

**Nos. 17-1191 & 17-1206**

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**THYME HOLDINGS, LLC  
d/b/a WESTGATE GARDENS CARE CENTER**

**Petitioner/Cross-Respondent**

v.

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

and

**SERVICE EMPLOYEES INTERNATIONAL UNION  
LOCAL 2015**

**Intervenor**

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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THYME HOLDINGS, LLC d/b/a WESTGATE )  
GARDENS CARE CENTER )  
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Petitioner/Cross-Respondent )  
 ) Nos. 17-1191 & 17-1206  
v. )  
 ) Board Case No.  
NATIONAL LABOR RELATIONS BOARD ) 32-CA-190480  
 )  
Respondent/Cross-Petitioner )  
 )  
and )  
 )  
SERVICE EMPLOYEES INTERNATIONAL )  
UNION LOCAL 2015 )  
 )  
Intervenor )

**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certify the following:

**A. Parties and Amici**

Thyme Holdings, LLC d/b/a Westgate Gardens Care Center was the Respondent before the Board in the above-captioned case and is the Petitioner/Cross-Respondent in this court proceeding. The Board’s General Counsel was a party before the Board. Service Employees International Union Local 2015 was the charging party before the Board.

## **B. Rulings Under Review**

The case under review is a Decision and Order of the Board, issued on August 16, 2017 and reported at 365 NLRB No. 118, which relies on the findings of the Board's Regional Director for Region 32 in an earlier representation proceeding. The Regional Director's findings in the representation proceeding are contained in an unpublished Decision and Direction of Election, which issued on October 27, 2016.

## **C. Related Cases**

This case has not previously been before this Court. The Board is not aware of any related cases either pending or about to be presented before this or any other court.

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Dated at Washington, DC  
this 8th day of February 2018

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## GLOSSARY

Act	The National Labor Relations Act (29 U.S.C. § 151 et seq.)
Board	The National Labor Relations Board
Br.	Opening brief of Petitioner/Cross-Respondent Thyme Holdings, LLC d/b/a Westgate Gardens Care Center
Company	Thyme Holdings, LLC d/b/a Westgate Gardens Care Center
CNA	Certified Nursing Assistant
DSD	Director of Staff Development
JA	Joint Appendix
LVN	Licensed Vocational Nurse
Union	Service Employees International Union Local 2015

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**BRIEF FOR THE  
NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF JURISDICTION**

This case is before the Court on the petition of Thyme Holdings, LLC d/b/a Westgate Gardens Care Center (“the Company”) to review, and the cross-

application of the National Labor Relations Board (“the Board”) to enforce, a Board Order issued against the Company on August 16, 2017, and reported at 365 NLRB No. 118. (JA 546-48.)<sup>1</sup> The Board found that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 158(a)(5) and (1)) (“the Act”), by refusing to bargain with Service Employees International Union Local 2015 (“the Union”) as the certified collective-bargaining representative of the licensed vocational nurses (“LVNs”) employed at the Company’s Visalia, California facility. (JA 547.)

The Board had subject matter jurisdiction under Section 10(a) of the Act (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. The Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), which allows an aggrieved party to obtain review of a final Board order in this Circuit, and allows the Board to cross-apply for enforcement.

As the Board’s Order is based, in part, on findings made in an underlying representation proceeding, the record in that proceeding (Board Case No. 32-RC-183272) is before the Court pursuant to Section 9(d) of the Act (29 U.S.C. § 159(d)). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). Under

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<sup>1</sup> Record references are to the Joint Appendix (“JA”). References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” refers to the Company’s opening brief.

Section 9(d), the Court has jurisdiction to review the Board's actions in the representation proceeding solely for the purpose of "enforcing, modifying or setting aside in whole or in part the [unfair-labor-practice] order of the Board." 29 U.S.C. § 159(d). The Board retains authority under Section 9(c) of the Act (29 U.S.C. § 159(c)) to resume processing the representation case in a manner consistent with the Court's ruling. *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).

The Company filed its petition for review on August 18, 2017. The Board filed its cross-application for enforcement on September 11, 2017. These filings were timely, as the Act places no time limit on the institution of proceedings to review or enforce Board orders. The Union has intervened on the side of the Board in this proceeding.

### **STATEMENT OF THE ISSUE PRESENTED**

Whether the Board reasonably found that the Company failed to prove that the LVNs are statutory supervisors excluded from the Act's coverage. If so, the Board properly certified the Union as their representative, and the Company violated the Act by refusing to bargain.

### **STATEMENT OF THE CASE**

This case involves the Company's refusal to bargain with the Union as the collective-bargaining representative of its LVNs, despite the LVNs' overwhelming

selection of the Union as their representative by a vote of 20 to 2 in a Board-conducted representation election, and despite the Board's subsequent certification of the Union as the LVNs' collective-bargaining representative. The Company bases its refusal on the ill-supported claim, which it advanced in the underlying representation proceeding, that the LVNs are supervisors under the Act. The Board reasonably rejected that claim, following a hearing on the matter, because the Company failed to carry its burden of proving—by specific, non-conclusory evidence—that the LVNs possess supervisory authority as defined in the Act. Now, the Company copiously cites the conclusory evidence on which it previously relied, but falls far short of establishing, as it must on review in this Court, that the record compels reversal of the Board's relevant findings. Those findings, as well as the resulting orders in the representation and unfair-labor-practice proceedings, are summarized below.

## **I. FINDINGS OF FACT**

### **A. Background: the Company's Operations, Staff, and Organizational Structure**

The Company operates a one-story nursing home in Visalia, California. (JA 458-59; JA 17-18.) The nursing home accommodates up to 140 residents in 75 rooms arranged along two main corridors. (JA 459; JA 21-23, 567.) Located among the resident rooms are three nurses' stations, each of which serves between 23 and 26 designated resident rooms. (JA 459; JA 22, 99-101, 567.)

Administrator Eric Tolman is the highest-ranking on-site manager of the facility. (JA 459; JA 17.) Below him, in the nursing department, are several nurse-managers: a Director of Nursing (DON), two Assistant Directors of Nursing (ADONs), a Director of Staff Development (DSD), and a NOC<sup>2</sup> Shift Supervisor.<sup>3</sup> (JA 459; JA 26-28, 568.) Below the nurse-managers are 12 registered nurses (“RNs”), 37 licensed vocational nurses (“LVNs”), and about 80 certified nursing assistants (“CNAs”). (JA 458-59; JA 25-26, 40, 231, 565-66, 568.) The LVNs and CNAs work together to provide basic care for the facility’s residents and perform many of the same functions, except that the CNAs are not licensed to administer medications.<sup>4</sup> (JA 464 n.6, 465; JA 301, 371-72.)

The facility operates 24-hours a day, 7 days a week. (JA 18.) The Administrator and the various managers in the nursing department work, for the most part, during the day shift, Monday through Friday. (JA 459; JA 18, 29-31,

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<sup>2</sup> “NOC” refers to the overnight shift, which is the third shift for CNAs, and the second shift for nurses. (JA 35-37, 242.)

<sup>3</sup> As discussed further below, the Company also employs a Staffing Coordinator/Scheduler (also called the Head of Central Supply) who makes assignments within the nursing department, although her precise position within the nursing hierarchy is not clear from the record. (JA 462-63; JA 112, 288-89.)

<sup>4</sup> The record does not disclose the duties of the RNs as distinguished from the LVNs. (JA 472 n.20.)

109-10.) Even when they are not physically present, however, at least one manager is on-call and therefore accessible. (JA 459; JA 109-10, 257, 404.)

The RNs, LVNs, and CNAs are distributed over all shifts, throughout the week, in accordance with a schedule that is centrally prepared by Staffing Coordinator/Scheduler Amanda Pacheco. (JA 459, 462; JA 32, 35.) There is no evidence that the duties of the nurses (RNs and LVNs) change during the evening, night, and weekend shifts when they are the highest-level officials on-site. (JA 459.)

On June 10, 2016, the Union filed a petition to represent the LVNs, as well as other employees, at a sister healthcare facility in Visalia, California. (JA 461-62 n.4.) Within weeks of that petition, the Company issued a new “charge nurse” job description for its RNs and LVNs. (JA 461-62 n.4; JA 569-72.) The new job description called for the nurses to “perform performance evaluation reviews for staff, including determination of wage increases if applicable,” and to “participat[e] in the hire . . . process.” (JA 569.)

### **B. Reward of the CNAs**

In the summer of 2016, immediately after the Company’s issuance of the new job description, DSD Kulsum Hussain began selecting LVNs to fill out evaluations for the CNAs. (JA 467 & n.9; JA 245-46.) She determined which LVNs would evaluate which CNAs by considering the amount of overlap in their

schedules and the LVN's likely familiarity with the CNA to be evaluated. (JA 467 n.9; JA 147-49, 227.)

Once Hussain matched an LVN and CNA for evaluation purposes, she would give the LVN a one-page evaluation form to fill out and return to her the same day. (JA 467; JA 147-150, 309-10, 367-68, 648-723.) The form contained the following grid:

RATINGS					
APPROPRIATE	5=EXCELLENT	4=GOOD	3=SATISFACTORY	2=FAIR	1=POOR
JOB KNOWLEDGE					
WORK QUALITY					
ATTENDANCE/PUNCTUALITY					
INITIATIVE					
COMMUNICATION					
DEPENDABILITY					
OVERALL RATING					

(JA 309, 648-723.) Below the grid, the form allowed space for signatures and comments from the evaluated CNA, the LVN evaluator, and an approving official.

(JA 648-723.)

The Company did not provide any training or guidance to the LVNs as to how they should fill out the evaluation form or what the various terms on the evaluation grid meant. (JA 467; JA 149-51, 308, 366.) Accordingly, there were significant variations in how the LVNs completed the new task set for them. (JA 648-723.) Some LVNs left portions of the grid blank—for example, the boxes

calling for ratings of “Attendance/Punctuality” and an “Overall Rating.”<sup>5</sup> (JA 648, 651, 655, 660-61, 664-65, 672, 682, 688, 693-95, 699, 706-07, 712, 715-16, 718.) Some recorded the numerical equivalents of their ratings and then provided totals in the boxes provided for an overall rating. (JA 662, 683, 690.) Others presented their overall rating as an average of the ratings in individual areas. (JA 668, 670-71, 673, 675, 691-92, 708, 711, 717, 720, 723.) Some used the space allowed for comments to note their lack of familiarity with the CNA they evaluated. (JA 659, 664, 697, 708.) Others used that space to record their general impressions of the CNA, or to simply say something encouraging. (JA 649-51, 655, 657, 662, 665, 668-72, 674-75, 678-80, 682-83, 688, 690-95, 699, 704-05, 709, 712-22.) Still others provided no comments at all. (JA 648, 652-54, 656, 658, 660-61, 663, 666-67, 673, 676-77, 681, 684-85, 687, 689, 696, 698, 700-03, 706-07, 710-11, 723.)

The LVNs returned their filled-out forms to DSD Hussain. (JA 466-67; JA 147, 152-53.) Thereafter, Hussain presented each CNA with their evaluation for review, any comments, and signature. (JA 153; JA 153, 309.) Once the CNA signed the evaluation, Hussain took it to Administrator Tolman for his signature. (JA 147, 155.) After collecting all of the signed evaluations, Hussain went through them and “categorized” or “characterized” each one as “excellent,” “good,” or

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<sup>5</sup> The LVNs were not given access to the CNAs’ personnel files or attendance records for purposes of the evaluation. (JA 467 n.10; JA 308.)

“fair.”<sup>6</sup> (JA 466-67; JA 155-56.) As a final step, she submitted her characterizations of each CNA’s evaluation to the Company’s human resources department. (JA 155-56.)

Tolman’s plan was to provide two wage increases to the CNAs in September 2016: one based on their performance, and the other without regard to performance. (JA 467-68 & n.11; JA 51, 121-25, 156.) However, there is no record of any CNA actually receiving either planned wage increase.

### **C. Hiring of CNAs**

DSD Hussain screens applications for CNA vacancies, selects applicants to interview, and conducts all interviews thereafter. (JA 469-70; JA 161-62, 164, 246-47.) Although the DSD historically has completed all of these hiring tasks alone, the Company decided in the summer of 2016 to modify the hiring process by inviting available LVNs to participate in applicant interviews. (JA 469-70; JA 45, 49-50, 246, 248, 306, 327.)

Under the modified process, DSD Hussain checks, just before a scheduled interview, to see if any LVN has time to sit in on the interview. (JA 469-70; JA 162, 176-77.) If she finds an available LVN, she “pulls” the LVN from the floor for the interview, giving them a list of questions to ask the applicant. (JA 469-70;

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<sup>6</sup> Hussain noted that in a few instances the same CNA was evaluated more than once. (JA 156.)

JA 162-64, 249-50.) During the interview, the LVN asks the questions printed on the form, as directed, and jots down the applicant's answers. (JA 470; JA 162-64.) After the applicant leaves, the LVN returns the form to Hussain, and Hussain asks for the LVN's opinion. (JA 470; JA 165, 177.) Thereafter, the LVN has no further involvement in consideration of the applicant. (JA 470.) Hussain determines whether to hire the applicant and completes all remaining steps in the hiring process by herself. (JA 469-70; JA 165, 177, 247.)

#### **D. Assignment of the CNAs**

The Company's Staffing Coordinator/Scheduler, Amanda Pacheco, centrally prepares a schedule for all of the LVNs and CNAs who work for the Company. (JA 462, 463; JA 134-35, 257-58.) Pacheco's schedule identifies when and where each LVN and CNA will work, as well as which LVNs will work with which CNAs. (JA 462, 464; JA 134-35, 254-263.) Pacheco's schedule is subject to review by the DON, who is the final authority on all scheduling matters in the nursing department. (JA 462; JA 134-35.)

At the various nurses' stations, the LVNs create daily assignment sheets mirroring the information on Pacheco's central schedule. (JA 462; JA 178-83, 254, 331-35, 389-96, 399-400, 736-47.) When Pacheco's schedule is not readily available, the LVNs copy assignments from past daily assignment sheets. (JA 464; JA 389-97.) The CNA assignments are straightforward and often reflect a rotation

between basic duties such as: “dining room” (which involves supervising residents who are able to feed themselves in the dining room); “T/A [total assistance] dining room” (which involves feeding residents who need assistance in the dining room); “floor” (which involves staying on the floor and responding to call lights from resident rooms); “trays” (which involves serving those residents who take meals in their rooms); and “trays and floor” (which involves both responding to call lights and serving meals in resident rooms). (JA 462, 464; JA 21-22, 184, 186-87, 189, 257-62, 328-35, 389-97, 567.) Occasionally, an LVN may instruct a CNA to perform a discrete task related to the patient care in which both are involved, but such instructions do not have the effect of altering the centrally determined assignments for CNAs, or their basic duties such as those outlined above. (JA 464-65; JA 384-86, 394-96.)

Where a unit is short-staffed because of a CNA’s unexpected absence, or because of a change in the resident census, one of the LVNs on duty may redistribute the CNAs on the shift, in order to equalize workloads. (JA 462, 464-65; JA 191-92, 264-67.) The LVNs, however, do not have the authority to call additional CNAs into work, to keep CNAs at work beyond their scheduled hours, or to alter their existing shifts. (JA 463; JA 263-66, 316.) Along the same lines, LVNs cannot approve vacation requests from CNAs. (JA 463; JA 265, 316.)

However, they do handle, in the first instance, CNA requests to leave work early and go home due to illness. (JA 463-64; JA 265-66, 297-98, 316, 380-81.)

### **E. Discipline of the CNAs**

The Company makes available, at each of the nurses' stations, forms that the LVNs and RNs may use to write-up CNA infractions. (JA 359, 611-47.) Although the forms allow the preparer to select from a range of options including "suspension" and "termination," the LVNs typically select the option of "oral counseling" or "written warning." (JA 471; JA 611-13, 616, 618, 621, 623-35, 638-39, 641-47.) In some instances, they select both options for the same write-up. (JA 623.)

After filling in two more portions of the form—identifying the "Problem" and relevant "Details"—the LVN may sign it and present it to the CNA for their consideration, signature, and comments. (JA 471-72.) The LVN then submits the signed form to DSD Hussain for Administrator Tolman's signature and eventual filing.<sup>7</sup> (JA 623.)

The Company does not maintain a formal progressive disciplinary system assigning any particular significance to the LVNs' write-ups. (JA 474.)

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<sup>7</sup> If the LVN elects to do so, he or she may also fill out additional portions of the form, addressing "Prior Discussion and/or Warnings," "Summary of Corrective Action," and "Consequences of Failure to Improve." (JA 643.)

Accordingly, the write-ups do not have any necessary or automatic effect on a CNA's job status once filed. (JA 474; JA 56, 58, 577-610.)

## **II. PROCEDURAL HISTORY**

### **A. The Representation Proceeding**

On August 31, 2016, the Union filed a representation petition seeking certification as the LVNs' representative. (JA 457.) The Company maintained that the LVNs are supervisors and therefore cannot constitute an appropriate unit for collective bargaining. (JA 564.) Following a hearing, the Regional Director issued a Decision and Direction of Election, finding that the Company failed to meet its burden of proving that the LVNs are supervisors. (JA 458-82.) She ordered a secret-ballot election in the petitioned-for unit of LVNs. (JA 479-81.)

The Company sought Board review of that Decision, reiterating its claim that the LVNs are supervisors because they allegedly have authority to reward CNAs, effectively recommend the hiring of CNAs, assign CNAs, and discipline them. (JA 486-510.) The Board (Members Pearce and McFerran, Member Miscimarra dissenting in part) denied the request for review. (JA 512-14.) In the election, the LVNs voted 20 to 2 for the Union. (JA 483.) Accordingly, the Regional Director certified the Union as the LVNs' representative. (JA 484.)

Thereafter, the Union asked the Company to negotiate an initial collective-bargaining agreement. (JA 519.) The Company refused the Union's request to

bargain in order to test the certification in an unfair-labor-practice proceeding. (JA 515.)

### **B. The Unfair-Labor-Practice Proceeding**

Based on the Union's unfair-labor-practice charge, the Board's General Counsel issued a complaint alleging that the Company violated the Act by refusing to bargain with the Union. (JA 522, 526-33.) The Company admitted its refusal, and the General Counsel filed a motion for summary judgment. (JA 537-39, 447-541.) The Company opposed summary judgment, maintaining that it has no duty to bargain because the LVNs in the bargaining unit are supervisors. (JA 546.)

### **III. THE BOARD'S CONCLUSIONS AND ORDER**

On August 16, 2017, the Board (Chairman Miscimarra, and Members Pearce and McFerran) granted the General Counsel's motion, finding that all representation issues raised by the Company "were or could have been litigated in the prior representation proceeding," and there was no other basis for reexamining that proceeding. (JA 546.) Accordingly, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union. (JA 547.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found and from any like or related interference with employees' exercise of their rights under Section 7 of the Act (29 U.S.C. § 157). (JA 547.)

Affirmatively, it requires the Company to: bargain with the Union upon request, and embody any understanding reached in a signed agreement; and post a remedial notice. (JA 547-48.)

### **SUMMARY OF ARGUMENT**

Substantial evidence supports the Board's finding that the Company did not carry its burden of proving that the LVNs are statutory supervisors who are excluded from collective bargaining under the Act. Specifically, the Company failed to prove its claims that the LVNs can reward CNAs, effectively recommend their hire, assign them, or discipline them within the meaning of the Act. Accordingly, the Board properly certified the Union as the LVNs' collective-bargaining representative, and the Company's refusal to recognize and bargain with the Union violated Section 8(a)(5) and (1) of the Act.

The Company's claim that the LVNs reward CNAs fails, at the outset, because the Company did not submit payroll records to demonstrate the claimed reward. Moreover, even assuming that the CNAs received performance-based wage increases as the Company claims, the Company's evidence fails to show that it was the LVNs' evaluations that controlled the amounts of those wage increases. In light of numerous discrepancies between the LVNs' evaluations and the purported wage increases, the Board reasonably found that an official above the

LVNs retained ultimate control over the ratings assigned to the CNAs and the amount of their corresponding raises.

As the Board additionally found, the Company's claim that the LVNs have supervisory authority to reward CNAs further fails because the Company did not prove that the LVNs use independent judgment in performing their role in the alleged process of reward. In order to exercise independent judgment as a supervisor under the Act, an individual must not only act free from the control of others, but must also form an opinion by discerning and comparing data. Here, there is absolutely no evidence that the LVNs discerned or compared data, or weighed any particular factors, in quickly selecting among 5 descriptors for CNA performance in various areas, and in occasionally adding a few general impressions of the CNA.

Turning to the Company's separate claim that the LVNs have supervisory authority in regard to hiring, the Board reasonably found that the Company failed to prove that the LVNs effectively recommend the hiring of CNA applicants by merely sitting in on interviews. There is no specific evidence that the LVNs make recommendations regarding the hiring of applicants using independent judgment. And although the Company cites one instance in which an LVN allegedly recommended an applicant for hire, the testimony regarding that incident reasonably suggests that the LVN offered her feedback based on her personal

knowledge of the applicant, not based on any weighing of factors in her purported capacity as a supervisor. The Board therefore reasonably found that the Company had failed to establish even a single specific instance of the LVNs' alleged supervisory authority in the area of hiring.

Similarly, the Company failed to prove that the LVNs have authority to assign CNAs within the meaning of the Act—that is, to assign them to a time, place, or significant overall duties using independent judgment. The CNAs' schedules—including when and where they work—are largely dictated by a schedule centrally created by the Company's Staffing Coordinator/Scheduler. Although the LVNs may make minor adjustments to the schedule to address unanticipated changes, or may distribute routine tasks within the CNAs' assignments, such actions do not rise to the level of assignment for purposes of the Act. Nor is there any evidence that the LVNs weigh any specific factors or otherwise exercise independent judgment in taking such minor actions.

As the Board further found, the Company also failed to prove that the LVNs have authority to discipline CNAs within the meaning of the Act. Although the evidence indicates that the LVNs can write up CNAs for perceived misconduct or neglect of duty, there is no evidence that such write-ups have any effect on the subject CNA's job status. Moreover, the Company failed to prove that it employs a progressive disciplinary system under which the LVNs' write-ups have a defined

effect, or increase the prospect or severity of later discipline. The Board therefore found that the LVNs' write-ups are not disciplinary under settled law, and do not establish authority to discipline for purposes of the Act. In any event, as the Board additionally found, the Company adduced no evidence to demonstrate that the LVNs exercise independent judgment in preparing write-ups.

Because the Company failed to prove, by a preponderance of the evidence, that the LVNs have any of the claimed forms of supervisory authority, its references to various secondary indicia of authority are to no avail. Employees do not acquire the status of supervisors simply because they superficially appear to be supervisors, or because the Company chooses to call and describe them as such.

## **ARGUMENT**

### **THE BOARD REASONABLY FOUND THAT THE COMPANY FAILED TO PROVE THAT THE LVNs ARE STATUTORY SUPERVISORS, AND THEREFORE THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION**

#### **A. Applicable Principles and Standard of Review**

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of [its] employees . . . ." 29 U.S.C. § 158(a)(5). Here, the Company has admittedly (Br. 4) refused to bargain in order to seek court review of the Board's certification of the Union as the LVNs' representative. The Company specifically claims the LVNs are

statutory supervisors, who are excluded from the Act's protections. *See* 29 U.S.C. § 152(3).

Section 2(11) of the Act states, in relevant part, that a "supervisor" is "any individual having authority, in the interest of the employer, to hire, . . . assign, reward or discipline other employees, or responsibly to direct them . . . or effectively to recommend such action," provided that "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). Thus, individuals are statutory supervisors only if "(1) they have the authority to engage in a listed supervisory function, (2) their exercise of such authority is not merely of a 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); *accord Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). In interpreting Section 2(11), the Board is mindful of the statutory goal of distinguishing truly supervisory personnel, who are vested with "genuine management prerogatives," from employees who enjoy the Act's protections even though they perform "minor supervisory duties." *Oakwood*, 348 NLRB at 688 (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81 (1974)); *see also Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996) (noting that "reviewing courts must take care to assure that exemptions from NLRA coverage are not so

expansively interpreted as to deny protection to workers the Act was designed to reach”).

The party asserting supervisory status bears the burden of proving that status “by a preponderance of the evidence.” *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 305 (6th Cir. 2012) (citing *Kentucky River*, 532 U.S. at 711-12); see *Allied Aviation Serv. Co. of New Jersey v. NLRB*, 854 F.3d 55, 59 (D.C. Cir. 2017) (reiterating the burden of proof established in *Kentucky River*). “Because of the serious consequences of an erroneous determination of supervisory status,” the Board and the courts are “particularly cautious before concluding that a worker is a supervisor when the asserted supervisory authority has not been exercised.” *Frenchtown*, 683 F.3d at 305 (quoting *Jochims v. NLRB*, 480 F.3d 1161, 1168 (D.C. Cir. 2007)) (internal quotation marks omitted). Accordingly, the party asserting supervisory status must support its position with specific examples based on record evidence. *Oil, Chem. & Atomic Workers v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971) (“*Oil Workers*”). Conclusory or generalized testimony is insufficient. See, e.g., *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1467 (7th Cir. 1983); *Golden Crest Healthcare*, 348 NLRB 727, 731 (2006). Nor is theoretical or “paper power”—as in a job description—sufficient to prove supervisory status. *Beverly Enters.-Mass, Inc. v. NLRB*, 165 F.3d 960, 962-63 (D.C. Cir. 1999); *New York Univ. Med. Ctr. v. NLRB*, 156 F.3d 405, 414 (2d Cir. 1998).

Given the Board’s expertise in evaluating the “infinite variations and gradations of authority” that may exist in the workplace, the Board’s findings with regard to supervisory status are “entitled to great weight.” *Oil Workers*, 445 F.2d at 241 (citation and internal quotation marks omitted). Those findings must be upheld so long as they are supported by substantial evidence, even if the Court “would justifiably have made a different choice had the matter been before it de novo.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951). “Put differently,” the question before the Court is simply “whether on this record it would have been possible for a reasonable jury to reach the Board’s conclusion.” *Allied Aviation*, 854 F.3d at 65.

**B. The Company Ignores Its Unique Burden of Proof in This Supervisory-Status Case**

Throughout its brief, the Company complains that the Board “ignored” the testimony of its exclusively management witnesses, and applied a “new,” “secret corroboration rule,” requiring the Company to provide evidentiary support for its managers’ representations about the LVNs’ alleged supervisory authority. (Br. 2, 3, 5, 6, 8, 27, 28, 30.) The Company’s complaints are baseless.

The Board’s requirement of corroboration in this case stems from the well-known principles—recited above and emphasized by the hearing officer at the outset of the underlying hearing—that the party asserting supervisory status has the burden of proving that status, and cannot meet its burden by generalized or

conclusory evidence.<sup>8</sup> See *Frenchtown*, 683 F.3d at 312 (finding that “[t]he conclusory testimony [the Company] adduce[d] [wa]s insufficient to carry its burden of proof under the Act”); *Res-Care*, 705 F.2d at 1467 (upholding the Board’s finding that nurses had no supervisory authority where the evidence of such authority was “limited very largely to the [nursing home] administrator’s general assertions” at hearing). This Court has not only embraced these principles, as already discussed, it has specifically held that “[s]tatements by management purporting to confer authority do not alone suffice” to establish supervisory status under the Act. *Beverly Enters.-Mass., Inc. v. NLRB*, 165 F.3d 960, 963 (D.C. Cir. 1999); accord *Jochims v. NLRB*, 480 F.3d 1161, 1168 (D.C. Cir. 2007). There is accordingly nothing “new” or “secret” about the Board’s demand for corroboration of the conclusory management testimony in this case.<sup>9</sup>

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<sup>8</sup> The hearing officer specifically stated: “Please be aware that because the issue of supervisory status involves a statutory exclusion, the party seeking to exclude employees on th[at] basis, i.e., the Employer in this case, bears the burden of proof. You must present specific detailed evidence in support of your position, and general conclusory statements by witnesses will not be sufficient.” (JA 16.)

<sup>9</sup> Thus, the Company’s suggestion that the Board violated basic principles of due process, by failing to give adequate notice of a new rule, is meritless. Along the same lines, as the Board explained in addressing the Company’s misguided due process arguments, the Company was in no way foreclosed from calling witnesses and presenting relevant evidence at the hearing. (JA 478 n.25.) In particular, “the Employer at all times had the power to call as witnesses (and even to subpoena) any LVNs or CNAs in order to put forth first-hand evidence” of the LVNs’ alleged

Contrary to the Company's claims, moreover, the Board's requirement of corroboration did not operate to exclude evidence that would otherwise be admissible under the Federal Rules of Evidence. (Br. 31-33.) Indeed, as the Company acknowledges, nearly all of its proffered evidence was admitted without objection.<sup>10</sup> (Br. 31-32.) The Board simply accorded little weight to the conclusory or generalized evidence presented, or found it insufficient to meet the Company's burden of proof. Nothing in the Federal Rules of Evidence precludes the Board from considering the sufficiency of the evidence in this manner, as the law developed under Section 2(11) plainly requires.

Likewise, neither the Board's Rules and Regulations nor its internal guidance for hearing officers supplants the specific rule, articulated in countless Board and court cases under Section 2(11) of the Act, that the party advocating for the exclusion of individuals from the Act's coverage must support that position "by a preponderance of the evidence." *See, e.g., Palmetto Prince George Operating, LLC v. NLRB*, 841 F.3d 211, 215 (4th Cir. 2016); *Entergy Miss., Inc. v. NLRB*, 810 F.3d 287, 295 (5th Cir. 2015); *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 305 (6th Cir. 2012). Thus, the Company's effort to abdicate its burden of proof, or

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supervisory authority. (JA 478 n.25.) The Company's strategic failure to put on such evidence relevant to its burden is not a due process violation.

<sup>10</sup> The Company erroneously refers to such evidence as "undisputed," even though it was merely admitted without objection. (Br. 5, 19, 20 n.8.)

to construe it as a burden shared with the Union and the hearing officer, utterly fails. (Br. 17 n.7, 29.) *See also Frenchtown*, 683 F.3d at 305 & n.2 (noting that, in *Kentucky River*, the Supreme Court rejected the Sixth Circuit’s prior rule that the Board bore the burden of proof in supervisory-status cases).

At bottom, this case involves well-known principles that the Company inexplicably disregarded or underestimated, believing that it could rely largely on the testimony of two managers to establish the LVNs’ alleged supervisory status. Unfortunately for the Company, the two managers at issue provided mostly generalized or conclusory testimony, with few specific examples to substantiate their statements regarding the scope of the LVNs’ purported authority. *See Oil Workers*, 445 F.2d at 243 (holding that “what the statute requires is evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority”). Moreover, the documentary evidence that the Company proffered failed to provide unequivocal support for the managers’ testimony. Indeed, as further discussed below, there were numerous unexplained inconsistencies between the documents and the managers’ testimony. The Board, thus, reasonably found the Company’s evidence wanting. Specifically, the Board found that the Company failed to meet its burden of proving its claims that the LVNs reward CNAs, effectively recommend their hire, assign them, and

discipline them using independent judgment. The Board's relevant findings, discussed below, are supported by substantial evidence.

**C. The Company Failed To Carry Its Burden of Proving that Its LVNs Have Authority To Reward CNAs Through Evaluations**

The Company argues that the LVNs are supervisors because they prepare evaluations that result in performance-based wage increases for the CNAs. As the Board reasonably found, however, the Company failed to meet its burden of proving (1) that wage increases were in fact distributed based on LVN-prepared evaluations, and (2) that the LVNs' role in any such result involved the use of independent judgment.

**1. The evidence does not establish a direct correlation between LVN-prepared evaluations and later wage increases**

As the Company implicitly acknowledges, the authority to evaluate is not a supervisory function under Section 2(11) of the Act. *See Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535, 536-37 (1999). Evaluations enter into the Section 2(11) analysis only where they demonstrably affect the job status of evaluated employees—for example, where they determine wage increases or bonuses. *See New York Univ. Med. Ctr. v. NLRB*, 156 F.3d 405, 413 (2d Cir. 1998). However, as the Board has emphasized, the nexus to later rewards must be clear and direct. *See Coventry Health Continuum*, 332 NLRB 52, 53 (2000); *Harborside Healthcare, Inc.*, 330 NLRB 1334, 1335 (2000). Specifically, the proponent of

supervisory status must show (1) that “an employee’s evaluation leads to pay changes,” (2) that “there is a direct correlation between the evaluation and merit increases or bonuses to the evaluated employees,” and (3) that admitted “supervisors do not independently investigate or change the ratings.” *NLRB v. Hilliard Dev. Corp.*, 187 F.3d 133, 145 (1st Cir. 1999); accord *Extendicare Health Facilities, Inc.*, 330 NLRB 1377, 1377 (2000) (finding that nurses had authority to reward where there was “a direct linkage” between the evaluations they issued “without any review by higher authorit[ies]” and later merit pay increases for the evaluated nursing assistants). Here, the Board reasonably found that the Company fell far short of these necessary showings. (JA 465-69.)

The Company produced 75 single-sheet evaluation forms in which LVNs rated CNA performance in up to six categories, using check marks or numbers to indicate whether the CNA was “excellent,” “good,” “satisfactory,” “fair,” or “poor,” and sometimes giving the CNA an overall rating. (JA 648-723.) The Company, however, did not offer any payroll records into evidence to show the relationship of the evaluation ratings to later wage increases for the CNAs. In the absence of this critical evidence, the Board found that the Company had fundamentally failed to make its case that LVNs reward CNAs, or effectively recommend their reward, through wage increases. (JA 469.) See *Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260, 265 (2d Cir. 2000) (charge-nurse

evaluations held non-supervisory where there was “no evidence that CNAs are promoted or rewarded based on the evaluations, and the evaluation forms do not include recommendations for pay raises, promotions, or other rewards”); *New York Univ. Med. Ctr.*, 156 F.3d at 413 (“Evaluations that do not affect job status of the evaluated person are inadequate to establish supervisory status.”).

The Company protests that it produced competent evidence of the wage increases, in the form of a summary document prepared by DSD Hussain. (Br. 24-25.) The summary purported to record each CNA’s overall rating and corresponding wage increase. But, on close inspection, the summary document clearly fails as a substitute for the underlying records summarized.

As the Board noted, the summary provides no data for six CNAs whose evaluations are in evidence. (JA 468.) Similarly, the summary does not account for the fact that four of the listed CNAs were each evaluated twice (JA 682, 684, 693, 700, 704, 705, 708, 721), and that two of them received conflicting ratings over the course of the repeated evaluations (JA 682, 684, 693, 708). It is not clear, moreover, how Hussain arrived at a rating of record and corresponding wage increase for those CNAs who were evaluated twice.

Even if the summary is assumed to be an accurate reflection of the CNAs’ ratings of record and wage increases, the Board reasonably found that it does not provide unambiguous support for the Company’s claim that it is the LVN

evaluations that control CNA wage increases. (JA 467-68.) Indeed, as the Board found, comparison of the LVN evaluations against the summary document shows that the LVNs' overall ratings often *did not* match the rating of record and corresponding wage increase purportedly awarded to the CNA according to the summary. (JA 467-68.) In 11 instances in particular, the evaluating LVN gave the CNA an overall rating different from the "eval rating[]" recorded in the summary. (JA 724.) (*See* table below.) In those instances, as the Board explained by way of a few examples, the wage increase purportedly awarded to the CNA corresponded with the rating recorded in the summary, not with the overall rating given by the LVN. (JA 468.)

	<b>CNA Name</b>	<b>Individual Ratings</b>	<b>LVN's Overall Rating</b>	<b>Overall Rating Listed on Summary</b>	<b>Raise</b>
1	Alcantar, Arturo Review dated 7/21/16 (JA 689)	3 Excellent 3 Good	Excellent	Good	2%
2	Alva, Tracie Review dated 8/11/16 (JA 668)	5 "5s" (Excellent) 2 "4s" (Good)	"5" written under "Excellent"	Good	2%
3	Alvarado, Jalissa Review dated 7/21/16 (JA 659)	2 Excellent 2 Good 2 Satisfactory	Good	Fair	1%
4	Gadsden, Reatha J. Review dated 8/10/16 (JA 676)	4 Excellent 2 Good	Excellent	Good	2%

	<b>CNA Name</b>	<b>Individual Ratings</b>	<b>LVN's Overall Rating</b>	<b>Overall Rating Listed on Summary</b>	<b>Raise</b>
5	Gainey, Anna Review dated 8/10/16 (JA 677)	5 Excellent 1 Good	Good	Excellent	3%
6	Howser, Priscilla Review dated 7/21/16 (JA 709)	6 Excellent	Excellent	Good	2%
7	Miska, Phillip Review dated 7/21/16 (JA 674)	4 Excellent 2 Good	Excellent	Good	2%
8	Ramos, Rosamaria Review dated 6/29/16 (JA 682)	2 "5s" (Excellent) 3 "4s" (Good) 1 left blank	"3" written under "Satisfactory"	Good	2%
9	Rivera Carrillo, Martha Review dated 7/5/16 (JA 678)	5 Excellent 1 Good	Good	Excellent	3%
10	Rodriguez, Amber Review dated 8/16/16 (JA 662)	2 "5s" (Excellent) 1 "4" (Good) 1 "3" (Satisfactory) 2 "2" (Fair)	"21" written under "Excellent"	Fair	1%
11	Zamora, Raymond Undated (JA 684)	1 Excellent 4 Good 1 Satisfactory	Good	Excellent	3%

In 15 other instances, addressed in the additional table below, the evaluating LVN provided no clear overall rating, and yet the summary document attributes an

overall rating to the evaluation. Once again, as the Board noted, the CNA's wage increase accords with the overall rating captured in the summary document, not with any overall rating given by the LVN on the actual evaluation form. (JA 467-68 & n.15.)

	<b>CNA Name</b>	<b>Individual Ratings</b>	<b>LVN's Overall Rating</b>	<b>Overall Rating Listed on Summary</b>	<b>Raise</b>
1	Alcaraz, Nancy Undated (JA 712)	6 Excellent	None	Excellent	3%
2	Carabay, Cecilia Review date 7/21/16 (JA 675)	4 Excellent 2 Good	"4.5" written under "Excellent" and "Good" (across both columns)	Good	2%
3	Fernandez, Manuel Review dated 8/10/16 (JA 648)	3 Excellent 3 Good	None	Good	2%
4	Garcia, Sarah Review dated 7/21/16 (JA 672)	5 Excellent 1 Satisfactory	None	Good	2%
5	Gutierrez, Priscilla Undated (JA 661)	1 Excellent 2 Good 3 Satisfactory	None	Fair	1%
6	Matthews, Wanda F. Review dated 8/24/16 (JA 651)	2 Excellent 3 Good 1 Satisfactory	None	Good	2%

	<b>CNA Name</b>	<b>Individual Ratings</b>	<b>LVN's Overall Rating</b>	<b>Overall Rating Listed on Summary</b>	<b>Raise</b>
7	Nielsen, Brice Review dated 8/17/16 (JA 683)	5 "5s" (Excellent) 1 "4" (Good)	"25" written under "Excellent"; "4" written under "Good"	Good	2%
8	Pacheco, Anita I. Review dated 8/23/16 (JA 673)	4 "5s" (Excellent) 2 "4s" (Good)	"4.5" written under "Excellent"	Good	2%
9	Peralta, Yesenia Undated (JA 664)	1 Excellent 1 Good 4 Satisfactory	None	Excellent	3%
10	Ramos, Rosamaria Undated (JA 693)	5 Excellent 1 Good	None	Good	2%
11	Rivera, Sheryl Review dated 7/21/16 (JA 707)	6 Excellent	None	Excellent	3%
12	Saldana, Maria Review dated 7/21/16 (JA 706)	6 Excellent	None	Excellent	3%
13	Seechan, Sheila Review dated 8/17/16 (JA 692)	4 "5s" (Excellent) 2 "4s" (Good)	"20" written under "Excellent"; "8" written under "Good"	Good	2%
14	Tompkins, Jeremy Undated (JA 655)	1 Excellent 4 Good 1 Satisfactory	None	Good	2%
15	Xaivong, Somchith Review dated 8/24/16 (JA 688)	5 Good 1 left blank	None	Good	2%

The Company argues that where the LVN failed to provide an overall rating conforming to one of the five pre-established rating levels (Excellent, Good, Satisfactory, Fair, or Poor), DSD Hussain simply added the ratings given to the CNA in individual areas (bearing in mind that “Excellent” equals 5, “Good” equals 4, “Satisfactory” equals 3, “Fair” equals 2, and “Poor” equals 1) and then divided the total by the number of areas rated to come up with an average figure. (Br. 44-49.) The Company claims that Hussain then converted the average figure to the equivalent descriptor (again bearing in mind the equivalencies noted above). The problem for the Company is that, in several instances, it is clear that Hussain did not simply take the average of the evaluating LVN’s ratings. For example, Hussain gave CNA Yessenia Peralta an overall rating of “Excellent,” even though Peralta’s average rating was far below that: the evaluating LVN deemed Peralta “satisfactory” in four out of the six rating categories, “good” in only one category, and “excellent” in only one category, which should have resulted in an average rating of 3.5 (halfway between “satisfactory” and “good”). (JA 664.) Meanwhile, in several other cases, Hussain gave the CNA an overall rating of “good,” even where the evaluating LVN had deemed the CNA “excellent” in three or more of the six rating categories. (See JA 648, 672-73, 675, 683, 692-93.) In each instance, as the Board found, it appears that DSD Hussain exercised her discretion to determine an appropriate overall rating and corresponding wage increase, rather

than simply applying the LVN's assessments as the Company claims. (JA 468.)  
*See Pac Tell Group, Inc. v. NLRB*, 817 F.3d 85, 92-93 (4th Cir. 2015) (no authority to reward shown where manager took putative supervisors' evaluations and combined his opinions with those in evaluations to determine appropriate performance-based wage increases).<sup>11</sup>

In a vain effort to defend its summary document, and its claim that the LVNs have authority to reward CNAs, the Company argues that the Board focused on "a few" discrepancies and problems to discount all of the evidence that the Company produced about the purported relationship between LVN evaluations and CNA wage increases. As shown above, however, the problems with the Company's evidence are far from few, and they fairly suggest, as the Board concluded, "that it was the Administrator or DSD rather than the LVNs who retained ultimate control over the ratings received by the CNAs and consequently the amount of their raises." (JA 468.)

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<sup>11</sup> The evidence in this case does not support the Company's claim that the LVNs acted together with Hussain to achieve an overall rating as part of a "collaborative effort" among equals. (Br. 51.) Thus, the Company's reliance on *Extendicare Health Facilities, Inc.*, 330 NLRB 1377 (2000), which involved such collaborative evaluations, is misplaced. *See Harbor City Volunteer Ambulance Squad, Inc.*, 318 NLRB 764, 764 (1995) (supervisory status established where putative supervisors prepared evaluations through a "collaborative effort" with higher-level managers, those evaluations led to wage increases, and there was no evidence that managers ever took unilateral action in regard to the evaluations); *cf. Harborside Healthcare, Inc.*, 330 NLRB 1334, 1335 (2000) (finding "no evidence that [charge nurse] evaluations . . . reflect a collaborative effort between equals").

Having failed to demonstrate a direct correlation between LVN evaluations and CNA wage increases, the Company falls back on the testimony of Tolman that he told the LVNs that they would be evaluating the CNAs, and that their evaluations would determine CNA wage increases. But “[s]tatements by management purporting to confer authority do not alone suffice” to establish supervisory status under the Act. *Beverly Enters.-Mass., Inc. v. NLRB*, 165 F.3d 960, 963 (D.C. Cir. 1999); *accord Jochims v. NLRB*, 480 F.3d 1161, 1168 (D.C. Cir. 2007). In any event, no other witness was able to confirm that Tolman even made the above two statements to the LVNs, whether in a group meeting or otherwise.<sup>12</sup>

At best, thus, the Company’s evidence on the issue of authority to reward is ambiguous and inconclusive. Under settled law, therefore, the Board reasonably found that the Company had failed to carry its burden of proving the claimed authority by a preponderance of the evidence. *Brusco Tug & Barge, Inc.*, 359 NLRB 486, 490 (2012), *enforced*, 696 F. App’x 519 (D.C. Cir. 2017); *Pac Tell Group, Inc. v. NLRB*, 817 F.3d 85, 92-93 (4th Cir. 2015).

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<sup>12</sup> The Company makes much of the fact that Gonzales initially denied that Tolman had made the statements at issue, and then later “admitted” that he simply could not remember any such statements. (Br. 11 n.5, 15-16.) But this “admission” does not advance the Company’s cause. As the Board correctly noted, Gonzales, like DSD Hussain, did not confirm the relevant statements to which Tolman testified. (JA 466 & n.8.) Accordingly, Tolman’s testimony that he made those statements remains unsupported by any other evidence, even if not directly contradicted.

**2. The evidence does not establish that the LVNs use independent judgment in preparing CNA evaluations**

Even if the Company had succeeded in establishing the necessary direct correlation between LVN evaluations and later CNA wage increases, the Company's claim that the LVNs have supervisory authority to reward CNAs would still fail because the Company did not prove that the LVNs perform their role in the process—i.e., prepare evaluations—using “independent judgment.” 29 U.S.C. § 152(11). To exercise independent judgment within the meaning of the Act, “an individual must at a minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” *Oakwood*, 348 NLRB 686, 692-93 (2006); *accord Pac Tell Group*, 817 F.3d at 91. *See also NLRB v. Missouri Red Quarries, Inc.*, 853 F.3d 920, 928 (8th Cir. 2017) (noting that “independent judgment” under the Act requires “weigh[ing] [of] factors relevant to the action involved”); *Croft Metals, Inc.*, 348 NLRB 717, 722 (2006) (no independent judgment shown where employer “adduced almost no evidence regarding the factors weighed or balanced by lead persons in making production decisions and directing employees). Here, the Company adduced no evidence to establish that the LVNs discern or compare data in preparing the CNAs' evaluations.

To the extent that the record addresses the process by which LVNs evaluated CNAs, it suggests that the LVNs simply jot down their general impressions—by

making notations indicating that the CNA is “excellent,” “good,” “fair,” or “poor” in given areas, and sometimes adding a few narrative comments. There is no evidence as to what factors, if any, the LVNs consider in selecting among the various gradations of performance.

Indeed, Gonzales’s testimony—which the Company highlights as evidence of the “clear use of independent judgment”—only underscores that the LVNs made quick, routine judgments in filling out the evaluation forms given to them. (Br. 38-40.) For example, Gonzales testified that he evaluated “work quality” by simply considering whether the CNA seemed to handle residents well, adding that the residents are “either done good or they’re not done good.” (Br. 39, JA 364-69.) Similarly, Gonzales testified that he evaluated “attendance/punctuality” by considering whether the CNA is “on the floor when the shift starts,” and evaluated “communication” by asking “[i]f you ever hear from [the CNA].” (Br. 39, JA 364-69.) Along the same lines, Gonzales testified that he evaluated dependability by simply asking himself if the CNA “appear[ed] to get their job done . . . without [his] having to constantly be asking or taking them to their supervisor.” (Br. 30, JA 364-69.)

As the Board found, moreover, other testimony provided by Gonzales suggests that the LVNs neither had the time, nor at times the familiarity with the CNA involved, to permit any careful weighing of factors or making of distinctions.

(JA 467.) As Hussain admitted and Gonzales confirmed, Hussain gave the LVNs “very little time to complete and return the evaluations,” often asking for them to be returned the same day. (JA 467.) And although the Company counters that some of the LVNs nevertheless took the time to add narrative comments to their evaluations, none of the comments includes any suggestion that the LVN weighed different factors or considerations in rating the CNA’s performance. Instead, most of the narrative comments simply record a few general impressions or compliments on the CNA’s work. Some, moreover, specifically note the LVN’s lack of familiarity with the CNA and admit inability to meaningfully evaluate the CNA’s performance.

The Company argues that this simply means that the LVNs may have made “arbitrary” judgments in evaluating the CNAs, and that such arbitrary judgments still qualify as “independent judgment” for purposes of the Act. (Br. 36-37 n.16.) The Company, however, cites no case to support this bold claim, nor does it explain why arbitrary judgments are not “routine or clerical” and therefore non-supervisory under the clear terms of Section 2(11) of the Act. In any event, the Board has plainly held that judgments do not rise above the “routine and clerical” for purposes of Section 2(11) where they do not involve “discerning or comparing

data.” *Oakwood*, 348 NLRB at 692-93.<sup>13</sup> Applying that standard here, the Board reasonably found that the hasty and sometimes ill-informed judgments made by the LVNs in preparing evaluations would not qualify them as supervisors, even if their evaluations were directly correlated with later wage increases—which they are not, as shown above. *See VIP Health Servs., Inc. v. NLRB*, 164 F.3d 644, 649 (D.C. Cir. 1999) (where nurses based evaluations on “quick, impressionistic judgment[s],” the Board was entitled to find that their “unstudied appraisals” did not follow from independent judgment).

**D. The Company Failed To Carry Its Burden of Proving that Its LVNs Have Authority To Effectively Recommend the Hiring of CNAs**

The record establishes that an undisputed manager—DSD Hussain—controls the hiring process. Thus, it is Hussain who “solicit[s] applications, grant[s] and conduct[s] interviews, and decide[s] when and whom to hire.” *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 310 (6th Cir. 2012) (finding that charge nurses lacked authority to hire or effectively recommend the hiring of CNAs). The Company nevertheless claims that the LVNs “effectively

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<sup>13</sup> While advancing its own peculiar and unsupported view of independent judgment, the Company does not challenge the Board’s interpretation of that statutory term in *Oakwood*. The Company accordingly has waived any challenge to the *Oakwood* definition of independent judgment that the Board applied in this case. *See Dunkin’ Donuts Mid-Atl. Distrib. Ctr., Inc. v. NLRB*, 363 F.3d 437, 441 (D.C. Cir. 2004).

recommend” the hiring of CNAs because the Company has started pulling LVNs from the floor to ask questions and record answers in applicant interviews. (Br. 62-63.) The Board reasonably rejected the suggestion that such ministerial activities qualify as effective hiring recommendations for purposes of Section 2(11) of the Act.

As the Board found, individual “LVNs are quickly pulled into hiring interviews with no prior notice or time to prepare,” and they are “handed the [Company’s] already established list of questions immediately before the interview.” (JA 470.) During the interview, the LVN’s role is to ask the applicant a set of five questions printed on the Company’s pre-prepared list, and to write down the applicant’s answers. Although the Company’s witnesses testified that, in theory, the LVNs are free to go beyond the list of prepared questions, “there is no detailed, concrete non-conclusory evidence that any LVNs have in fact asked questions other than the prepared questions, what questions were asked, and whether the applicants’ answers to such unrehearsed questions played any part in whether they did or did not ultimately receive the CNA position for which they were applying.” (JA 470.) *Frenchtown*, 683 F.3d at 310 (finding that the charge nurses’ supervisory authority to hire was not shown based on manager’s conclusory testimony, which “lacked important details,” such as “what precisely

the charge nurses said about the [applicant] aides” and “what role or weight the charge nurses’ input played in hiring the aides”).

At the conclusion of the interview, the LVN hands in (to the DSD) the completed form, capturing the Company’s pre-printed questions and the LVN’s transcription of the applicant’s answers. DSD Hussain also solicits oral feedback from the LVN about the applicant, but as the Board found, there is no evidence that any LVN’s feedback included a specific recommendation to hire, or not to hire, an applicant. There is also very little specific evidence as to whether or how an LVN’s feedback or thoughts on an applicant were later relied upon in making hiring decisions. In any event, Hussain’s continual involvement in every stage of the hiring process, including the interviews, undermines the Company’s position that the LVNs make recommendations that are routinely followed without a superior’s independent investigation, and therefore “effective” for purposes of the Act. *See J.C. Penney Corp.*, 347 NLRB 127, 129 (2006) (“mere screening of applications or other ministerial participation” in the hiring process does not suggest supervisory authority); *Aardvark Post*, 331 NLRB 320, 320-21 (2000) (editor was not a supervisor where he merely let superior know whether applicants were technically qualified and left superior to determine whether the applicant was otherwise a good fit); *Int’l Ctr. for Integrative Studies/The Door*, 297 NLRB 601, 601-02 (1990) (employee lacked authority to effectively recommend hiring where

his role was limited to screening resumes, making recommendations with respect to technical qualifications, and participating, along with higher-level officials, in applicant interviews).

The Company attempts to meet its burden of proving effective recommendation by citing a single interview after which—according to DSD Hussain—LVN Maria Santillan overcame Hussain’s misgivings about an applicant, by relating her own past experience with that applicant at another facility. As an initial matter, the Company cannot meet its burden based on an isolated incident. *See NLRB v. Missouri Red Quarries, Inc.*, 853 F.3d 920, 928 (8th Cir. 2017) (noting that if “an isolated incident of supervision” were sufficient, “practically all employees would be supervisors” (internal quotation marks and citation omitted)); *Frenchtown*, 683 F.3d at 306 (finding that “[a] single instance of discipline does not support a finding of supervisory status”). Further, as the Board reasonably found, Santillan’s purported influence in this single instance does not establish that the LVNs, as a class, make effective recommendations with regard to hiring. (JA 471.)

Instead, the incident as recounted by Hussain simply shows that “Hussain valued the opinion of LVN Santillan . . . because of the merely coincidental fact that she happened to work with [the] CNA applicant . . . at another facility operated by another employer in the past.” (JA 471.) Hussain, in other words,

gave weight to Santillan’s feedback because Santillan, “irrespective of her LVN status and her participation in the hiring interview, was able to speak to the quality of CNA applicant Ramona’s work on a first-hand percipient basis.” (JA 471.) *See Jefferson Chem. Co.*, 237 NLRB 1099, 1102 (1978) (authority to effectively recommend not shown where a recommendation to hire “is approved out of respect for the judgment of another, rather than because of [her] delegated authority to participate in the hiring process”). Even if, as the Company maintains, this single incident admits of other interpretations, the Company cannot carry its burden of proving supervisory status by ambiguous or inconclusive evidence. *See Pac Tell Group, Inc. v. NLRB*, 817 F.3d 85, 92-93 (4th Cir. 2015); *see also NLRB v. NSTAR Elec. Co.*, 798 F.3d 1, 15 (1st Cir. 2015) (on review, the party challenging the Board’s supervisory-status determination must show that the evidence “compels a conclusion contrary to the one” reached by the Board).

**E. The Company Failed To Carry Its Burden of Proving that Its LVNs Have Authority To Assign CNAs**

Under well-established Board law, the term “assign” as used in Section 2(11) of the Act refers to “appointing an employee to a time (such as a shift or overtime period),” “designating an employee to a place (such as a location, department, or wing),” or “giving significant overall duties, i.e., tasks, to an employee.” *Oakwood*, 348 NLRB at 689-90; *accord Frenchtown*, 683 F.3d at 311; *Mars Home for Youth v. NLRB*, 666 F.3d 850, 855 (3d Cir. 2011). “‘Assign’ does

not refer to an ‘ad hoc instruction that the employee perform a discrete task,’ nor does it include assignments made ‘solely on the basis of equalizing workloads.’”

*Pac Tell Group*, 817 F.3d at 92.

With regard to assignment to a time, there is no evidence that the LVNs assign the CNAs to a particular time. Staffing Coordinator/Scheduler Amanda Pacheco periodically draws up schedules for all nursing staff, with the approval of the Director of Nursing. Those schedules identify when individual CNAs and LVNs will work. The LVNs have no role in preparing the overall schedules. Moreover, the LVNs do not even have the lesser role of summoning on-call CNAs to work, or keeping CNAs at work beyond their scheduled hours.

Although DSD Hussain testified that LVNs sometimes may allow a sick CNA to go home, she inconsistently testified that in such an instance she, as the DSD, or Scheduler Pacheco, would have to be apprised of the situation before the CNA could leave. LVN Gonzales, for his part, specifically denied that he had any authority to send a sick CNA home.

Even if the evidence conclusively established that the LVNs have authority to send sick CNAs home, the Board reasonably found that such authority would not support a finding of Section 2(11) supervisory status. As the Board explained, “[i]t would seem self-evident that a sick employee cannot continue to work, especially in a healthcare facility, and acknowledgment of this fact by an LVN

does not require sufficient independent judgment to establish that such LVN possessed supervisory authority.” (JA 464.) *See C&W Super Mkts., Inc. v. NLRB*, 581 F.2d 618, 622 (7th Cir. 1978) (no supervisory authority where night manager could “allow employees to go home early if they were sick or if there was no work left for them to do”); *see also Shaw, Inc.*, 350 NLRB 354, 357 & n.23 (2007) (authority to “permit an employee to leave work shortly before the end of the workday” was merely routine); *Azusa Ranch Mkt.*, 321 NLRB 811, 812 (1996) (authority “to allow employee to leave early on request” was merely routine).

With regard to assignment to a place, the record fails to establish that the LVNs have authority to designate CNAs to a place. In drawing up the overall nursing schedule, Scheduler Pacheco determines where, in the facility, each CNA will work, as well as “which CNAs [will] work with which LVNs.” (JA 464.) LVNs have no role in this process, but merely transcribe Pacheco’s determinations—either directly from her nursing schedule, or indirectly from recent daily assignment sheets. Contrary to the Company’s claims, there is no evidence that any LVN has ever deviated from Pacheco’s assignments in preparing a daily assignment sheet. (Br. 53-54.) Moreover, even if the LVNs may determine the order in which the CNAs perform routine tasks during their shifts (such as distributing meal trays and responding to resident call lights), the limited authority to sequence work within a shift does not qualify as authority to “assign” under the

Act. *See Oakwood*, 348 NLRB at 689 (distinguishing between assignment of employees to a shift, which is supervisory, and “choosing the order in which the employee will perform discrete tasks” during the shift, which is not supervisory); *accord NSTAR*, 798 F.3d at 16.

The Company argues that, even so, the LVNs have authority to “assign,” within the meaning of the Act, because they can temporarily move a CNA from one unit to another to address an imbalance of work caused by a CNA’s unexpected absence or a change in the resident census. (Br. 53-54.) But this kind of authority amounts to a mere switching of tasks among employees, which does not rise to the level of assignment for purposes of the Act. *See Croft Metals*, 348 NLRB 717, 722 (2006).

With regard to the remaining aspect of assignment under *Oakwood*—the giving of significant overall duties—it is clear that the LVNs only give CNAs occasional discrete tasks related to the patient care in which both the LVNs and CNAs are jointly involved. Under settled law, such discrete or “ad hoc assignments” do not transform an employee into a supervisor under the Act. *See Croft Metals*, 348 NLRB 717, 721 (2006); *accord Frenchtown*, 683 F.3d at 311. As the Board found in this case, the “LVNs and CNAs work side by side performing many of the same patient care duties . . . .” (JA 464.) *See Latas de Aluminio Reynolds*, 276 NLRB 1313 (1985) (fact that putative supervisors perform

the same duties as putative supervisees militates against a finding of supervisory status). The CNAs' duties, moreover, "are simply a function of their classifications and are performed without significant instruction or oversight by an LVN." (JA 465.)

In any event, even if the LVNs' various, minor actions above qualified as assigning the CNAs to a place or to significant overall duties, the Company has failed to establish that the alleged assignments require the use of independent judgment. The transcription of Pacheco's CNA assignments onto daily assignment sheets, or the copying of CNA assignments from past daily assignment sheets, is a "routine or clerical" activity. In either situation, the LVNs are merely following an already established pattern, which requires no independent judgment. *CGLM Inc.*, 350 NLRB 974, 984 (2007) (warehouse manager issued only "routine or clerical" directions where "[l]oading trucks was performed in a set pattern"), *enforced*, 280 F. App'x 366 (5th Cir. 2008); *Croft Metals*, 348 NLRB at 722 (no independent judgment where lead persons tell workers what to load, but "follow a preestablished delivery schedule and generally employ a standard loading pattern").

The Company produced no "actual examples of nurses adjusting patient assignments that also described the factors the nurse considered in making the adjustment, a showing necessary to establish independent judgment." *Frenchtown*,

683 F.3d at 312. And the mere transfer of a CNA from one unit to another where there is a staffing shortage or change in resident census may involve nothing more than “the equalization of workloads[,] which the Board has found does not require the exercise of independent judgment.” (JA 464.) *See Oakwood*, 348 NLRB at 693; *accord Pac Tell Group*, 817 F.3d at 92. The Company, moreover, has failed to show that something more was involved in addressing staffing shortages or changes in the resident census here—for example, that the LVNs analyzed the CNAs’ relative skills and individual patient needs, and reallocated staff based on such analysis. *See Loparex LLC v. NLRB*, 591 F.3d 540, 551 (7th Cir. 2009) (assignments that “did not take into account the personal characteristics” of the employees did not require independent judgment); *cf. Frenchtown*, 683 F.3d at 311 (recognizing that nurses use independent judgment where “they weigh the needs of a patient against the skills or special training of staff”).

The same is true for the LVNs’ assignment of discrete duties to the CNAs. As the Board found, the CNAs, as a group, are similarly skilled in assisting residents with activities of daily living, such as eating or bathing. Their duties are “well-known and based on their title rather than on any particular expertise.” (JA 465.) Accordingly, there appears to be no basis for the LVNs “to consider the relative skills or strengths of the CNAs trained on a particular task,” and the Company failed to show otherwise. (JA 465.) *See NSTAR*, 798 F.3d at 14 n.12

(disputed employees lacked authority to assign with independent judgment where record failed to show that they analyzed available employee skill sets in making alleged assignments); *NLRB v. Sub Acute Rehab. Ctr. at Kearny, LLC*, 675 F. App'x 173, 178 (3d Cir. 2017) (nurses lacked authority to assign with independent judgment where nursing home's staffing coordinator created the schedule for CNAs, and nurses merely distributed routine daily tasks among similarly skilled CNAs). The Board thus found that the LVNs simply match available CNAs to tasks that must be done—which does not require meaningful discretion or independent judgment. *See Telemundo de Puerto Rico, Inc. v. NLRB*, 113 F.3d 270, 274 (1st Cir. 1997) (technical director's orders were “perfunctory and routine” where “each technician had his own assignment and performs repetitive tasks day after day, [and] the crew members require minimal supervision”); *Shaw*, 350 NLRB at 356.<sup>14</sup>

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<sup>14</sup> In arguing that the LVNs exercise independent judgment in making assignments to CNAs, the Company treats the LVNs' responsibility for the CNAs' work as if it is relevant to the question of independent judgment. (Br. 56-58.) Responsibility, however, goes to an entirely different set of terms in Section 2(11), and an entirely different form of statutory authority: the authority “responsibly to direct” other employees. That distinct form of supervisory authority, moreover, is not at issue in this case, as the Company did not claim, before the Board, that the LVNs are supervisors by virtue of any authority to responsibly direct CNAs. *See* 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.”).

## **F. The Company Failed To Carry Its Burden of Proving that Its LVNs Have Authority To Discipline CNAs**

The Company's argument that the LVNs have authority to discipline CNAs rests on just 16 nurse write-ups in evidence, as well as the testimony of Administrator Tolman and DSD Hussain that the nurses have the power to issue such write-ups independently.<sup>15</sup> Although the Company proffered many more write-ups—37 in all—there are “various defects” undermining the probative value of most of those proffered write-ups. (JA 472.) Seven were issued by RNs and therefore have no bearing on the alleged authority of the LVNs. (JA 472.) Of the remaining write-ups, DSD Hussain admitted that 14 followed from express instructions that she gave the LVNs involved—either to write up specific CNAs or to write up a certain type of infraction. (JA 475 & nn.22-23.) Accordingly, those write-ups, as well, shed no light on the LVNs' alleged authority. *See Oakwood*, 348 NLRB at 693 (holding that “a judgment is not independent if it is dictated by . . . the verbal instructions of a higher authority”); *accord Pac Tell Group*, 817 F.3d at 93; *Frenchtown*, 683 F.3d at 304.

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<sup>15</sup> The Company does not challenge the Board's finding that the evidence is inconclusive as to the LVNs' authority to effectively recommend discipline by other means. (JA 474.) The Company accordingly has waived any argument relating to that separate finding unrelated to the nurse write-ups. *See Dunkin' Donuts*, 363 F.3d at 441.

The Company's relevant documentary evidence, thus, dwindles to 16 write-ups, and even those appear to be nothing more than incident reports. (JA 473.) *See Allied Aviation Serv. Co. of New Jersey v. NLRB*, 854 F.3d 55, 65 (D.C. Cir. 2017) ("Having a role as witnesses, or reporters of fact, within a disciplinary process is legally insufficient to establish the effective exercise of disciplinary authority."). Moreover, as the Board found, there is no evidence that these write-ups—whether called “oral counselings” or “written warnings”—“lead to any actual discipline of a CNA or otherwise affect their terms and conditions of employment.” (JA 472-73.) Accordingly, under settled Board law, the write-ups do not establish authority to discipline for purposes of Section 2(11) of the Act. *See Ten Broeck Commons*, 320 NLRB 806, 812 (1996) (written warnings that are merely reportorial and not linked to disciplinary action affecting job status are not evidence of supervisory authority); *Ohio Masonic Home*, 295 NLRB 390, 394 (1989) (“The mere authority to issue verbal reprimands . . . is too minor a disciplinary function to constitute supervisory authority.”); *Phelps Cmty. Med. Ctr.*, 295 NLRB 486, 490 (1989) (the power to issue warnings that do not alone affect job status or tenure is not supervisory); *accord Jochims v. NLRB*, 480 F.3d 1161, 1170 (D.C. Cir. 2007).

Nor has the Company established that the LVNs' write-ups are disciplinary by virtue of their role in a defined progressive disciplinary system. *See The*

*Republican Co.*, 361 NLRB No. 15, 2014 WL 3887221, at \*11 (2014) (“A warning may qualify as disciplinary within the meaning of Section 2(11) if it automatically or routinely leads to job-affecting discipline, by operation of a defined progressive disciplinary system.” (internal quotation marks and citation omitted)). Although Administrator Tolman testified that the Company has a system of progressive discipline, he was unclear as to the progression of steps within that purported system. At first, he testified that the steps are: in-service training, verbal warning, written warning, “and then potentially termination.” (JA 62.) Later in his testimony, however, he allowed that the third step in the process could be “another written [warning], but it could be termination,” and that suspension could be a step in the system as well. (JA 62, 128-29.) *See also Frenchtown*, 683 F.3d at 307 (“Although [the director of nursing] did testify generally that in-services lead to discipline and are the first step in the disciplinary process, general, conclusory testimony that employees have supervisory responsibilities is not sufficient to satisfy [the Company’s] burden of proof.”).

Meanwhile, the Company’s employee handbook, which purports to set forth the Company’s workplace policies, says nothing about the alleged progressive disciplinary system. And the Company produced no evidence to demonstrate that any oral counseling or written warning had ever led to more serious action by operation of the alleged progressive disciplinary system. *See Frenchtown*, 683

F.3d at 308 (employer claim that nurse-prepared forms routinely led to discipline was “undercut by the fact that [no nurse] mentioned . . . considering [a CNA’s] prior in-service in her file nor even checking [a CNA’s] file before issuing the discipline”). In these circumstances, the Board reasonably found that the Company had not “borne its burden of proving the existence of a progressive disciplinary system, and the role that the warnings introduced by the [Company] play within the system.” (JA 474.) *Veolia Transp. Servs., Inc.*, 363 NLRB No. 188, 2016 WL 2772296, at \* 8 (2016).

As the Board further found, even assuming that the LVNs’ write-ups qualify as disciplines for purposes of the Act, the Company still failed to prove that the LVNs exercised independent judgment in preparing them. The Company adduced no LVN testimony regarding the preparation of the write-ups in evidence. Moreover, many of the write-ups memorialized obvious infractions—such as leaving a resident in soiled or dangerous conditions—that demanded action, thus eliminating any role for the discretionary choices characteristic of independent judgment. *Frenchtown*, 683 F.3d at 309 (holding that no independent judgment is shown where the putative nurse-supervisor took action based on egregious misconduct); *accord Jochims*, 480 F.3d at 1171-72 (citing Board cases for the proposition that no independent judgment is required to respond to obvious violations of employer policy or common working conditions); *see also Oakwood*,

348 NLRB at 693 (independent judgment is not implicated “[i]f there is only one obvious and self-evident choice”).<sup>16</sup>

**G. The Secondary Indicia on Which the Company Relies Do Not Demonstrate the LVNs’ Supervisory Status**

In the absence of specific evidence affirmatively establishing the LVNs’ alleged supervisory authority, the Company cannot meet its burden through indirect means, by relying on secondary indicia of supervisory status. *Frenchtown*, 683 F.3d at 315; *735 Putnam Pike Operations, LLC v. NLRB*, 474 F. App’x 782, 784 (D.C. Cir. 2012). Thus, notwithstanding the Company’s insistence that the LVN’s are “charge nurses,” there is nothing magical or transformative about that title. (Br. 3.) “[T]he Act, by its terms, focuses on what workers are authorized to do, not what they are called.” *NLRB v. NSTAR Elec. Co.*, 798 F.3d 1, 11 (1st Cir. 2015); *accord Allied Aviation*, 854 F.3d at 59 (“it is job function, not title, that confers supervisory status”). “Were [it] not so, an employer could give an employee with no supervisory duties a supervisory title and thereby deny that worker the protection that Congress intended the Act to provide.” *NSTAR*, 798 F.3d at 12.

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<sup>16</sup> The testimony of LVN Gonzales to which the Company refers (Br. 59) as an example of the LVNs’ disciplinary authority only underscores the lack of independent judgment informing LVN write-ups where obvious infractions are concerned. Gonzales testified that if he found a CNA sleeping at a nurses’ station or in a room, he “would know that’s call for a write-up” because “that’s not acceptable at the [work]place.” (Br. 59, citing JA 317-18.)

Along the same lines, the fact that the Company issued a “charge nurse” job description to the LVNs, purporting to give them supervisory authority that they did not previously have, does not demonstrate that the LVNs actually possess supervisory authority. (Br. 65-66.) *See Frenchtown*, 683 F.3d at 307-08, 314 (job descriptions are insufficient to establish supervisory status because “theoretical or paper power does not a supervisor make” (citation omitted)). Nor does it matter that the Company may have told LVNs and CNAs about the LVNs’ new job description and proposed expanded range of authority. (Br. 64.) “Statements by management purporting to confer authority do not alone suffice” to establish supervisory status under the Act. *Beverly Enters.-Mass., Inc. v. NLRB*, 165 F.3d 960, 963 (D.C. Cir. 1999); *accord Jochims*, 480 F.3d at 1168.

Likewise, there is no merit to the Company’s suggestion that the LVNs should be considered statutory supervisors because they are, at times, the highest-ranking employees at the facility. (Br. 55-56 & n.27, 66.) As this Court has explained, “if the [nurses] whom the [e]mployer contends are in charge do not possess Section 2(11) supervisory authority, then the absence of anyone else with such authority does not then automatically confer it upon th[o]se nurses.” *VIP Health Servs., Inc. v. NLRB*, 164 F.3d 644, 649-50 (D.C. Cir. 1999) (internal quotation marks and citation omitted); *see also NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1467 (7th Cir. 1983) (“A night watchman is not a supervisor just because he

is the only person on the premises at night, and if there were several watchmen it would not follow that at least one was a supervisor.”). In any event, the LVNs are never truly in charge of the facility in this case, because a higher-level official is always on-call and therefore available if an issue requiring supervisory input arises. *See Palmetto Prince George Operating, LLC v. NLRB*, 841 F.3d 211, 217 (4th Cir. 2016) (agreeing with the Board that “the fact that nurses are the most senior staff on site after hours ‘is even less probative where management is available after hours’” (quoting *Golden Crest Healthcare Ctr.*, 348 NLRB 727, 730 n.10 (2006)); *Frenchtown*, 683 F.3d at 315.

Clearly, the LVNs are an important part of the Company’s operations, as are the CNAs. But “important roles are played by many people who are not supervisors,” and importance is not the test for supervisory status under the Act. *NLRB v. Hilliard Dev. Corp.*, 187 F.3d 133, 148 (1st Cir. 1999). As the Board reasonably found, the Company did not carry its burden of proving that the LVNs have any form of supervisory authority recognized in Section 2(11) of the Act. Because the LVNs are therefore statutory employees, the Company is legally obligated to bargain with the Union as the collective-bargaining representative that the LVNs overwhelmingly selected, and its refusal to do so violates Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)), as the Board properly found. *See VIP Health Servs.*, 164 F.3d at 646 (upholding Board finding that employer

violated Section 8(a)(5) and (1) by refusing to bargain with union as representative of nurses, where employer had failed to establish its defense that nurses were statutory supervisors).

**CONCLUSION**

The Board respectfully requests that the Court enter a judgment denying the Company's petition for review and enforcing the Board's Order in full.

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National Labor Relations Board

February 2018

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

THYME HOLDINGS, LLC d/b/a WESTGATE	)	
GARDENS CARE CENTER	)	
	)	
Petitioner/Cross-Respondent	)	
	)	Nos. 17-1191 & 17-1206
v.	)	
	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD	)	32-CA-190480
	)	
Respondent/Cross-Petitioner	)	
	)	
and	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL	)	
UNION LOCAL 2015	)	
	)	
Intervenor	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 12,790 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC  
this 8th day of February 2018

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and	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL	)	
UNION LOCAL 2015	)	
	)	
Intervenor	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on February 8, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC  
this 8th day of February 2018

# **ADDENDUM**

**STATUTORY ADDENDUM**

**Relevant provisions of the National Labor Relations Act,  
29 U.S.C. §§ 151-69:**

Sec. 2. [§152.] When used in this Act [subchapter]—

\*\*\*

(3) The term “employee” shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act [this subchapter] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

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

Sec. 7. [§ 157.] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a

condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

Sec. 8. [§ 158.] (a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];

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(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [section 159(a) of this title].

Sec. 9 [§ 159.]

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(c) [Hearings on questions affecting commerce; rules and regulations]

(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) [subsection (a) of this section], or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) [subsection (a) of this section]; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a) [subsection (a) of this section]; the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists

shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c) [section 160(c) of this title].

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act [subchapter] in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) [of this section] the extent to which the employees have organized shall not be controlling.

(d) [Petition for enforcement or review; transcript] Whenever an order of the Board made pursuant to section 10(c) [section 160(c) of this title] is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f)

[subsection (e) or (f) of section 160 of this title], and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Sec. 10. [§ 160.] (a) [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

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(e) [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce

additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.