

**Case No. 16-1310**

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In The  
UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

v.

LAKEPOINTE SENIOR CARE & REHAB CENTER, LLC,

*Respondent.*

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**RESPONDENT'S REPLY BRIEF**

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## ARGUMENT

In its main brief, Respondent Lakepointe Senior Care & Rehab Center, LLC (“Lakepointe”) showed that its Charge Nurses are supervisors within the meaning of Section 2(11) of the National Labor Relations Act and, therefore, are not “employees” able to collectively bargain against Lakepointe. Lakepointe primarily focused on four indicia of supervisor status:

- the Charge Nurses *discipline* certified nursing assistants (“CNAs”);
- they *responsibly direct* CNAs;
- they *assign* work to CNAs; and
- they *evaluate* CNAs.

Petitioner National Labor Relations Board (the “Board”) responded with a brief similar to the decision it is attempting to defend. The Board’s brief muddles, misrepresents, and ignores the facts in the record, and that skirts controlling legal principles. This reply addresses the most glaring factual and legal problems with the Board’s brief. Equally significant, though, is the Board’s failure to point to any evidence countering Lakepointe’s undisputed evidence related to several issues.

In short, the Board ignored relevant evidence in the record so it could reach a desired result despite the lack of any, let alone substantial, evidence supporting the result. As this Court previously held, “when the Board ‘misconstrues or fails to

consider important evidence, its conclusions are less likely to rest upon substantial evidence.”<sup>1</sup>

Substantial evidence does not support the Board’s finding that the Charge Nurses are not supervisors. Only by ignoring the evidence favoring supervisor status – both admissions by the Union’s witnesses and un rebutted evidence from Lakepointe’s witnesses, as well as the documentary evidence – and misconstruing evidence to justify its decision was the Board able to reach the result it did. That result was wrong and the Court should reverse the Board’s order.

**A. The Charge Nurses *discipline* the CNAs.**

Several undisputed facts about *discipline* are clear from the Board’s response brief. First, the Board does not challenge the Regional Director’s finding that, confronted with a CNA’s performance issue, “the charge nurse has authority and discretion to (1) do nothing; (2) verbally counsel the CNA without issuing a write-up; (3) complete a written ‘one-on-one’ form; or (4) record the incident on an Employee Action Improvement Process (EAIP) form.” (Reg’l Dir. Op. at AR 866.) Second, the Board does not dispute that the Charge Nurses fill out an Employee Action Improvement Process form (“EAIP form” or “Disciplinary Form”), describing the nature of the CNA’s performance issue. Third, the Board

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<sup>1</sup> *GGNSC Springfield LLC v. NLRB*, 721 F.3d 403, 407 (6<sup>th</sup> Cir. 2013) (quoting *Lakeland Health Care Assocs., LLC v. NLRB*, 696 F.3d 1332, 1335 (11<sup>th</sup> Cir. 2012)).

does not dispute that a Charge Nurse's decision to issue a Disciplinary Form sets into motion Lakepointe's progressive-discipline process. These facts alone compel reversal of the Board's Order under existing Sixth Circuit case law.

Instead of contesting these critical findings, the Board instead argues that the Charge Nurses merely report issues, and that this is insufficient to make them supervisors. This is precisely the argument the Board made unsuccessfully in *GGNSC Springfield LLC v. NLRB* and *Extendicare Health Servs., Inc. v. NLRB*.<sup>2</sup> More specifically, according to the Board, the Charge Nurses are not supervisors, because (a) they do not determine what kind of discipline – that is, the level of discipline – to impose, (b) the Charge Nurse is never the only supervisor to sign the Disciplinary Form, (c) they do not identify which rule has been violated, and (d) a higher level supervisor always reinvestigates the alleged misconduct. At least in the context of a progressive-discipline process, the Board's arguments (a) and (b) are at odds with this Court's prior decisions involving charge nurses, argument (c) is an irrelevant distinction, and argument (d) is contrary to the evidence.

Like here, in *GGNSC*, the Board argued that the charge nurses were not supervisors because they did not determine the level of discipline. But this Court

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<sup>2</sup> *Id.* at 408 (“The Board’s regional director determined that the Center’s RN charge nurses lacked the authority to discipline CNAs, reasoning that they ‘merely report misconduct’ to the Director of Nursing[.]”); *Extendicare Health Servs., Inc. v. NLRB*, 182 Fed. Appx. 412, 416-417 (6<sup>th</sup> Cir. 2006) (“The Board viewed the nurses’ ‘writing up’ of assistants’ misconduct as a mere ‘reporting function’ that ‘does not establish supervisory status.’”).

held the charge nurses in *GGNSC* were supervisors even though they did not determine the level of discipline.<sup>3</sup> The disciplinary form (or “employee memorandum form”) in *GGNSC* had four parts as the Court explained:

[1] This pre-printed form includes a space for explaining the violation and for listing the employee’s disciplinary actions for the past twelve months; it appears that the charge nurse does not list the CNA’s prior discipline and instead leaves that part blank. [2] The form then asks for the category of violation observed, which the charge nurse indicates. [3] If the box for “Category Two Violation” is noted, the form asks which ‘step’ in the process the violation constitutes, the answer to which depends entirely on the number of written warnings received over the last year. Charge nurses do not indicate which step is involved, because they typically do not know. [4] The cited CNA signs the form on the line indicated “Employee,” and the charge nurse signs on the line for “Supervisor.” Sometimes the Director of Nursing or the Assistant Director signs the form, either underneath the charge nurse’s signature or sometimes as the sole signature of the “supervisor.”<sup>4</sup>

Notably, the charge nurses in *GGNSC* did not determine the level of discipline – “Charge nurses do not indicate which step is involved, because they typically do not know” – yet the Court still found them to be supervisors.

***Error! Bookmark not defined.*** *GGNSC* also shows that the Charge Nurses do not have to be the only signers of a Disciplinary Form to be supervisors. As the quotation above indicates, in *GGNSC*, the director of nursing or assistant director of nursing sometimes signed in addition to the charge nurse and sometimes the director or assistant director was the only person to sign the form. In other words,

<sup>3</sup> *GGNSC*, 721 F.3d at 409-410.

<sup>4</sup> *Id.* at 409-410.

the charge nurses did not even sign some of the forms, yet this Court held that they were still supervisors because they set the progressive-discipline process into motion by completing the form.

Even though the Charge Nurses describe the CNAs' misconduct on the Disciplinary Form, the Board says this is not sufficient because the Charge Nurses do not also cite a specific rule that has been violated. Other than citing this difference with *GGNSC*, the Board does not show why this matters. Indeed, it does not matter. It is the fact that the Charge Nurses decide when to initiate the disciplinary process with a Disciplinary Form that makes them supervisors. Whether or not they cite a specific rule makes no difference because they are still identifying a violation and initiating discipline. Simply describing misconduct on the form starts the progressive-discipline process.

Finally, the Board suggests that higher up supervisors reinvestigate the Charge Nurses' assertions about CNA misconduct to determine whether or not to act on those assertions. The Board is wrong. As Lakepointe discussed on page 31 of its main brief, Director of Nursing McCauley and HR Manager Schrauben each testified that some form of discipline is administered every time a Charge Nurse submits a Disciplinary Form against a CNA. (Tr. at AR 199-200 and 292.) Further, the example the Board cites does not support its argument. In that case, the DON did not reinvestigate the Charge Nurse's assertions warranting a

suspension but rather conducted a deeper investigation that led to evidence of additional wrongdoing by the CNA that resulted in the CNA's termination. (Tr. at AR 294.)

The Board cites two older cases in support of its argument that merely reporting misconduct is insufficient for supervisory status. But both cases are easily distinguished from this Court's more recent decisions involving charge nurses. In *Highland Superstores, Inc. v. NLRB*, the putative supervisor wrote a report as directed by his supervisor even though he had no personal knowledge of the events in his report.<sup>5</sup> This is not even remotely comparable to the Charge Nurses who exercise independent judgment to determine whether to create a Disciplinary Form in the first place. Likewise, *Beverly Enters. v. NLRB* did not involve a progressive-discipline system.<sup>6</sup> But here, it is the Charge Nurses' role in the progressive-discipline process that elevates them to supervisory status as many Sixth Circuit decisions show. Indeed, as *GGNSC* holds: “[W]hile the RN's role in the process is limited to completing the employee memorandum and submitting it to the Director of Nursing, it is that very act that leads directly and automatically to a written warning – a ‘step’ in the company's policy of progressive discipline.”<sup>7</sup>

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<sup>5</sup> *Highland Superstores, Inc. v. NLRB*, 927 F.2d 918, 922 (6<sup>th</sup> Cir. 1991).

<sup>6</sup> *Beverly Enters. v. NLRB*, 661 F.2d 1095 (6<sup>th</sup> Cir. 1981).

<sup>7</sup> *GGNSC*, 721 F.3d at 410.

Thus, based solely on the Charge Nurses' role in the progressive-discipline process, the Court should hold that the Charge Nurses are supervisors, reversing the Board's order.

**B. The Charge Nurses *responsibly direct* the CNAs.**

Under *Oakwood Healthcare*, 348 NLRB 686 (2006), a supervisor responsibly directs a subordinate when [1] “the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary” and [2] “there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.”<sup>8</sup> In its argument that the Charge Nurses do not responsibly direct the CNAs, the Board makes three mistakes.

First, the Board confuses the difference between *directing* work and *assigning* work. *Assigning* work is a distinct part of the statutory definition of *supervisor*. Even if the Charge Nurses do not *assign* tasks to the CNAs because those tasks are dictated from other sources – the evidence actually shows that the Charge Nurses play a role in this – the Charge Nurses nevertheless *direct* the work by ensuring that the CNAs completed the work and correct their work when needed.

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<sup>8</sup> *Id.* 692.

Second, the Board contends that the Charge Nurses do not *responsibly direct* the CNAs because the Charge Nurses are held accountable for their own failures, not those of the CNAs. The Board’s argument in this regard directly contradicts *Oakwood Healthcare*, quoted above. *Responsibly direct* means the supervisor has authority to direct work and to take corrective action, and “there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.”<sup>9</sup> “These steps” refers to the supervisor’s duty to direct and take corrective action. In other words, under the Board’s own test as laid out in *Oakwood Healthcare*, the supervisor must be subject to adverse consequences for failing to perform her own supervisory duties. This is precisely what Director of Nursing McCauley, HR Manager Schrauben, and the Charge Nurses themselves said. (Tr. at AR 134-137, 170-171, 181-182, 278-283, and 332-336.)

Third, the Board argues that the evidence merely showed that Charge Nurses “potentially” would receive a lower pay increase if they failed to supervise effectively. In an abstract sense, this is correct. But in the specific examples addressed on pages 12-13 of Lakepointe’s main brief, the Charge Nurses in fact received lower pay increases due to deficient supervision. For example, Charge Nurse Lia Udano received just one point (of a possible three points) for “Directs nurse assistants ... and administers discipline as appropriate.” Her point total was

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<sup>9</sup> *Id.* 692.

34 (Needs Improvement), just one point shy of “Meets Expectations.” (ER Ex. 36 at AR 769-770.) As a result, she received a 1% raise; if she had received just one more point, she would have received a 1.5% raise.

But even if there was not this example of a Charge Nurse’s poor supervision resulting in a lower raise, the Charge Nurses would still *responsibly direct* the CNAs. Notably, the Board’s test in *Oakwood Healthcare* does not require proof of actual adverse consequences but rather only that “there is a prospect of adverse consequences[.]” The Eleventh Circuit recently made this very point, holding that the employer does not need to produce evidence that an LPN has ever actually been disciplined or discharged for failing to supervise CNAs because “the Act requires only a prospect of adverse consequences.”<sup>10</sup> That court relied on the nurses’ job description and the testimony of the director of nursing to establish the prospect for adverse consequences.<sup>11</sup> The Board could not disregard this evidence, the court held, and, because “[t]here was no evidence directly refuting this accountability[,] the Board’s conclusion that the LPNs do not responsibly direct CNAs was not supported by substantial evidence.”<sup>12</sup> The evidence in the present case is equally strong, as Lakepointe’s argument on pages 36-37 of its main brief

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<sup>10</sup> *Lakeland Health Care Associates, LLC v. NLRB*, 696 F.3d 1332, 1344 (11<sup>th</sup> Cir. 2012). The court added that “the Act requires only that the putative supervisor be at risk of suffering adverse consequences for the performance of others.” *Id.* at 1344 n.14.

<sup>11</sup> *Id.* at 1345.

<sup>12</sup> *Id.* at 1346.

shows, and the lack of any evidence to the contrary only further demonstrates the Board's flawed analysis.

**C. The Charge Nurses *assign* work to the CNAs.**

As Lakepointe explained in its main brief, the Charge Nurses are supervisors if they either designate the place *or* the time (including overtime) a CNA will work. And here, the Charge Nurses *assign* work to the CNAs for two reasons, either of which makes them supervisors: They assign the CNAs to residents based on the residents' particular needs; and they approve the CNAs' overtime.

**1. The Charge Nurses assign the CNAs to appropriate residents.**

“In the healthcare context, assign ‘encompasses the charge nurses’ responsibility to assign nurses and aides to particular patients.’”<sup>13</sup> “Nurses use independent judgment in making these assignments when they weigh the needs of a patient against the skills or special training of staff.”<sup>14</sup> As previously discussed, the Charge Nurses’ duties include “mak[ing] assignments based on the shift’s needs” (ER Ex. 14 at AR 339-341) and Director of Nursing McCauley confirmed that Charge Nurses decide which CNA to assign to which resident, making adjustments based on particular residents’ needs. (Tr. at AR 164.) McCauley covers this responsibility in her Charge Nurse orientation. (Tr. at AR 164.)

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<sup>13</sup> *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 311 (6<sup>th</sup> Cir. 2012) (quoting *Oakwood*, 348 NLRB at 689).

<sup>14</sup> *Id.* (quoting *Oakwood*, 348 NLRB at 693).

Specifically, the orientation materials cover the Charge Nurses' role in "distribut[ing] and mak[ing] changes to CNA assignments; this includes the residents assigned, duties, break and lunch times, etc." (ER Ex. 18 at AR 723-724.) McCauley also covers this subject in periodic meetings. (ER Ex. 17 at AR 719.) LPN Tisler corroborated this evidence, testifying that she assigns CNAs to particular residents, distributing the work among the CNAs. (Tr. at AR 80.)

The Board's response is that the scheduler (not the Charge Nurses) assigns CNAs to a particular unit and "to a permanent set of residents." Pet.'s Br. at 6. This is only partly true. Yes, the scheduler assigns CNAs to a particular unit, but the scheduler does *not* assign CNAs to a permanent set of residents; the evidence the Board cites does not say otherwise. While the Board highlights evidence that, generally, CNAs work with the same residents – that allows relationships to be developed, after all – the undisputed fact remains that special circumstances arise when the Charge Nurses have to make assignments based on particular residents' needs, as McCauley explained.

The Board focuses attention on unit assignments – either by the scheduler or by the Charge Nurses when a CNA needs to be moved to another unit due to staffing needs. While Lakepointe does not fully agree with the Board's description of this process, this is not a relevant point; Lakepointe's argument is based on the

Charge Nurse's assignment of CNAs beneath her to particular residents, not the assignment of CNAs to a particular unit.

**2. The Charge Nurses approve the CNAs' overtime.**

Having the authority to assign overtime work is indicative of supervisory status.<sup>15</sup> The Board does not dispute that LPNs Tisler, Baskin, and Butler readily admitted that they approve overtime for CNAs. (Tr. at AR 72, 140-142, and 243-244; see, e.g., ER Ex. 7 at AR 330 and ER Ex. 12 at AR 337.) Instead, the Board wrongly contends that the Charge Nurses do not have authority to approve overtime.

Not surprisingly, the Board ignores the admissions of LPNs Tisler and Butler. The Board also ignores the testimony of Director of Nursing McCauley, who testified that Charge Nurses authorize CNAs' overtime, deciding whether overtime is appropriate in a particular situation (Tr. at 202, 205), and the testimony of HR Manager Schrauben, who testified that Charge Nurses must approve overtime for CNAs (Tr. at AR 266-267). Instead, the Board asserts that a Charge Nurse "'normally' must get approval from the director of nursing or unit coordinator before signing an overtime authorization form." Pet.'s Br. at 26.

While Charge Nurses may occasionally have the director of nursing approve CNAs' overtime in advance, the testimony makes clear that such approval is not

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<sup>15</sup> *Dale Serv. Corp.*, 269 NLRB 924 (1984).

always obtained or always required. Indeed, McCauley and Schrauben testified that such approval was *not* required – that is, that the Charge Nurse’s approval alone is sufficient. The only witness who testified otherwise was LPN Davidson, who asserted that recent changes, communicated only orally by clinical care coordinator Toni Green, mean that Charge Nurses can no longer approve overtime. (Tr. at AR 110-111.) Of course, this testimony flies in the face of the testimony of McCauley and Schrauben. And it is based on a supposed comment from a person that contradicts Lakepointe’s Employee Handbook. Davidson’s testimony also contradicts logic. As several witnesses testified, during the night, the Charge Nurses are the highest ranking employees at the facility. If 15 or 20 minutes of overtime needs to be approved during this time, it obviously will be approved by the Charge Nurse. Further, once the CNA works the overtime with the Charge Nurse’s approval, Lakepointe is legally obligated to pay for the overtime work under state and federal wage-and-hour laws. In other words, the Charge Nurse’s approval has a legally binding effect on Lakepointe. Contrary to the Board’s suggestion, higher-up supervisors could not overrule the Charge Nurse’s approval without violating wage-and-hour laws, and there is no evidence that they have ever tried to do so.

The Board attempts to divert attention from the Charge Nurses’ role with respect to overtime by citing two NLRB cases. Neither case is comparable to the

present case. In *Beverly Enter.-Minn., Inc.*, the Board held that “the authority to verify employees’ time cards is routine and clerical and does not indicate supervisory authority.”<sup>16</sup> There is a demonstrable difference between merely verifying a time card and approving an employee to work overtime. The former situation does not change the employer’s legal relationship with the employee, but the latter situation does. The other case is *Croft Metals, Inc.*<sup>17</sup> But, unlike here, in that case the putative supervisors “do not ... appoint employees to ... any overtime periods[.]”<sup>18</sup> As a result, *Croft Metals* provides no support for the Board’s argument.

**D. The Charge Nurses *evaluate* the CNAs.**

The Board does not dispute that a person who *evaluates* other employees is a supervisor. Instead, the Board focuses on testimony that Charge Nurses do not frequently complete evaluations and that they take only a few minutes each. But this does not change the fact that Charge Nurses do evaluate the performance of CNAs – rather, it actually proves that they do. The Board also asserts that evaluations are now signed by the director of nursing in addition to the Charge Nurse. But the Board ignores Director of Nursing McCauley’s testimony that she has never changed an evaluation prepared by a Charge Nurse (Tr. at AR 207) and

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<sup>16</sup> *Beverly Enter.-Minn., Inc.*, 348 NLRB 727, 732 n.10 (2006).

<sup>17</sup> *Croft Metals, Inc.*, 348 NLRB 717 (2006).

<sup>18</sup> *Id.* at 722.

is unable to cite any evidence of such a change (because there is none). Finally, the Board asserts that evaluations of CNAs are just one of several factors considered for CNAs' promotions and wage increases. And, as HR Manager Schrauben testified, these evaluations can affect a CNA's employment status. (Tr. at AR 274-275.) Again, the Board cites no contrary evidence because there is none.

### **CONCLUSION AND RELIEF REQUESTED**

For the reasons stated, Lakepointe asks the Court to enter a decree setting aside in whole the Board's Order that Lakepointe bargain with the Union relative to the Charge Nurses.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because this brief contains 3,406 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using MS Word 2010 with Times New Roman font at 14 point.

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**CERTIFICATE OF SERVICE**

I certify that on August 29, 2016, I electronically filed Respondent's Brief on Appeal using the Court's CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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