

Nos. 17-2330, 17-2579

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

2850 GRAND ISLAND BOULEVARD OPERATING COMPANY, LLC,
d/b/a ELDERWOOD AT GRAND ISLAND

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

BRIEF AND SUPPLEMENTAL APPENDIX FOR
THE NATIONAL LABOR RELATIONS BOARD

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TABLE OF CONTENTS

Headings	Page(s)
Statement of jurisdiction	1
Statement of the issues	2
Statement of the case.....	3
I. The Board’s findings of fact	4
A. Background; the nursing hierarchy at Elderwood’s facility	4
B. The work responsibilities of Elderwood’s CNAs and LPNs	5
C. Employee evaluations, awards, and discipline.....	7
D. The Board-supervised election and the representation case before the Board	8
E. The unfair-labor-practice case before the Board.....	10
II. The Board’s conclusions and Order	11
Summary of argument.....	11
Argument.....	13
Elderwood violated the Act by refusing to recognize or bargain with the Union	13
A. Substantial evidence supports the Board’s finding that Elderwood failed to demonstrate that the LPNs constitute supervisors under the Act.....	13
1. The party alleging supervisory status has the burden to demonstrate that the putative supervisors exercise supervisory functions using independent judgment	14
2. There is insufficient evidence that LPNs exercise any supervisory functions using independent judgment	17

TABLE OF CONTENTS

Headings-cont'd	Page(s)
a. LPNs do not assign work to CNAs using independent judgment	17
i. There is insufficient evidence that LPNs exercise independent judgment by assigning CNAs to particular residents.....	18
ii. There is insufficient evidence that LPNs exercise independent judgment by otherwise assigning significant overall duties to CNAs	23
b. LPNs do not responsibly direct CNAs	26
i. There is insufficient evidence that LPNs are held accountable via annual performance evaluations for directing CNAs.....	27
ii. There is insufficient evidence that LPNs are held accountable by being subject to discipline for directing CNAs or that they exercise independent judgment in direction.....	29
c. LPNs lack the authority to discipline or effectively recommend disciplining CNAs.....	32
d. LPNs lack the authority to effectively recommend rewarding CNAs.....	36
e. LPNs do not adjust the grievances of CNAs	38
f. LPNs lack the authority to effectively recommend the transfer of CNAs.....	40
B. The Board did not abuse its discretion in overruling Elderwood’s election objections and certifying the Union	42

TABLE OF CONTENTS

Headings-cont'd	Page(s)
1. The party challenging the conduct of an election bears a heavy burden to prove objectionable conduct interfering with employee free choice	43
2. LPNs did not engage in objectionable conduct warranting invalidation of the election results	45
a. There was no objectionable conduct by LPNs if the Court affirms the Board's finding that the LPNs are not supervisors	45
b. The Court lacks jurisdiction to entertain Elderwood's forfeited objection to the Union's choice of an LPN as its election observer	46
c. The Board did not abuse its discretion in finding insufficient evidence that an LPN engaged in objectionable electioneering near the polling area.....	49
d. The Board did not abuse its discretion in finding insufficient evidence that an LPN made an objectionable promise of benefits to a coworker.....	51
e. The Board did not abuse its discretion in finding insufficient evidence that LPNs engaged in objectionable harassment or coercion of coworkers.....	53
f. The presence of LPNs at organizing meetings or in the vicinity of a coworker signing an authorization card does not establish objectionable misconduct	55
3. The Union did not engage in objectionable conduct warranting invalidation of the election results	56
4. The Court lacks jurisdiction to entertain Elderwood's unfounded argument that the tentative inclusion of LPNs in the unit description requires decertification.....	58
Conclusion	61

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Advanced Disposal Servs. E., Inc. v. NLRB</i> , 820 F.3d 592 (3d Cir. 2016)	57
<i>Amalgamated Clothing & Textile Workers Union v. NLRB</i> , 736 F.2d 1559 (D.C. Cir. 1984).....	58
<i>Avante at Wilson, Inc.</i> , 348 NLRB 1056 (2006).....	15
<i>Boire v. Greyhound Corp.</i> , 376 U.S. 473 (1964).....	2
<i>Bos. Insulated Wire & Cable Co.</i> , 259 NLRB 1118 (1982).....	44, 57
<i>Brown & Root, Inc.</i> , 314 NLRB 19 (1994).....	31
<i>C&G Heating & Air Conditioning, Inc.</i> , 356 NLRB 1054 (2011).....	57
<i>Carrier Air Conditioning Co. v. NLRB</i> , 547 F.2d 1178 (2d Cir. 1976)	53
<i>Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.</i> , 467 U.S. 837 (1984).....	15
<i>Children’s Farm Home</i> , 324 NLRB 61 (1997).....	32, 36, 37
<i>Chinese Daily News</i> , 344 NLRB 1071 (2004).....	56
<i>Coventry Health Ctr.</i> , 332 NLRB 52 (2000).....	36

TABLE OF AUTHORITIES

Cases-cont'd	Page(s)
<i>Croft Metals, Inc.</i> , 348 NLRB 717 (2006)	17
<i>Frenchtown Acquisition Co. v. NLRB</i> , 683 F.3d 298 (6th Cir. 2012)	16
<i>Freund Baking Co.</i> , 330 NLRB 17 (1999)	2
<i>Golden Crest Healthcare Ctr.</i> , 348 NLRB 727 (2006)	15, 20, 26, 27, 28, 29, 40
<i>Hamilton Test Sys., N.Y., Inc. v. NLRB</i> , 743 F.2d 136 (2d Cir. 1984)	59
<i>Harborside Healthcare, Inc.</i> , 343 NLRB 906 (2004)	44, 54, 56
<i>Ken-Crest Servs.</i> , 335 NLRB 777 (2001)	39, 40
<i>Laguna Coll. of Art & Design</i> , 362 NLRB No. 112, 2015 WL 3758354 (June 15, 2015)	52, 54
<i>Longs Drug Stores Cal., Inc.</i> , 347 NLRB 500 (2006)	50
<i>Lowe's HIW, Inc.</i> , 349 NLRB 478 (2007)	49, 50
<i>Lynwood Manor</i> , 350 NLRB 489 (2007)	18, 19, 20, 21, 22, 25
<i>Matson Terminals, Inc.</i> , 361 NLRB No. 50, 2014 WL 4809833 (Sept. 26, 2014), <i>enforced</i> , 637 F. App'x 609 (D.C. Cir. 2016)	46

TABLE OF AUTHORITIES

Cases-cont'd	Page(s)
<i>Mich. Masonic Home</i> , 332 NLRB 1409 (2000)	15, 22, 36
<i>Milchem, Inc.</i> , 170 NLRB 362 (1968)	50
<i>Monarch Bldg. Supply</i> , 276 NLRB 116 (1985)	48
<i>Nathan Katz Realty, LLC v. NLRB</i> , 251 F.3d 981 (D.C. Cir. 2001).....	57
<i>NLRB v. A.J. Tower Co.</i> , 329 U.S. 324 (1946).....	43
<i>NLRB v. Arthur Sarnow Candy Co.</i> , 40 F.3d 552 (2d Cir. 1994)	43, 44
<i>NLRB v. Bell Aerospace Co.</i> , 416 U.S. 267 (1974).....	15
<i>NLRB v. Black Bull Carting, Inc.</i> , 29 F.3d 44 (2d Cir. 1994)	44
<i>NLRB v. Bloomfield Health Care Ctr.</i> , 372 F. App'x 118 (2d Cir. 2010).....	43
<i>NLRB v. Health Care & Ret. Corp. of Am.</i> , 511 U.S. 571 (1994).....	14
<i>NLRB v. HeartShare Human Servs. of N.Y., Inc.</i> , 108 F.3d 467 (2d Cir. 1997)	13
<i>NLRB v. Ky. River Cmty. Care, Inc.</i> , 532 U.S. 706 (2001).....	14, 15

TABLE OF AUTHORITIES

Cases-cont'd	Page(s)
<i>NLRB v. Meenan Oil Co.</i> , 139 F.3d 311 (2d Cir. 1998)	33, 34, 59
<i>NLRB v. Quinnipiac Coll.</i> , 256 F.3d 68 (2d Cir. 2001)	16, 60
<i>NLRB v. Springfield Hosp.</i> , 899 F.2d 1305 (2d Cir. 1990)	16, 44
<i>NLRB v. Wagner Elec. Corp.</i> , 586 F.2d 1074 (5th Cir. 1978)	46
<i>N.Y. Univ. Med. Ctr. v. NLRB</i> , 156 F.3d 405 (2d Cir. 1998)	15, 29, 34, 37, 38
<i>Ne. Iowa Tel. Co.</i> , 346 NLRB 465 (2006)	56
<i>Oakwood Healthcare, Inc.</i> , 348 NLRB 686 (2006)	15, 17, 18, 19, 20, 22, 25, 26, 27, 31, 32
<i>Regal Health & Rehab Ctr., Inc.</i> , 354 NLRB 466 (2009), <i>incorporated by reference</i> , 355 NLRB 352 (2010)	19, 20
<i>Republican Co.</i> , 361 NLRB No. 15, 2014 WL 3887221 (Aug. 7, 2014).....	21
<i>Rochester Joint Bd., Amalgamated Clothing & Textile Workers Union v. NLRB</i> , 896 F.2d 24 (2d Cir. 1990)	43
<i>Safeway, Inc.</i> , 338 NLRB 525 (2002)	44
<i>Schnurmacher Nursing Home v. NLRB</i> , 214 F.3d 260 (2d Cir. 2000)	16, 36, 46, 48, 58, 60

TABLE OF AUTHORITIES

Cases-cont'd	Page(s)
<i>Sears, Roebuck & Co. v. NLRB</i> , 957 F.2d 52 (2d Cir. 1992).....	59
<i>Seattle Opera v. NLRB</i> , 292 F.3d 757 (D.C. Cir. 2002).....	46
<i>St. Francis Med.</i> , 323 NLRB 1046 (1997).....	40
<i>Superior Prot., Inc.</i> , 341 NLRB 267 (2004).....	47
<i>Ten Broeck Commons</i> , 320 NLRB 806 (1996).....	41
<i>Torrington Extend-A-Care Emp. Ass'n v. NLRB</i> , 17 F.3d 580 (2d Cir. 1994).....	45
<i>United Nurses Ass'ns of Cal. v. NLRB</i> , 871 F.3d 767 (9th Cir. 2017).....	15, 16
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	16
<i>Veolia Transp. Servs., Inc.</i> , 363 NLRB No. 98, 2016 WL 245559 (January 20, 2016).....	37, 38
<i>Veolia Transp. Servs., Inc.</i> , 363 NLRB No. 188, 2016 WL 2772296 (May 12, 2016).....	33
<i>Waldinger Corp.</i> , 331 NLRB 544 (2000), <i>enforced</i> , 262 F.3d 1213 (11th Cir. 2001).....	56

TABLE OF AUTHORITIES

Statutes	Page(s)
National Labor Relations Act, as amended (29 U.S.C. §§ 151 <i>et seq.</i>)	
Section 2(11) (29 U.S.C. § 152(11)).....	14, 15, 17, 26, 32, 36, 37, 38, 39, 41
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	3, 10, 11, 13
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	3, 10, 11, 13
Section 9(c) (29 U.S.C. § 159(c))	2
Section 9(d) (29 U.S.C. § 159(d)).....	2
Section 10(a) (29 U.S.C. § 160(a))	2
Section 10(e) (29 U.S.C. § 160(e))	2, 46, 55, 58
Section 10(f) (29 U.S.C. § 160(f)).....	2
Regulations	
29 C.F.R. § 102.69(a).....	47

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**ON PETITION FOR REVIEW AND
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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on the petition of 2850 Grand Island Boulevard Operating Company, LLC, d/b/a Elderwood at Grand Island (“Elderwood”) for review, and the cross-application of the National Labor Relations Board (“the Board”) for enforcement, of a Board Decision and Order issued against Elderwood on July 21, 2017, and reported at 365 NLRB No. 110. The Board had jurisdiction

over the unfair-labor-practice proceeding below pursuant to Section 10(a) of the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, as amended (“the Act”). 29 U.S.C. § 160(a). The Board’s Order is final with respect to all parties, and this Court has jurisdiction pursuant to Section 10(e) and (f) of the Act, as the underlying unfair labor practice occurred in New York. 29 U.S.C. § 160(e), (f). The petition and application are timely, as the Act provides no time limit for such filings.

The Board’s Order is based, in part, on findings made in an underlying representation (election) proceeding (Board Case No. 03-RC-184298), and thus the record in that proceeding is also before the Court pursuant to Section 9(d) of the Act. 29 U.S.C. § 159(d); *see Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). The Court has jurisdiction to review the Board’s actions in the representation proceeding for the limited 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 to resume processing the representation case in a manner consistent with the Court’s rulings. 29 U.S.C. § 159(c); *see Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).

STATEMENT OF THE ISSUES

Elderwood refused to recognize or bargain with the union its employees chose in a secret-ballot election to represent them. The ultimate issue is whether

substantial evidence supports the Board's finding that Elderwood's refusal violated Section 8(a)(5) and (1) of the Act, which in turn hinges on Elderwood's two challenges to the Union's certification as representative:

1. Whether substantial evidence supports the Board's finding that Elderwood failed to demonstrate that its licensed practical nurses (LPNs) constituted supervisors within the meaning of the Act, which would have made them ineligible to vote in the election or remain part of the bargaining unit.

2. Whether the Board abused its discretion in overruling Elderwood's election objections and certifying the Union.

STATEMENT OF THE CASE

This unfair-labor-practice case concerns the Board's finding that Elderwood violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5), (1), by admittedly refusing to recognize or bargain with the Union as the certified bargaining representative of a unit of Elderwood's employees. Before the Board, Elderwood contested the validity of the Union's certification by arguing that certain employees included in the unit were supervisors ineligible to vote, and by alleging that objectionable conduct interfered with the representation election. The Board rejected those arguments. The Board's findings in the representation and unfair-labor-practice proceedings, as well as the Decision and Order under review, are summarized below.

I. THE BOARD'S FINDINGS OF FACT

A. Background; the Nursing Hierarchy at Elderwood's Facility

Elderwood operates several nursing homes in New York State, including a skilled nursing facility in Grand Island, New York. (A.682; A.6.)¹ The Grand Island facility houses approximately 88 residents across two floors, each of which constitutes a separate “unit” of nurses and managers. (A.682; A.51, 165.) The facility as a whole is overseen by a Director of Nursing (“DON”), who is responsible for supervising all nursing staff. (A.682; A.245.) Below the DON is a Registered Nurse nursing supervisor (“RN nursing supervisor”), who is responsible for managing nursing across both floors. (A.682; A.52-54, 482.) The two floors are each individually managed by a Registered Nurse unit manager (“RN unit manager”), who directly supervises the licensed practical nurses (“LPNs”) and certified nursing assistants (“CNAs”) responsible for performing the daily care of residents. (A.682; A.52-54, 166-68, 482.) At times when an RN unit manager is not available, LPNs and CNAs report directly to the RN nursing supervisor. (A.682; A.52-54, 168.)

¹ “A.” references are to the Joint Appendix. “S.A.” references are to the Special Appendix. “Supp. A.” references are to the Supplemental Appendix. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” refers to Elderwood’s opening brief to the Court.

B. The Work Responsibilities of Elderwood's CNAs and LPNs

During the day shift, there are typically two LPNs and five to six CNAs working on each unit. (A.682; A.56, 165, 482.) During evening, night, and weekend shifts, there are sometimes only four or five CNAs across both units. (A.682; A.165.) Elderwood employs a full-time scheduler who assigns CNAs to particular units and shifts. (A.686; A.69-70, 484, 501.) In addition to full-time and part-time CNAs, there are also "float" CNAs who are occasionally required to switch between units. (A.686.) The order in which a CNA is required to float to a different unit is determined by a manager based on the CNA's position in a "float book," which is maintained by the RN nursing supervisor. (A.686, 698; A.68-69, 205-08, 501-02.)

At the start of each shift, regular full-time CNAs are pre-assigned to the same groups of residents without the input of LPNs. (A.686, 725; A.32, 486.) To the extent LPNs play a role in assigning part-time and float CNAs to groups of residents, their primary considerations are factors such as the gender and personality-based preferences of the residents and their families, or the equalization of workloads. (A.686-87, 726; A.32-33, 49-50.) LPNs do not have the authority to change CNAs' schedules or to grant overtime. (A.686; A.69.)

Most of the tasks performed by CNAs on a daily basis are set forth in detailed resident care plans that are kept on the door of each resident's room.

(A.687, 726; A.58-60, 504-06, 532, 542.) Each resident's personalized care plan is determined in advance by management personnel, including doctors and physical therapists. (A.687, 692; A.73, 174, 504-06.) The resident care plans go into great detail and encompass factors such as the resident's preference for the gender of the CNA caring for them. (A.691; A.59-60.) Determinations as to when and how CNAs perform tasks, such as distributing food trays, giving showers, taking vital signs, and assisting residents to the dining hall, are set in advance by the resident care plans or other documents, such as the dining room seating chart. (A.726; A.57, 174, 493, 495-96.) Any delegation of discrete tasks by LPNs is limited to balancing workloads or rotating among CNAs. (A.686-88; A.36-37.) There is a predetermined schedule for CNAs' break times, which are set in advance based on the preferences of the CNAs' assigned residents. (A.686; A.38-39, 70-71.)

Both CNAs and LPNs are required to follow the resident care plans and to ensure that each resident is properly cared for. (A.690-92; A.59, 73, 504.) In the course of their daily work, if a CNA determines that a resident is experiencing pain or other problems arise, the CNA can stop to confer with an LPN, who can then confirm the issue and report it to a management official. (A.691; A.49, 74, 87, 120-21, 506-07, 527.) The RN unit managers and other management officials have the sole authority to assess the medical needs of residents and make modifications to the resident care plans. (A.691, A.72, 87, 253.) Throughout the day, LPNs are

busy performing their own assigned tasks, such as administering medications to residents or recording information in a computerized system, which are generally distinct from the tasks performed by CNAs. (A.55-68, 483-95.)

C. Employee Evaluations, Awards, and Discipline

LPNs receive annual performance evaluations that are prepared by the RN unit manager or another management official. (A.689; A.209.) Most of the thirty-six elements listed on the LPN evaluation forms relate to the LPNs' performance of assigned tasks, while two additional elements refer to “[d]irect[ing] and monitor[ing] the personal care duties and nursing care procedures carried out by [CNAs],” and “monitor[ing] the performance of [CNAs] in implementation of the care plan” for each resident. (A.689, 727; A.652-58.) RN unit managers or other management officials also prepare annual performance evaluations for CNAs. (A.729; A.209.) Management officials sometimes solicit feedback from LPNs about specific CNAs, but the LPNs do not recommend ratings or otherwise determine the outcome of the CNAs' evaluations. (A.729; A.69, 510-11.)

Separate from their annual evaluations, employees are eligible for employee-of-the-month recognition as awarded by a panel of managers. (A.695, 729; A.411-12.) CNAs can be nominated for such recognition by any of their coworkers and by residents or family members of residents. (A.695, 729; A.425-26.)

Both LPNs and CNAs are subject to discipline from managers, including written warnings or “write-ups.” (A.690.) LPNs do not have the authority to issue discipline to CNAs or to directly cause CNAs to be disciplined. (A.728-29; A.73, 621-22.) Although LPNs have the ability to report incidents to the RN nursing supervisor or another manager, there is no requirement that they do so, and any resulting discipline is determined by the management official. (A.728-29; A.39-41, 69, 483.)

D. The Board-Supervised Election and the Representation Case Before the Board

Following a campaign to organize employees at the Elderwood facility, the Union filed a petition with the Board on September 15, 2016, seeking a representation election among all full-time and regular part-time and per diem service and maintenance employees at Elderwood’s facility, including the LPNs and CNAs. (S.A.1-2, A.680; A.6-9.) Among the employees that allegedly supported unionization were several LPNs. One of them, LPN Kerrison, attended organizing meetings and, on one occasion, was present when a coworker signed a union authorization card outside the workplace. (A.734; A.587-89.) At some point before the election, Kerrison also spoke with a CNA who asked her about the Union and the benefits of unionization, and Kerrison explained the difference between just-cause protections and at-will employment. (A.733-34; A.568-79.)

The parties entered into a stipulated election agreement, with Elderwood reserving its right to challenge the voting eligibility of the fifteen LPNs based on its contention that they were statutory supervisors, and the Board conducted a secret-ballot election on October 6. (S.A.1-2; A.6-9, 740.) The election was held in a windowless basement room of Elderwood's facility. (A.709; A.157.) On the day of the election, the Union parked a bus bearing its logo in a parking lot near Elderwood's facility, but off Elderwood's property and out of view of the polling place. (A.709; A.422-23, 659.) Several union representatives were also present off Elderwood's property. (A.708; A.422-24.) After voting herself, LPN VonReyn later returned to the facility with LPN Kissel and walked with her to the polling area. (A.706; A.424.) Per the Board agent's instructions, VonReyn waited outside while Kissel voted. (A.706; A.404.) Kerrison served as the Union's observer during the election, but Elderwood did not object to her role during the election or at a pre-election conference. (A.734.)

Elderwood filed timely objections to the election, and a Board Hearing Officer held a three-day evidentiary hearing in November 2016 with respect to those objections as well as the status of the fifteen challenged ballots cast by LPNs. (A.723.) The Hearing Officer issued a Report on Challenges and Objections recommending denial of Elderwood's challenges to the LPNs' ballots and of its election objections, which Elderwood appealed to the Board's Regional Director

for Region 3. (A.678-722.) On January 6, 2017, the Regional Director issued a Supplemental Decision and Order finding that the fifteen LPNs are not supervisory employees within the meaning of the Act, and overruling Elderwood's objections to the conduct of the election. (A.723-39.)

Elderwood filed a request for review of the Regional Director's decision with the Board. On April 21, 2017, the Board (then-Acting Chairman Miscimarra, and Members Pearce and McFerran) denied Elderwood's request for review and thereby affirmed the Regional Director's decision. (S.A.1-2 n.3, A.745-46.)

Pursuant to a revised tally of ballots, which favored the Union by a vote of 58 to 46, the Board certified the Union as the employees' representative. (A.740-43.)

E. The Unfair-Labor-Practice Case Before the Board

Following the Union's certification as bargaining representative, the Employer admittedly refused to recognize or bargain with the Union. (S.A.1-2; A.752-53.) The Board's General Counsel issued an unfair-labor-practice complaint alleging that the Employer thereby violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(1), (5), and subsequently filed a motion for summary judgment with the Board. (S.A.1; A.749-51.) Elderwood filed a response contesting the validity of the Union's certification. (S.A.1 & n.1.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On July 21, 2017, the Board (Chairman Miscimarra, and Members Pearce and McFerran) granted the General Counsel's motion for summary judgment and found that Elderwood violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize or bargain with the Union. (S.A.1-2.) The Board found that all representation issues raised by Elderwood were or could have been litigated in the underlying representation proceeding. (S.A.1.)

The Board's Order requires Elderwood to cease and desist from the unfair labor practice found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by the Act. (S.A.2.) Affirmatively, the Board's Order requires Elderwood to, on request, recognize and bargain with the Union as the exclusive representative of employees in the certified unit; and to post a remedial notice. (S.A.2.)

SUMMARY OF ARGUMENT

The determination of supervisory status under the Act, and with respect to nurses in particular, is a well-trod area of Board law. It is well established that the party alleging supervisory status—and thereby attempting to strip certain employees of their rights under federal labor law—carries the evidentiary burden in demonstrating that the putative supervisors do in fact have the authority to exercise supervisory functions. It is also well established that in exercising such

functions, putative supervisors must use independent judgment that rises above the level of the routine or clerical. Here, substantial evidence supports the Board's findings that Elderwood failed to demonstrate that its LPNs are supervisors based on any of the six supervisory functions that it has alleged. This is despite a multi-day hearing at which Elderwood was given a full opportunity to introduce evidence, and despite the volume of settled case law establishing the appropriate legal standard, the evidentiary burden placed on the party alleging supervisory status, and the necessity of specific evidence rather than conclusory assertions.

Likewise, Elderwood's objections to the conduct of the Board-supervised election, which are primarily based on mundane actions taken by allegedly pro-union supervisory LPNs before or during the election, are unfounded. Even assuming, in the alternative, that Elderwood's LPNs constitute supervisors, there is insufficient evidence of objectionable conduct that would have reasonably interfered with employee free choice in the election. Parties challenging the conduct of representation elections bear a heavy burden, and elections reflecting the desire of employees for unionization pursuant to their rights under the Act are not lightly set aside. Elderwood has failed to demonstrate that the Board abused its discretion by certifying the Union as the employees' representative.

ARGUMENT

ELDERWOOD VIOLATED THE ACT BY REFUSING TO RECOGNIZE OR BARGAIN WITH THE UNION

An employer violates Section 8(a)(5) and (1) of the Act when it refuses to recognize or bargain with the duly certified bargaining representative of its employees. *NLRB v. HeartShare Human Servs. of N.Y., Inc.*, 108 F.3d 467, 470 (2d Cir. 1997) (citing 29 U.S.C. § (5) and (1)). Elderwood has admittedly refused to recognize or bargain with the Union in order to challenge the Board's certification of the Union as the exclusive bargaining representative of a unit of Elderwood's employees. Thus, to the extent the Court upholds the Board's rejection of Elderwood's arguments as to the supervisory status of fifteen LPNs and as to the conduct of the representation election, then Elderwood has violated the Act. *Id.*

A. Substantial Evidence Supports the Board's Finding That Elderwood Failed to Demonstrate That the LPNs Constitute Supervisors Under the Act

The Board found that the fifteen LPNs who cast challenged ballots in the representation election are statutory employees entitled to union representation, rather than ineligible supervisors, and that they are properly included in the bargaining unit. (A.738, 745-46.) As such, the Board ordered the challenged ballots to be opened and counted, and subsequently certified the Union to represent

the entire unit based on a revised tally of ballots. (A.740, 742-43.) Substantial evidence supports the Board's finding.

1. The Party Alleging Supervisory Status Has the Burden to Demonstrate That the Putative Supervisors Exercise Supervisory Functions Using Independent Judgment

Section 2(11) of the Act defines the term "supervisor" to include:

. . . 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.

29 U.S.C. § 152(11). To establish that certain employees constitutes statutory supervisors, a party must demonstrate that the employees: (1) hold the authority to engage in any one of the twelve supervisory functions listed in the statute; (2) that their exercise of such authority "is not of a merely routine or clerical nature, but requires the use of independent judgment"; and (3) that their authority is held "in the interest of the employer." *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 713 (2001). The Supreme Court has recognized that terms used in Section 2(11), "such as 'independent judgment' and 'responsibly to direct,'" are ambiguous. *NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 579 (1994). As a result, it "falls clearly within the Board's discretion" to reasonably interpret the meanings of the ambiguous terms in Section 2(11). *Ky. River Cmty. Care*, 532 U.S. at 713

(citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)); see *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687-94 (2006) (clarifying Board’s interpretations of term “independent judgment” and of specific supervisory functions listed in Section 2(11)).

In excluding certain employees from the coverage of the Act, Congress took “great care” to distinguish between “true supervisors vested with ‘genuine management prerogatives,’” and lead employees “who are protected by the Act even though they perform ‘minor supervisory duties.’” *Oakwood Healthcare*, 348 NLRB at 687-88 & n.15 (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81 (1974)). Accordingly, an employer attempting to preclude certain of its employees from enjoying rights under federal labor law carries the evidentiary burden in establishing supervisory status. *Ky. River*, 532 U.S. at 711-12; see *N.Y. Univ. Med. Ctr. v. NLRB*, 156 F.3d 405, 413 (2d Cir. 1998) (noting employer’s “natural advantage in adducing proof as to how it organizes its operations and personnel”). It is well established that purely conclusory evidence is insufficient to establish employees’ authority to exercise supervisory functions, and that the absence of specific evidence is construed against the party alleging supervisory status. *Golden Crest Healthcare Ctr.*, 348 NLRB 727, 731 (2006); *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006); *Mich. Masonic Home*, 332 NLRB 1409, 1409 (2000); see, e.g., *United Nurses Ass’ns of Cal. v. NLRB*, 871 F.3d 767,

783-85 (9th Cir. 2017); *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 307-09, 314 (6th Cir. 2012).

The Board's determinations as to supervisory status, and as to whether a party carried its burden in demonstrating supervisory status, are findings of fact that are conclusive if supported by substantial evidence. *NLRB v. Quinnipiac Coll.*, 256 F.3d 68, 73-74 (2d Cir. 2001); *Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260, 265 (2d Cir. 2000). Substantial evidence means such relevant evidence as a reasonable mind "might" accept as adequate to support a conclusion in light of the record as a whole. *Schnurmacher Nursing Home*, 214 F.3d at 265. In other words, even if the Court disagrees with the Board, it will not overturn the Board's findings unless "no rational trier of fact could reach the conclusions drawn by the Board." *NLRB v. Springfield Hosp.*, 899 F.2d 1305, 1310 (2d Cir. 1990) (emphasis added); see *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (holding that courts may not displace Board's choice between "two fairly conflicting views," even if court would have made a different choice had matter been before it *de novo*).

Elderwood does not challenge (Br.34-35) the propriety of the Board's well settled *Oakwood Healthcare* line of cases, which was the primary precedent relied upon by the Board here.²

2. There Is Insufficient Evidence That the LPNs Exercise Any Supervisory Functions Using Independent Judgment

a. LPNs Do Not Assign Work to CNAs Using Independent Judgment

The Board found that Elderwood failed to demonstrate that LPNs have the authority to assign CNAs to particular residents, or to otherwise assign significant overall duties to CNAs, using independent judgment. (A.725-26.) Under Section 2(11) of the Act, the term “assign” refers to “the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” *Oakwood Healthcare*, 348 NLRB at 689. The term refers to the assignment of “significant overall duties,” not to “ad hoc instruction[s] that [an] employee perform a discrete task,” *id.*, or to the occasional “switching of tasks” among employees, *Croft Metals, Inc.*, 348 NLRB 717, 721-22 (2006).

² As a result, Elderwood's challenge to unnamed “recent health care decisions” by the Board (Br.34-35) is irrelevant. Moreover, Elderwood's invocation of various dissenting opinions by Chairman Miscimarra (Br.34-35) overlooks the fact that Chairman Miscimarra joined in the unanimous result in this case and stated that the findings regarding supervisory status are “consistent with the principles” set forth in those dissents (A.745 n.1).

In order to constitute a supervisor under the Act, an individual must not only “assign” significant overall duties, but must exercise “independent judgment” in doing so. *Oakwood Healthcare*, 348 NLRB at 687, 692-94; *e.g.*, *Lynwood Manor*, 350 NLRB 489, 489-90 (2007) (finding no supervisory status where employees assigned work but did not exercise independent judgment). When assigning such work, a supervisor must act independently by forming a judgment free of the control of others that involves “discerning and comparing data” and that requires “a degree of discretion that rises above the ‘routine or clerical.’” *Lynwood Manor*, 350 NLRB at 490.

i. There is insufficient evidence that LPNs exercise independent judgment by assigning CNAs to particular residents

The record fully supports the Board’s finding that there is insufficient evidence that LPNs exercise independent judgment by assigning part-time and float CNAs to groups of residents. (A.725-26.) It is undisputed that LPNs generally play no role in scheduling CNAs or in determining when and on what floor they work. All of Elderwood’s full-time CNAs are assigned to the same individual residents with no input from LPNs. Although LPNs may play some role in assigning part-time and float CNAs to the remaining residents as necessary, there is conflicting testimony as to how those assignments are made, and no concrete evidence that LPNs exercise “independent judgment” in making them.

In the healthcare context, the assignment of nurses to individual patients may indicate supervisory status when those assignments exhibit independent judgment by being “tailored to patient conditions and needs and particular skill sets.” *Lynwood Manor*, 350 NLRB at 490. For example, in *Oakwood Healthcare*, the Board found that one subset of charge nurses at an acute care hospital exercised independent judgment when assigning staff nurses to patients, because they frequently relied on “training and experience” to assess the medical needs of patients, the skill sets of nurses, and other complexities of the work involved. 348 NLRB at 697-98. The Board’s finding in that particular case was based on extensive mutually corroborative testimony, which included detailed examples of the independent judgment involved—such as ensuring that a staff nurse assigned to a patient in need of a blood transfusion was not assigned to another seriously ill patient, or determining whether a staff nurse should be assigned to a psychiatric patient rather than a mental health worker. *Id.* at 696-98.

Here, in contrast, the only concrete examples of considerations made by Elderwood’s LPNs in assigning part-time and float CNAs to residents are routine factors that require no expertise or independent judgment, such as the equalization of workloads, or the gender and personality-based preferences of residents and their families, which are partially detailed in the individualized resident care plans. (A.726.) *See Regal Health & Rehab Ctr., Inc.*, 354 NLRB 466, 472 (2009)

(finding no supervisory status in assigning nurses based on gender preferences of patients), *incorporated by reference*, 355 NLRB 352 (2010); *Lynwood Manor*, 350 NLRB at 490 (reaffirming that “mere equalization of workloads” requires no independent judgment). Moreover, there is testimony indicating that assignments are frequently based on room location, and that LPNs and CNAs collaborate on how to distribute assignments. (A.725 n.4; A.485-87, 500-01.) *See Oakwood Healthcare*, 348 NLRB at 698 (finding insufficient evidence of independent judgment where testimony indicated that assignments of emergency room nurses were made based on “geographic areas,” or based on rotation system not dictated by putative supervisors). There is also evidence that CNAs can effectively reject the work assignment recommendations of an LPN without facing repercussions. (A.731 & n.10; A.507-09.). *See Golden Crest Healthcare*, 348 NLRB at 729-30 (noting “well established” principle that putative supervisor must have authority “to *require* that a certain action be taken,” not “merely to *request* that a certain action be taken”).

In its brief, Elderwood entirely ignores this conflicting evidence regarding how resident assignments are made. Elderwood instead claims, wrongly, that there is “nothing in the record which controvert[s] or undermine[s]” (Br.23-24) its own conclusory assertion that LPNs consider patient acuity and nursing skill in making assignments. Yet, not only did the Board emphasize that such conflicting evidence

does exist (A.725-26), but the evidence purportedly indicating that LPNs consider patient acuity or nursing skill is limited to conclusory testimony elicited in response to leading questions and unaccompanied by any supporting examples. *See Lynwood Manor*, 350 NLRB at 490 (finding conclusory testimony that nurses consider “patient acuity,” without further explanation or illustration, insufficient to establish use of independent judgment); *see also Republican Co.*, 361 NLRB No. 15, 2014 WL 3887221, at *7 (Aug. 7, 2014) (reaffirming that party alleging supervisory status does not carry its burden if evidence “is in conflict or otherwise inconclusive”).

Elderwood primarily relies on vague testimony from LPN Mbaki agreeing with leading questions and failing to provide specific illustrations. (Br.20-24.) When initially asked which factors LPNs consider in assigning CNAs to groups of residents, Mbaki stated that he considers the gender of the CNA and specific requests from family members. (A.32-33.) In response to a leading question from Elderwood’s counsel as to whether “the skills of the [CNA]” are relevant, Mbaki agreed without providing any examples of what “skills” might be at issue. (A.33.) Indeed, Mbaki subsequently indicated that all CNAs possess the skills to care for any given resident. (A.58.) Mbaki also agreed with a leading question about the “acuity of the patient” being relevant, but he provided no details and his answer suggested that he was referring to mere personality-based considerations such as

whether a CNA “is more familiar” with a “difficult” resident. (A.33-34.) Later, Mbaki vaguely stated that the most important consideration in assigning CNAs is “making sure that the patients have been paired with the right [CNA] for the day,” and again reiterated gender preference as his only example. (A.49-50.) In additional testimony cited by Elderwood (Br.20-23), former Acting DON Tonya Stumpo vaguely indicated that CNA assignments are based on making workloads “fair and manageable” and considering whether a particular CNA “might work really well with [a particular] resident.” (A.170-71.)

The testimony relied upon by Elderwood is devoid of specific examples of patient or skill-based evaluations made by statutory supervisors, as were present in a case like *Oakwood Healthcare*, and as are required for a finding of supervisory “independent judgment” under the Act. *See Oakwood Healthcare*, 348 NLRB at 696-68; *Lynwood Manor*, 350 NLRB at 490. Moreover, the absence of such evidence, despite a three-day evidentiary hearing and the testimony of numerous employer witnesses, is construed against the party alleging supervisory status. *See Mich. Masonic Home*, 332 NLRB at 1409. Given the absence of specific examples of independent judgment, combined with the presence of conflicting testimony as to how assignments are made, there is insufficient evidence that LPNs act as supervisory employees by assigning part-time and float CNAs to residents.

ii. There is insufficient evidence that LPNs exercise independent judgment by otherwise assigning significant overall duties to CNAs

Likewise, Elderwood has failed to produce sufficient concrete evidence demonstrating that LPNs assign significant duties to CNAs or exercise independent judgment in doing so. (A.726.) The duties of CNAs in caring for residents are set forth in minute detail by the personalized care plans for each resident that are established by management officials, including doctors and physical therapists. The daily schedule of care given to residents is highly routinized, and even variables such as where to seat residents in the dining hall or the days on which residents receive showers are predetermined. To the extent LPNs are occasionally required to delegate discrete tasks to CNAs, the evidence indicates that they do so based on an attempt to balance workloads or rotate assignments among CNAs. The Board found insufficient evidence that LPNs have the authority to assign work using independent judgment or that they can unilaterally modify resident care plans to assign CNAs unscheduled tasks. (A.726 & n.6.)

In response to the Board's reasonable assessment of the evidence, Elderwood makes a number of repetitive and misleading assertions that are unsupported by the citations provided or by the evidence. (Br.20-25.) Elderwood mischaracterizes the evidence when it asserts, for example, that LPNs "make" the detailed assignment sheets governing the work performed by CNAs (Br.24), that

LPNs “often make assignments that are not on assignment sheets” (Br.24), and that LPNs assign CNAs discretionary tasks “each morning” (Br.21). The transcript citations provided by Elderwood do not support those assertions. Tellingly, when Elderwood claims that there are “specific examples” of such assignments in the record, it provides no citations whatsoever. (Br.23.)

There is similarly no evidence in the record that LPNs have “broad authority” (Br.21 n.4) to deviate from resident care plans or to assign discrete tasks such as unscheduled showers. The testimony of CNA Neyra cited by Elderwood (Br.21 n.4) merely confirms that, *when* a change to the predetermined showering schedule “need[s] to be made,” an LPN can assign that task to the appropriate CNA (A.107-08). The only proffered example of such a situation is the hypothetical scenario whereby an LPN accedes to a family’s request that a resident receive an unscheduled shower (A.57, 79-80, 91-92), which, as the Board found, would not require independent judgment on the part of the LPN (A.726 & n.6). The Board found insufficient evidence that LPNs have the discretion to independently require CNAs to give unscheduled showers. (A.726 & n.6.)

At the hearing, Elderwood’s counsel also attempted to elicit testimony that LPNs have the authority to suspend treatment in certain circumstances when CNAs do not, but the Board found that in practice “the LPN’s responsibility . . . is indistinguishable from the CNA’s.” (A.691.) Whenever any nurse, whether CNA

or LPN, determines that a resident being treated according to a resident care plan is experiencing pain or is being harmed, the nurse can make the “common sense” decision to temporarily cease treatment in order to notify a more senior nurse. (A.120-21, 527.) Thus, CNAs have the ability to stop and confer with an LPN, and the LPN must then notify the RN unit manager or another management official. Only managers have the ultimate authority to “assess” the medical needs of residents or to modify the resident care plans. (A.49, 72-74, 87, 253, 506-07.) Furthermore, Elderwood’s witnesses could not identify a specific example of such a situation actually occurring. (A.251.)

In any event, even assuming for the sake of argument that LPNs did have the authority to instruct CNAs to perform discrete tasks not included in the resident care plans, Elderwood’s arguments overlook the fundamental requirements that a statutory supervisor assign “significant overall duties,” and that he or she exercise “independent judgment” in doing so. *Lynwood Manor*, 350 NLRB at 489-90. The Board found that any discrete task assignments made by LPNs are ad hoc and do not require independent judgment on the part of the LPNs. (A.687-88, 726.) Thus, occasionally directing CNAs to give an unscheduled shower or to move a resident to a different seat in the dining hall would merely constitute an “ad hoc instruction [to] perform a discrete task,” rather than an “assignment” of work under established law. *Oakwood Healthcare*, 348 NLRB at 689. Moreover, acceding to

a family's request that a resident receive an unscheduled shower, moving an unruly resident to a different seat, or notifying a manager that a resident had complained about experiencing pain are the type of "routine or clerical" decisions that require no independent judgment. *See id.* at 693.³

b. LPNs Do Not Responsibly Direct CNAs

The record also supports the Board's finding that Elderwood failed to demonstrate that its LPNs constitute supervisors under the separate responsible-direction factor. (A.727-28.) Section 2(11) of the Act allows for a finding of supervisory status if an individual possesses the authority "responsibly to direct" coworkers. 29 U.S.C. § 152(11). Under this factor, a supervisory employee must "direct" the work of coworkers, must be held "responsible" or accountable for the coworkers' performance, and must exercise "independent judgment" in doing so. *Oakwood Healthcare*, 348 NLRB at 690-92; *e.g.*, *Golden Crest Healthcare*, 348 NLRB at 730-32 & n.14 (finding no supervisory status where employees directed

³ Elderwood's passing references to break times (Br.22) or charge pay allegedly received by senior LPNs (Br.24) are immaterial. Break times are prescheduled based on the preferences of CNAs' assigned residents. (A.38-39, 70-71.) To the extent senior LPNs occasionally receive charge pay when RN unit managers are away, their only additional responsibility is fielding phone calls from doctors and family members, with no interaction with CNAs. (A.77-78, 169.) Even if the evidence showed that LPNs were sometimes the highest-ranking employees on site—which it does not, given the presence of the RN nursing supervisor (A.52-54, 76, 82)—such factor has nothing to do with assignment of work, but is instead a "secondary indicia" of supervisory status insufficient to satisfy the requirements of Section 2(11). *See Golden Crest Healthcare*, 348 NLRB at 730 n.10.

coworkers but did not do so “responsibly”). As explained below, the record supports the Board’s finding that Elderwood failed to demonstrate that LPNs are held accountable for using independent judgment to responsibly direct the work of CNAs, either in annual evaluations or by being subject to discipline. (A.727-28.)

The party alleging supervisory status under this factor must demonstrate “that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary,” and that there is an actual prospect of “adverse consequences” for the putative supervisor if the work is not performed properly. *Oakwood Healthcare*, 348 NLRB at 692. The purpose of the factor is to identify genuine supervisors who have a potentially “adversarial relationship” toward those they are directing, and to distinguish between “those employees whose interests, in directing other employees’ tasks, align with management from those whose interests, in directing other employees, is simply the completion of a certain task.” *Id.* Employees do not “responsibly” direct coworkers if, in delegating or monitoring discrete tasks, they are “accountable for their *own* performance or lack thereof, not the performance of *others*.” *Id.* at 695.

i. There is insufficient evidence that LPNs are held accountable via annual performance evaluations for directing CNAs

Elderwood first attempted to establish LPNs’ supervisory accountability for the direction of CNAs by relying on the annual evaluation forms used to assess

LPNs. The Board noted, however, that although two of the thirty-six elements listed on the annual evaluation forms reference directing or “monitor[ing]” CNAs in implementing the resident care plans, there is no concrete evidence that LPNs are evaluated based on their independent direction of CNAs or that LPNs face any adverse consequences as a result. (A.727.) Under established Board law, the party alleging supervisory status must demonstrate an actual “prospect of adverse consequences,” which requires a “more-than-merely-paper showing that such a prospect exists.” *Golden Crest Healthcare*, 348 NLRB at 731. Thus, as the Board found in *Golden Crest Healthcare*, an employer does not carry its burden simply by pointing to “job evaluation forms” which suggest that such accountability might exist. *Id.* Here, as in that case, Elderwood failed to demonstrate that any adverse consequences “could or would” befall the LPNs as a result of low ratings in two of thirty-six elements, and Elderwood has instead “shown only ‘paper’ accountability.” *Id.* Indeed, Elderwood did not even establish that LPNs have ever been rated on the two elements in question, as it only introduced a blank evaluation form into evidence. (A.652-58.)

In its brief to the Court, Elderwood cites testimony (Br.27) in which DON Stumpo merely confirmed the wording of the employee evaluation forms, without explaining the significance of the purported responsible-direction elements and without giving any examples of potential adverse consequences (A.213-14).

Tellingly, the only suggestion of any evaluation-based consequences cited by Elderwood (Br.27) is inapposite testimony by the facility administrator regarding the evaluation of CNAs rather than of the LPNs at issue (A.443). As the Board found, and as noted above, Elderwood failed to produce evidence of any LPNs having been evaluated based on their direction of CNAs, or having suffered any adverse consequences as a result. (A.689, 727.) *Cf. N.Y. Univ. Med. Ctr.*, 156 F.3d at 414 (“Theoretical or paper power does not a supervisor make.”).

ii. There is insufficient evidence that LPNs are held accountable by being subject to discipline for directing CNAs or that they exercise independent judgment in direction

Likewise, the Board reasonably found that Elderwood failed to produce concrete evidence that LPNs have been disciplined or that they are realistically subject to discipline as a result of their direction of tasks performed by CNAs. (A.727.) The Board emphasized that nearly all of the evidence relied upon by Elderwood to allege that LPNs are subject to an actual prospect of discipline is “generalized and conclusionary.” (A.727.) The Board has “long recognized” that such evidence is insufficient to establish a putative supervisor’s responsible direction of coworkers. *Golden Crest Healthcare*, 348 NLRB at 731.

In any event, even the conclusory testimony from management officials cited by Elderwood (Br.26-28) does not support its argument. In response to leading questions, DON Stumpo equivocally agreed that it is “possible” that an

LPN could be disciplined for a CNA's failure to perform work properly, depending "on the circumstances" and "on what the failure was." (A.177, 223.) Stumpo indicated that she was not aware of such discipline having ever occurred (A.253), and the only hypothetical example she provided was a situation in which an LPN "had knowledge" that a resident was not being cared for properly and yet chose not to intervene. (A.223.) Even then, Stumpo only vaguely indicated that the LPN could be "held responsible" if "something were to happen," with no explanation as to what that might entail. (A.223.) Similarly, DON Deana Viccica vaguely testified that LPNs are "responsible" for CNAs and the overall care of residents, and agreed that LPNs could "potentially" be disciplined because of a CNA, "depend[ing] on the circumstances." (A.270-72.) Once again, however, Viccica provided no examples of such discipline, and her only hypothetical was a situation in which *the DON* instructed *an LPN* to do something and the task was never completed, in which case the LPN would be accountable "because that's the person [the DON] gave the instruction to." (A.272.)

Elderwood's only purported example (Br.26) of an LPN actually being disciplined is the vague testimony of LPN Mbaki, who stated that he once received a write-up when "the CNA broke the care plan, but I was involved in the situation so I was told that I did not make the CNA aware" (A.81). As the Board reasonably found, the circumstances surrounding this discipline are "murky," and Elderwood

failed to introduce any corroborating evidence such as the disciplinary write-up or the testimony of a management official explaining why Mbaki was disciplined.

(A.727 & n.7.) The ambiguous testimony in question suggests just as plausibly that Mbaki was disciplined for his own negligence and “involve[ment] in the situation,” rather than for his failure to properly direct the actions of the CNA.

(A.690.) *See Oakwood Healthcare*, 348 NLRB at 695.⁴

Moreover, aside from the lack of “responsible” direction, any evidence of responsible direction must exhibit the exercise of “independent judgment,” as opposed to supervision that is merely “routine or clerical” in nature. *Oakwood Healthcare*, 348 NLRB at 691-92 & n.38 (“Thus, in our view, for an individual ‘responsibly to direct’ under the Act with ‘independent judgment,’ that individual [must] exercise ‘significant discretion and judgment in directing’ others.”). As the Board found, both LPNs and CNAs are required to follow the detailed resident care plans, and every nurse has a responsibility to notify a manager if, for example, they are aware that a resident is experiencing pain or is not being properly cared for. (A.691.) LPN Mbaki’s purported discipline involved a resident who fell in

⁴ For the same reason, and contrary to Elderwood’s suggestion (Br.28), the testimony from DON Viccica indicating that an LPN could be reprimanded for engaging in “fraud” by falsely certifying on a “Treatment Administrative Record” that specific treatment had been performed when it had not (A.283) speaks to the duties of the LPNs themselves, and not to their accountability for directing the performance of CNAs. *Cf. Brown & Root, Inc.*, 314 NLRB 19, 21 n.6 (1994) (“The fact that leadmen may function like quality control employees, in inspecting and reporting the work of others, does not confer supervisory authority on them.”).

the bathroom when left alone contrary to the care plan. (A.81.) Even assuming that Mbaki was disciplined for his failure to oversee the CNA's compliance with the terms of the care plan, it would not establish the exercise of a supervisory function involving "significant discretion" or independent judgment. *See Oakwood Healthcare*, 348 NLRB at 692 n.38. Similarly, hypothetical scenarios such as an LPN intervening to ensure a resident care plan is followed, or passing on an instruction from a manager, do not involve independent judgment on the part of the LPN. *Id.* at 693 (finding no independent judgment if actions are "dictated or controlled by detailed instructions [or] the verbal instructions of a higher authority").

c. LPNs Lack the Authority to Discipline or Effectively Recommend Disciplining CNAs

The Board next found insufficient evidence that LPNs have the authority to "discipline other employees" or "effectively to recommend" discipline within the meaning of Section 2(11) of the Act, 29 U.S.C. § 152(11), and the record supports the Board's finding. (A.728-29.) In order to demonstrate that employees have the authority "effectively to recommend" actions within the meaning of the Act, there must be evidence that their recommendations are actually effective, or that they can cause actions to be taken without an independent investigation by superiors. *See Children's Farm Home*, 324 NLRB 61, 61 (1997). It is well established that putative supervisors do not exercise supervisory authority if they serve a merely

“reportorial” role by bringing problems to the attention of management personnel who determine what, if any, discipline is warranted. *Veolia Transp. Servs., Inc.*, 363 NLRB No. 188, 2016 WL 2772296, at *7-8 (May 12, 2016); *see NLRB v. Meenan Oil Co.*, 139 F.3d 311, 319, 322 (2d Cir. 1998) (holding that, where employees report problems to management but make no specific recommendations regarding discipline, “[t]he fact that these reports may *result* in disciplinary action is irrelevant”).

Here, the Board found that Elderwood failed to carry its evidentiary burden. (A.728-29.) Although Elderwood identified three examples of LPNs purportedly issuing written warnings to CNAs, the Board observed that there was insufficient evidence that two of these purported examples were disciplinary write-ups that had issued to the employees in question, and that the third purported example was issued by the DON rather than an LPN. (A.728-29.) As the Board found, to the extent that LPNs filled out the three forms in question, the weight of the evidence indicates that they did so “as a reportorial function rather than as a specific recommendation of discipline.” (A.694.) Indeed, the Board noted that testimony from nurses involved in each of the incidents confirmed that the forms in evidence are not examples of LPNs issuing discipline to CNAs. (A.728-29.)

Former CNA and current LPN Vrba, who was the subject of one form dated April 2012, unambiguously testified that the LPN “did not write [her] up,” but

instead “just wrote out the report to hand to the director of nursing.” (A.628.)

Vrba indicated that her signature on the form was to acknowledge that the DON had spoken to her about the situation, and she further testified that the warning was issued by the DON rather than the LPN. (A.629-32.) Vrba stated that the forms are used in practice as “reporting sheet[s]” rather than “disciplinary form[s],” and that managers retain total discretion in determining whether to issue discipline. (A.628-30.) There is insufficient evidence that the LPN recommended that Vrba be disciplined, or that the LPN did anything other than “act[] as a conduit for information.” *Meenan Oil Co.*, 139 F.3d at 322. Indeed, Vrba’s testimony and the role of the DON in directly counseling her suggest the opposite, as does the more recent experience of LPN Harris, discussed below. Elderwood failed to produce any testimony from the LPN who allegedly filled out the form, or the DON who issued it to Vrba, and thus is it also unclear to what extent the DON was involved in the preparation of the form. *Cf. N.Y. Univ. Med. Ctr.*, 156 F.3d at 413-14 (affirming non-supervisory status of doctor who wrote written warnings where contents were dictated by superior).

The other two forms are dated October 2016—several weeks after the representation election—and were filled out by LPN Harris, who made clear that she never issued discipline to CNAs. Harris was concerned that residents’ beds were being kept in an improper position by CNAs that she did not directly work

with, after having complained to her own supervisors about the issue several times. (A.618-19.) In her testimony, Harris confirmed that she never spoke to the CNAs at issue (A.621-22), that she does not have the authority to issue discipline (A.621-22), and that she merely used the forms to “report[]” an issue to the RN nursing supervisor that she thought should be addressed (A.622). There is no evidence that the RN nursing supervisor followed up by taking any action, or that either one of the CNAs involved ever received the forms or was aware of their existence. As the Board further observed, if Harris “had the authority to discipline the employees, she presumably would have,” and the fact that her reports did not result in discipline is strong evidence that LPNs do *not* have such authority. (A.729 & n.9.)

In its brief, Elderwood once again mischaracterizes the evidence and ignores the reasoning of the Board. (Br.29-30.) Its assertions that a CNA “received a disciplinary write-up from [an LPN]” (Br.29), and that there is evidence of “[an LPN] actually issuing two Notices of Warnings to CNAs” (Br.29), are factually inaccurate, as discussed above. The further assertion that the Board based its conclusion “primarily on” the low frequency with which LPNs exercised any purported disciplinary authority (Br.29-30) is false. The Board instead found that there is insufficient evidence that LPNs have *ever* issued or effectively recommended discipline, or that they have the independent authority to do so. (A.728-29.) Insofar as the Board noted that Elderwood was only able to identify

three purported examples of minor written warnings signed by LPNs—two of which are dated after the representation election, and one of which is over four years old—the Board did so to bolster its finding that LPNs do not possess the authority to issue discipline or effectively recommend discipline. (A.694, 728.) Moreover, all three incidents involved alleged violations of the nondiscretionary resident care plans, and thus Elderwood has made no showing that LPNs utilize independent judgment in reporting potential disciplinary incidents to managers. *See Mich. Masonic Home*, 332 NLRB at 1410.

d. LPNs Lack the Authority to Effectively Recommend Rewarding CNAs

The Board similarly found that Elderwood failed to demonstrate that the LPNs exercise independent judgment by effectively recommending rewards for CNAs, and the Board’s finding is again supported by the record. (A.729-30.) Section 2(11) encompasses the authority to “reward” employees or effectively recommend such rewards. 29 U.S.C. § 152(11). As with discipline, putative supervisors do not effectively recommend rewards by reporting information to management, or by evaluating employees in a manner that does not directly affect the coworkers’ terms and conditions of employment. *See Coventry Health Ctr.*, 332 NLRB 52, 53 (2000); *Children’s Farm Home*, 324 NLRB 61, 61 (1997); *cf. Schnurmacher Nursing Home*, 214 F.3d at 265 (affirming that employees do not exercise supervisory authority by serving “reporting function” or by preparing

evaluations that do not affect job status). Employees also do not effectively recommend rewards by simply nominating coworkers for an award that they may or may not receive. *Cf. Veolia Transp. Servs., Inc.*, 363 NLRB No. 98, 2016 WL 245559, at *14 (Jan. 20, 2016).

Although DON Stumpo testified that she would sometimes ask LPNs about CNAs when preparing the CNAs' annual performance evaluations, the LPNs are not responsible for preparing those evaluations, and the Board found insufficient evidence that LPNs make recommendations as to how CNAs should be rated.

(A.729.) *See Children's Farm Home*, 324 NLRB at 61 (finding no supervisory status where putative supervisors' role in evaluation process was "merely advisory and preliminary"). Indeed, the Board found no evidence as to the frequency with which managers consult LPNs, the nature of the information sought from them, or how much weight, if any, their input is given. (A.729.)

Moreover, there is also no concrete evidence regarding how a positive evaluation would affect a CNA's wage rates or other terms and conditions of employment, as to constitute a "reward" within the meaning of Section 2(11).

(A.729.) The only evidence produced by Elderwood as to the effect of CNA evaluations was testimony that evaluations may be "helpful," alongside other unspecific criteria, when granting certain CNAs tuition reimbursement. (A.443-44.) *See N.Y. Univ. Med. Ctr.*, 156 F.3d at 413-14 ("Evaluations that do not affect

job status of the evaluated person are inadequate to establish supervisory status.”). Based on the dearth of evidence in the record, the Board found that Elderwood failed to demonstrate that LPNs play a significant role in evaluating CNAs or that LPNs meet the statutory requirements for effectively recommending rewards using independent judgment. (A.729.)

The ability of LPNs to nominate CNAs for employee-of-the-month recognition is also a red herring, because, as the Board found, “all employees and residents’ family members” can do the same. (A.729; A.425-26.) Elderwood’s assertion that nominations by LPNs “hold more weight than a recommendation from a peer or a residents’ family members” (Br.31)—even if it were not partially contradicted by the witness whose testimony Elderwood cites (A.434)—does not establish the type of independent supervisory authority contemplated by the Act. *See Veolia Transp. Servs.*, 363 NLRB No. 98, 2016 WL 245559, at *14. In any event, Elderwood’s witness could only identify a single instance in which an LPN ever successfully nominated a CNA for employee of the month. (A.411-12.)

e. LPNs Do Not Adjust the Grievances of CNAs

As the Board found, there is likewise insufficient evidence that LPNs have the authority to adjust employees’ grievances or to exercise independent judgment in doing so. (A.696-98, 730-31.) Section 2(11) refers to the authority of statutory supervisors to “adjust [the] grievances” of other employees in the interest of the

employer. 29 U.S.C. 152(11). An individual does not possess the authority to independently adjust grievances within the meaning of the Act if they merely have “the limited authority to resolve minor disputes,” such as “personality conflicts or ‘squabbles’ between employees.” *Ken-Crest Servs.*, 335 NLRB 777, 779 (2001).

Here, the evidence does not demonstrate that LPNs even have the limited authority to resolve minor disputes. Elderwood ignores and has waived any objection to the Board’s finding that two of the three instances of purported grievance adjustments alleged by Elderwood were based on “pure hearsay” with no probative value. (A.730.) DON Stumpo gave an example of an LPN placing a new CNA undergoing orientation with a different “mentor,” but she only heard about the incident secondhand, and she did not know the identities of all of the nurses involved or whether the LPN had consulted the RN nursing supervisor first. (A.225-27, 254.) DON Viccica cited an incident that she heard about secondhand in which two LPNs intervened to help calm down CNAs who were yelling at each other in the dining hall. (A.287-90.) Neither manager had been involved with or knew all of the details regarding the alleged incidents about which they were testifying. In any event, the alleged incidents would not establish that LPNs have the authority to do anything other than resolve minor personality conflicts, such as placing a new CNA with a different mentor that “she would be better with,” (A.226), or intervening to calm down two CNAs who were “yelling back and

forth” across the dining room (A.288). *See Ken-Crest Servs.*, 335 NLRB at 779; *St. Francis Med. Ctr.-W.*, 323 NLRB 1046, 1048 (1997) (finding no supervisory authority based on ability resolve “squabble” such as complaint that coworker was not “pulling his load”).

Elderwood’s third example, concerning LPN Kerrison’s role in allegedly mediating a dispute between CNAs over the division of certain tasks, directly undermines its arguments. Administrator Tom DiJohn testified that the CNAs *disagreed* with Kerrison’s proposed division and continued to argue, and that the situation was only resolved when *he* intervened and ordered the CNAs to comply with Kerrison’s proposal. (A.438-39, 455.) Kerrison herself testified that she provided a “recommendation” for how to resolve a dispute between CNAs, that the CNAs ignored it, and that the CNAs instead said they were going to go downstairs to speak with the RN nursing supervisor before encountering DiJohn. (A.507-09.) Moreover, as the Board noted, offering a recommendation or even a directive based on the mere equalization of workloads among employees does not establish “independent judgment” as required for all supervisory functions under the Act. (A.698.) *See Golden Crest Healthcare*, 348 NLRB at 730 n.9.

f. LPNs Lack the Authority to Effectively Recommend the Transfer of CNAs

Finally, the record supports the Board’s finding that Elderwood failed to demonstrate that LPNs possess the authority to effectively recommend employee

transfers, given that decisions to “float” CNAs are made by managers based on a predetermined order. (A.731-32 & n.11.) Section 2(11) includes, as an additional supervisory factor, the authority to “transfer” coworkers or to effectively recommend their transfer using independent judgment. 29 U.S.C. § 152(11). In order to establish that putative supervisors possess the authority to effectively recommend employee transfers, a party must demonstrate that transfers can be made solely on the recommendations of the putative supervisor. *Ten Broeck Commons*, 320 NLRB 806, 813 (1996).

The Board found that the weight of the evidence indicates that decisions as to which CNAs to “float” from one unit to another are primarily based on a predetermined order of rotation, and that the decisions are made by managers rather than LPNs. (A.698.) For example, LPN Kerrison testified that the decision to float a CNA to another unit is made by the RN nursing supervisor based on which CNA’s turn it is according to the “float book,” which is kept in the supervisor’s office. (A.501-02.) Kerrison’s testimony was corroborated by DON Stumpo, who stated that CNAs are floated based on their “turn” in the “float book,” and that any deviation from that order must be explained to and approved by the RN nursing supervisor. (A.205-08.)

In its brief, Elderwood ignores this evidence and yet again misconstrues the facts (Br. 33). The only evidence it cites is inapposite testimony from LPN Mbaki

indicating that LPNs play a role in assigning CNAs to residents *after* they have been floated (A.91), and testimony from DON Viccica merely confirming that the identity of the CNA required to float is generally determined by the “float book” and that managers makes the decision as to which CNA to float (A.286-87). At most, the evidence suggests that LPNs can bring unspecified issues to a manager’s attention to “help [the manager] make an informed decision” (A.42), and that managers “rarely seek the LPNs’ input” (731-32 & n.11).

For the foregoing reasons, there is insufficient evidence that the LPNs have the authority to exercise any of the supervisory functions discussed above, or that they utilize independent judgment in doing so—both of which are required for a finding of supervisory status under the Act. Substantial evidence thus supports the Board’s finding that Elderwood has failed to demonstrate that the LPNs are supervisors within the meaning of the Act.

B. The Board Did Not Abuse Its Discretion in Overruling Elderwood’s Election Objections and Certifying the Union

The Board acted well within its discretion in finding that there is insufficient evidence of objectionable conduct that would warrant setting aside the results of the representation election, even assuming, in the alternative, that the LPNs constitute supervisory employees. (A.732-38.) As such, the Board overruled

Elderwood's election objections and certified the Union as the exclusive bargaining representative of the employees. (A.738, 742-43, 745-46.)

1. The Party Challenging the Conduct of an Election Bears a Heavy Burden to Prove Objectionable Conduct Interfering with Employee Free Choice

Congress has entrusted the Board with the task of deciding representation questions under the Act, and thus the Board is entitled to a "wide degree of discretion" to establish the "procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). This Court has long recognized that "the conduct of representation elections is the very archetype of a purely administrative function, with no *quasi* about it, concerning which the courts should not interfere save for the most glaring discrimination or abuse." *NLRB v. Arthur Sarnow Candy Co.*, 40 F.3d 552, 556 (2d Cir. 1994) (citing cases); *see NLRB v. Bloomfield Health Care Ctr.*, 372 F. App'x 118, 119-20 (2d Cir. 2010) (unpublished). Accordingly, "when reviewing a request to overturn a Board decision refusing to set aside an election, [the Court is] limited to the narrow question of whether the Board abused its discretion in certifying the election." *Rochester Joint Bd., Amalgamated Clothing & Textile Workers Union v. NLRB*, 896 F.2d 24, 27 (2d Cir. 1990). The party objecting to the conduct of an election bears a "heavy burden" in demonstrating that the Board abused its discretion in certifying the results. *Arthur*

Sarnow Candy, 40 F.3d at 556; see *NLRB v. Black Bull Carting, Inc.*, 29 F.3d 44, 46 (2d Cir. 1994). As previously noted, the Board's findings of fact are conclusive if supported by substantial evidence. *Springfield Hosp.*, 899 F.2d at 1310.

As relevant to the present case, the Board has established two standards for assessing allegedly objectionable conduct. When reviewing alleged pro-union conduct by supervisors, the Board considers: (1) whether the conduct "reasonably tended to coerce or interfere with employees' exercise of free choice in the election," including the nature and degree of the employee's supervisory authority, and the nature, extent, and context of the conduct; and (2) whether the conduct "interfered with freedom of choice to the extent that it materially affected the outcome of the election." *Harborside Healthcare, Inc.*, 343 NLRB 906, 909 (2004). When reviewing allegedly impermissible electioneering by a party to the election, the Board considers a variety of factors to determine whether the evidence is "sufficient to warrant an inference that [the electioneering] interfered with the free choice of the voters." *Bos. Insulated Wire & Cable Co.*, 259 NLRB 1118, 1118-19 (1982). The party challenging the conduct of the election bears a "heavy" burden to prove that objectionable conduct occurred and impacted the election. *Safeway, Inc.*, 338 NLRB 525, 525-25 (2002).

2. LPNs Did Not Engage in Objectionable Conduct Warranting Invalidation of the Election Results

a. There Was No Objectionable Conduct by LPNs If the Court Affirms the Board's Finding That the LPNs Are Not Supervisors

As an initial matter, Elderwood has effectively conceded that, if the Court affirms the Board's finding that the LPNs are not supervisors, then LPNs' conduct in connection with the representation election was not objectionable. In its brief, Elderwood's arguments are premised on its contention that the allegedly objectionable conduct was undertaken by supervisors (Br.36-38), and it raises no alternative contention that the conduct was nonetheless objectionable under the lower standard for non-party employee conduct. *See, e.g., Torrington Extend-A-Care Emp. Ass'n v. NLRB*, 17 F.3d 580, 593 (2d Cir. 1994) (holding that arguments contesting Board decision not raised in party's opening brief are deemed waived).

Although, for the reasons discussed above, substantial evidence supports the Board's finding that the LPNs are not supervisors, the Board also found no objectionable conduct even assuming, in the alternative, that the LPNs are statutory supervisors. (A.732-38.)

b. The Court Lacks Jurisdiction to Entertain Elderwood's Forfeited Objection to the Union's Choice of an LPN as Its Election Observer

Elderwood first argues (Br.38-40) that the election should be set aside because a putative supervisor, LPN Kerrison, served as the Union's election observer. The Court lacks jurisdiction to entertain this argument, because Elderwood has forfeited it three times over. Under Section 10(e) of the Act, "[n]o 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." 29 U.S.C. § 160(e); *Schnurmacher Nursing Home*, 214 F.3d at 270 n.3; accord *Seattle Opera v. NLRB*, 292 F.3d 757, 766 (D.C. Cir. 2002) (holding that argument was not properly before court because employer failed to raise it in request for review to Board); *NLRB v. Wagner Elec. Corp.*, 586 F.2d 1074, 1076 n.2 (5th Cir. 1978) (same).

In its request for review to the Board, Elderwood failed to contest the Regional Director's specific findings (A.734) that Elderwood had waived the argument by not raising it in its election objections, and by not challenging Kerrison's role at the pre-election conference. See, e.g., *Matson Terminals, Inc.*, 361 NLRB No. 50, 2014 WL 4809833, at *1 n.1 (Sept. 26, 2014) (noting that party fails to raise argument to Board by not including it in request for review of Regional Director decision), *enforced*, 637 F. App'x 609 (D.C. Cir. 2016);

Superior Prot., Inc., 341 NLRB 267, 267 (2004) (finding party precluded from raising argument in unfair-labor-practice proceeding when it earlier failed to request that Board overturn specific conclusion by Regional Director). Given that the Board was never presented with the arguments that Elderwood is now making against the Regional Director's findings, including Elderwood's own interpretations of Board law, the Court is jurisdictionally barred from resolving those arguments in the first instance.

In any event, the Regional Director was correct to find that Elderwood forfeited the argument at an earlier stage of the representation proceeding. (A.734.) The Board's regulations state that a party objecting to the conduct of an election must file objections "which shall contain a short statement of the reasons therefor and a written offer of proof." 29 C.F.R. § 102.69(a). Elderwood's objections made no mention of Kerrison's role as the Union's election observer, and the issue was not raised at the post-election evidentiary hearing or in Elderwood's post-hearing brief to the Hearing Officer. (A.734.) Rather, Elderwood first raised the claim in exceptions filed with the Regional Director to the Hearing Officer's Report. It is well established under Board law that a party is precluded from litigating issues that it failed to identify in timely filed election objections, absent special circumstances such as newly discovered and previously unavailable evidence. *Superior Prot.*, 341 NLRB at 267-68.

Contrary to Elderwood's arguments to the Court (Br.39-40), its objections did not preserve the issue. Objection 1 alleged a variety of specific coercive conduct by LPNs "in the days and weeks *preceding* the election." (A.639 (emphasis added).) Objection 3 alleged specific "electioneering activities" during the polling period, and by its terms referred to alleged conduct by LPN VonReyn, discussed below, not Kerrison's status as election observer. (A.640.) Elderwood's objections did not identify any separate challenge to the Union's choice of election observer. *Cf. Schnurmacher Nursing Home*, 214 F.3d at 270 n.3 (acknowledging principle that "general objection[s]" are insufficient to apprise the Board that party intends to press specific objection).

Moreover, Elderwood largely ignores the Regional Director's further finding that, under established law, Elderwood's failure to specifically object at the pre-election conference to Kerrison's designation as the Union's observer precludes it from raising such objection *after* the election. (A.734.) *E.g., Monarch Bldg. Supply*, 276 NLRB 116, 116 (1985) (finding employer estopped from objecting to union's use of putative supervisor as observer where employer made "no comment or protest" at pre-election conference). Elderwood's only response is to note that it had previously made generalized arguments regarding the status of LPNs as supervisors. (Br.39-40.) In the stipulated election agreement, however, Elderwood reserved the right to challenge the "eligibility" of LPNs *as voters* and to resolve

their status in a post-election hearing. (A.7 n.1.) Elderwood does not explain why it made no comment in response to the Union's intention to use Kerrison as its observer. Parties should not be permitted to withhold such arguments at the pre-election conference with the later goal of invalidating an unfavorable election result.

c. The Board Did Not Abuse Its Discretion in Finding Insufficient Evidence That an LPN Engaged in Objectionable Electioneering Near the Polling Area

Elderwood next argues (Br.41) that allegedly pro-union LPN VonReyn engaged in impermissible "electioneering" in the polling area. There is no evidence or contention that VonReyn was acting as an agent of the Union. Indeed, the Board found no agency relationship (A.705-06) and Elderwood has not contested that finding. There is also no evidence that VonReyn did anything more than accompany a coworker to the polling area and then comply with the Board agent's instruction to wait outside while the coworker voted. (A.706.)

Even assuming that VonReyn was a statutory supervisor and therefore an agent of Elderwood, the Board will not invalidate an election based solely on one party's agent being present near the polling area or directing employees as to where to vote. (A.706 & n.10.) *See Lowe's HIW, Inc.*, 349 NLRB 478, 479 (2007). For example, in *Lowe's HIW*, an agent of the employer waited nearby while employees stood in line to vote, and at one point held open the door to the

polling location for twenty minutes while telling employees to “have their votes ready.” *Id.* The Board found no basis to overturn the election or to infer that employees would have been impermissibly coerced. *Id.*; *see also Longs Drug Stores Cal., Inc.*, 347 NLRB 500, 503 (2006). Here, the most the evidence shows is that VonReyn walked with a coworker going to vote, and that the Board agent told her to wait outside the polling area. (A.404.) Moreover, contrary to the assertion that VonReyn returned “with a subordinate employee” (Br.41), the evidence indicates that VonReyn was accompanying LPN Kissel (A.233), who is another putative supervisor (A.679).

Elderwood’s vague contention that VonReyn could be heard talking “outside the polling location” (Br.41) is similarly insufficient to warrant setting aside the election. The only evidence cited (Br.41) is testimony from Elderwood’s election observer, CNA Neyra, who stated that he did *not* hear VonReyn having a conversation with anybody, but that she “probably” was because he could hear her voice without hearing what she was saying (A.399). The legal standard cited by Elderwood (Br.41 n.7) involves supervisors or other agents who engage in “*prolonged* conversations” with employees “waiting to cast ballots.” *Milchem, Inc.*, 170 NLRB 362, 362 (1968) (emphasis added). Here, the Board found no evidence that VonReyn did anything other than walk with Kissel to the polling area and then temporarily wait outside. (A.706.) Elderwood does not point to concrete

evidence that VonReyn spoke to employees waiting in line to vote, or that any such conversation was more than *de minimis* in nature. Neyra merely stated that he could hear VonReyn's voice after she was directed to wait outside the polling area, without explaining who she might have been talking to or how long she remained in the hallway outside the polling area. On these facts, the Board's decision to overrule Elderwood's objection was well within its discretion.

d. The Board Did Not Abuse Its Discretion in Finding Insufficient Evidence That an LPN Made an Objectionable Promise of Benefits to a Coworker

Elderwood further argues (Br.42) that the election should be set aside because a single employee was allegedly given an unlawful "promise[] of future benefits" by LPN Kerrison. However, as the Board reasonably found, the record evidence reveals, at most, "that Kerrison explained to a CNA . . . how a just cause provision in a union contract differed from the employee's current at will status." (A.733.) There is no evidence that Kerrison indicated that she could personally ensure that the CNA would be disciplined under a just-cause standard, or that the CNA might have concluded that merely voting for the Union would resolve any unspecified disciplinary issues she was facing at the time. In Kerrison's testimony—the sole evidence cited by Elderwood (Br.42)—she indicated that she explained the difference between just-cause protections and at-will employment after the CNA asked her about the Union and the potential advantages of

unionization (A.568-79). There is likewise insufficient evidence that this alleged “promise” was conveyed to other employees or that more than a single CNA was aware of it.

Elderwood ignores, and has thereby waived any objection to, the Board’s further findings that Kerrison was at most a low-level supervisor who, under Board law, could restrain or coerce employees only if she “directly supervise[d]” them, and that there was no such evidence here. (A.733 n.12.) *See Laguna Coll. of Art & Design*, 362 NLRB No. 112, 2015 WL 3758354, at *1 n.3 (June 15, 2015) (finding no tendency to coerce or interfere with employee free choice where low-level supervisor did not have direct supervisory authority over affected employees). Even assuming that Kerrison was a statutory supervisor, Elderwood does not explain why any reasonable CNA would have concluded that an LPN had the ability to intervene to prevent a CNA from facing discipline—particularly where, as here, there is no evidence that Kerrison directly supervised the CNA in question. Elderwood has conceded the Board’s dispositive findings on this latter point, and therefore the Board did not abuse its discretion by overruling Elderwood’s objection.

e. The Board Did Not Abuse Its Discretion in Finding Insufficient Evidence That LPNs Engaged in Objectionable Harassment or Coercion of Coworkers

The Court should also reject Elderwood's cursory renewal of its allegation of "harassment of anti-union employees," and its entirely unfounded assertion that employees were "threatened with discipline if they failed to vote in favor of the Union" (Br.43). Elderwood has once again failed to address, and has therefore conceded, the Board's finding that "almost all of the evidence describing the conduct [identified by Elderwood as objectionable] qualifies as hearsay and has no probative value." (A.735-36.) As a result, the Board found that Elderwood "has not sustained its burden that much of the alleged misconduct actually occurred." (A.735-36.) In particular, there was insufficient non-hearsay evidence that LPN VonReyn tracked the attendance of LPN Nice and told other employees not to trust her, that VonReyn made false accusations about LPN Greig, or that VonReyn directed a CNA to relay her accusations to management. *Cf. Carrier Air Conditioning Co. v. NLRB*, 547 F.2d 1178, 1190 (2d Cir. 1976) (holding that testimonial evidence regarding alleged union statements was "substantially undermined by its hearsay nature" and was "poor substitute for direct evidence").

The Board also emphasized that virtually all of the alleged "harassment of anti-union employees" (Br.43) was directed at anti-union *LPNs*, and thus, taking Elderwood's view that the LPNs are supervisors, any alleged harassment would

have been directed at other putative supervisors rather than employees (A.735 n.13).⁵ *Cf. Laguna Coll. of Art*, 362 NLRB No. 112, 2015 WL 3758354, at *1 n.3 (noting principle that putative supervisor's conduct has no tendency to interfere with employee free choice when it is not directed at employees he or she has supervisory authority over). Moreover, even assuming that the hearsay-based incidents actually occurred, there is insufficient evidence that they were related to the union campaign rather than personality conflicts. Indeed, the record shows that the longstanding antagonism between VonReyn and Nice, in particular, predates the union campaign by several years. (A.735 n.14, 736 & n.16.) As such, the Board acted within its discretion in overruling Elderwood's unfounded objection.

The cases selectively paraphrased by Elderwood (Br.43-44) are inapposite, because—even assuming that the LPNs are statutory supervisors—there is insufficient evidence that the LPNs wielded the same control over CNAs as the supervisors in those cases, or that any of the LPNs engaged in the type of pervasive union campaign that might have coerced employees. To the extent Elderwood is now implying that a statutory supervisor's "active and outspoken support" for a union (Br.43) constitutes a legitimate basis for setting aside the election results, Elderwood is mistaken. *See Harborside Healthcare*, 343 NLRB at 909-10

⁵ In addition to the alleged incidents noted above involving LPNs Nice and Greig, the only other testimony cited by Elderwood (Br.43) concerns an alleged argument involving LPN Zucarelli (A.227-30). As previously noted, Elderwood has made no argument regarding LPNs' objectionable conduct if they are not supervisors.

(describing, in Board decision post-dating the cases cited by Elderwood, revised multi-part framework for evaluating conduct of pro-union supervisors).

Elderwood also made no such contention to the Board, and thus it would be barred by Section 10(e) of the Act. 29 U.S.C. § 160(e).

f. The Presence of LPNs at Organizing Meetings or in the Vicinity of a Coworker Signing an Authorization Card Does Not Establish Objectionable Misconduct

Elderwood's only other claim of objectionable conduct by LPNs (Br.44) is its assertion that they coerced CNAs by "attend[ing] Union organizing meetings" and by "participat[ing] and observ[ing] co-workers signing authorization cards." The Board emphasized that there is no evidence or claim that LPNs distributed or solicited authorization cards. (A.733.) The testimony cited by Elderwood (Br.44) indicates that, at most, LPN Kerrison was present when another employee signed an authorization card (A.587).⁶ Elderwood does not contest the Board's finding that a separate, exceedingly vague allegation regarding an LPN purportedly trying to convince a CNA to sign an authorization card was "pure hearsay and insufficient to establish that the alleged conduct occurred." (A.733.)

Contrary to Elderwood's claim of objectionable conduct, the Board has consistently found that pro-union conduct by supervisory employees such as attending organizing meetings, or being present when coworkers sign authorization

⁶ There is no indication as to whether this employee was a CNA or another putative supervisor LPN. (A.587.)

cards, does not have the tendency to coerce or interfere with employee free choice. (A.734.) *See Ne. Iowa Tel. Co.*, 346 NLRB 465, 466-67 (2006) (finding no coercion where pro-union supervisors' conduct was limited to attending union meetings and signing authorization cards in presence of coworkers); *Waldinger Corp.*, 331 NLRB 544, 545-46 (2000) (finding that employees were not coerced into signing authorization cards due to mere presence of supervisory employee who did not solicit signatures), *enforced*, 262 F.3d 1213 (11th Cir. 2001). The cases cited by Elderwood (Br.44) are inapposite, as they concern active supervisory *solicitation* of signed authorization cards. *Harborside Healthcare*, 343 NLRB at 911; *see Chinese Daily News*, 344 NLRB 1071, 1072 (2004). Here, as the Board found, there is no evidence or claim that such solicitation occurred (A.733), and the Board did not abuse its discretion in overruling this objection.

3. The Union Did Not Engage in Objectionable Conduct Warranting Invalidation of the Election Results

Elderwood also argues (Br.44-46) that the Union and its agents engaged in impermissible electioneering. The evidence indicates that, on the day of the election, the Union parked a bus bearing its logo in a parking lot adjacent to Elderwood's facility, but "away from and out of sight of the polling place, which was in a windowless basement room." (A.708-09, 737 n.19.) Neither the Union's bus nor any of its agents were stationed on Elderwood's property. (A.422-23.) As the Board found, there is no evidence that the Union's agents engaged in

electioneering directed at employees in the voting area or waiting in line to vote, or that the Union engaged in any conduct in a “no-electioneering” area or contrary to the instructions of a Board agent. (A.709.) *See Bos. Insulated Wire*, 259 NLRB at 1118-19 (discussing relevant factors for evaluating allegedly impermissible electioneering); *cf. Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981, 991-93 (D.C. Cir. 2001) (remanding for evidentiary hearing where such factors were alleged and were taken to be true). The Board has consistently found that the presence of union agents in the general vicinity of the polling facility does not constitute objectionable conduct invalidating the election. *E.g., C&G Heating & Air Conditioning, Inc.*, 356 NLRB 1054, 1054-55 (2011); *cf. Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 606-07 (3d Cir. 2016) (affirming Board’s rejection of objection based on union parking eighteen-wheeler truck near driveway to employer’s facility).

As a result, the Board did not abuse its discretion in finding that there is insufficient evidence of objectionable conduct by the Union or its agents as to warrant setting aside the results of the election.⁷

⁷ Elderwood’s conclusory argument that the circumstances of the election, “considered together,” created an atmosphere of fear and reprisal (Br.48-49) is without merit. The Board expressly considered the “cumulative effect” of all the allegedly objectionable conduct identified by Elderwood, and found no basis for setting aside the results of the election. (A.737-38.) As the Board noted, “[t]he record contains insufficient evidence to establish that much of the conduct to which [Elderwood] objects happened, and the remaining conduct is not

4. The Court Lacks Jurisdiction to Entertain Elderwood's Unfounded Argument That the Tentative Inclusion of LPNs in the Unit Description Requires Decertification

Finally, the Court lacks jurisdiction to entertain Elderwood's belated argument (Br.46-48) that the entire election should be set aside because the LPNs were tentatively listed in the description of the unit in the stipulated election agreement, and the Board "does not have the power" to modify that description without "mislead[ing] voters." Elderwood never raised this argument before the Board, and thus Section 10(e) of the Act bars its consideration by the Court.

29 U.S.C. § 160(e); *Schnurmacher Nursing Home*, 214 F.3d at 270 n.3.

In any event, Elderwood's argument lacks factual and legal support. Prior to the election, both parties and all employees were on notice that the status of the LPNs was in dispute and would be resolved after the election. The stipulated election agreement expressly stated that "supervisors as defined by the Act" were excluded, that there was "a dispute as to whether the LPNs" were "supervisors under the Act," and that the parties had reserved the right to "resolve [the LPNs'] status in a post-election proceeding, if necessary." (A.6-7 & n.1.) The notice of election contained identical language. (Supp. A.2 & n.1.) The Union ultimately

objectionable by any standard." (A.737-38.) *See Amalgamated Clothing & Textile Workers Union v. NLRB*, 736 F.2d 1559, 1569-70 (D.C. Cir. 1984) (recognizing that cumulative-effect arguments "may not be used to turn a number of insubstantial objections to an election into a serious challenge").

won the election both without (49-35) and with (58-46) the LPNs included in the tally of ballots. (A.740.)

In many cases, the entire purpose of a stipulated election agreement is to avoid undue delay by *deferring* determinations as to the status of disputed voters until after a post-election hearing. It is a well-established procedure that this Court has consistently upheld. Thus, as the Court made clear in *Sears, Roebuck & Co. v. NLRB*, the issue in each of the cases cited by Elderwood (Br.47) was that the election notice to employees “described a bargaining unit different from the one ultimately established by the Board *and did not alert employees to the possibility of change.*” 957 F.2d 52, 55 (2d Cir. 1992) (emphasis added) (discussing cases).⁸ Here, as in *Sears, Roebuck & Co.*, the election notice unambiguously described the disputed status of the LPNs, and there is no evidence that employees voiced any “objections or confusion” about the scope of the unit or the “special position” of the LPNs prior to the election. 957 F.2d at 56.

The only other cases cited by Elderwood (Br.46-47) directly contradict its argument. *See Meenan Oil Co.*, 139 F.3d at 319, 322 (excluding two employees held to be confidential employees but otherwise upholding Board certification and

⁸ The cases cited by Elderwood also involved highly unusual circumstances not present here, such as an initial notice to employees that they were voting for “a broad facility-wide unit,” and a certified unit that was “less than half the size and considerably different in character.” *Hamilton Test Sys., N.Y., Inc. v. NLRB*, 743 F.2d 136, 140 (2d Cir. 1984).

enforcing Board order). In *Quinnipiac College*, the Court reaffirmed that the “mere presence of supervisors in a bargaining unit does *not* automatically require decertification of the entire unit,” and that the general rule is to uphold the Board’s certification with any statutory supervisors excluded. 256 F.3d at 79 (emphasis added).⁹

Thus, even assuming that the Court had jurisdiction to reach Elderwood’s newly raised argument, such argument is premised on a distortion of the facts of this case and on a misrepresentation of the Court’s precedent. The Court should enforce the Board’s Order in full in addition to finding that the LPNs are not supervisors. But even if the Court reaches a contrary result on this latter point, the appropriate remedy would be to enforce the Board’s Order as modified to exclude the putative supervisors from the unit. *E.g.*, *Schnurmacher Nursing Home*, 214 F.3d at 270 (enforcing Board order as modified to exclude supervisors).

⁹ There is no allegation here, as there was in a separate section of the Court’s opinion in *Quinnipiac College* not cited by Elderwood, that the putative supervisor LPNs dominated the “formation and governance” of the Union as to create any question of unlawful supervisory interference. 256 F.3d at 80-81.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

Respectfully submitted,

/s/ Usha Dheenan

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/s/ Eric Weitz

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March 2018

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

2850 GRAND ISLAND BOULEVARD)	
OPERATING COMPANY, LLC, d/b/a)	
ELDERWOOD AT GRAND ISLAND)	
)	
Petitioner/Cross-Respondent)	
)	Nos. 17-2330, 17-2579
v.)	
)	Board Case No.
NATIONAL LABOR RELATIONS BOARD,)	03-CA-193859
)	
Respondent/Cross-Petitioner)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 13,885 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
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Dated at Washington, DC
this 12th day of March, 2018

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

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CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Second 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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Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 12th day of March, 2018

Nos. 17-2330, 17-2579

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

2850 GRAND ISLAND BOULEVARD OPERATING COMPANY, LLC,
d/b/a ELDERWOOD AT GRAND ISLAND

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

SUPPLEMENTAL APPENDIX FOR
THE NATIONAL LABOR RELATIONS BOARD

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TABLE OF CONTENTS

Description of Item	Page(s)
Notice of Election, Board Case No. 03-RC-184298.....	Supp. A.1

Form NLRB-707
(4-2015)



**United States of America
National Labor Relations Board
NOTICE OF ELECTION**



PURPOSE OF ELECTION: This election is to determine the representative, if any, desired by the eligible employees for purposes of collective bargaining with their employer. A majority of the valid ballots cast will determine the results of the election. Only one valid representation election may be held in a 12-month period.

SECRET BALLOT: The election will be by SECRET ballot under the supervision of the Regional Director of the National Labor Relations Board (NLRB). A sample of the official ballot is shown on the next page of this Notice. Voters will be allowed to vote without interference, restraint, or coercion. Electioneering will not be permitted at or near the polling place. Violations of these rules should be reported immediately to an NLRB agent. Your attention is called to Section 12 of the National Labor Relations Act which provides: ANY PERSON WHO SHALL WILLFULLY RESIST, PREVENT, IMPEDE, OR INTERFERE WITH ANY MEMBER OF THE BOARD OR ANY OF ITS AGENTS OR AGENCIES IN THE PERFORMANCE OF DUTIES PURSUANT TO THIS ACT SHALL BE PUNISHED BY A FINE OF NOT MORE THAN \$5,000 OR BY IMPRISONMENT FOR NOT MORE THAN ONE YEAR, OR BOTH.

ELIGIBILITY RULES: Employees eligible to vote are those described under the VOTING UNIT on the next page and include employees who did not work during the designated payroll period because they were ill or on vacation or temporarily laid off, and also include employees in the military service of the United States who appear in person at the polls. Employees who have quit or been discharged for cause since the designated payroll period and who have not been rehired or reinstated prior to the date of this election are *not* eligible to vote.

SPECIAL ASSISTANCE: Any employee or other participant in this election who has a handicap or needs special assistance such as a sign language interpreter to participate in this election should notify an NLRB Office as soon as possible and request the necessary assistance.

PROCESS OF VOTING: Upon arrival at the voting place, voters should proceed to the Board agent and identify themselves by stating their name. The Board agent will hand a ballot to each eligible voter. Voters will enter the voting booth and mark their ballot in secret. **DO NOT SIGN YOUR BALLOT.** Fold the ballot before leaving the voting booth, then personally deposit it in a ballot box under the supervision of the Board agent and leave the polling area.

CHALLENGE OF VOTERS: If your eligibility to vote is challenged, you will be allowed to vote a challenged ballot. Although you may believe you are eligible to vote, the polling area is not the place to resolve the issue. Give the Board agent your name and any other information you are asked to provide. After you receive a ballot, go to the voting booth, mark your ballot and fold it so as to keep the mark secret. **DO NOT SIGN YOUR BALLOT.** Return to the Board agent who will ask you to place your ballot in a challenge envelope, seal the envelope, place it in the ballot box, and leave the polling area. Your eligibility will be resolved later, if necessary.

AUTHORIZED OBSERVERS: Each party may designate an equal number of observers, this number to be determined by the NLRB. These observers (a) act as checkers at the voting place and at the counting of ballots; (b) assist in identifying voters; (c) challenge voters and ballots; and (d) otherwise assist the NLRB.

WARNING: This is the only official notice of this election and must not be defaced by anyone. Any markings that you may see on any sample ballot or anywhere on this notice have been made by someone other than the National Labor Relations Board, and have not been put there by the National Labor Relations Board. The National Labor Relations Board is an agency of the United States Government, and does not endorse any choice in the election.

Form NLRB-707
(4-2015)



**United States of America
National Labor Relations Board
NOTICE OF ELECTION**



VOTING UNIT

EMPLOYEES ELIGIBLE TO VOTE:

Those eligible to vote are: all full-time and regular part-time and per diem service and maintenance and technical employees including LPNs, LPN Team Leaders, LPN Charge, CNAs, Activity Leaders, Cooks, Dietary Aides, Housekeeping Aides, Laundry Aides, Maintenance Assistants, Memory Care Specialists, Physical Therapy Aides, Seasons Certified Nursing Assistants, Certified Occupational Therapy Assistants, Diet Technicians, Physical Therapy Assistants, Unit Clerks, Receptionists, and Medical Records Coordinators employed by the Employer at its 2850 Grand Island Boulevard, Grand Island, New York facility.¹

EMPLOYEES NOT ELIGIBLE TO VOTE:

Those not eligible to vote are: all business office clerical employees, guards and professional employees and supervisors as defined by the Act, and all other employees. Who were employed by the Employer during the payroll period ending September 24, 2016.

DATE, TIME AND PLACE OF ELECTION

Thursday, October 6, 2016	5:30 a.m. to 8:00 a.m. and 1:30 p.m. to 5:30 p.m.	In-service room located in the basement of the Employer's 2850 Grand Island Blvd., NY facility 2850 Grand Island Blvd., Grand Island, NY
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EMPLOYEES ARE FREE TO VOTE AT ANY TIME THE POLLS ARE OPEN.

	<p>UNITED STATES OF AMERICA National Labor Relations Board 03-RC-184298</p> <p>OFFICIAL SECRET BALLOT For certain employees of 2850 GRAND ISLAND BOULEVARD OPERATING COMPANY LLC D/B/A ELDERWOOD OF GRAND ISLAND</p>	
Do you wish to be represented for purposes of collective bargaining by 1199 SEIU UNITED HEALTHCARE WORKERS EAST?		
MARK AN "X" IN THE SQUARE OF YOUR CHOICE		
<p>YES</p> <div style="border: 1px solid black; width: 40px; height: 20px; margin: 0 auto;"></div>	<p>NO</p> <div style="border: 1px solid black; width: 40px; height: 20px; margin: 0 auto;"></div>	
<p>DO NOT SIGN THIS BALLOT. Fold and drop in the ballot box. If you spoil this ballot, return it to the Board Agent for a new one.</p> <p>The National Labor Relations Board does not endorse any choice in this election. Any markings that you may see on any sample ballot have not been put there by the National Labor Relations Board.</p>		

¹ There is a dispute as to whether the LPNs, LPN Team Leaders, and the LPN Charge are supervisors under the Act. There is also a dispute as to whether the Receptionists and Medical Records Coordinators should be included in the appropriate collective bargaining unit. The parties have reserved the right to challenge the eligibility of employees holding these job titles and to resolve their status in a post-election proceeding, if necessary.

WARNING: This is the only official notice of this election and must not be defaced by anyone. Any markings that you may see on any sample ballot or anywhere on this notice have been made by someone other than the National Labor Relations Board, and have not been put there by the National Labor Relations Board. The National Labor Relations Board is an agency of the United States Government, and does not endorse any choice in the election.

Form NLRB-707
(4-2015)



United States of America
National Labor Relations Board
NOTICE OF ELECTION



RIGHTS OF EMPLOYEES - FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union
- Choose representatives to bargain with your employer on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities
- In a State where such agreements are permitted, the Union and Employer may enter into a lawful union-security agreement requiring employees to pay periodic dues and initiation fees. Nonmembers who inform the Union that they object to the use of their payments for nonrepresentational purposes may be required to pay only their share of the Union's costs of representational activities (such as collective bargaining, contract administration, and grievance adjustment).

It is the responsibility of the National Labor Relations Board to protect employees in the exercise of these rights.

The Board wants all eligible voters to be fully informed about their rights under Federal law and wants both Employers and Unions to know what is expected of them when it holds an election.

If agents of either Unions or Employers interfere with your right to a free, fair, and honest election the election can be set aside by the Board. When appropriate, the Board provides other remedies, such as reinstatement for employees fired for exercising their rights, including backpay from the party responsible for their discharge.

The following are examples of conduct that interfere with the rights of employees and may result in setting aside of the election:

- Threatening loss of jobs or benefits by an Employer or a Union
- Promising or granting promotions, pay raises, or other benefits, to influence an employee's vote by a party capable of carrying out such promises
- An Employer firing employees to discourage or encourage union activity or a Union causing them to be fired to encourage union activity
- Making campaign speeches to assembled groups of employees on company time, where attendance is mandatory, within the 24-hour period before the polls for the election first open or the mail ballots are dispatched in a mail ballot election
- Incitement by either an Employer or a Union of racial or religious prejudice by inflammatory appeals
- Threatening physical force or violence to employees by a Union or an Employer to influence their votes

The National Labor Relations Board protects your right to a free choice.

Improper conduct will not be permitted. All parties are expected to cooperate fully with this Agency in maintaining basic principles of a fair election as required by law.

Anyone with a question about the election may contact the NLRB Office at (716)551-4931 or visit the NLRB website www.nlrb.gov for assistance.

WARNING: This is the only official notice of this election and must not be defaced by anyone. Any markings that you may see on any sample ballot or anywhere on this notice have been made by someone other than the National Labor Relations Board, and have not been put there by the National Labor Relations Board. The National Labor Relations Board is an agency of the United States Government, and does not endorse any choice in the election.

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Dated at Washington, DC
this 12th day of March, 2018