

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

NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

v.

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

Respondent/Cross-Petitioner

*
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* **Nos. 16-1330**
* **16-1505**
*
* **Board Case No.**
* **22-CA-093626**
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**MOTION OF THE NATIONAL LABOR RELATIONS BOARD FOR
PUBLICATION OF AN UNPUBLISHED DECISION**

To the Honorable, the Judges of the United States Court of Appeals for the Third Circuit:

The National Labor Relations Board (“the Board”), by its Deputy Associate General Counsel, respectfully moves the Court to publish its unpublished opinion in the above-captioned case, and shows that:

1. On January 11, 2017, a panel of this Court (Circuit Judges Jordan, Greenway, and Rendell) issued a non-precedential opinion in the above-captioned case, upholding the Board’s Decision and Order (361 NLRB No. 118) issued against Sub-Acute Rehabilitation Center at Kearny, LLC d/b/a Belgrove Post-Acute Care Center (“the Company”). Agreeing with the Board, the panel found that the Company violated Section 8(a)(5) and (1) (29 U.S.C. § 158(a)(5) and (1))

of the National Labor Relations Act (“the NLRA”) by refusing to recognize and bargain with the Union after its employees voted in favor of union representation in a Board-conducted election. In doing so, the Court affirmed the Board’s findings in the underlying representation proceeding that the Company failed to meet its burden of showing that four individuals who voted in the election were supervisors under Section 2(11) of the NLRA (29 U.S.C. § 152(11)).

2. The Court’s Internal Operating Procedure 5.2 states that an opinion should be published “when it has precedential or institutional value.” The panel opinion meets this requirement because publication would provide valuable in-circuit guidance to parties litigating supervisory status issues before this Court, and give the Court in-circuit precedent upon which it could rely in future cases. Thus, in its decision, the panel frequently looked to and relied on Board law and precedent from its sister circuits. One example is the Court’s reliance on such cases in concluding that an employer’s vague assertions of assignment authority were insufficient to establish supervisory status. *See* slip op. at 8, citing *Bldg. Contractors Ass’n*, 364 NLRB No. 74 (Aug. 16, 2016); *Golden Crest Healthcare Ctr.*, 348 NLRB 727, 731 (2006); *Oil Workers v. NLRB*, 455 F.2d 237, 243 (D.C. Cir. 1971); *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 305 (6th Cir. 2012). Similarly, the Court, again relying on out-of-circuit precedent, found that routine adjustments to assignments and schedules do not demonstrate independent

judgment. *See* slip op. at 8, citing *Frenchtown Acquisition*, 683 F.3d at 312.

Likewise, in upholding the Board's finding that the Company failed to establish that the purported supervisors responsibly directed employees because they were not held accountable, the Court again turned to Board and out-of-circuit law. *See* slip op. at 11, citing *Golden Crest*, 348 NLRB at 731, and *NLRB v. NSTAR Elec. Co.*, 798 F.3d 1, 17 (1st Cir. 2015). Importantly, publishing the opinion in the instant case would provide the Court and litigants with direct, in-circuit guidance on those issues.

3. Appellate courts have encouraged administrative agencies like the Board to request publication of unpublished opinions that have precedential impact on the statutes those agencies administer. *See, e.g., Continental Stock Transfer and Trust Co. v. SEC*, 566 F.2d 373, 374, n. 1 (2d Cir. 1977). Because the panel's opinion addresses issues important to the Board's administration of a key provision of the NLRA, it is of substantial institutional value to the Board. Publication will also allow the Board to conserve scarce resources in defending against the same or similar arguments when seeking enforcing of future Board orders before this Court, and provide the bench and bar with guidance in future cases.

WHEREFORE, the Board respectfully requests that the Court publish its opinion in this case.

s/Linda Dreeben _____
Linda Dreeben
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Dated at Washington, DC
this 26th day of January, 2017

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its motion contains 666 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

/s/ Linda Dreeben
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CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

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

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1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 26th day of January, 2017