

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

2850 GRAND ISLAND BOULEVARD)
OPERATING COMPANY, LLC, d/b/a)
ELDERWOOD AT GRAND ISLAND,)
)
the Employer,)
)
and)
)
1199 SEIU UNITED HEALTHCARE)
WORKERS EAST,)
)
the Petitioner.)
_____)

Case No. 03-RC-184298

**EMPLOYER'S REQUEST FOR REVIEW OF
ACTING REGIONAL DIRECTOR'S SUPPLEMENTAL DECISION
AND ORDER ON CHALLENGES AND OBJECTIONS**

HODGSON RUSS LLP
Attorneys for the Employer
Peter C. Godfrey, Esq.
The Guaranty Building
140 Pearl Street, Suite 100
Buffalo, New York 14202-4040
716-856-4000

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Pursuant to Section 102.69(c) of the Rules and Regulations of the National Labor Relations Board (the “Board”), 2850 Grand Island Boulevard Operating Company, LLC, d/b/a Elderwood at Grand Island (“Elderwood,” or the “Employer”), respectfully requests a review of the Acting Regional Director’s Supplemental Decision and Order on Challenges and Objections (the “Decision”).¹ Compelling reasons exist for the Board to grant review of the Decision because it raises a substantial question of law or policy based on a departure from Board precedent regarding the supervisory status of Licensed Practical Nurses (LPNs) serving as Team Leaders at a skilled nursing facility. Additionally, it is respectfully submitted that the Regional Director made a significant number of substantial factual determinations that were clearly erroneous and which prejudicially affected the rights of the Employer. Finally, assuming arguendo that existing Board precedent supports the Regional Director’s determination regarding supervisory status of Team Leaders, such precedent is contrary to the Act and there are compelling reasons for reconsideration of applicable Board precedent.

I. STATEMENT OF THE CASE

This case involves a determination of supervisory status with regard to LPNs, LPN Team Leaders, and LPN Charges (collectively, “Team Leaders”)² who exercised independent judgment in the assignment of work, direction of Certified Nursing Assistants (CNAs), recommendation of discipline and rewards, adjustment of grievances, and

¹ References to the Acting Regional Director’s Decision and Order are herein designated as (Dec. __), references to the Hearing Officer’s Report on Challenges and Objections are designated herein as (Rep. __), references to the Employer’s Exhibits are designated herein as (Er. __), references to the Union’s Exhibits are designated herein as (Pet. __), and references to the transcript are designated herein as (Tr. __).

² The testimony was undisputed that employees in titles LPNs, LPN Team Leaders, and LPN Charges all serve as “Team Leaders,” and all perform duties which are functionally identical.

recommendation of transfer in a nursing home facility. The Regional Director concluded that the Team Leaders are not supervisors for purposes of Section 2(11) of the National Labor Relations Act (the “Act”). His Decision, however, was contrary to Board precedent and was based on factual determinations that were clearly erroneous and prejudicial. These reasons in and of themselves compel the conclusion that the Board should grant the Employer’s request for review. Equally as important, however, to the extent the Decision finds any support in existing Board precedent is contrary to law, and this case presents compelling reasons for reconsideration of such precedent. In the words of Member Miscimarra, “[M]any of the Board’s supervisor determinations have become increasingly abstract and out of touch with practical realities of the workplace.” *Chi LakeWood Health*, 365 NLRB No. 10 (2016) (Member Miscimarra, dissenting). This case offers the Board an opportunity to revisit and correct its policy with regard to determinations on supervisory status.

A. Procedural History

Elderwood is a skilled nursing facility located at 2850 Grand Island Boulevard, Grand Island, NY 14072. On September 15, 2016, 1199 SEIU United Healthcare Workers East (the “Union”) filed the Petition for Representation with the Region, docketed at 03-RC-184298, in which it sought to represent certain employees at Elderwood. On September 26, 2016, the Region approved the parties’ Stipulated Election Agreement, and an election was scheduled for the following Bargaining Unit:

Included: all full-time and regular part-time and per diem service and maintenance and technical employees including LPNs, LPN Team Leaders, LPN Charges, CNAs, Activity Leaders, Cooks, Dietary Aides, Housekeeping Aides, Laundry Aides, Maintenance Assistants, Memory Care Specialists, Physical Therapy Aides, Seasons Certified Nursing Assistants, Certified Occupational

Therapy Assistants, Diet Technicians, Physical Therapy Assistants, Unit Clerks, Receptionists, and Medical Records Coordinators employed by the Employer at its 2850 Grand Island Boulevard, Grand Island, New York facility.

Excluded: all business office clerical employees, guards and professional employees and supervisors as defined by the Act, and all other employees.

Elderwood preserved the right to challenge the supervisory status of the Team Leaders. An election was held on October 6, 2016, and the Tally of Ballots revealed 49 votes in favor of the Union, 35 votes against the Union, and 22 challenged ballots.

On October 13, 2016, Elderwood filed Objections to the Election based on conduct affecting the outcome of the election. On November 4, 2016, and continuing for two (2) days thereafter, a hearing was held before Hearing Officer Caroline Wolkoff (the "Hearing Officer"). The scope of this hearing was narrowed to the question of supervisory status for the Team Leaders, and the conduct alleged in the Employer's objections. The Hearing Officer's report (the "Report") was issued on November 29, 2016.

The Hearing Officer concluded in her Report that the Team Leaders were not statutory supervisors under Section 2(11) of the Act. Specifically, the Hearing Officer recommended a finding that the Team Leaders do not (1) assign work to; (2) responsibly direct; (3) effectively recommend discipline for; (4) adjust grievances for; (5) effectively recommend rewards for; or (6) effectively recommend for or against transfers of certified nursing assistants (CNAs). The Hearing Officer further recommended that the Region overrule the Employer's Objection that the Union, its agents, or third-parties engaged in improper conduct during, and leading up to, the election. Elderwood timely filed objections to the Report.

The Acting Regional Director of Region 3 (the “Regional Director”) rendered a Decision on January 6, 2017. Through his Decision, the Regional Director adopted the Hearing Officer’s findings and concluded that the Team Leaders are not supervisors within the meaning of Section 2(11) of the Act, and ordered that their ballots be opened and counted. The Regional Director also overruled all of the Employer’s remaining objections regarding the conduct of the Union, its agents or third parties during, and leading up to, the election.

In his Decision, it is respectfully submitted that the Regional Director overlooked uncontroverted evidence of supervisory status, mischaracterized portions of the record that he examined, and departed from established Board precedent. For these reasons, the Board should grant review and conclude that the Team Leaders are supervisory and therefore should be excluded from the unit, and that the objectionable conduct of the Union and these supervisory Team Leaders warrants setting aside the election. Moreover, to the extent the Regional Director’s decision is arguably supported by existing Board precedent, such precedent is contrary to the Act and should be revisited by the Board.

B. Summary of Factual Background

As detailed further below, Team Leaders at Elderwood at Grand Island have responsibilities that are inherently supervisory.

Team Leaders assign tasks to CNAs and assign CNAs to specific residents and exercise extensive independent judgment in so doing. For example, CNAs are assigned to particular residents (Tr. 76, lines 17-23), thus assigning an array of tasks called for under each such resident’s care plan; they assign particular discretionary tasks to CNAs each morning (Tr. 75, lines 1-3) such as assignments relating to “nourishment” (Tr. 76, lines 8-10; 14-16) and

unscheduled showers (Tr. 65, lines 5-8); they assign and monitor break times for CNAs (Tr. 16, 23); and they may deviate from established care plans and assignments associated therewith when they determine it is appropriate (Tr. 33-34). They make such decisions weighing such subjective factors as their own assessment regarding acuity of the resident and experience of the CNA. (Tr. 34, lines 3-4; Tr. 71, line 16). They are authorized to make changes to CNAs' assignments in response to changing conditions on their unit, or other emergent concerns. (Tr. 156, lines 12-14).

Team Leaders are responsible for directing and overseeing the CNAs' performance of assigned tasks, and they exercise independent judgment in doing so. (Tr. 65, lines 12-25). Team Leaders are held accountable for the CNAs' job performance (Tr. 65, lines 15-25) and have been subject to disciplinary action when a CNA fails to properly perform his or her responsibilities (Tr. 65-66; Tr. 256, line 19). They are subject to evaluations assessing how well they "direct and monitor the personal care duties and nursing care procedures carried out by nursing assistants of their assigned team," and they "monitor the performance of nursing assistants and implementation of the care plan," (Er. 3) and these evaluations can impact terms and conditions of their employment. (Tr. 427). Each day they are required to sign off on a Treatment Administration Record (TAR) confirming that CNAs for which they are responsible have properly completed tasks, and Team Leaders may face and, in fact have faced, disciplinary action if tasks are not actually completed properly. (Er. 6; Tr. 162).

Team Leaders have disciplined and effectively recommended discipline against CNAs. There were three specific disciplinary notices included in the record reflecting circumstances in which Team Leaders formally issue discipline to CNAs. (*See* Er. 11, 12 & 13;

Tr. 604, lines 9-20; Tr. 590 lines 1-4, 604; Tr. 612, lines 7-21; 614, lines 14-25; Er. 13). In addition, the record contains further evidence of Team Leaders' issuing counselling to CNAs. (Tr. 27-28).

Team Leaders also adjust grievances among CNAs. The record contains numerous examples of Team Leaders adjusting grievances disputes among employees. (Tr. 209, lines 18-21). Examples include a circumstance in which a Team Leader assigned a new preceptor to a CNA facing challenges during her orientation (Tr. 210-11, 344); a dispute among CNAs involving job assignments which was resolved by the Team Leader and the Administrator confirmed to the employees involved that the Team Leader's resolution should be abided by because "she is their supervisor" (Tr. 422-23); and a situation involving a verbal altercation between two CNAs which was resolved by the employees' Team Leader (Tr. 272-74).

Team Leaders also effectively recommend rewards for CNAs. Examples in the record of such rewards include Team Leader involvement in the evaluation process which can have an impact on benefits of employment. (Tr. 250, lines 1-4; Tr. 427, lines 16-23). They have also recommended CNAs for the "employee of the month" program that rewards CNAs for strong work performance (Tr. 395-97) and such recommendations are given particular weight (Tr. 396, lines 9-11).

Finally, Team Leaders have the authority to effectively recommend which CNAs to transfer or "float" between floors and units. (T. 271, lines 4-6).

These and other indicia of supervisory status are detailed below.

1. Team Leaders, Acting as Supervisors, Engaged in Impermissible Pro-Union Conduct that Affected the Outcome of the Election.

Before and during the course of the election, a number of Team Leaders (the putative supervisors) engaged in various acts of pro-Union conduct that interfered with employees' exercise of free choice in the election to an extent that it affected the outcome of the election. This conduct included, but was not limited to threatening discipline or job loss, promising benefits, participating in the organizing campaign, and interrogating employees. As detailed below, pro-Union Team Leaders: told an anti-Union coworker that the pro-Union Team Leader was tracking her attendance (Tr. 403); falsely accused an anti-Union coworker of working under the influence of drugs or alcohol (Tr. 403); directed a subordinate CNA to report the false allegations against the anti-Union coworker (Tr. 327, 416); promised a subordinate CNA that the Union would automatically provide a "just cause" requirement for disciplinary action, implying that the CNA's pending disciplinary action would be resolved if she voted for the Union (Tr. 561-62); harassed coworkers about their beliefs regarding the Union (Tr. 211-14, 300-03, 320-21, 403); pressured coworkers into signing authorization cards (Tr. 297, 403); attended Union organizing meetings with subordinate CNAs (Tr. 571-72); acted as the Union's observer during the election, observing and monitoring each voter (Tr. 496); and participated and observed coworkers signing authorization cards (Tr. 570).

Such conduct warrants further review in that it constitutes sufficient grounds to overturn the election.

II. ARGUMENTS AND AUTHORITIES

A. The Regional Director's Decision Constituted a Departure from Board Precedent and was based, in part, on Clearly Erroneous Factual Determinations.

The Regional Director incorrectly concluded that Team Leaders are not supervisors within the meaning of Section 2(11) of the Act, and ordered that their ballots be opened and counted. (Dec. 10). This finding raised a substantial question of law because it constituted a departure from Board precedent. Equally as problematic, the Decision was based largely on substantial factual determinations that were clearly erroneous because the Regional Director failed to take into account uncontroverted evidence and mischaracterized certain portions of the record that he examined. The Decision, therefore, had a prejudicial effect on the rights of the Employer and should be reviewed by the Board.

Supervisors cannot be included within a bargaining unit because the rights and protections of the Act do not extend to such individuals. 29 U.S.C. § 152(3) (“The term ‘employee’ . . . shall not include . . . any individual employed as a supervisor”); *NLRB v. Meenan Oil Co.*, 139 F.3d 311, 320 (2d Cir. 1998) (“Supervisors are not protected under the [National Labor Relations Act] and do not possess a right to bargain collectively.”). Under Section 2(11) of the Act, a “supervisor” is defined as:

Any individual having the 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.

29 U.S.C. § 152(11).

The Supreme Court has articulated the applicable three-step test to determine whether an individual is a “supervisor” under the Act:

Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions; (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and (3) their authority is held in the interest of the employer.

NLRB v. Kentucky River Cmty. Care, Inc., 532 U.S. 706, 713 (2001). Importantly, the functions of a supervisor are disjunctive, and an employee may be considered a supervisor even if he or she only exercises one of the twelve personnel actions. *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571, 573-74 (1994); *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980); *Children’s Farm Home*, 324 NLRB 61, 65 (1997); *Queen Mary*, 317 NLRB 1303 (1995); *Allen Servs., Co.*, 314 NLRB 1060 (1994). Additionally, as explained by Board Member Miscimarra, the Board should strongly consider the tenet that even if the employee “has no direct authority to take any of the 12 actions enumerated . . . he or she is still a supervisor . . . if he or she possesses the authority to ‘effectively . . . recommend’ any one of the 12 actions.” *Buchanan Marine, L.P.*, 363 NLRB No. 58 at *4 (Dec. 2, 2015) (Member Miscimarra, dissenting).

Here, the credible evidence and testimony show that Elderwood’s Team Leaders use independent judgment to discipline, recommend discipline or reward, adjust grievances, responsibly direct, and assign CNAs in the interest of Elderwood, and that the Team Leaders should, therefore, be considered statutory supervisors.

1. The Team Leaders Exercised Independent Judgment to Assign Work to CNAs.

In his Decision, the Regional Director concluded that Team Leaders do not exercise supervisory authority in assigning work to CNAs. In so doing, the Regional Director failed to take into account substantial evidence demonstrating that the Team Leaders use independent judgment in assigning tasks to CNAs on a daily basis. Thus, the Regional Director's factual determination on this point was clearly erroneous.

The record contains specific, direct and uncontroverted testimony demonstrating that the Team Leaders assign CNAs work and assign CNAs to residents using independent judgment. For example, Team Leader, John Mbaki testified that CNAs report to their Team Leaders on a daily basis (Tr. 14), and CNA Julio Neyra testified that Team Leaders are responsible for assigning work to and overseeing CNAs. (Tr. 75). Mr. Neyra testified that his Team Leader is his "boss." (Tr. 77, lines 21-22; 97, lines 13-16) and confirmed his understanding that he "reports" to his team leader on a day-to-day basis. (Tr. 75, lines 1-3). Mr. Neyra testified that his work is "assigned by the team leader." (Tr. 75, line 17).

The current Director of Nursing, Ms. Viccica, testified, "At the beginning of the shift, they would assign the CNAs to their sections, to the residents. And then throughout their shift they would oversee that the CNAs are doing what they're supposed to do appropriately and timely." (Tr. 254, lines 18-21). Acting Director of Nursing, Tonya Stumpo, also testified that Team Leaders "do their assignment sheets, so they're assigning the group of residents they're caring for, the tasks they're doing." (Tr. 154). Each morning, they also assign breaks and lunches to their CNAs (Tr. 16, 23), as well as discrete tasks such as nourishment, holding trays, and showers (Tr. 20-21). With regard to assignments relating to the "nourishment" of residents,

Mr. Neyra testified that these assignments are alternated and assignments are made by the Team Leader. (Tr. 76, lines 8-10; 14-16 (stating “Q: Who makes the decision as to how they should be alternated? A: The team leader.”)).

In fact, CNA Julio Neyra testified that when CNAs are “floated” (or transferred) to work on a floor that is not their regular assignment, as happens daily due to census adjustments and other factors, it is the Team Leader who makes the determination, in her or his discretion, to which resident the floated CNA should be assigned. (Tr. 76, lines 17-23 (stating “Q: When there are circumstances that there are instances where new aides for whatever reason are transferred or floated onto your floor, how are assignments for residents made? A: By a team leader. They're doing the modifications then. Q: Is there any standard protocol that applies in that regard or does the team leader make the decision himself? A: The team leaders make the decision.”) Similarly, when a CNA goes home sick, the Team Leader makes the decision how to reassign that CNA’s work. (Tr. 69-69.)

Team Leader John Mbaki testified that he makes these assignments based on a CNA’s “skills and sometimes how long they’ve been working as nursing assistants.” (T. 18). As also explained by Team Leader John Mbaki,

I usually make the [CNA] assignments in the morning. You know, making sure this person is taken care of . . . We delegate things like checking vital signs . . . [W]e do their break schedules and things of that nature . . . Typically, on our floor we have about 46-47 residents that we take care of. And depending on how many certified nursing assistants we have for that day, you know, we assign who is going to be taking care of these people. (Tr. 16, lines 1-4, 10-13).

Additionally, the undisputed testimony established that Team Leaders also make changes to CNAs’ assignments in response to changing conditions on their unit, or other

emergent concerns. Mr. Mbaki testified that he may deviate from established care plans for residents, and assignments associated therewith, where he determines appropriate. (Tr. 33-34). Team Leaders are authorized to make these changes on their own without the need for prior authorization. (Tr. 156, lines 12-14). Similarly, Team Leaders have the discretion to assign unscheduled tasks, such as unplanned shower assignments. Mr. Mbaki testified, “If a family member requests their loved one to take a shower today and it is not scheduled, you can request the CNA who is taking care of that person to go ahead and give the shower.” (Tr. 65, lines 5-8). Ms. Stumpo explained that Team Leaders change CNA assignments “depending on resident need, how many open beds there are, if they have to give another CNA [a task or resident] to make it a fair assignment, the number of residents. They adjust shower times.” (Tr. 155, lines 4-9). Mr. Neyra also corroborated this testimony offering an example of circumstances in which Team Leaders assign CNAs unscheduled shower duties due to factors such as input from family members, gender, and other subjective factors that a Team Leader would evaluate. (Tr. 77, lines 1-9 (Q: are there ever situations that the team leader modifies the schedule over the course of the day? A: Yes. Q: Can you give me an example of when that may have occurred? A: When somebody don't get a shower the night before or something like that, the family has requested one of their loved ones get a shower today, the team leader is the one who make the call.”)).³

³ The Regional Director alleged that the record did not reflect that LPNs can require CNAs to give residents an unscheduled shower, and they can only do so in circumstances when a family member requests a shower. The Regional Director’s findings, however, are entirely conclusory because his opinion was solely focused on the general example that was provided by Mr. Neyra, through which he explained how a shower schedule might be changed when requested by a family member. The Regional Director considered this to be the only situation in which an unscheduled shower can be given. In doing so, the Regional Director ignored Mr. Neyra’s clear testimony establishing that Team Leaders have the broad authority to assign unscheduled showers even in the absence of a family member request: “Q: For example, a shower that wasn’t on the schedule, is that something that can be done? A: Yes. Q: And how would that get assigned? A: By a team leader.” (Tr. 93, lines 2-6).

In the Decision, the Regional Director determined that there was insufficient evidence in the record to establish that Team Leaders exercise independent judgment in assigning CNAs. (Dec. 3-4). This conclusion, however, represents a clear departure from Board precedent. In *Oakwood Healthcare, Inc.*, 348 NLRB 686, 697 (2006), the Board determined that charge nurses exercised independent judgment when they assigned CNAs in consideration of both the resident's needs and ensuring a "fair distribution based upon an assessment of the probable amount of nursing each assigned patient will require on a given shift." In the Board's view, when nurses make "an assignment based upon the skill, experience, and temperament of other nursing personnel and on the acuity of the patients, that charge nurse has exercised the requisite discretion to make the assignment a supervisory function 'requir[ing] the use of independent judgment.'" *Id.* at 698.

Here, the credible evidence in the record establishes that Team Leaders consider the needs and preference of the resident, acuity, and relative skill of the CNAs when making assignments. (T. 18-19). Specifically, Mr. Mbaki testified that they take patient acuity into account when making assignments of CNAs to particular residents: "If somebody is more difficult, we can either assign them to somebody who is more familiar with them or pair the new person with somebody who's familiar with that person." (Tr. 19).

Mr. Mbaki testified that the most important decision he makes is "pairing the patients with the right person to take care of them." (Tr. 22). He explained that there is no training or guidance on how to make such assignments because "it's something we do at our discretion." (Tr. 23). Because residents have entirely different plans of care depending upon their acuity and circumstances, and Team Leaders have the discretion to deviate from care plans

in certain circumstances (Tr. 59, lines 8-15), the Team Leader's assignment of a CNA to a particular resident effectively determines tasks that the CNA would need to perform throughout the day. (Tr. 44 (stating that each resident's care plan "guides [aides] in most of what they need to do" in relation to that resident."))).

Team Leaders rely on their own experience and training when making determinations as to allocation of work and assignment of CNAs to certain residents. (Tr. 34, lines 3-4). They weigh and consider "how much care the resident needs." (Tr. 71, line 16). Team Leader, Mr. Mbaki, testified that the most important consideration in making his decision to allocate assignments among his subordinate CNAs is "making sure the patients have been paired with the right [CNAs] for the day." (Tr. 35-36). As explained by Ms. Stumpo, the Team Leaders "know the CNAs the best. They work with them every day, so they know who might work really well with this resident, this CNA might not be working well with this resident, and adjust on resident need." (Tr. 156, lines 5-10). This allows Team Leaders to use independent judgment when assigning CNAs.

The Regional Director discounted the Employer's proof and testimony⁴ contending it was "conclusionary and unaccompanied by specific examples." (Dec. 3). This conclusion is factually erroneous because the Employer provided express and undisputed testimony that clearly identified specific examples of Team Leaders using independent judgment to assign CNAs, including examples of the procedures that are in place on a daily basis. In addition to Mr. Mbaki's testimony detailed above, the testimony provided by Ms. Stumpo on this

⁴ The Regional Director took issue with testimony of Acting Director of Nursing Stumpo that the LPNs "work with the residents every day, so they know who might work really well with the resident, this CNA might not be working well with this resident and adjust on resident need." (Dec. 3).

point clearly identified how closely Team Leaders work with residents and CNAs each day and how it allows them to make decisions with regard to CNA assignments. Specifically, Ms. Stumpo testified, “They know the CNAs the best. They work with them every day, so they know who might work really well with this resident, this CNA might not be working well with this resident, and adjust on resident need . . . They’re authorized to make [adjustments] themselves.” (Tr. 156). The record does not include any evidence to rebut the testimony provided on these points. As explained by Board Member Miscimarra, “the Board should not disregard un rebutted evidence ‘merely because it could have been stronger, more detailed, or supported by more specific examples.’” *Chi LakeWood Health*, 365 NLRB No. 10 (2016) (quoting *Buchanan Marine, LP*, 363 NLRB No. 58, slip op. at 9 (2015) (Member Miscimarra, dissenting)).

Furthermore, the Regional Director concluded that the record contained insufficient evidence that Team Leaders exercise supervisory authority by assigning CNAs to discrete tasks because many of the tasks are set forth on a resident’s care plan or assignment sheet. Again, this conclusion was based on a clearly erroneous factual determination in that the Regional Director disregarded the fact that while Team Leaders often assign tasks based on assignment sheets, it is the Team Leaders themselves who make the assignment sheets. (Tr. 16, 254). Additionally, significant testimony was provided to explain that Team Leaders often make assignments that are not on assignment sheets. John Mbaki testified as follows, “Q. Are there ever situations where there might be an incident or a request made over the course of a shift that required you to redirect assignments from those that are initially contemplated? A: Most of the time when we change the assignment it’s for example if somebody is not feeling well, one of the CNAs and they have to go home. Q: And who makes that decision as to how to reassign them? A: We usually do, the Team Leaders.” (Tr. 61). Mr. Mbaki also testified, “Q: So as an LPN, do

you have the discretion to make that additional unscheduled shower assignment? A. Yes.” (Tr. 65). Julio Neyra also testified that Team Leaders “can do changes” to the preprinted schedules and forms (Tr. 92).

Finally, each weekend certain Team Leaders receive “charge pay” because there is no unit manager in the building and the Team Leaders assume the additional supervisory responsibilities of the unit manager. (Tr. 62, lines 9-15.). As the Union did not dispute the position that unit managers are supervisors, so too should they conceded that Team Leaders are supervisors, since they at times perform the same work. (*Id.*).

Accordingly, the Regional Director’s Decision on this point was a departure from Board precedent and was based on erroneous factual interpretations, which warrants further review by the Board.

2. The Team Leaders Exercised Independent Judgment to Responsibly Direct CNAs.

The Regional Director opined that Team Leaders do not responsibly direct CNAs because the record does not contain evidence establishing that Team Leaders are held accountable for the CNAs’ work. (Dec. 5). This finding, however, stands in direct contradiction to credible testimony and documentary evidence provided at the Hearing and demonstrates yet another departure from Board precedent.

The phrase “responsibly to direct” was added to Section 2(11) in response to a concern “that the person on the shop floor would not be considered a supervisor even if that person directly oversaw the work being done and would be held responsible if the work were done badly or not at all.” *Oakwood Healthcare, Inc.*, 348 NLRB at 690-91. Direction is

“responsible” when the putative supervisors are faced with the prospect of adverse consequences if they fail to exercise proper oversight. *Id.* at 691-92. LPNs have been found to “responsibly direct” CNAs when it is evident that LPNs “*would* be held accountable for the poor performance of their CNAs.” *Lakeland Health Care Associates, LLC v. NLRB*, 696 F.3d 1332, 1346 (11th Cir. 2012) (emphasis in original). Additionally, the Second Circuit has found LPNs and RN Charge Nurses to be statutory supervisors because “accountability for another’s failure to perform a duty **establishes as a matter of law** an employee’s supervisory power responsibly to direct.” *Schurmacher Nursing Home v. NLRB*, 214 F.3d 260, 267 (2d Cir. 2000) (emphasis added).

The Team Leaders’ evaluation form clearly states that Team Leaders are expected to “direct and monitor the personal care duties and nursing care procedures carried out by nursing assistants of their assigned team,” and “monitor the performance of nursing assistants and implementation of the care plan.” (Er. 3). In attempting to minimizing the import of this exhibit which was in direct conflict with the determination, the Regional Director opined that “a mere paper showing that putative supervisors are evaluated on their direction of employees is insufficient to confer supervisory status . . . [T]here is no evidence that any positive or negative action has been or might be taken as a result of the LPNs’ ratings on these two duties.” (Dec. 5). This statement is in conflict with the proof.

Specifically, Ms. Stumpo testified that Team Leaders’ performance is regularly reviewed and evaluated based on factors such as the ability to “direct and monitor the personal care duties and nursing care procedures carried out by nursing assistants of their assigned team,” and “follow the plan of care for each resident and monitor the performance of nursing assistants

and implementation of the care plan.” (Er. 3; Tr. 198-99). Ms. Stumpo testified as follows: “Q: Is it accurate that directing and monitoring these duties and procedures by the CNAs is in fact a duty of the LPN? A: Yes. Q: And they are evaluated on this duty on an annual basis? A: Yes.” (Tr. 198). Elderwood Administrator Thomas DiJohn testified that the CNA evaluation results have a direct bearing on a CNA’s eligibility on terms of employment such as a tuition reimbursement program. (Tr. 427).

Further, the Regional Director’s “no accountability” finding is clearly contradicted by the undisputed testimony of multiple witnesses. Ms. Stumpo testified that Team Leaders are “responsible for the oversight of the care delivered” by the CNAs. (Tr. 162, lines 12-13). Ms. Viccica corroborated that sentiment and testified that Team Leaders are expected and required to “oversee that the CNAs are doing what they’re supposed to do appropriately and timely.” (Tr. 254, lines 18-21).

Mr. Stumpo also explained that a Team Leader can be disciplined if a CNA does not perform in accordance with a resident’s care plan. (Tr. 162, lines 14-16; *see also* Tr. 207, lines 22-25 (stating “If the Team Leader had knowledge that the CNA was doing something incorrectly and didn’t address it, and something were to happen, they would be held responsible.”). Ms. Viccica, also testified that Team Leaders can be subject to disciplinary action if a CNA fails to properly perform his or her responsibilities because it is the Team Leader’s job to “ensure it is done.” (Tr. 256, lines 5-19).

Importantly, the testimony in the record was clear that Team Leaders are held accountable for the CNAs’ job performance. Mr. Mbaki testified that Team Leaders get written up when a CNA fails to perform an element of his or her duties correctly. (Tr. 65, lines 15-25)

“Oh, if [the CNAs] are not doing what they are supposed to do, a lot of times we [*i.e.*, the Team Leaders] get into trouble because we are supposed to ensure that they do what they’re supposed to do.”).

In fact, Mr. Mbaki gave an example about a time when he personally was subject to disciplinary action when a subordinate CNA deviated from the care plan for a resident. (Tr. 65-66). Specifically, Mr. Mbaki testified that he was written up for the following incident: “[T]he CNA broke the care plan, but I was involved in the situation so I was told that I did not make the CNA aware. It was somebody who fell in the bathroom and they were not supposed to be left alone in the bathroom.” (Tr. 66).⁵ This evidence goes directly against the Regional Director’s conclusion that there has been no proof of discipline against Team Leaders who fail to properly supervise CNAs. Accordingly, the Decision is based on a clearly erroneous factual determination.

Similarly, the Team Leader’s responsibility to direct is also reflected in each Team Leader’s daily obligation to sign off on residents’ Treatment Administration Records (TARs), which also exemplifies how Team Leaders may be disciplined if a CNA fails to properly treat residents. The TAR is a medical record that identifies specific tasks that must be completed for an individual resident. (*See* Er. 6). A CNA is assigned to perform the tasks detailed on the TAR. (Tr. 267). Once the tasks are completed, the Team Leader must sign the TAR to indicate both that the tasks were completed *and* that they were completed properly. (Er.

⁵ The Regional Director took issue with the fact that this information was provided by Mr. Mbaki on cross examination. Regardless of the way in which his testimony was made part of the record, this important issue is directly relevant to the analysis at issue because it is direct testimony from a Team Leader who experienced discipline due to the actions of his subordinate CNA.

6). If the Team Leader signs the TAR and the task was not completed properly by the CNA, the Team Leader will be subject to discipline even though it was actually the CNA who failed to properly perform the task. (Er. 6; Tr. 162). Thus, Team Leaders exercise independent judgment in directing and overseeing CNAs in the performance of their assignments. The Regional director erred in failing to consider this important evidence which was contrary to his determination.

Even if no Team Leaders had been disciplined for the performance of a CNA in the past – which they clearly have – the mere prospect of adverse action for a failure to exercise proper oversight is sufficient to establish that an employee “responsibly directs” others. *Lakeland Health Care*, 696 F.3d at 1344. The Regional Director’s interpretation “improperly fails to recognize that ‘accountability’ can exist based on ‘the supervisor’s own conduct and judgment in exercising oversight and direction of employees in order to accomplish the work.’” *Community Education Centers, Inc.*, 360 NLRB No. 17 (2014), slip op. at 2 (quoting *Entergy Mississippi, Inc.*, 357 NLRB 2150, 2158 (20110) (Member Hayes, dissenting).

Here, the record is undisputed that Team Leaders are responsible for directing and overseeing the CNAs’ performance of assigned tasks, and they exercise independent judgment in doing so. (Tr. 65, lines 12-25). It was made abundantly clear that Team Leaders have “full responsibility” to ensure that CNAs complete their work as assigned. (Tr. 65, line 14).

The Regional Director’s factual determinations on this point were clearly erroneous. As a result, the Decision was a significant departure from established Board policy because the evidence provided clearly establishes that Team Leaders are held accountable for the actions of the CNAs.

3. The Team Leaders Exercised Independent Judgment to Effectively Recommend Discipline to CNAs.

The Regional Director concluded that Team Leaders do not effectively recommend discipline of CNAs despite clear evidence to the contrary. Again, this conclusion was based on an erroneous factual determination. The credible testimony and documentary evidence establishes that Team Leaders have the authority to discipline CNAs and have actually issued written warnings. (Er. 11, 12, 13). Warnings and counseling actions are undisputedly forms of discipline under Section 2(11) of the Act. *See, e.g., Lakeland Health Care*, 696 F.3d at 1332.

The credible testimony and documentary evidence establishes that the Team Leaders have the authority to discipline CNAs. In fact, Elderwood provided specific evidence of a disciplinary write-up issued against Team Leader, Jessica Vrba, issued by a Team Leader, Karen Clayton, while she was a CNA. (Er. 13). Jessica Vrba, who at the time of the hearing in this matter was a current LPN Team Leader, admitted under oath that she had received a disciplinary write-up issued by a Team Leader when she was a CNA.⁶ Specifically, Ms. Vrba stated that she received a write-up from Team Leader Karen Clayton in 2012. (Tr. 612, lines 7-21; 614, lines 14-25; Er. 13). The disciplinary write-up currently remains in Ms. Vrba's personnel file. (Tr. 590, lines 1-4). Such documents can serve as the basis for progressive disciplinary action in the future, up to and including discharge. (Tr. 612, lines 17-21).

⁶ The Regional Director downplayed the relevance of this incident by noting that "only one discipline in which an LPN's signature appears has been issued." (Dec. 6). The important point, however, is that this incident is direct proof of an LPN exercising her disciplinary authority. The significance of this incident cannot be dismissed. Additionally, the Regional Director's conclusion is contrary to the evidence provided because the Employer produced two additional write-ups prepared by an LPN that stated they were issued by an LPN. (Er. 11, 12).

Additionally, evidence was presented regarding a situation in which Edna Harris, an LPN Team Leader, completed and submitted two notice of warning forms for two CNAs who engaged in misconduct. (Er. 11, 12). Specifically, Team Leader Edna Harris testified that she recently issued two disciplinary write-ups against CNAs, Mattie Joseph and Laquita Black, for failure to follow the residents' care plans. (Er. 11, 12). Ms. Harris stated that she completed Notices of Warnings by identifying the CNAs and detailing the misconduct at issue, signed the documents under the heading "Issued By" and listed her title as "LPN." (Er. 11, 12; Tr. 604, lines 9-20). Once the forms were completed, Ms. Harris submitted them to management, and the documents were eventually placed in the CNAs' personnel files. (Tr. 590, 604).

However, the Regional Director based his conclusion on the premise that "the Employer provided only three specific examples over the last four years that purport to demonstrate disciplinary authority. In only one of these instances was the discipline given to the employee." (Dec. 6). Additionally, the Regional Director disregarded clearly established case law in forming his opinion. Specifically, *Lakeland Health Care* held that "the frequency with which an employee exercises disciplinary authority – authority that, in an ideal workplace, will be exercised infrequently or sparingly – cannot be determinative of the existence of supervisory authority." 696 F.3d at 1332. Here, the Regional Director was focused on the limited number of situations in which a Team Leader was required to issue discipline to a CNA instead of considering the Team Leaders' actual ability to issue written warnings and impose discipline.

In rendering his opinion, the Regional Director failed to consider Mr. Mbaki's testimony that he counselled his weekend crew of CNAs regarding their abuse of break periods. He explained, "I just told them, we're going to be holding them more accountable if they

disappear from the floor or if patients need help and we can't find anybody to take care of them that it would be reported from that time onwards.” (Tr. 28-29). Mr. Mbaki’s testimony establishes that Team Leaders have engaged in counseling actions with regard to CNAs. The Regional Director, however, did not address this testimonial evidence in any way.

Furthermore, in reference to the testimony of Edna Harris, the Regional Director concluded that “the evidence relating to the two other examples provided by the Employer undermines its claim that LPNs have the authority to discipline.” (Dec. 6). In reaching this conclusion, however, the Regional Director erred in failing to consider key testimonial evidence from the Human Resources Coordinator, Darcy Stadelmaier, explaining that all of the disciplinary write-ups that the Employer offered as proof constitute a step in Elderwood’s disciplinary policy, and can serve as the basis for progressive disciplinary action in the future, up to and including discharge. (Tr. 590). The Regional Director, therefore, failed to recognize that the warnings issued constituted forms of discipline under Section 2(11) of the Act. *See Lakeland Health Care*, 696 F.3d at 1332. Thus, the Regional Director’s failure to consider the unrebutted testimony on this point constituted prejudicial error.

4. The Team Leaders Exercised Independent Judgment to Effectively Recommend Rewards for CNAs.

The Regional Director concluded that the Team Leaders do not effectively recommend rewards for CNAs. Again, this conclusion stands in opposition to the testimonial

evidence introduced at the Hearing and is, therefore, based on an erroneous factual determination.

The documentary and testimonial evidence introduced at the Hearing establishes that Team Leaders are directly involved in the evaluation of CNAs and that these evaluations can impact their benefits. As explained by Ms. Viccica, Team Leaders are integral to the evaluation of CNAs because they “are supervising the CNAs on the floor all the time.” (Tr. 249, lines 24-25). She also testified, “Many times I will go to an LPN and ask what does the CNA do good, are there any issues, what do you want to compliment them on, and put that in their evaluation.” (Tr. 250, lines 1-4).

The Regional Director’s decision was based on an erroneous factual underpinning that the Employer had not provided sufficient evidence to prove that Team Leaders determine or recommend what ratings should be assigned to CNAs. This is contrary to the testimony of Ms. Stumpo who has actually prepared employee evaluations during the period at issue. Ms. Stumpo testified that she regularly relies on Team Leaders to provide information about the CNAs for purposes of preparing CNA evaluations. (Tr. 249-50). Ms. Stumpo specifically testified that she has incorporated input from Team Leaders into the performance appraisal of CNAs. (Tr. 252, Lines 1-16). Thus, the Regional Director’s factual determination in this regard was contrary to the evidence.

The Regional Director also concluded that the Employer did not provide details establishing how evaluations impact employees’ eligibility for tuition reimbursement. In rendering this determination, however, the Regional Director clearly ignored factual testimony that was placed on the record. Specifically, Mr. DiJohn testified that the CNA evaluations,

which are regularly completed with input from Team Leaders, can affect a CNA's job status because the results have a direct bearing on a CNA's eligibility on terms of employment such as the tuition reimbursement program. (Tr. 427). He explained that the Employer has a "star" program under which it provides tuition reimbursement and that "one of the weighting criteria is the evaluation." (Tr. 427, lines 16-23). He further stated that awards under this program are \$7,000 to \$8,000. (*Id.*). The Regional Director's disregard for un rebutted testimony establishes that his decision was based on erroneous factual determinations.

Without further explanation, the Regional Director concluded that the ability to nominate a CNA for employee of the month does not establish that Team Leaders can recommend rewards. To the contrary, the testimonial evidence established that Team Leaders play an integral role in the recommendation of employee of the month awards, which reward CNAs for strong work performance. (Tr. 395-97). Elderwood's Human Resources Coordinator, Darcy Stadelmaier, explained that recommendations from Team Leaders play a particularly large role in selection for the award. Specifically, "A supervisor is typically looked upon higher than a peer. It's easy for a peer to peer, but any time a supervisor wants to take a minute and recognize an employee we look at it." (Tr. 396, lines 9-11). While other employees and residents' family members can nominate CNAs for the award, the testimony also established that recommendations from Team Leaders are given particularly high weight because they are the CNAs' superiors. (Tr. 395-96). Ms. Sadelmaier also testified that recently a CNA, Amanda Ken-Martin, was awarded employee of the month based in significant part on the recommendation of the Team Leader, Chris VonReyn. (Tr. 395, lines 16-24).

Despite the Regional Director's conclusion, which was based largely on erroneous factual determinations, the evidence introduced at the Hearing clearly establishes that Team Leaders are directly involved in the evaluation and recommendation of CNAs for rewards.

5. The Team Leaders Exercised Independent Judgment to Adjust Grievances Among CNAs.

The Regional Director concluded that the evidence provided failed to establish that Team Leaders resolve CNAs' grievances. This conclusion similarly contradicts the clear testimonial evidence in the record and is based on erroneous factual determinations.

LPN Team Leaders are considered statutory supervisors when they possess the authority to resolve even minor complaints or grievances, such as those related to lunch breaks and assignments. *See Passavant Ret. & Health Ctr. v. NLRB*, 149 F.3d 243 (3d Cir. 1998) (determining that LPNs were supervisors when they had the authority to send nursing aides home for flagrant conduct violations and the authority to resolve minor problems or complaints, such as daily assignments or break times). Additionally, LPNs were found to have the authority to adjust grievances using independent judgment when evidence was presented that two arguing CNAs went to their LPN charge nurse to resolve disputes. *NLRB v. Attleboro Assoc., Ltd.* 176 F.3d 154, 166 (3d Cir. 1999).

Elderwood presented evidence clearly demonstrating that Team Leaders have the authority to adjust grievances and settle disputes among employees. For example, Ms. Viccica testified that Team Leaders are expected to resolve issues among CNAs before escalating to higher management. (Tr. 271). Ms. Stumpo testified that the Team Leaders are the first points of contact for CNAs and will address or attempt to resolve nearly all issues initially. (Tr. 209).

Specifically, she explained that, “Initially, [Team Leaders are] the first people there usually. There are several issues that occur daily. There could be major things, minor things, but they are the ones addressing initially and trying to work them out.” (Tr. 209, lines 18-21). Team Leaders are actively encouraged and expected to settle these disputes. (Tr. 272, lines 6-9) (“I would as the director of nursing expect my Team Leaders to make that call on the unit. There’s plenty of confrontations on the unit that the LPNs take care of before or they never come to us.”).

Additionally, she provided the following testimony:

Evening shift and midnights, there's one supervisor in the building. There is not even a manager there. And the same on weekends . . . [An LPN] get[s] charge pay on the weekends when there is no unit manager there. And I -- that's what I know for sure. It's the most experience LPN that's getting that charge pay. (Tr. 151).

The Employer also provided specific examples of grievances that were adjusted by Team Leaders, but the Regional Director concluded that they did not establish that Team Leaders resolve CNA grievances. The examples clearly illustrate, however, that CNAs are expected to approach their Team Leaders about any daily complaints, disputes, or concerns. The Regional Director discredited the testimony describing distinct examples of Team Leaders adjusting grievances and settling disputes among employees. However, as explained by Board Member Miscimarra, the Board should not disregard evidence “merely because it could have been stronger, more detailed, or supported by more specific examples.” *Buchanan Marine, LP*, 363 NLRB No. 58, slip op. at 9 (2015) (Member Miscimarra, dissenting).

Regardless, Elderwood presented testimonial evidence clearly demonstrating that Team Leaders have significant authority to adjust grievances and settle disputes among employees. First, the testimony recounted an incident that occurred around September 27, 2016,

Jenelle Walters, a CNA, approached Christine Vonreyn, then a Team Leader, about difficulties that the CNA was facing during her orientation. (Tr. 210-11, 344). Ms. Walters explained that she had not yet completed a required assignment while working with her assigned CNA preceptor. (Tr. 210-11). Upon hearing this, Ms. Vonreyn attempted to solve Ms. Walter's concern by reassigning her to a different preceptor. (*Id.*). Ms. Stumpo testified that the LPNs would not need to obtain approval from higher management before reassigning CNAs, and Billie Ambrusko, the RN Supervisor on staff that day, confirmed that Ms. Vonreyn had not, in fact, sought any prior approval. (Tr. 210-11, 344).

Second, during the summer of 2016, Tom DiJohn, Elderwood's Administrator, testified that a group of CNAs expressed concern about Team Leader, Rachel Kerrison's, division of shower assignments. The CNAs thereafter complained to the Administrator that Ms. Kerrison's assignment was unfair. The Administrator, Mr. DiJohn, reaffirmed Ms. Kerrison's authority and supported her decision. In fact, Mr. DiJohn told the CNAs that they should do what she says because "she is their supervisor." (Tr. 423).⁷

Third, Ms. Viccica testified about a verbal altercation between two CNAs who began yelling at each other in the dining room. (Tr. 272-74). After hearing about the incident later that day, Ms. Viccica approached Mr. Mbaki, the LPN assigned to these CNAs, to

⁷ In a footnote, the Regional Director notes that evidence relating to Team Leader, Rachel Kerrison's, resolution of this dispute relating to the assignment of showers is "inconsistent with the Employer's assertion that LPNs assign CNAs work." (Dec. 9, FN 10). This characterization is not at all consistent with the facts. To the contrary, Administrator, Tom DiJohn, testified that two CNAs (referred to in the record as "Marcel" and "Keisha") were "both pretty heated about the way Rachel [Kerrison] had made an *assignment* to them regarding allocation of shower responsibilities. (Tr. 422 (emphasis added)). When Marcel and Keisha complained to Mr. DiJohn he simply responded: "I agree with Rachel's assessment, her evaluation of that...Rachel is your supervisor. I trust her judgment on that, that's what we're going to do." In fact this was a situation where the Administrator expressly recognized the supervisor's authority to make assignments.

determine what happened earlier in the morning. Mr. Mbaki explained that he had taken the CNAs aside, talked to them individually, and calmed them down. In Ms. Viccica's estimation, Mr. Mbaki had appropriately resolved the immediate problem. (*Id.*).

As these examples illustrate, CNAs are expected to approach their LPNs about any daily complaints, disputes, or concerns. Credible testimony clearly established that the LPNs not only have the authority to resolve grievances among CNAs, but in fact, actually do so.

Indeed, both Ms. Stumpo and Ms. Viccica testified that Team Leaders are expected to resolve issues among CNAs before escalating to higher management. (Tr. 209, 271). Thus, Team Leaders are not only permitted, but are actively encouraged, to settle such disputes. The Regional Director completely failed to consider any of the evidence establishing that Team Leaders are the first points of contact for CNA grievances and that they address and often resolve grievances that arise. (Tr. 209).

6. The Team Leaders Exercised Independent Judgment to Effectively Recommend For, or Against, Transfers of CNAs.

Without further explanation, the Regional Director adopted the Hearing Officer's finding that Team Leaders do not effectively recommend for or against the transfer of employees. The Regional Director's conclusions in this regard are clearly erroneous because the factual testimony provided clearly establishes the Team Leaders' ability to recommend employee transfers.

The Hearing Officer's report concluded that Team Leaders lack the authority to effectively recommend for and against transfers of CNAs because these decisions are "primarily based on whose turn it is, which is tracked in a 'float book' kept in the RN supervisor's office."

(Rep. 21-22). However, testimony from the hearing established that Team Leaders possess the authority to effectively recommend which CNAs to float. The Regional Director's claim that nursing supervisors determine when and who to float is clearly erroneous because Ms. Viccica testified that when she needs a CNA to float, she gives the decision to the Team Leader. (T. 271, lines 4-6) ("When I call up to the unit and I say someone needs to float, the LPN is the one that sends the person."). The testimony established that Team Leaders consider a number of factors when determining which CNAs to float. (Tr. 270-71). For instance, a Team Leader could "use the float book as one. Also, the acuity of the unit." (Tr. 270, lines 4-5).

While not always sought or provided, these recommendations have been used by a nursing supervisor when determining which CNA to float. On this point, Mr. Mbaki, testified as follows:

Q: Right. Are there times though when you do provide your opinion in that regard?

A: Yes.

Q: Okay. And are there times when your opinion has been weighed by the – your supervisors?

A: Yes.

Q: And do you believe that there are times that your opinion has influenced the decision that your supervisor has made, with regard to particular transfers?

A: Yes.

(Tr. 28, lines 1-10). Clearly, the float book is not binding on the Team Leader. In any event, it is left to the discretion of the Team Leader to decide who to float, and the Director of Nursing testified that she is not there when the Team Leader makes this decision. (Tr. 270-71).

The Team Leaders certainly have the authority to effectively recommend who to float – or temporarily transfer – and exercise this authority without constraint. Therefore, the conclusion reached in the Decision is clearly erroneous and prejudicial.

Based on the foregoing, it is clearly evident that Team Leaders exercise supervisory authority over CNAs. In addition to the other indicia of supervisory authority in the record, the evidence provided necessitates a finding that the Regional Director’s Decision was erroneous and constituted a departure from Board precedent and must be reversed.

B. The Regional Director’s Conclusion that the Conduct of the Putative Supervisors Does Not Warrant Setting Aside the Election Constituted a Departure from Board Precedent.

The Regional Director overruled the Employer’s first objection to the election, which asserted that certain Team Leaders, as supervisors, engaged in pro-union conduct that tainted the election.⁸ This dismissal, however, should be reversed because the Regional Director failed to recognize that the Team Leaders are supervisors and that their activities in this case represent typical conduct that has overturned elections in the past.

Pro-union supervisory conduct may warrant setting aside an election, even in the absence of an explicit threat of reprisal or promise of benefit. *Harborside Healthcare, Inc.*, 343 NLRB No. 100 (2004). The Board has determined that whenever a supervisor engages in pro-union or anti-union conduct directed toward employees, the potential exists for these activities to improperly pressure those employees. *Id.* Therefore, “in the interest of conducting free and fair

⁸ The Regional Director overruled the objection based on his finding that Team Leaders are not supervisors. Additional support for his position was provided in the event his finding concerning the supervisory status of Team Leaders is reversed, which, for the reasons stated above, it should be. (Dec. 10).

elections,” it is incumbent on the Board to ensure that employees are protected from conduct by supervisors that interferes with the employees’ freedom of choice. *Id.*

The Regional Director opined that there was “insufficient evidence that any putative supervisor engaged in pro-Union conduct that would tend to coerce or interfere with employees’ exercise of free choice in the election.” (Dec. 11). This finding is clearly erroneous and prejudicial in light of the fact that significant testimonial evidence was offered into the record establishing the conduct engaged in by the pro-Union supervisors.

Specifically, the record establishes that pro-Union Team Leaders engaged in the following acts: told an anti-union coworker that the pro-Union Team Leader was tracking her attendance (Tr. 403); falsely accused an anti-Union coworker of working under the influence of drugs or alcohol (Tr. 403); directed a subordinate CNA to report the false allegations against the anti-Union coworker (Tr. 327, 416); promised a subordinate CNA that the Union would automatically provide a “just cause” requirement for disciplinary action, implying that the CNA’s pending disciplinary action would be resolved if she voted for the Union (Tr. 561-62); harassed coworkers about their beliefs regarding the Union (Tr. 211-14, 300-03, 320-21, 403); pressured coworkers into signing authorization cards (Tr. 297, 403); attended Union organizing meetings with subordinate CNAs (Tr. 571-72); acted as the Union’s observer during the election (Tr. 496); and participated and observed coworkers signing authorization cards (Tr. 570). Despite the Regional Director’s findings, each of the activities attributed to the supervisory Team Leaders represents typical conduct which has overturned elections. As a result, the Regional Director’s decision must be reversed.

C. Compelling Reasons Exist for Reconsideration of an Important Board Rule.

Assuming *arguendo* that the Regional Director's decision regarding the Team Leaders' supervisory status had some support in existing Board precedent, compelling reasons exist for reconsidering such precedent. Indeed, it is respectfully submitted that the Board's recent trend in significantly narrowing the definition of "supervisor" under the Act has yielded a definition that is inconsistent with the plan language of the Act and not reflective of modern industrial realities. The Board developed a standard to describe conventional supervisory functions when *Oakwood Healthcare*, 348 NLRB No. 37 (2006), *Croft Metals, Inc.*, 348 NLRB No. 38 (2006) and *Golden Crest Healthcare Center*, 348 NLRB No. 39 (2006) were issued in 2006. Since then, however, the Board has applied the standard so narrowly that many statutory supervisors no longer qualify as such. In fact, the current application of the standard has made it nearly impossible for nurses who perform many of the duties specified in Section 2(11) of the Act, to be classified as supervisors. The overall effect of this narrowed application has been to impede employers in their abilities to rely upon certain managers, vested with material management authority, to effectively utilize such authority.

As pointed out by Member Miscimarra, the Board's supervisory determinations have become "increasingly abstract and out of touch with practical realities of the workplace" *Chi LakeWood*, 365 NLRB No. 10 (2016) (Member Miscimarra, dissenting). Indeed, the Board's recent decisions have created an exceedingly high standard for employers to satisfy before their managers will be considered supervisors under the Act. This case presents an appropriate opportunity for the Board to revisit its application of its supervisory determination and return to a framework that "incorporates commonsense principles guiding the application of the factors set forth in Section 2(11)." *Id.*

D. The Regional Director Erroneously Failed to Consider the Atmosphere of Fear and Reprisal that was Created Due to the Circumstances Surrounding the Election and, Therefore, Based his Conclusion on Erroneous Factual Determinations.

1. The Circumstances Surrounding the Election Defeated Employees' Freedom of Choice.

The Board has articulated:

In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is [the Board's] duty to establish those conditions; it is also [the Board's] duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again.

General Shoe Corp., 77 NLRB 124, 127 (1948).

The Board has long held that the primary goal in any secret-ballot election is to protect employee free choice. *Independence Residences, Inc.*, 355 NLRB 724, 732 (2010) (noting that "purpose of [the Board's] election objections jurisprudence" is to protect employees' free choice); *Jeld-Wen of Everett, Inc.*, 285 NLRB 118, 121 (1987) (the Board's "general goal" is to "conduct elections under conditions as nearly ideal as possible to determine the uninhibited desires of employees").

Just as pro-union supervisory conduct may be grounds for setting aside an election, third-party threats rise to the level of objectionable conduct if it is "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 NLRB. 802, 803 (1984). In assessing the seriousness of third-party threats, the Board considers (1) the nature of the threat itself; (2) whether the threat encompassed the

entire bargaining unit; (3) whether reports of the threat were widely disseminated within the unit; (4) whether the person making the threat was capable of carrying it out, and whether it is likely that the employees acted in fear of his capability of carrying out the threat; and (5) whether the threat was “rejuvenated” at or near the time of the election. *Westwood Horizons Hotel*, 270 NLRB. 802 (1984) (finding that threats made by pro-union were disseminated to the unit, and sufficient to set aside the election, when they were directed towards employees who did not support the union and “two or three employees, not shown to be union adherents, were present when the threats were made.”). Here, all five factors weigh in favor of finding that the LPNs’ conduct, including their third-party threats, was sufficiently severe to have interfered with the possibility of a free election.

Lastly, an election may be set aside based on conduct of a party if it “has the tendency to interfere with employees’ freedom of choice.” *Cambridge Tool & Mfg. Co.*, 316 NLRB 716, 716 (1995). Here, not only was the conduct described above perpetrated by either pro-Union supervisors, third-party proponents of the Union, or both, but Union representatives engaged in further election misconduct that vitiated the employees’ freedom of choice. For example, Union representatives (a) parked a large R.V. immediately next to the Elderwood facility, which essentially acted as a mobile campaign billboard (Er. 4; Tr. 406-07); (b) travelled from the R.V. and escorted a coworker down to the polling area to “show her where to vote” (Tr. 217-18; and (c) distributed flyers which contained materially false information about the election details (Er. 10; Tr. 338-40).

Under any standard articulated, the totality of the circumstances defeated employees’ freedom of choice during, and leading up to, the election, which was decided by a

particularly close margin. The Board has clearly explained that it is “not material that fear and disorder may have been created by individual employees or nonemployees and that their conduct cannot probatively be attributed either to the Employer or to the Union. The significant fact is that such conditions existed and that a free election was thereby rendered impossible.” *Al Long*, 173 NLRB 447, 448 (1968). Therefore, the Regional Director’s decision affirming the Hearing Officer’s recommendation that the Employer’s Objections be overruled and a revised Tally of Ballots issue was clearly erroneous and prejudicial. *See* (Rep. 35).

2. The Regional Director’s Determination with Regard to the Circumstances Surrounding the Election was Clearly Erroneous.

The Regional Director dismissed each objection in full without providing further explanation. In so doing, the Regional Director (and the Hearing Officer) addressed each incident in isolation, which prevented an analysis that considers the collective influence of all conduct and events related to the eligible voters. *See, e.g.*, (Rep. 24-27, 29, 31-32). The Report frequently noted that certain conduct was “isolated” or “targeted at only a single voter.” However, considered together, these circumstances collectively create an atmosphere of fear and reprisal, destroy employee free choice, and lead to voter confusion throughout the proposed unit.

In adopting the Hearing Officer’s recommendation, the Regional Director also neglected to consider relevant evidence and testimony that was made part of the record. Once again, these findings and recommendations omit certain facts or mischaracterize testimony of relevant witnesses. The Regional Director failed to address relevant evidence and instead deferred to the Hearing Officer’s conclusions. As identified in the Employer’s Brief in Support of Exceptions to the Hearing Officer’s Report on Objections, examples of the Hearing Officer’s and Regional Director’s omissions and mischaracterizations are as follows:

- The Report found that the allegation that a Team Leader “made a colleague feel forced into signing an authorization card” was too speculative. (Rep. 24). However, the Human Resources Coordinator and another Team Leader (Shannon Horne) both testified about this conduct. (Tr. 403; Er. 7). In reaching the conclusion that this was too speculative, however, the Hearing Officer relied on the fact that neither the Human Resources Coordinator nor the Team Leader, a putative supervisor, knew whether the employee had actually signed an authorization card. (Rep. 24). Yet, this fails to consider that it would be unlawful for either of these individuals to interrogate an employee about their card signing activity, and possess that knowledge.
- The Report concluded that there was no evidence that a Team Leader was “tracking [a coworker’s] attendance due to [the coworker’s] failure to support the Union.” (Rep. 24). The Hearing Officer reached this conclusion despite the fact that the actual coworker-in-question testified that the pro-Union Team Leader was harassing her because of what the Team Leader perceived to be her view of the union. (Tr. 318). The Regional Director noted that employees were aware of rumors that the Team Leader was tracking the co-worker’s attendance before the organizing campaign, and concluded that this proof is dispositive of the claim that it was related to the employees’ respective positions on the campaign. However, there is no proof on the record to support the

Regional Director's findings, and mere rumors are insufficient to discount the direct testimony provided by the employee.

- The Report concluded that there was no evidence that a Team Leader “accused a colleague of being under the influence of drugs or alcohol because of that person’s failure to support the union.” (Rep. p. 25). However, relevant testimony established that the individual accused was “very vocal to the aides of why [Elderwood] [didn’t] need a union.” (Tr. 405). At the same time that this employee was loudly expressing her anti-Union viewpoints, the pro-Union Team Leader was allegedly harassing other anti-Union coworkers and was actively engaged in the Union campaign. This pro-Union Team Leader then made the false accusation against the Union opponent on September 30, 2016, less than a week before the election. (Tr. 404). Worse still, the pro-Union Team Leader did not report the accusation to Human Resources herself, but instead directed a subordinate CNA to do so. (Tr. 327; 416). This had the practical effect of both jeopardizing the job security of the anti-Union coworker, while also disseminating this implicit threat to subordinate workers.
- The Report characterized a Team Leader’s acts of intimidation directed towards Lisa Nice, Emily Nitkowski and Jamie Grieg as nothing more than “gossip” targeted at only a single individual. (Rep. 26). Not only does this ignore the reality of the workplace, but it also directly contradicts the undisputed testimony on the record. First and foremost, it strains

credulity to believe that these instances could have been limited to the individuals involved. For example, Lisa Nice testified that the pro-Union Team Leader spread gossip about her because she “was voting no for the union” to at least three other people in the unit. (Tr. 318). Similarly, at least two witnesses who testified were aware of the pro-Union Team Leader’s conduct directed towards Emily Nitkowski and Jamie Grieg. In fact, the pro-Union Team Leader actually directed another CNA to report the false accusation against the anti-union coworker, which would almost-necessarily spread this threat throughout the unit. (Tr. 327; 416). Next, both the tracking of attendance records and the false accusation of working under the influence can result in discipline up to and including discharge. (Tr. 403-04). Conduct which carries consequences of this severity cannot be characterized as mere “gossip.” Finally, while the Report addresses each instance in isolation and concludes that each one is directed at a single individual, it is important to note that, in total, there are at least three different individuals who were subject to the misconduct, perpetrated by two different pro-Union Team Leaders.

- The Report found that there was no evidence that a Team Leader “made a promise that, if the Union won the election, a just cause standard would apply or a particular outcome would occur,” and that the Team Leader “was not acting as the Union’s agent” when making the alleged promise of benefits (Rep. 27). However, it is undisputed that the pro-Union Team Leader clearly explained her interpretation of “just cause” protection to a

CAN, who worked in the same unit and on the same shift as the Team Leader, facing pending disciplinary charges. (Tr. 550-61, 554). Even if this promise was not explicit, the pro-Union Team Leader admitted that she understood that the CNA “was a smart person,” and therefore would understand that she would receive the benefit of the ‘just cause’ protection if the Union was voted into the facility. (Tr. 561-62); see also (Tr. 556) (the Team Leader testifying that she explained to the CNA that “an at-will employee is somebody without a union and a just cause is somebody with a union.”). Regardless of whether it was explicitly stated in *quid-pro-quo* format, the Team Leader apparently believed the message was adequately conveyed.

- The Report mischaracterized a Team Leader’s conduct in escorting a voter into the polling and making an announcement, and subsequently concluded that her actions did not substantially impair employees’ exercise of free choice. (Rep. 29). This characterization of the event fails to appreciate the incident in the broader context. The pro-Union Team Leader at issue here is the same Team Leader that lodged the false allegations of misconduct, made unspecified threats of reprisal, and was accused of harassing others. This Team Leader came into the facility with another employee, and loudly proclaimed that she was going to “show [the other employee] where to vote” in front of “four of five” employees in the reception area. (Tr. 409). She then walked into the polling area with the employee, before the Board agent was forced to tell her to leave. (Tr. 383).

The Employer's observer then testified that she could hear this Team Leader having a conversation outside of the polling location. (Id.). When the Team Leader finally left the polling area, she then walked around the facility with several CNAs. (Tr. 218). Given the totality of the circumstances, and the numerous events which occurred leading up to the election, the pro-Union Team Leaders conduct was observed by eligible voters, and can reasonably be expected to have had a coercive impact on them.

- The Report concluded that the misinformation contained in the Union's did not have "any effect on employee free choice or the result of the election." (Rep. 33). This flyer stated that employees "can vote before or after [their] scheduled shift, *or* during non-work hours between designated times listed below." (Tr. 338) (emphasis added). The Director of Therapy testified that at least one aide approached her about this finding, and was confused because it was not clear whether employees could vote during working hours. (Tr. 338-39). Once this flyer was brought to her attention, the Director of Therapy herself became unsure about the polling times, and sought guidance from the Administrator before clarifying for the aide. (Tr. 339). The Report, however, mischaracterizes this event by suggesting that the Director of Therapy clarified the "only instance on the record of confusion caused by the flyer." (Rep. 33). Certainly, however, if one aide is so confused that she feels it necessary to approach her supervisor for clarification, other employees are almost guaranteed to be similarly

confused. The Report's conclusion to the contrary defies this practical reality. Finally, unlike *Midland Nat'l Life Ins.*, 263 NLRB 127 (1982), the misstatements contained in this document were not propaganda that could be "recognized for what they were" by a savvy electorate. These instead were deliberate falsities about crucial election details, which, when combined with the other activities of Union representatives, employees or agents, third-parties, and pro-Union supervisors, created an atmosphere of confusion and impeded employee free choice.

The Regional Director erroneously concluded that the conduct, whether viewed separately or in the aggregate, did not warrant setting aside the election on the basis that much of the conduct was unsubstantiated or facially non-objectionable. As described, however, the Hearing Officer's and the Regional Director's opinions were based largely on mischaracterized evidence. Thus, the Regional Director's conclusion is erroneous and prejudicial in light of the evidence presented that clearly substantiates the conduct at issue.

The activities at issue, in the aggregate, constitute a pattern of coercive and intimidating conduct, which gave rise to an atmosphere of fear and reprisal and made a fair election impossible. It is well settled that "objections must be carefully scrutinized in close elections." *Robert Orr-Sysco Food Servs.*, 338 NLRB 614, 614 (2002). Here, the margin of votes was exceptionally close, with 49 votes in favor of the Petitioner-Union, 35 opposed, and 22 challenged ballots. However, neither the Hearing Officer nor the Regional Director appropriately credited the facts as presented through the testimony of Elderwood's witnesses. As a result, the Regional Director failed to address the true impact of the supervisors' misconduct

and the context in which these incidents were occurring. Accordingly, the Regional Director’s decision affirming the Hearing Officer’s conclusion that the Employer’s Objections should be overruled was clearly erroneous and prejudicial.

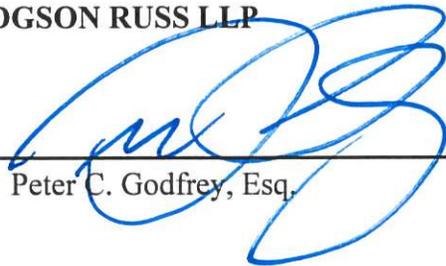
III. CONCLUSION

For the foregoing reasons and based on the record evidence, it must be found that the Team Leaders are statutory supervisors under Section 2(11) of the Act, and their conduct, or that of Union representatives, employees, agents, or third-parties, impermissibly affected the outcome of the election. Accordingly, Elderwood respectfully requests that the Board reject the Regional Director’s Decision, and grant the Employer’s request for review.

Dated: January 20, 2017

Respectfully submitted:

HODGSON RUSS LLP

By:  _____
Peter C. Godfrey, Esq.

CERTIFICATE OF SERVICE

In accordance with Section 102.114 of the Board's Rules and Regulations, I hereby certify that on this 20th day of January, 2017, the foregoing Employer's Request For Review Of Acting Regional Director's Supplemental Decision And Order On Challenges And Objections was filed electronically with the National Labor Relations Board using the E-Filing system on the Board's website, and on this same date, the following were served via first class U.S. mail and electronic mail:

Catherine Creighton
Creighton Johnsen & Giroux
560 Ellicott Square Building
295 Main Street
Buffalo, New York 14203
ccreighton@cpjglaborlaw.com

Paul Murphy
Acting Regional Director
National Labor Relations Board, Region 3
Niagara Center Building
130 S. Elmwood Avenue, Suite 630
Buffalo, New York 14202
Paul.murphy@nlrb.gov

