

No. 16-1310

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

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

LAKEPOINTE SENIOR CARE AND REHAB CENTER, LLC

Respondent

**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board for enforcement of a Board Decision and Order issued against Lakepointe Senior Care and Rehab Center, LLC on February 11, 2016, and reported at 363 NLRB No. 114. The Board found that Lakepointe violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. § 158 (a)(5) and (1),

by refusing to bargain with SEIU Healthcare Michigan as the duly elected collective-bargaining representative of a unit of charge nurses.

The Board had subject matter jurisdiction over this matter under Section 10(a) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 151, 160(a). The Board's Order is final, and this Court has jurisdiction under Section 10(e) of the Act, 29 U.S.C. § 160(e), because the unfair labor practice was committed in Michigan. The Board's application for enforcement of its Order was timely because the Act places no time limit on the initiation of enforcement proceedings.

As the Board's unfair-labor-practice Order is based, in part, on findings made in an underlying representation proceeding (AR 1050),¹ the record in that proceeding (Board Case No. 07-RC-143710) is also before the Court pursuant to Section 9(d) of the Act, 29 U.S.C. § 159(d). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). Under Section 9(d), the Court has jurisdiction to review the Board's actions in the representation proceeding solely for the purpose of "enforcing, modifying or setting aside in whole or in part the [unfair-labor-practice] order of the Board." 29 U.S.C. § 159(d). The Board retains authority under Section 9(c) of the Act, 29 U.S.C. § 159(c), to resume processing the

¹ "AR" references are to the administrative record filed with the Court. "Br." references are to Lakepointe's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

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 CONCERNING ORAL ARGUMENT

The Board believes that this case involves the application of well-settled legal principles to straightforward facts and, therefore, that argument would not be of material assistance to the Court. However, if the Court believes that argument is necessary, the Board requests to participate and submits that 10 minutes per side would be sufficient.

STATEMENT OF THE ISSUE

The ultimate issue in this case is whether substantial evidence supports the Board's finding that Lakepointe violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the exclusive collective-bargaining representative of an appropriate unit of charge nurses. The resolution of this issue turns on a subsidiary one: whether substantial evidence supports the Board's finding that Lakepointe did not carry its burden of proving that its nurses are statutory supervisors excluded from the Act's protections.

STATEMENT OF THE CASE

This unfair-labor-practice case arises from Lakepointe's admitted refusal to recognize and bargain with the Union as the certified representative of its charge nurses. In the underlying representation proceeding, the Board rejected

Lakepointe's challenges to the Union's certification. (AR 1050.) Having rejected those challenges, the Board held (AR 1051) that Lakepointe's refusal to bargain violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1). The facts and procedural history relevant to both the representation and unfair-labor-practice proceedings are set forth below.

I. STATEMENT OF FACTS

A. Background: Lakepointe's Operations

Lakepointe operates a nursing care facility in Clinton Township, Michigan. (AR 1050, 862; 936, 942.) The facility is divided into three units and is staffed around the clock. (AR 862; 43.)

Lakepointe's nursing department is headed by a director of nursing, and each unit is managed by a coordinator. (AR 862; 43-44, 99, 159-60, 161, 342.) Lakepointe employs approximately 34 charge nurses, including seven contingent nurses and one wound care nurse, who are either licensed practical nurses (LPNs) or registered nurses (RNs). (AR 859, 873-74; 287, 326.) The nursing department additionally includes approximately 90 certified nursing assistants (CNAs), activity aides, restorative aides, and ward clerks.² (AR 863; 35-36.)

² These classifications, along with dietary aides, porters, cooks, laundry aides, and maintenance employees, are in a bargaining unit already represented by the Union. (AR 863; 35.)

Shifts are staffed by two to three charge nurses and three to four CNAs per unit. (AR 863; 45, 99.) The director of nursing and unit coordinators work until approximately 5:00 p.m., at which point a late night supervisor—an assignment that rotates among departmental heads—handles all in-house matters until 7:00 p.m. (AR 862; 64, 89, 161-62.) From 7:00 p.m. until 7:00 a.m., charge nurses are the highest-ranking personnel on-site. (AR 872; 64, 162.) During this overnight period, Lakepointe’s on-call policy dictates that the charge nurses are to call the director of nursing or facility administrator for a multitude of reasons, including resident abuse, injury, and missing charts. (AR 872; 59-63, 89, 216, 797.)

Charge nurses attend monthly nurse meetings but do not attend daily supervisory meetings, which are attended by the administrator, director of nursing, unit coordinators, and other departmental heads.³ (AR 872; 94-96, 108-09, 236-37.)

B. Charge Nurses Do Not Schedule CNAs or Assign Them to Residents

Lakepointe’s scheduler determines CNAs’ scheduled hours, including shift assignments. (AR 863; 103, 163, 220.) Charge nurses do not possess authority to change CNAs’ assigned shifts. (AR 863; 103-04, 121, 220.) If a CNA has not completed all of her assigned tasks before the shift ends, a charge nurse can

³ The wound care nurse attends the daily meetings but is present only during the clinical portion. (AR 236.)

complete an “Overtime Authorization” form, which documents the reason that the CNA is staying late. (AR 863; 75-77, 87, 141-42, 331, 337.) All CNA overtime is ultimately approved by a higher management official. (AR 863; 110-11.)

Charge nurses do not have authority to call in additional CNAs when a shift is understaffed; rather, the front desk, staffed until 11:30 p.m., handles all call-ins. (AR 863; 87-88.) CNA breaks are scheduled according to the facility’s practices. (AR 863; 91-92.) The CNAs are required to notify a charge nurse when going on break, and break times can be adjusted by the charge nurses based on resident and staffing needs. (AR 863; 118.)

Lakepointe’s scheduler assigns CNAs to a unit and to a permanent set of residents. (AR 864; 80, 91, 103-04, 122, 163.) Charge nurses complete daily assignment sheets for their unit and shift once they receive a list of CNAs assigned to the shift. (AR 864; 80, 103-04, 122-23.) The assignment sheets, generated by management, largely define a CNA’s daily tasks. (AR 864; 91-92, 104.) The charge nurses insert CNAs’ names, the resident rooms they are assigned to, and any extra duties they are to perform in addition to their regular day-to-day duties. (AR 864; 80, 103-04.) Extra duties might include checking safety devices or monitoring resident snacks. (AR 864; 338.) Many of the CNAs’ daily tasks, such as giving residents showers, are assigned by management, not the charge nurses. (AR 91-92.) In addition, the computer system used by both the charge nurses and

CNAs throughout the day identifies which tasks need to be completed and the time for completion. If the task has not been checked off as completed at the correct time, the system alerts higher-level managers. (AR 131-34, 144-46.)

Charge nurses possess authority to transfer CNAs to different units based on staffing and resident needs but do not independently decide which CNA will go. (AR 864; 114-15.) When such a need arises, Lakepointe's scheduler will notify the charge nurse, who then utilizes a pool list kept at the nurses' station to dispatch a CNA to the requested unit, or CNAs may decide among themselves who will go. (AR 864; 114-15.) When transferring a CNA to a different unit, charge nurses do not take into account that CNA's abilities. (AR 864; 114-15.)

C. Charge Nurses Report Incidents, but Management Decides Whether and How To Discipline the CNAs

If a charge nurse believes that a CNA is providing inadequate care, she may complete an "Employee Action Improvement Process" (EAIP) form. (AR 866; 47, 793.) The EAIP form replaced the "Employee Disciplinary Warning Record" form sometime in 2011. (AR 866; 53-54, 794.) Charge nurses do not need approval from management to write an EAIP form. (AR 866; 201, 272.)

A charge nurse fills out the EAIP form by summarizing the incident or issue. (AR 866; 47-48, 100, 327, 743-45.) The EAIP form does not include a specific section for the charge nurse to indicate a rule violation, unlike the former disciplinary warning form. (AR 866; 793-94.) Previously, a charge nurse

reviewed the employee rule book, determined which rule had been violated, and indicated the rule violation on the disciplinary warning form. (AR 866; 794.) Some senior charge nurses, trained to use the prior form, may still reference a catch-all “Group 1/Rule 13 – failure to perform job duties satisfactorily” on the EAIP.⁴ (AR 866; 55, 86, 327.) Otherwise, any work rule violation is written or typed on the form by Lakepointe’s human resources manager after the EAIP form reaches human resources. (AR 866; 100, 252, 272, 743-45.)

Lakepointe’s progressive discipline policy contains four disciplinary steps: verbal coaching, formal counseling, written warning, and discharge. (AR 179-80, 566-67.) The EAIP form lists those levels of discipline, as well as suspension and “last chance agreement.” (AR 727.) Charge nurses do not check off the level of discipline to be imposed because they do not have access to the CNAs’ personnel files and, therefore, do not know at which step in Lakepointe’s progressive discipline process any CNA may be. (AR 866; 49-50, 102, 180, 728, 744.) Charge nurses may place comments on the EAIP under “Describe Desired/Expected Behavior” regarding expected corrective behavior, but they do not make any recommendations for action. (AR 866; 49-50, 102, 327.)

⁴ Group 1 rule violations are “normally” subject to the progressive discipline policy although Lakepointe “may initiate discipline at a higher step depending on the severity and circumstances surrounding the incident.” (AR 567.) Group 2 violations are considered to be more severe and lead to immediate suspension or termination. (AR 568.)

After completing the EAIP, the charge nurse signs it on the line indicating “supervisor” and gives it to the unit coordinator, the director of nursing, the human resources manager, or the front desk. (AR 866-67; 48, 81, 100-01.) Although charge nurses previously presented disciplinary warnings directly to CNAs and allowed for union representation during the resulting discussion, they no longer do so. (AR 867; 50, 90, 100-01, 197, 249, 320.) After the charge nurses turn in the EAIP form, Lakepointe processes it, and charge nurses often are unaware whether it actually resulted in discipline. (AR 867; 50-52, 126.)

D. The CNAs’ Daily Tasks Are Generally Routine and Are Determined by Lakepointe Managers

Charge nurses may direct CNAs to perform certain tasks, such as waking, feeding, toileting, or transferring residents. (AR 870; 116-17, 136.) Similarly, charge nurses may correct CNAs if the CNAs are not performing necessary resident care duties. (AR 870; 116-17, 147.) Many of these duties are determined by the CNAs’ job description, by assignment sheets generated by management, or by Lakepointe’s computer system. (AR 870; 91-92, 104, 132-34, 144-46, 790-91.)

Charge nurses are evaluated annually by a unit coordinator in the areas of assigning and directing CNAs, enforcing facility practices and work rules, and administering discipline. Charge nurses are held accountable for their own work and failures, not those of CNAs. (AR 869, 871; 134-37, 170-71, 182, 278-83, 332-36, 767-72.)

E. Charge Nurses Occasionally Evaluate CNAs, Upon the Unit Coordinator's Request

In the past, charge nurses completed CNAs' 90-day probationary evaluations, as well as their annual evaluations. (AR 870 n.15; 761-66.) Due to staffing shortages over the past one to two years, there have been no probationary evaluations of CNAs. (AR 870 n.15; 178, 216-17, 224, 273-74, 296-97.) At present, the CNAs primarily are evaluated annually by their unit coordinator, although the charge nurses may, upon request, assist the coordinator in completing the evaluations. (AR 870; 57, 68-69, 105, 153-54.) The forms are pre-printed, take just a few minutes to complete, and are infrequently prepared by charge nurses. (AR 870; 57-59, 107, 328-29.) For instance, in a six-month period, one charge nurse completed about five CNA evaluations, another charge nurse typically completes one evaluation every two months, and still another charge nurse has not completed any evaluations because her unit coordinator does all of them. (AR 870; 59, 105, 153-54.) Charge nurses do not present the evaluations to the CNAs or discuss the evaluations with them. (AR 870; 57, 68-69, 78.)

At one time charge nurses checked a box on the evaluation to indicate whether the evaluated CNA was recommended for continued employment; the current form has no such box, and charge nurses no longer make that recommendation. (AR 870; 58, 106-07, 320, 328-29.) Previously, only the charge nurse and CNA signed the completed evaluations, and there was no review of the

evaluations by higher management. (AR 870; 320, 328-29.) CNA evaluations are now signed by the CNA, charge nurse, and the director of nursing or other management official such as the human resources director. (AR 870; 207, 328-29.) In addition, once completed, evaluations are now given to the director of nursing for her signature. (AR 870; 207, 328-29.)

Charge nurses participate in completing a “competencies assessment” evaluation of newly-hired CNAs within three weeks of their orientation. (AR 870-71; 176-77.) The charge nurse serves as one of four evaluators, who may also include experienced CNAs or other nurses. (AR 870-71; 116, 176-77.) The evaluators check off whether the CNA is adequately performing routine resident care and their documentation skills. The evaluators do not make any recommendation regarding continued employment for the evaluated CNA. (AR 870-71; 176-77, 260, 747-52.)

II. PROCEDURAL HISTORY

A. The Representation Proceeding

On December 29, 2014, the Union filed a petition under Section 9(c) of the Act, 29 U.S.C. § 159(c), seeking to represent a unit of Lakepointe’s charge nurses. (AR 310.) Lakepointe opposed the petition. Lakepointe contended that the charge nurses were supervisors within the meaning of Section 2(11) of the Act, 29 U.S.C. § 152(11). Lakepointe also argued that a 2005 finding of the Board’s then-

Regional Director for Region 7, that the charge nurses are supervisors, prevented relitigation of the issue. Alternatively, Lakepointe urged that the petitioned-for unit must include one wound care nurse as well as contingent nurses. On February 13, 2015, after a hearing, the Board's Regional Director for Region 7 issued a Decision and Direction of Election, finding that the supervisory issue was not barred by res judicata or collateral estoppel and that Lakepointe had failed to carry its burden of demonstrating that the charge nurses were supervisors. (AR 860, 862-72.) The Regional Director further found the petitioned-for unit to be appropriate, with the inclusion of the wound care nurse and contingent nurses.⁵ (AR 873-74.)

Lakepointe requested review of the Regional Director's decision, which the Board (Chairman Pearce; Members Miscimarra and Hirozawa) denied on June 11, 2015. (AR 1039.) The Board then conducted an election, which the Union won by a vote of 26 to 3. (AR 931.) On July 7, 2015, the Board certified the Union as the collective-bargaining representative of Lakepointe's charge nurses. (AR 933.)

⁵ The unit consists of "All full-time, regular part-time, and contingent charge nurses and wound care nurses employed by the Employer at its facility located at 37700 Harper, Clinton Township, Michigan; but excluding all MDS nurses, all other employees, guards and supervisors as defined in the Act." (AR 859.)

B. The Unfair-Labor-Practice Proceeding

In August 2015, the Union requested that Lakepointe recognize and bargain with it as the charge nurses' exclusive collective-bargaining representative. (AR 1051; 937.) Lakepointe refused. (AR 1051; 937, 943.) Based on an unfair-labor-practice charge filed by the Union (AR 934), the Board's General Counsel issued a complaint alleging that Lakepointe's refusal violated Section 8(a)(5) and (1) of the Act and subsequently moved the Board for summary judgment. (AR 1050; 936-39, 946-53.) After the Board issued a Notice to Show Cause, Lakepointe filed a response opposing the General Counsel's motion and reasserting its arguments that the Regional Director's 2005 finding was controlling and that the charge nurses were supervisors. (AR 1050; 1046-48.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On February 11, 2016, the Board (Chairman Pearce; Members Miscimarra and Hirozawa) issued its Decision and Order finding that Lakepointe had violated Section 8(a)(5) and (1) as alleged. To remedy that unfair labor practice, the Board's Order requires Lakepointe to cease and desist from failing and refusing to recognize and bargain with the Union or, 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. (AR 1051.) Affirmatively, the Order directs Lakepointe to

bargain with the Union on request, to embody any resulting understanding in a signed agreement, and to post a remedial notice. (AR 1051.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that Lakepointe failed to sustain its burden of proving that its charge nurses are statutory supervisors. The Board is, therefore, entitled to enforcement of its finding that Lakepointe violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union.

Lakepointe insists that the charge nurses have supervisory authority because they assign work to CNAs, discipline them, direct them in completing tasks, or evaluate them, but its evidence fails to establish that charge nurses exercise supervisory authority under the Act.

Lakepointe failed to show that the charge nurses assign or recommend assignments within the meaning of the Act. Rather, the record establishes that the scheduler assigns the CNAs to shifts and units and assigns most CNAs a permanent set of residents. Charge nurses possess no authority to call in replacements when a CNA is absent. Although a charge nurse may occasionally be directed to reassign a CNA to an understaffed unit, the charge nurse generally uses a pool list to determine which CNA will be reassigned or the CNAs decide among themselves.

Lakepointe also failed to prove that the charge nurses have the authority to discipline or effectively recommend the discipline of other employees. Instead, the record shows that the role of charge nurses is simply to document and report misconduct by completing an EAIP form. Upper-level management reviews the form, may conduct additional investigation, and determines the discipline to be imposed.

Lakepointe's evidence of responsible direction is similarly deficient. While charge nurses may direct CNAs to complete specific tasks, CNAs require little direction because their duties follow a set routine or are determined by management. Moreover, there is no evidence that charge nurses are held accountable when CNAs fail to adequately perform their job responsibilities, as is required to show responsible direction under the Act.

Even less persuasive is Lakepointe's claim that the charge nurses evaluate the work performance of CNAs. The evidence shows that the charge nurses only occasionally evaluate CNAs and then, only upon the request of the unit coordinators. Charge nurses do not make any recommendation for continued employment, and the evaluations do not, by themselves, affect the CNAs' wages or job status. Without such a showing, Lakepointe has failed to prove that, by occasionally completing CNA evaluations, charge nurses exercise supervisory authority.

Nor does Lakepointe's claim that the charge nurses are the highest-ranking employees at nights and on weekends establish supervisory authority. Such a secondary indicium of supervisory authority does not confer supervisory status under the Act where, as here, there is no evidence that the charge nurses exercise at least one of the primary indicia as well. Moreover, the record establishes that Lakepointe's undisputed managers always retain final authority in supervisory matters and that charge nurses seek their guidance and permission even at night and on weekends.

Finally, Lakepointe is incorrect when it claims that the Board's rule against relitigation of representation issues barred the Union from filing an election petition and demonstrating that the charge nurses are no longer statutory supervisors. The rule against relitigation applies to related, subsequent unfair-labor-practice cases and does not apply in cases such as this one where the Union was never previously certified, years have passed, and circumstances have changed.

Ultimately, Lakepointe failed to meet its burden of showing that the charge nurses exercise any supervisory authority with independent judgment.

Accordingly, the Board properly found that Lakepointe violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union.

ARGUMENT

Section 7 of the Act grants employees “the right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing”⁶ Section 8(a)(5), in turn, prohibits employers from refusing to bargain collectively with the representatives of their employees.⁷ A refusal to bargain with employees’ duly elected collective-bargaining representative thus violates Section 8(a)(5) and, derivatively, Section 8(a)(1).⁸

Lakepointe admits that it refused to bargain with the Union, but contends that the Board erred in certifying the Union and determining that its charge nurses are not supervisors under the Act. (Br. 3.) Therefore, as long as substantial evidence supports the Board’s finding, Lakepointe’s refusal to bargain with the Union violates Section 8(a)(5) and (1) of the Act.⁹

⁶ 29 U.S.C. § 157.

⁷ 29 U.S.C. § 158(a)(5).

⁸ See 29 U.S.C. § 158(a)(1) (“It shall be an unfair labor practice for an employer [] to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [S]ection 7”). See also *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *NLRB v. Centra, Inc.*, 954 F.2d 366, 367 n.1 (6th Cir. 1992).

⁹ *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946); *NLRB v. Duriron Co.*, 978 F.2d 254, 255 (6th Cir. 1992).

A. Lakepointe Has the Burden of Showing that Individuals Possess Supervisory Responsibilities Requiring the Exercise of Independent Judgment

Section 2(3) of the Act excludes “any individual employed as a supervisor” from the statutory definition of “employee.”¹⁰ In turn, Section 2(11) of the Act defines the term “supervisor” as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.¹¹

Those powers are listed in the disjunctive, so possession of any one is enough to make an individual a supervisor.¹² However, authority is only supervisory within the meaning of the Act if it is exercised with independent judgment.¹³ The mere “routine” or “clerical” performance of those duties does not constitute independent judgment elevating an employee to the status of supervisor.¹⁴

¹⁰ 29 U.S.C. § 152(3).

¹¹ 29 U.S.C. § 152(11).

¹² *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 713 (2001).

¹³ *Id.*; *NLRB v. Dole Fresh Vegetables, Inc.*, 334 F.3d 478, 485 (6th Cir. 2003).

¹⁴ 29 U.S.C. 152(11); *NLRB v. Child World, Inc.*, 817 F.2d 1251, 1254 (6th Cir. 1987).

In 2006, in *Oakwood Healthcare, Inc.*,¹⁵ and its two companion cases, *Croft Metals, Inc.*,¹⁶ and *Golden Crest Healthcare Center*,¹⁷ the Board clarified that “to exercise ‘independent judgment,’ an individual must at a minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.”¹⁸ The Board further explained that “a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.”¹⁹ This Court defers to *Oakwood Healthcare*’s interpretation of “independent judgment” because it “reasonably defines the ‘*degree* of discretion required for supervisory status.”²⁰

The Board’s interpretation of the term “independent judgment” follows, in part, from the legislative purpose behind Section 2(11) to distinguish between truly supervisory personnel, who are vested with “‘genuine management prerogatives,’”

¹⁵ 348 NLRB 686 (2006).

¹⁶ 348 NLRB 717 (2006).

¹⁷ 348 NLRB 727 (2006).

¹⁸ *Oakwood Healthcare*, 348 NLRB at 692-93.

¹⁹ *Id.* at 693 (footnote omitted).

²⁰ *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 304 n.1 (6th Cir. 2012) (quoting *Kentucky River*, 532 U.S. at 713).

and employees—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.”²¹ Accordingly, “[i]t is important for the Board not to construe supervisory status too broadly, for a worker who is deemed to be a supervisor loses his organizational rights.”²² Indeed, “[m]any nominally supervisory functions may be performed without the ‘exercise of such a degree of judgment or discretion as would warrant a finding’ of supervisory status under the Act.”²³

The burden of demonstrating supervisory status rests with the party asserting it.²⁴ To meet this burden, a party seeking to prove supervisory status must establish it by a preponderance of the evidence.²⁵ Moreover, inconclusive or

²¹ *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81 (1974) (quoting S. Rep. No. 80-105, at 4 (1947)).

²² *Williamson Piggly Wiggly v. NLRB*, 827 F.2d 1098, 1100 (6th Cir. 1987) (alteration in original) (quotation marks and citation omitted); *see also Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996) (“[The Board] and reviewing courts must take care to assure that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach.” (citations omitted)).

²³ *Kentucky River*, 532 U.S. at 713 (alteration and ellipses omitted) (quoting *Weyerhaeuser Timber Co.*, 85 NLRB 1170, 1173 (1949)).

²⁴ *Id.* at 711-12; *Frenchtown*, 683 F.3d at 305; *Dole Fresh Vegetables*, 334 F.3d at 485.

²⁵ *See, e.g., Frenchtown*, 683 F.3d at 305; *Dean & Deluca N.Y., Inc.*, 338 NLRB 1046, 1047 (2003); *Croft Metals*, 348 NLRB at 721.

conflicting evidence is insufficient to support a finding of supervisory status.²⁶

Rather, a party must support its claim with specific evidence of an employee's actual responsibilities and not just conclusory or generalized testimony.²⁷ Finally, it is settled that job descriptions and other "paper power" are insufficient to prove supervisory status.²⁸

Because of the Board's "special expertise, [it] is afforded broad discretion" in determining whether an individual is a supervisor.²⁹ Such a determination is a "mixed question of law and fact."³⁰ The Board's factual findings and its application of the law to those facts are conclusive "if supported by substantial evidence on the record considered as a whole."³¹ Moreover, the Court may not

²⁶ *N.Y. Univ. Med. Ctr.*, 324 NLRB 887, 908 (1997), *enforced in relevant part*, 156 F.3d 405 (2d Cir. 1998).

²⁷ *See Dole Fresh Vegetables*, 334 F.3d at 489 (employer failed to present specific evidence supporting manager's general statements about employees' duties); *W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 874 (6th Cir. 1995) (noting that "the Board is not required to accept an employer's self-serving declarations" (quotation marks and citation omitted)).

²⁸ *Frenchtown*, 683 F.3d at 314; *N.Y. Univ. Med. Ctr.*, 156 F.3d at 414.

²⁹ *Williamson Piggly Wiggly*, 827 F.2d at 1100; *accord Frenchtown*, 683 F.3d at 305-06.

³⁰ *Highland Superstores, Inc. v. NLRB*, 927 F.2d 918, 923 (6th Cir. 1991) (citing *NLRB v. Lauren Mfg. Co.*, 712 F.2d 245, 247 (6th Cir. 1983)).

³¹ 29 U.S.C. §160(e); *Frenchtown*, 683 F.3d at 306; *Dole Fresh Vegetables*, 334 F.3d at 484.

displace the Board’s inferences, even if it “may have reached a different conclusion had the matter been before [it] de novo.”³²

B. Substantial Evidence Supports the Board’s Finding that Lakepointe Failed To Carry Its Burden of Proving that the Charge Nurses Are Statutory Supervisors

Lakepointe contends that its charge nurses have the authority to assign, discipline, responsibly direct, and evaluate CNAs, or effectively recommend these actions, and are thus supervisors under the Act. Lakepointe also relies on a secondary indicium of supervisory authority—that charge nurses are the highest-ranking employees at nights and on weekends—which does not, on its own, confer supervisory status under the Act. For each of these claims, Lakepointe fails to carry its burden of showing that its charge nurses are statutory supervisors.

1. Lakepointe Failed To Meet Its Burden of Showing that Its Charge Nurses Assign or Effectively Recommend Assignments Using Independent Judgment

Lakepointe failed to meet its burden of showing that the charge nurses assign or effectively recommend assignments within the meaning of the Act. (AR 863-65.) The evidence on which Lakepointe relies only confirms that charge nurses have limited assigning authority, such as making occasional transfers due to short staffing or assigning discrete tasks on an ad hoc basis.

³² *Frenchtown*, 683 F.3d at 304.

As construed by the Board in *Oakwood*, the term “assign” refers to “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.”³³ In the healthcare setting, assignment of work refers to “the charge nurse’s designation of significant overall duties to an employee, not to the charge nurse’s ad hoc instruction that the employees perform a discrete task.”³⁴ The term ‘assign’ also “encompasses the charge nurses’ responsibility to assign nurses and aides to particular patients.”³⁵ However, such assignments must involve the exercise of independent judgment by “weigh[ing] the individualized condition and needs of a patient against the skills or special training of available nursing personnel.”³⁶ This Court recognizes the reasonableness of, and defers to, the Board’s definition of “assign” as set forth in *Oakwood Healthcare*.³⁷

The record firmly supports the Board’s conclusion that Lakepointe failed to prove that charge nurses have the authority to assign overall job duties to CNAs;

³³ *Oakwood Healthcare*, 348 NLRB at 689; *accord Frenchtown*, 683 F.3d at 311.

³⁴ *Oakwood Healthcare*, 348 NLRB at 689.

³⁵ *Id.*

³⁶ *Id.* at 693.

³⁷ *Frenchtown*, 683 F.3d at 311 n.8.

permanently assign CNAs to certain rooms, units or shifts; or recommend such assignment. (AR 863-65; 91-92, 103-05.) Rather, Lakepointe's scheduler prepares the daily assignment sheet, which assigns CNAs to a unit and a shift. (AR 863; 103, 163, 220.) Moreover, charge nurses cannot call in CNAs to fill a staffing shortage or require CNAs to stay past the end of their shifts. (AR 865; 87-88, 105, 216.) Thus, substantial evidence supports the Board's finding that Lakepointe failed to prove the charge nurses assign work within the meaning of *Oakwood*.

Lakepointe's claim (Br. 40) that charge nurses use independent judgment to assign CNAs to residents based on resident needs is contradicted by the record. (AR 114-15.) Most CNAs already have a permanent set of residents they care for each day, an assignment made by the scheduler, not the charge nurse. (AR 80, 91, 103-04, 122.) For CNAs without an assigned set of residents, the charge nurse assigns them to the same residents they had the day before in order to maintain continuity, or evenly distributes the residents on the unit to the available CNAs. (AR 80, 91.) CNAs also adjust their assignments among themselves. (AR 93.) Because Lakepointe provides no evidence that charge nurses consider the CNAs' skills or training in order to match them with specific residents, the Board reasonably determined the charge nurses do not assign CNAs using independent judgment.³⁸

³⁸ *See id.* at 312 (holding that employer failed to establish independent

Although Lakepointe claims (Br. 41) that charge nurse Butler assigned CNA Thompson to another unit, the record shows that the unit was overstaffed and Butler was told to send any late-arriving CNA to another unit. Thompson proved to be that late arrival. When he refused to go to another unit as Butler requested, Butler completed an EAIP form. (AR 240-41, 742.) Nothing in this scenario suggests that Butler exercised independent judgment by “weigh[ing] the individualized condition and needs of a patient against the skills or special training of available nursing personnel.”³⁹ Moreover, in other situations, charge nurses use a pool list to determine who will be assigned to a short-staffed unit, or a CNA will volunteer to go. (AR 114-15.)

Contrary to Lakepointe’s assertions (Br. 40), charge nurses have no authority to assign overtime to CNAs or to approve it. What a charge nurse can do is sign a CNA’s overtime authorization form when the CNA must stay over to complete a task at the end of her shift. The purpose of the form is to document the reason for the CNA’s failure to clock out on time. (AR 863; 87-88, 141-43, 220-21, 331, 337.) Nothing in the record suggests that the charge nurses direct the CNAs to stay past the end of their shifts to complete tasks. Further, as the charge

judgment because it did not provide “actual examples of nurses adjusting patient assignments that also described the factors the nurse considered in making the adjustment”).

³⁹ *Oakwood Healthcare*, 348 NLRB at 693.

nurses testified, they cannot require CNAs to stay beyond their shifts, and charge nurses “normally” must get approval from the director of nursing or unit coordinator before signing an overtime authorization form. (AR 863; 87-88, 110-11, 140-44.)

Simply signing off on the overtime authorization form to show that the CNAs needed extra time to complete tasks at the end of their shift is routine and does not indicate that the charge nurses are exercising supervisory authority.⁴⁰ Thus, substantial evidence supports the Board’s finding that the charge nurses’ “limited role in signing overtime authorization forms does not constitute a ‘discretionary choice,’ [and] does not require the use of independent judgment.” (AR 865.)

2. Lakepointe Failed To Meet Its Burden of Showing that Charge Nurses Have Authority To Discipline or Effectively Recommend Discipline

Lakepointe contends (Br. 28-33) that because the charge nurses can record incidents on EAIP forms, they exercise the authority to discipline the CNAs. The Board, however, found that “while charge nurses can take corrective action by recording and reporting deficiencies in CNAs’ job performance, these corrective

⁴⁰ *Golden Crest Healthcare Ctr.*, 348 NLRB 727, 732 n.10 (2006) (finding that charge nurses’ “authority to verify employees’ time cards is routine and clerical and does not indicate supervisory authority”); *Croft Metals, Inc.*, 348 NLRB 717, 722 (2006) (finding that leadpersons did not use independent judgment in directing employees to complete work).

actions fall short of disciplinary authority because charge nurses do not impose or effectively recommend discipline.” (AR 867.) The record shows that charge nurses do not make disciplinary decisions; they only complete incident reports which their superiors review before deciding whether to impose discipline. Merely reporting employees’ performance issues, where others decide whether and what kind of discipline will be imposed, is not indicative of supervisory authority.⁴¹

Moreover, the discipline that management decides to impose is not determined merely by recourse to the progressive discipline policy, as Lakepointe suggests (Br. 31). Instead, undisputed managers conclude which work rules were violated and determine the severity of any discipline. The record shows that the managers, rather than the charge nurses, exercise independent judgment in determining which employees will be disciplined severely. A comparison of three EAIP forms in the record (AR 727-29, 742, 743-45) indicates that any independent judgment is exercised by the managers, not the charge nurses. In one case, the CNA had a prior discipline and was found to have violated one Group 2 rule (considered to be more severe) and two Group 1 rules. She was suspended. (AR

⁴¹ See *Highland Superstores, Inc. v. NLRB*, 927 F.2d 918, 922 (6th Cir. 1991) (“the mere reporting of facts is not enough to make the reporter a supervisor”); *Beverly Enters. v. NLRB*, 661 F.2d 1095, 1100 (6th Cir. 1981) (affirming Board’s finding that LPNs’ disciplinary reports were “more in the nature of a reporting function, not amounting to effective recommendations of appropriate personnel action”).

727.) In the second case, the CNA violated one Group 2 rule and had one prior discipline. He was suspended. (AR 742.) And in the third case, the CNA had no prior discipline and was found to have violated one Group 2 rule and one Group 1 rule. She was terminated. (AR 743.) Nothing in the original EAIP forms indicates that the charge nurses chose or recommended these disciplinary measures. (AR 293-94, 728-29, 744-45.)

A further comparison may be useful. Two charge nurses wrote very similar EAIP forms for CNAs who failed to provide adequate care for residents. (*Compare* AR 327 “[resident] has not been changed or checked all day” *with* AR 744 “did not provide any care all shift [to named resident]”). One of those incidents garnered additional investigation by the director of nursing, who determined that the CNA had also falsified company records, and subsequently fired the CNA. (AR 743.) The record does not indicate that the second incident received any additional investigation, and the CNA received only a formal counseling. (AR 327.)

This evidence supports the Board’s conclusion that the charge nurses’ involvement in each incident was limited to reporting. Indeed, of the four EAIP forms in the record (AR 867; 327, 727-29, 742, 743-45), only one was the original written by the charge nurse, and it had been signed by three additional higher-level managers before the discipline was administered. (AR 327.) The other three

forms had been typed, rewritten to refer to the charge nurse in the third person, and signed by managers, including the director of nursing and the human resources director. (AR 727-29, 742-45.) Thus, substantial evidence supports the Board’s conclusion that the “charge nurses do not impose or effectively recommend discipline.” (AR 867.)

The evidence here contrasts sharply with the Court’s findings in *GGNSC Springfield LLC v. NLRB*,⁴² relied upon by Lakepointe (Br. 28-33). In that case, the Court found that charge nurses determined what category of violation was involved and indicated the category on the disciplinary form. In so doing, the charge nurses differentiated between “category one” offenses, which were subject to immediate discharge, and “category two” offenses, which were subject to the employer’s progressive discipline policy.⁴³

In the present case, as the Board observed (AR 866), other than longtime charge nurses who sometimes out of habit reference a catch-all “Group 1/Rule 13 – failure to perform job duties satisfactorily” on the EAIP form, charge nurses do not specify which work rule was violated. Rather, the human resources director writes or types the work rule violation on the EAIP form. (AR 866; 55, 86, 100, 252,

⁴² 721 F.3d 403, 409 (6th Cir. 2013) (finding that charge nurses, by issuing written disciplinary memoranda that automatically led to a written warning, exercised supervisory authority).

⁴³ *Id.*

272, 327, 743-45.) Further, Lakepointe’s charge nurses no longer enforce all of the nursing home’s work rules as they did in the past. (AR 319, 323, 794.) While the old disciplinary form asked the charge nurse to indicate the type of work rule violation (absenteeism/tardiness, quality of care/performance, conduct, insubordination, other), charge nurses now report only incidents related to resident care. (AR 86, 793-94.)

Moreover, the Court in *GGNSC* explained that in order “to constitute statutory supervisory authority, the warning must not only initiate, or be considered in determining future disciplinary action, but also it must be the basis of later personnel action without independent investigation or review by other supervisors.”⁴⁴ The Court relied upon evidence that the disciplinary warnings issued by charge nurses in *GGNSC* were sometimes signed only by the charge nurse, managers did not investigate the disciplinary warnings until an employee received the fourth warning within twelve months, and the employer applied a defined progressive discipline policy.⁴⁵ In contrast, Lakepointe’s charge nurses are never the only ones to sign the EAIP forms. The forms are always signed by at least one—and up to three—managers, and the charge nurses are unaware whether

⁴⁴ *Id.* at 411 (quoting *Phelps Cmty. Med. Ctr.*, 295 NLRB 486, 490 (1989)).

⁴⁵ *Id.*

an EAIP form that they have written will actually result in discipline.⁴⁶ (AR 867; 51-52, 129, 327, 727, 742-43.) Further as shown above, the record does not establish that the progressive discipline policy is applied mechanically; rather, managers decide how to apply the policy.⁴⁷ While Lakepointe claims (Br. 11) that managers “do not perform an independent investigation of the charges” in the EAIP, the record belies this claim. In fact, most of the forms in the record were subject to independent investigation. (AR 272, 294, 727, 742, 743.)

In these circumstances, where the record evidence shows that managers exercise a high degree of involvement with discipline and determine the severity of any discipline imposed, substantial evidence supports the Board’s finding that charge nurses do not discipline or effectively recommend discipline within the meaning of the Act.

⁴⁶ See *Frenchtown*, 683 F.3d at 307 (distinguishing *Promedica Health Sys., Inc.*, 206 F. App’x 405 (6th Cir. 2006); *Extendicare Health Servs., Inc. v. NLRB*, 182 F. App’x 412 (6th Cir. 2006); *NLRB v. Beacon Light Christian Nursing Home*, 825 F.2d 1076 (6th Cir. 1987); and *Oak Park Nursing Care Ctr.*, 351 NLRB 27 (2007), because “the actions taken by the employees in the cited cases were expressly part of the disciplinary process”).

⁴⁷ *G4s Gov’t Solutions, Inc.*, 363 NLRB No. 113, 2016 WL 555916, *4 (finding that where employer did not consistently apply progressive discipline policy and labor relations department reviewed all discipline prior to issuance, employer failed prove that lieutenants exercised the authority to discipline as defined in the Act).

3. Lakepointe Failed To Meet Its Burden of Showing that Its Charge Nurses Responsibly Direct CNAs Using Independent Judgment, or with the Requisite Accountability

Substantial evidence also supports the Board’s finding that charge nurses do not responsibly direct CNAs because any direction is routine without independent judgment and because the charge nurses are not held accountable for the CNAs’ performance. (AR 869-70.) To exercise responsible direction under Section 2(11), an individual must possess the authority to oversee others and to decide “what job shall be undertaken next or who shall do it,” and must exercise this authority “responsibly” and with independent judgment.⁴⁸ For direction to be “responsible,” moreover, “the person directing and performing the oversight . . . must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly.”⁴⁹ Lakepointe failed to carry its burden of proving that charge nurses responsibly direct CNAs or are held accountable for the CNAs’ performance.

While the Board found that charge nurses direct CNAs to perform certain tasks, such as waking or feeding residents, Lakepointe failed to prove that the

⁴⁸ *Oakwood Healthcare*, 348 NLRB at 691.

⁴⁹ *Id.* at 691-92. *Accord Frenchtown*, 683 F.3d at 313-14 (finding the Board’s definition of “responsible” both reasonable and consistent with Sixth Circuit precedent in *Ohio Power Co. v. NLRB*, 176 F.2d 385, 387 (6th Cir. 1949)).

charge nurses direct CNAs using independent judgment. (AR 870.) The record reflects that the charge nurses' direction of the CNAs does not rise above the merely routine. For example, charge nurses check to make sure CNAs have completed their daily tasks. (AR 93-94, 144-46.) Many of those tasks are defined in the CNAs' job descriptions, are assigned by management, or are listed in Lakepointe's computer system, which not only identifies which tasks need to be completed, but also indicates the time for completion. (AR 91-92, 104, 132-34, 144-46, 790-91.) On this record, Lakepointe has failed to show that the charge nurses responsibly direct CNAs to perform tasks or that their involvement in ensuring CNAs complete tasks requires the exercise of independent judgment.⁵⁰

Nor are charge nurses held accountable for the CNAs' performance, as the Board and Court require to establish supervisory status.⁵¹ In order to establish accountability under the Act, Lakepointe must show that the charge nurses "fac[e] the risk of actual adverse consequences."⁵² Here, the evidence supports the Board's finding that the charge nurses are held accountable for their own failures

⁵⁰ See *VIP Health Servs., Inc. v. NLRB*, 164 F.3d 644, 649 (D.C. Cir. 1999) (finding that nurses' direction of home health care aides to perform basic tasks such as monitoring vital signs was "merely routine" and did not establish that the nurses responsibly directed the aides); *Providence Alaska Med. Ctr. v. NLRB*, 121 F.3d 548, 554 (9th Cir. 1997) (finding that charge nurses did not responsibly direct other nurses by providing "routine guidance" to them).

⁵¹ *Frenchtown*, 683 F.3d at 314. *Accord Oakwood*, 348 NLRB at 692-93.

⁵² *Frenchtown*, 683 F.3d at 314.

regarding resident care, not the failures of the CNAs. (AR 869.) For example, Lakepointe submitted one disciplinary form purporting to show that a charge nurse was disciplined for a CNA's performance. But the record actually shows that the charge nurse was disciplined for failing to "check completion" of the CNA's assigned checklist. (AR 725.) Nothing on the disciplinary form indicates that the CNA did not, in fact, complete her work, only that the charge nurse failed to check that the work was completed. (AR 192-93, 725.) In other words, as the Board concluded, the charge nurse was disciplined for her failure to perform her own duties. (AR 869; 192-93, 725.) Contrary to Lakepointe's claim (Br. 37) that the charge nurses are held accountable for the CNAs' performance, the director of nursing testified that charge nurses are disciplined for their own failures regarding resident care, not those of the CNAs. (AR 869; 182, 192-93.) By showing merely that the charge nurses are "[b]eing held accountable for their own performance rather than that of aides,"⁵³ Lakepointe has failed to establish that the charge nurses responsibly direct the CNAs.

Lakepointe's argument (Br. 39) that three charge nurses "received lower pay increases because of their failure to appropriately direct staff under their supervision" is both irrelevant and unsupported by the record. Again, Lakepointe's assertion is simply that the charge nurses were held accountable for a failure to

⁵³ *Id.*

perform their own duties. Furthermore, while the evaluations noted that the three charge nurses needed to improve with regard to directing other staff, the charge nurses also received low scores in a variety of resident care criteria, including: accurately recording resident treatments (AR 767); instructing residents regarding changes in medication or treatment (AR 767); preparing and updating resident care plans (AR 769); demonstrating ability to perform specified treatments (AR 769); consistently treating residents and coworkers with dignity and respect (AR 770); consistently following facility policies and procedures (AR 770, 772); and demonstrating ability to evaluate resident's response to nursing care and modifying or revising treatment plans (AR 771). The record does not demonstrate that these charge nurses failed to get full merit increases because of any deficiencies in directing staff. Indeed, the human resources manager testified only that directing other staff could "potentially" have affected their increases. (AR 280, 282.)

Therefore, the Board reasonably found that there was "no evidence that any charge nurses suffered any negative consequences as a result of being evaluated in the areas of assigning and directing CNAs; enforcing facility practices and work rules; and administering discipline." (AR 871.)

Lakepointe also contends (Br. 36) that the charge nurse job description, Lakepointe's organizational chart, and orientation materials for newly hired charge nurses demonstrate that charge nurses responsibly direct CNAs' performance. As

this Court has held, however, absent specific evidence, “[t]heoretical or paper power does not a supervisor make.”⁵⁴

In short, Lakepointe does not provide any example of a charge nurse either using independent judgment to direct a CNA or facing adverse consequences for a CNA’s poor performance. Instead, the record amply supports the Board’s conclusion that charge nurses do not responsibly direct other employees.

4. Charge Nurse Evaluations of CNAs Do Not Affect CNA Wages or Conditions of Employment

The authority to evaluate employees is not one of the supervisory powers enumerated in Section 2(11) of the Act.⁵⁵ Nevertheless, the Board and courts have held that an individual who evaluates the performance of other employees qualifies as a supervisor if the evaluation is shown to, “by itself, affect the wages and/or job status of the employee being evaluated.”⁵⁶ As the Board found, Lakepointe presented no evidence “showing that evaluations of CNAs affect their job tenure or status.” (AR 871.) Indeed, the director of nursing testified only that evaluations

⁵⁴ *Frenchtown*, 683 F.3d at 308 (quoting *N.Y. Univ. Med. Ctr.*, 156 F.3d at 414) (alteration in *Frenchtown*).

⁵⁵ 29 U.S.C. § 152(11).

⁵⁶ *Williamette Indus., Inc.*, 336 NLRB 743, 743 (2001). *See also* *Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260, 265 (2d Cir. 2000); *NLRB v. Hilliard Dev. Corp.*, 187 F.3d 133, 145 (1st Cir. 1999); *Beverly Enters. v. NLRB*, 148 F.3d 1042, 1046-47 (8th Cir. 1998); *Modesto Radiology Imaging, Inc.*, 361 NLRB No. 84, 2014 WL 5524382, at *3 (2014).

“can have a financial impact” on CNA wages and that management’s decision to promote a CNA is based on several factors, including recommendations as well as evaluations. (AR 210.) Nothing in the record shows that the evaluations, alone, affect wages or promotions.

When charge nurses do assist the unit coordinators with annual evaluations, they do not make any recommendation for continued employment. This is in contrast to the evidence presented at the prior representation proceeding, which showed that at that time, charge nurses checked a box on the evaluation form to recommend continued employment. (AR 870; 320.) The charge nurses spend a mere three to four minutes on each evaluation, and each is signed by the director of nursing. (AR 870; 59, 207.) Charge nurses do not discuss or present the evaluations to the CNAs. (AR 870.) While charge nurses may participate in completing a competency assessment for newly hired CNAs, the charge nurse is only one of four evaluators (which can also include an experienced CNA). There is no evidence the charge nurse recommends continued employment through this competency assessment. (AR 871; 747-52.)

Lakepointe’s claim (Br. 43) that “these evaluations can affect a CNA’s employment status,” as Lakepointe “may” require a CNA to complete additional training or “may” terminate employment, is based on the human resources director’s testimony about 90-day evaluations. (AR 274-78, 761-66.) The record

was unequivocal that charge nurses have not completed the CNAs' 90-day evaluations for some time. (AR 870 n.15; 155, 216-17, 224, 273, 296-97.) In any event, when charge nurses completed the 90-day evaluation forms, they did not make any recommendation that would affect the CNAs' wages or job status. (AR 761-66.) Without that type of evidence, Lakepointe has failed to show that the evaluations "constitute the kind of personnel decision that establishes statutory supervisory authority."⁵⁷

In sum, Lakepointe is unable to show that performance evaluations written by charge nurses had even a marginal effect on employee wages, and offers no evidence that the evaluations affected conditions of employment in any other way. Therefore, Lakepointe's claim (Br. 43) that charge nurses, "through their evaluations, effectively recommend the promotion, discharge, or reward of the CNAs," is conclusory and without record support.⁵⁸

⁵⁷ *Harbor City Volunteer Ambulance Squad, Inc.*, 318 NLRB 764, 764 (1995). *See also NLRB v. St. Clair Die Casting, L.L.C.*, 423 F.3d 843, 850 (8th Cir. 2005) (finding that "the authority to evaluate employees without the authority to recommend specific personnel action is insufficient to confer supervisory status") (citation omitted).

⁵⁸ *See Dole Fresh Vegetables*, 334 F.3d at 489; *W.F. Bolin*, 70 F.3d at 874.

5. Charge Nurses' Night and Weekend Responsibilities Are at Best Secondary Indicia Insufficient To Show Supervisory Status; Top Managers Are Always on Call

The Board rejected Lakepointe's claim (Br. 44) that charge nurses are statutory supervisors because they are at times the highest-ranking employees on duty; such evidence is merely a secondary indicium of supervisory status, as it is not included among the 12 "primary indicia" listed in Section 2(11) of the Act.⁵⁹ (AR 872.) As such, it is insufficient to establish supervisory status unless the evidence supports finding at least one of the primary indicia as well.⁶⁰ Since Lakepointe fails to show that charge nurses possess any primary supervisory authority, the secondary indicium on which it relies cannot satisfy its burden.

In any event, the record supports the Board's finding that Lakepointe's top managers, *i.e.*, the director of nursing and administrator, are on call 24 hours a day, 7 days a week. (AR 871; 797.) Moreover, it is plainly evident from the charge nurses' testimony that managers remain the ultimate authority at night and on weekends. For instance, if a CNA fails to report to work, the front desk staff find a replacement. (AR 87-88.) And, if staffing falls below the state minimum level, the charge nurse must call the director of nursing. (AR 797.) Indeed, after hours,

⁵⁹ See *Williamette Indus.*, 336 NLRB at 743.

⁶⁰ *Frenchtown*, 683 F.3d at 315; see also *Dole Fresh Vegetables*, 334 F.3d at 487-88 (citing cases).

charge nurses have to call the director of nursing or administrator “for pretty much everything.” (AR 60, 89-90, 797.) This evidence substantially supports the Board’s conclusion that, even when charge nurses are the highest-ranking employees on duty, true supervisory authority remains vested in Lakepointe’s undisputed managers.⁶¹

C. The Board Did Not Abuse Its Discretion in Allowing the Union to Demonstrate Changed Circumstances

Lakepointe asserts (Br. 21-26) that the Union was barred by the Board’s rule against relitigation from having a representation hearing to show changed circumstances 10 years after the then-Regional Director found the charge nurses to be supervisors. Initially, in its statement of the facts (Br. 6), Lakepointe suggests that the Regional Director erred by not requiring the Union to somehow demonstrate changed circumstances *prior* to a hearing. Lakepointe, by failing to argue this point or support it with any authority in the argument section of its brief,

⁶¹ See *Frenchtown*, 683 F.3d at 315 (finding no supervisory status where at least one manager was always on call and charge nurses “[could], and d[id], seek managers’ guidance and permission in supervisory matters”); *Dole Fresh Vegetables*, 334 F.3d at 488-89 (finding no supervisory status where highest-ranking employees did not perform any supervisory task during their shift). Cf. *Caremore, Inc. v. NLRB*, 129 F.3d 365, 371 (6th Cir. 1997) (in addition to finding that charge nurses were supervisors because they assigned LPNs to particular wings, requested off-duty aides to report to work, and recommended discipline including immediate dismissal, the Court found as a “collateral fact” that nurses were the highest-ranking employees on-site during the second and third shifts).

has waived it.⁶² In any event, the Court reviews rulings in representation proceedings for abuse of discretion.⁶³ The Regional Director exercised her discretion to allow the Union to present its evidence of changed circumstances at a hearing, and Lakepointe has failed to offer any law or facts to show that the Regional Director abused that discretion.

Board rulings in representation proceedings under Section 9 of the Act, including designating a proper unit, setting aside an election, or certifying a union as bargaining representative, are non-adversarial in nature and do not result in the issuance of final orders subject to direct judicial review.⁶⁴ Representation proceedings are generally subject to judicial review only where the Board certifies a union as bargaining representative, the employer refuses to bargain with the

⁶² See Fed. R. App. P. 28(a)(9)(A) (argument must contain “appellant’s contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies”); *Conley v. NLRB*, 520 F.3d 629, 638 (6th Cir. 2008) (quotation marks and citation omitted) (finding that party waived “[i]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation”); *NLRB v. Jackson Hosp. Corp.*, 33 F. App’x 735, 736 (6th Cir. 2002) (finding that employer abandoned argument by not raising it in argument section of brief).

⁶³ See *Am. Bread Co. v. NLRB*, 411 F.2d 147, 152 (6th Cir. 1969) (finding that Board did not abuse discretion by allowing litigation of unit determination issue in subsequent unfair-labor-practice proceeding). *Accord Pace Univ. v. NLRB*, 514 F.3d 19, 24, 26 (D.C. Cir. 2008) (finding that Board did not abuse its discretion by declining to allow relitigation of a representation issue in a related, subsequent unfair-labor-practice case).

⁶⁴ See *Boire v. Greyhound Corp.*, 376 U.S. 473, 476-77 (1964); *AFL v. NLRB*, 308 U.S. 401, 409 (1940).

certified union to test the validity of the union's certification, and the Board issues a final order finding that the employer's conduct constitutes an unfair labor practice.⁶⁵

The Board's rule against relitigation applies when a party attempts to challenge findings from a representation proceeding in a subsequent unfair-labor-practice proceeding.⁶⁶ In that situation, the Board's rules provide that all issues that were or could have been raised in the representation case cannot be relitigated in a "related subsequent" unfair-labor-practice case.⁶⁷ As the D.C. Circuit has explained, the rule against relitigation applies "[w]here a company is charged with refusal to bargain with a union certified after election."⁶⁸ In such a case, "the proceeding is sufficiently 'related' to the representation proceeding to preclude relitigation of such common issues as the scope of the appropriate unit and employees therein."⁶⁹

The situation here is different: the Union was not certified as the collective-bargaining representative following the prior proceeding. Instead, the then-

⁶⁵ *Boire*, 376 U.S. at 476-77.

⁶⁶ 29 C.F.R. § 102.67(g) (formerly Section 102.67(f)).

⁶⁷ *Id.*

⁶⁸ *Amalgamated Clothing Workers of Am., AFL-CIO v. NLRB*, 365 F.2d 898, 904 (D.C. Cir. 1966).

⁶⁹ *Id.*

Regional Director, having found Lakepointe's charge nurses to be statutory supervisors, dismissed the representation petition. Here, Lakepointe is not seeking to preclude relitigation of issues in a related refusal-to-bargain case to test the validity of a union's certification, the scenario encompassed by the Board's no-relitigation rule. Instead, it urges that the Union be barred from even presenting evidence of changed circumstances based on findings in an unreviewed representation case 10 years earlier that resulted in no certification. In cases such as this one, the Board has held that a prior unit determination does not preclude a redetermination when a later petition is filed.⁷⁰ Under these circumstances, the Regional Director acted within her discretion in rejecting Lakepointe's reliance on the Board's no-relitigation rule. (AR 869.)

In the letter denying Lakepointe's motion to dismiss, the Regional Director explained that the earlier representation decision issued prior to the Board's decision in *Oakwood Healthcare, Inc.*⁷¹ (AR 801.) In *Oakwood*, the Board clarified the definitions of assign, responsibly direct, and independent judgment, all of which are involved in this case (see pp. 19-20, 23, and 32 for discussion of these definitions). As the Court has explained, the Board has the authority to change a

⁷⁰ See, e.g., *Cement Transp., Inc.*, 162 NLRB 1261, 1267 n.11 (1967); *Thalhimer Bros., Inc.*, 93 NLRB 726, 726 n.1, 727 (1951).

⁷¹ 348 NLRB 686 (2006).

policy and “to apply the new policy to parties to which the old policy previously had been applied.”⁷² The Board is not precluded by “the Fifth Amendment nor the principles of res judicata and equitable estoppel [] from reaching a decision in a later proceeding contrary” to a prior representation ruling by a Regional Director.⁷³

Thus, contrary to Lakepointe’s claim (Br. 25), the Regional Director did explain her decision to hold a representation hearing in this case—in the letter denying Lakepointe’s motion to dismiss and in the decision and direction of election in which she rejected Lakepointe’s reliance on the no-relitigation rule. (AR 860; 801.) The Regional Director also referenced the Board’s procedure in unit clarification cases. (AR 860.) Under that procedure, a party may challenge the validity of a unit certification by showing changed circumstances.⁷⁴ (AR 860.) Similarly, the Regional Director’s approach was consistent with the Board’s procedure allowing unions to seek another election after a loss (once the one-year election bar has passed), in a different unit upon a showing of changed

⁷² *Maxwell Co. v. NLRB*, 414 F.2d 477, 479 (6th Cir. 1969), *opinion clarified*, (6th Cir. Aug. 4, 1969).

⁷³ *Id.*

⁷⁴ *See NLRB v. Children’s Hosp. of Michigan*, 6 F.3d 1147, 1154 (6th Cir. 1993) (remanding to Board for consideration of newly discovered evidence in unit clarification case); *NLRB v. Mississippi Power & Light Co.*, 769 F.2d 276, 279 (5th Cir. 1985) (explaining that unit clarification allows positions to be added to the bargaining unit after an election “due to changed circumstances (for example, evolving or newly created jobs)”).

circumstances.⁷⁵ Lakepointe has failed to cite any case that would have required the Regional Director to follow a different procedure here. Nor could it. Regional Directors have “full authority to reconsider [their] decisions in representation cases based on an evaluation of new evidence.”⁷⁶

I.O.O.F. Home of Ohio,⁷⁷ upon which Lakepointe relies (Br. 23-24), is not to the contrary. In that case, the employer stipulated to an election in a unit including LPNs.⁷⁸ A mere six months after the union’s certification, the employer refused to bargain and withdrew recognition from the union because “it had ‘reconsidered’ the status of the LPNs.”⁷⁹ The Board rejected the employer’s petition to clarify the

⁷⁵ 29 U.S.C. § 159(c)(3) (“No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held”). *See, e.g., Ramada Beverly Hills*, 278 NLRB 691, 692 (1986) (finding prior decision and direction of election not controlling where changed circumstances supported employer’s position that a single unit was appropriate); *Tri-County Elec. Coop., Inc.*, 247 NLRB 968 (1978) (rejecting hearing officer’s conclusion that previous unit determination was *res judicata* and his finding that there were insufficient changed circumstances to justify relitigation of previous finding that three foremen were supervisors); *Frisch’s Rests., Inc.*, 182 NLRB 544, 544-45 (1970) (finding that Regional Director erred by ordering election in previously determined unit despite employer’s showing of changed circumstances); *Tide Water Associated Oil Co.*, 101 NLRB 570, 575-76 (1952) (finding that because of changed circumstances and amendments to the Act, employees previously included in the unit should be excluded as supervisors).

⁷⁶ *Air Lacarte, Florida, Inc.*, 212 NLRB 764, 766 n.5 (1974).

⁷⁷ 322 NLRB 921 (1997).

⁷⁸ *Id.* at 922.

⁷⁹ *Id.* at 921.

unit because it had failed to litigate the supervisory status of the LPNs in the prior representation proceeding.⁸⁰ The Board further noted that the employer “has offered to produce no newly discovered and previously unavailable evidence and there are no special circumstances that would justify relitigation of the supervisory issue.”⁸¹ Thus, as the Regional Director noted (AR 860), *I.O.O.F.* confirms that the Board allows parties to demonstrate changed circumstances in a representation hearing.

Neither does *Joint Council of Teamsters No. 42*⁸² support Lakepointe’s position (Br. 22-23). There, the Board had determined in a prior representation decision that owner-operator truck drivers were employees.⁸³ The Ninth Circuit disagreed and found the owner-operators to be independent contractors.⁸⁴ On remand, the Board found, “pursuant to the law of the case,” that the drivers were independent contractors and dismissed all inconsistent prior decisions.⁸⁵ Because

⁸⁰ *Id.* at 922.

⁸¹ *Id.*

⁸² 248 NLRB 808 (1980).

⁸³ *Associated Gen. Contractors of Cal., Inc.*, 201 NLRB 311, 314 (1973).

⁸⁴ *Associated Gen. Contractors of Cal., Inc. v. NLRB*, 564 F.2d 271, 282 (9th Cir. 1977).

⁸⁵ *Associated Gen. Contractors of Cal., Inc., et al.*, 239 NLRB 686, 686 (1978).

the issue of the status of the drivers had been fully litigated through the appeals court, the Board refused to reconsider the drivers' status two years later without evidence of a "significant change in the nature of the owner-operators' work since that litigation terminated."⁸⁶ Unlike in the present case, no changed circumstances were found or alleged. Here, the Union alleged and showed that circumstances had changed since the prior representation proceeding, and as a result of these changes, the charge nurses no longer exercised supervisory authority. The Board agreed.

In the prior proceeding here, the then-Regional Director based his decision that the charge nurses were supervisors on his findings that they disciplined and evaluated CNAs; he found that the charge nurses did not exercise any of the other Section 2(11) indicia. (AR 315-25.) The Regional Director found that the charge nurses initiated discipline, identified conduct that violated work rules, completed disciplinary forms, gave the forms to the CNAs, and permitted union representation during the resulting conversations. (AR 319-20.) The charge nurses used the disciplinary form to enforce all the employer's work rules, not only those involving resident care. (AR 319.) No further signatures or investigations were required unless the discipline involved suspension or termination. (AR 320, 773.) He further found that the charge nurses completed the 90-day and annual evaluations for CNAs, and checked a yes or no box indicating whether they

⁸⁶ *Joint Council of Teamsters No. 42*, 248 NLRB at 814.

recommended the CNAs for continued employment. (AR 320, 741.) The charge nurses also possessed authority to extend the CNAs' probationary period. Higher management officials did not review or sign the evaluations, and the evaluations were placed directly in the CNAs' personnel files. (AR 320, 741.)

Those findings stand in stark contrast to the charge nurses' current involvement in discipline and evaluations. As discussed above, since the prior representation proceeding, Lakepointe began using a different disciplinary form, and the charge nurses no longer identify the work rules violated or determine what form of discipline the CNAs will receive. (AR 866.) Likewise, they no longer enforce all Lakepointe's work rules, present the disciplinary forms to the CNAs, or allow union representation during discussions of the discipline. Moreover, all disciplinary forms are now signed by a higher-level management official. (AR 86, 327, 742-43.)

Nor do charge nurses currently perform CNAs' 90-day evaluations. (AR 870 n.15.) They occasionally, upon request, assist the unit coordinators in completing the annual evaluations. While in the past, charge nurses checked a box to indicate whether the CNAs were recommended for continued employment, the current evaluation form contains no such box. (AR 870; 761-62.) And the director of nursing now signs each evaluation, while in the past the evaluations were signed only by the charge nurse. (AR 870.) On the basis of those demonstrated changes

circumstances, the Board reasonably determined that the charge nurses no longer exercise supervisory authority.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court enforce the Board's Order in full.

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July 2016

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

NATIONAL LABOR RELATIONS BOARD)	
Petitioner)	
)	
v.)	
)	No. 16-1310
LAKEPOINTE SENIOR CARE &)	
REHAB CENTER, LLC)	
Respondent)	
)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Local Rule 32, the Board certifies that its final brief contains 11,088 words in proportionally spaced, 14-point Times New Roman type, and that the word processing system used was Microsoft Word 2010.

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Dated at Washington, D.C.
this 29th day of July, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

I certify that the 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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this 29th day of July, 2016