘responsible’ . . . and carried out with independent judgment.” *Id.* at 691 (citations omitted). And crucially, direction is responsible only if the person performing the oversight is held “accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employees are not performed properly.” *Id.* at 691-92; *accord Mars Home*, 666 F.3d at 853-54.

Requiring accountability demonstrates that the putative supervisor's interests are aligned with management such that "the directing employee will have . . . an adversarial relationship with those he is directing" and will "disregard[], if necessary, employees' contrary interests." *Oakwood*, 348 NLRB at 692. This contrasts with an employee who directs others' work but is not held accountable for their performance: their "interests, in directing other employees, is simply the completion of a certain task." *Id.* Accordingly, to establish accountability, the party bearing the burden of proof must establish that "the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary." *Id.* The party must also show that there is a "prospect of adverse consequences for the putative supervisor if he/she does not take these steps." *Id.*

Substantial evidence supports the Board's finding (A. 439-40) that the Company failed to carry its burden of establishing that LPNs responsibly direct CNAs. Simply put, no evidence exists that the Company has held LPNs accountable for work performed by CNAs. Indeed, as the Board explained, the Company proffered no evidence that any LPN was disciplined, given a poor performance rating, or suffered any other adverse consequence for failing to oversee CNAs who do not perform their jobs properly. (A. 428-29, 439-40.) Rather, LPN Naglieri conceded that as a floor nurse, she was never written up for

the conduct of a CNA. (A. 226-27.) Nor does the record contain evidence that the Company “imparted clear and formal notice to the LPNs that they will be held accountable for the job performance of CNAs.” (A. 439.)

Accordingly, the Board was fully warranted in finding that the Company “has not demonstrated that [LPNs] are held accountable for those they direct,” and that they therefore “do not possess the authority [to] responsibly direct.” (A. 440.) *See NLRB v. NSTAR*, 798 F.3d 1, 18 (1st Cir. 2015) (accountability not established where manager’s testimony that putative supervisors “can and have been held accountable” was “simply a conclusion without evidentiary value”); *Lynwood Manor*, 350 NLRB 489, 490-91 (2007) (accountability not established where employer relied on testimony from its DON and an LPN that LPNs are held accountable for care provided by CNAs because employer failed “to refer to any specific evidence in the record, or proffer to show any specific evidence, that nurses may be disciplined, receive a poor performance rating, or suffer any adverse consequences with respect to their terms and conditions of employment due to a failure in a CNA’s performance”); *Golden Crest Healthcare*, 348 NLRB at 731 (accountability not established where charge-nurse evaluations were not connected to “any material consequences to [the charge nurses’] terms and conditions of employment, whether positive or negative”).

The Company's claim (Br. 43, A. 210, 225-26) that it could not offer any examples of accountability because "there simply have been no instances where the [LPNs] would have to be held accountable for the CNAs" should be rejected. It strains credulity to suggest that 75 CNAs performed so spectacularly over an 18-month period that there was not a single instance where the Company could have held LPNs accountable for a CNA's job performance. Indeed, Administrator Baumrind's assertion (A. 61-63, 72) that during a shift where Naglieri was serving as an acting unit manager, the Company wrote her up for a CNA's failure to refill a resident's water pitcher belies the Company's claim that the CNAs' conduct was unimpeachable.

Contrary to the Company's claim (Br. 43), LPN Naglieri's testimony that the Company told LPNs they are ultimately responsible for the CNAs' performance and subject to discipline does not undermine the Board's finding. (A. 180, 185-86, 210, 212-16, 243.) As the D.C. Circuit has explained, "absent exercise, there must be other affirmative indications of authority. Statements by management purporting to confer authority do not alone suffice." *Beverly Enters.-Mass.*, 165 F.3d at 963. Rather, "what the statute requires is evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority." *Id.* (internal quotations and citations omitted); *accord Frenchtown*, 683 F.3d at 314. Here, such tangible evidence is lacking, and it was

not enough for Naglieri to simply claim (Br. 43) that such accountability and responsibility “was basically instructed.” (A. 215.) In addition, as the Board explained, no evidence exists that the Company trained the LPNs “on the ramifications of their being responsible for the performance of others.” (A. 440.)

Finally, for similar reasons, the Board (A. 429-30, 439-40) reasonably rejected the Company’s reliance (Br. 41-42) on a job description for LPNs that states they “[s]upervis[e]” undefined “nursing personnel,” and contains a heading entitled “responsibilities/accountabilities.” (A. 264.) To the extent that the job description purports to show LPNs’ accountability for CNA conduct, settled principles establish that paper authority fails to establish supervisory status. *See* cases cited above at p. 19.

3. The LPNs do not discipline or suspend CNAs

Substantial evidence supports the Board’s additional finding (A. 440) that the Company failed to carry its burden of establishing that LPNs possess supervisory disciplinary authority. The Company claimed that its LPNs initiate a progressive disciplinary system that affects the CNAs’ job status, but it did not even introduce any documentary evidence of such a system, as the Board noted. (A. 429.) Moreover, the record contains scant testimonial evidence of such a system and how it was applied. Thus, although the Company introduced a warning notice into the record, it simply states that “repetition” of misconduct that led to the

warning “may lead to further disciplinary action” (A. 263.) Aside from that lone notice, Administrator Baumrind (A. 429; 31-33, 64-65, 74) and LPN Naglieri (A. 429; 176-77, 210-14, 225) offered only generalized, conclusory testimony about the supposed system. *See* cases cited above p. 19 (noting the insufficiency of conclusory testimony).

Even if the Company had a progressive disciplinary system, the record contains virtually no evidence concerning its application. For instance, the record fails to show how, if at all, an LPN’s alleged discipline of a CNA impacted the CNA’s employment status. Indeed, Administrator Baumrind could only express her belief that LPNs had disciplined CNAs, but she could not recall a single example. (A. 429 and n.15; 64-65, 118.) Baumrind also asserted that the Company had suspended three CNAs during the 18 months prior to the Board hearing. (A. 429 n.15; 141.) As the Board noted, however, the Company did not introduce any evidence of the discipline into the record. (A. 429 n.15.) Nor, for that matter, did the Company introduce any evidence as to how it applied its disciplinary system to these CNAs, or the role, if any, played by the LPNs in the events leading up to the suspensions.

As for LPN Naglieri, she referenced only a single instance, but it involved nothing more than her telling a CNA who “was getting loud and obnoxious with another staff member . . . in a joking, jovial way,” to keep their voices down, and

informing the house supervisor of the situation. (A. 430, 442-43; 209-10.) The Company does not dispute the Board's finding that it failed to supply the date and location of the incident, the names of the offending employees, or any corroborating documentation. (A. 440-41; 211.) Nor does the Company deny Naglieri's admission that she did not know whether any documentation was ever placed in the employees' personnel records. (A. 441.)

In these circumstances, the Board (A. 441) reasonably discounted Naglieri's testimony as evidence that LPNs discipline or effectively recommend discipline to CNAs as part of a progressive disciplinary system. *See Frenchtown*, 683 F.3d at 309 (bringing misconduct to a manager's attention does not constitute disciplinary authority). And absent additional evidence, there is also no merit to the Company's further claim (Br. 46, 49) that Naglieri's actions affected the CNAs' job status, or provided the foundation for future discipline. *See Ten Broek Commons*, 320 NLRB 806, 812 (1996), cited in *Jochims v. NLRB*, 480 F.3d 1161, 1170 (D.C. Cir. 2007) (recognizing that, under Board law, written warnings and reprimands do not establish disciplinary authority absent evidence that they lead to job-affecting discipline). Accordingly, the Company has not shown that the LPNs discipline or effectively recommend discipline under Section 2(11) of the Act.

Moreover, even assuming that LPN Naglieri's act of telling employees to be quiet constituted discipline or effective recommendation under a progressive

disciplinary system, a single example in a bargaining unit of over 30 LPNs would not suffice to establish supervisory status. *See Frenchtown*, 683 F.3d at 306 (single instance of charge nurse signing counseling form for aide's verbal warning "does not support a finding of supervisory status"). Indeed, to "avoid unnecessarily stripping workers of their organizational rights" (*Beverly Enters.-Mass.*, 165 F.3d at 962), the Board appropriately "cautions against finding supervisory authority based only on infrequent instances of its existence," as the Board noted here. (A. 441.) *Accord Family Healthcare, Inc.* 354 NLRB 254, 209 (2009); *Golden Crest Healthcare*, 348 NLRB at 730 n.9. In short, the Board reasonably concluded that "[b]ased on the paucity of evidence adduced regarding [LPNs] issuing discipline, the [Company] has not satisfied its burden to prove that [they] possess and exercise the authority to discipline CNAs" within the meaning of Section 2(11) of the Act. (A. 441.)

The Company does not advance its position that the LPNs discipline CNAs under a progressive disciplinary system by relying (Br. 48-49) on *NLRB v. Attleboro Associates, Ltd.*, 176 F.3d 154 (3d Cir. 1999). In *Attleboro*, unlike here, there was ample evidence of LPNs issuing write-ups to CNAs that formally served as the first step in a progressive disciplinary system. Accordingly, the Court held that the LPN-issued write-ups were at least effective recommendations of discipline, inasmuch as they played a definite role in a progressive disciplinary

system, and included recommendations as to disciplinary action that were only “sometimes” reviewed by higher-level officials. 176 F.3d at 158, 164-65. By contrast, the Company offered no specific evidence that its LPNs complete or issue warning forms to CNAs, nor did its witnesses even explain its process for making effective recommendations.

Finally, contrary to the Company’s contention (Br. 48), it has not established that LPNs can suspend CNAs. The Company merely cites (Br. 48) Administrator Baumrind’s conjecture that LPNs could send CNAs home if they engaged in extreme misconduct such as hitting or sexually abusing a resident. (A. 66-67.) The Company, however, offered no concrete examples, and its reliance on a purely hypothetical scenario does not alleviate its burden of providing more than a conclusory claim to such authority. *Beverly Enters.-Mass.*, 165 F.3d at 963. In any event, isolated incidents of nurses sending aides home for egregious misconduct does not establish independent judgment. *Frenchtown*, 683 F.3d at 309.

In addition, the Company does not show how or when it informed LPNs of their purported authority to suspend CNAs and the process they would follow. Nor does the Company provide any support for its bald assertion (Br. 48) that LPNs could suspend CNAs without consulting company officials. To the contrary, Administrator Baumrind’s acknowledgement (A. 98) that not even the DON,

ADON, or house supervisor could suspend an employee without consulting or at least concurrently informing her fatally undermines the Company's assertion that LPNs could act alone. *See generally Phelps Med. Ctr.*, 295 NLRB 486, 492 (1989) (call to higher level manager when sending employee home precludes finding of supervisory authority), cited with approval in *Jochims*, 480 F.3d 1 at 1171-72.

Moreover, although Administrator Baumrind acknowledged (A. 98) that LPN Naglieri would be a better witness on the subject, the Company proffered no testimony from her regarding LPNs' authority to suspend CNAs when they are working as floor nurses. Particularly in these circumstances, the Company's reliance on Baumrind's conjecture about a hypothetical scenario falls far short of establishing that LPNs have authority to suspend CNAs. *See Beverly Enters.-Mass.*, 165 F.3d at 964; *Securitas Critical Infrastructure*, 817 F.3d at 1079-80.

Given the woefully inadequate evidence that LPNs have authority under Section 2(11) to suspend CNAs, the Company gains no ground by citing (Br. 48-49) *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). Those cases are not only factually distinguishable, they applied a more restrictive definition of "independent judgment" that was superseded by the *Oakwood* trilogy, which this Court accepted in *Mars Home*, 666 F.3d at 853-54. *See Chevron*, 467

U.S. at 843-45 (1984) (explaining judicial deference owed to agency's interpretation of ambiguous statutory terms), discussed above at p. 20.

4. LPNs do not adjust grievances or transfer employees

The Board reasonably found that the Company failed to carry its burden of establishing that LPNs adjust grievances or transfer employees under Section 2(11). As an initial matter, the Company offered no evidence that LPNs resolve disputes between CNAs. Rather, the Company relies solely on LPN Naglieri moving a CNA in response to a resident's request. *See* p. 22 above. As the Board noted, however, it is unclear that "the resolution of patient complaints is relevant to the grievance adjustment indicia of Section 2(11) authority." (A. 544 n.2.) In any event, resolving minor complaints, including personality conflicts, is insufficient to establish supervisory status. *Beverly Enters., Ala.*, 304 NLRB 862, 865 (1991). In addition, given that Naglieri appears to have simply responded to a resident's specific request, the Board reasonably found that "the evidence fails to show that the LPNs use independent judgment in resolving" such a request. (A. 544 n.2.)

In these circumstances, the Company gains no traction by citing (Br. 50-51) *Passavant*, 149 F.3d at 248, and *Attleboro*, 176 F.3d at 154, where the Court held that adjusting grievances between employees, even if minor, involves independent judgment. In the first place, as shown above at p. 39, those cases applied a more restrictive, pre-*Oakwood* definition of "independent judgment." Moreover, they

are factually distinguishable, as the Company, unlike the employers in the cited cases, offered no tangible examples of LPNs resolving disputes among employees. By contrast, in *Passavant*, the Court found that the purported supervisors adjusted grievances where the undisputed evidence established that that they resolved problems between employees regarding assignments and break times, and the collective-bargaining agreement not only covered those topics but also contained a “very broad” definition of “grievance.” 149 F.3d at 248. Similarly, in *Attleboro*, there was unrebutted evidence that LPN charge nurses had the authority to adjust grievances, including resolving disputes between CNAs regarding work assignments. 176 F.3d at 167. Here, however, the Company failed to present evidence that LPNs resolve such disputes between CNAs, and there is no collective-bargaining agreement with a broad grievance clause.

Finally, the Company’s claim (Br. 52) that LPNs transfer CNAs must also be rejected, given the severely circumscribed evidence offered by the Company, which shows only that LPN Naglieri moved two CNAs temporarily from one resident to another during a shift. *See* p. 22 above. In addition, the Company offered no evidence as to the factors, if any, that LPNs would take into account in making purported temporary transfers, and the record establishes that only higher-level management can permanently transfer CNAs. Accordingly, the Company has failed to establish that LPNs use independent judgment in this regard.

5. LPNs are not statutory supervisors because they sporadically serve as acting unit managers and house supervisors

When a putative supervisor engages as a supervisor part of the time and the rest of the time as a unit employee, determining their status turns on whether the individual spends a regular and substantial portion of his/her work time performing supervisory functions. *Oakwood*, 348 NLRB at 694. Under this standard, “regular” means according to a pattern or schedule, as opposed to sporadic substitution. *Id.* The Board has defined “sporadic” as including instances where the individual covers for a supervisor who is on vacation or out sick. *Hexacomb Corp.*, 313 NLRB 983, 984 (1994) (citing cases).

Applying those principles here, the Board reasonably found (A. 442-43) that the Company failed to carry its burden of establishing that its LPNs are supervisors because some of them occasionally serve as acting house supervisors and unit managers.⁴ As an initial matter, most of the assignments were, as the Board noted, “sporadic in nature and necessary only to cover shifts in which the permanent

⁴ Neither party took a position at the hearing regarding the supervisory status of the permanent unit managers and house managers. Accordingly, the Board did not pass on the Company’s subsequent position, which it repeats here (Br. 52-57), that these individuals are supervisors under the Act. (A. 443 n.25.) As the Board explained, “[a]ssuming *arguendo*” that they are supervisors, its conclusion remains the same that, as set forth above, the LPNs who fill those positions “do not do so in a ‘regular and substantial’ manner as to extinguish their Section 7 rights.” (A. 443-44 n.25.)

supervisors were either sick or on vacation.” (A. 443.) Thus, over an approximately 5-month period in 2012, six LPNs served as either acting unit managers or acting house supervisors on a particular shift from five to twenty-one times. In these circumstances, the Board reasonably concluded that the substitutions were not of “‘regular and substantial’ nature such that their [statutory] rights should be extinguished.” (A. 443 (citation omitted).) *See Hexacomb Corp.*, 313 NLRB at 983-84 (foremen/assistant supervisors who substitute for their undisputed supervisors when the supervisors are sick or on leave are not supervisors); *Jakel Motors*, 288 NLRB 730, 730, 744 (employee who would be in charge during vacations and an extended illnesses of assistant supervisor was not a supervisor); *see also Rhode Island Hosp.*, 312 NLRB 343, 349 (1993) (lead aides who filled in as supervisors during sicknesses, vacations, and leaves of absences were not supervisors, but group leaders who filled in during those time periods as well as during regular weekend rotations were supervisors).⁵

Although LPN Naglieri served as acting unit manager for a several-month period, as the Board noted, her service “was by design temporary” and occurred

⁵ The Company’s focus on the percentage of time that the LPNs serve in different positions ignores that “[t]he Board has not adopted a strict numerical definition of substantiality.” *Oakwood*, 348 NLRB at 689. In any event, the Company’s claim that such substitutions occurred over 18 percent of the time appears inflated as it apparently includes at least a portion of the time that LPN Naglieri served as a unit manager after a manager left the facility.

only because the manager had left the Company. (A. 443.) Indeed, Naglieri acknowledged that under company policy only an RN could fill the position permanently, and at the end of her temporary service she returned to her regular duties as a floor nurse. (A. 442; 163, 241-42, 249-50.) In these circumstances, the Board reasonably concluded that her service as an acting unit manager was not regular, and did not “extinguish” her rights under the Act. (A. 443.) *See St. Francis Medical Center-West*, 323 NLRB 1046 (1997) (hourly production leader was not a supervisor based on his substitution for a supervisor who took a five-month medical leave; his assumption of supervisory duties was temporary, caused by extraordinary circumstances, and not “regular”).

Contrary to the Company’s claim (Br. 57-58), *NLRB v. Florida Agricultural Supply Co., Division of Plymouth*, 328 F.2d 989, 989-91 (5th Cir. 1964), a case that predates pivotal developments in supervisory status law (including *Oakwood*), does not require a contrary result. The Fifth Circuit found that mechanics were supervisors where they regularly served as supervisors for three months per year during the employer’s peak work season, and about five percent of the time during the remainder of the year; attended monthly supervisory meetings; and received a higher rate of pay and more vacation time than rank and file employees. In these circumstances, the Court held that they were year-round supervisors who did “not lose their supervisory identities during the year” simply because “[t]heir

supervisory and non-supervisory functions are not sharply demarcated.” *Id.* at 991.

By contrast, here any time that LPNs spend as acting house supervisors and unit managers is sporadic and clearly demarcated, they receive no additional pay or benefits when acting in those roles, and there is no evidence they attend supervisors meetings.

CONCLUSION

The Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

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National Labor Relations Board

July 2016

H:/FINAL/Subacute

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

NATIONAL LABOR RELATIONS BOARD	*
	*
Petitioner/Cross-Respondent	* Nos. 16-1330
	* 16-1505
v.	*
	* Board Case No.
SUB ACUTE REHABILITATIONS CENTER AT	* 22-CA-093626
KEARNY, LLC d/b/a BELGROVE POST-ACUTE	*
CARE CENTER	*
	*
Respondent/Cross-Petitioner	*

CERTIFICATE OF BAR MEMBERSHIP

In accordance with Third Circuit L.A.R. 28.3(d) and 46.1(e), Board counsel David A. Seid certifies that he is a member in good standing of the bar of the State of Maryland. He is not required to be a member of this Court's bar because he is representing the federal government in this case.

Date at Washington, DC
this 25th day of July, 2016

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	*	
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 10,297 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010. Board counsel further certifies that: the electronic version of the Board’s brief filed with the Court in PDF form is identical to the hard copy of the brief that has been filed with the Court and served on opposing counsel; and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.2015.2015 and is virus-free according to that program.

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Date at Washington, DC
this 25th day of July, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

I certify foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC
this 25th day of July, 2016