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UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CORAL HARBOR REHABILITATION AND NURSING CENTER,	:
Petitioner,	: **Case No.**
v.	: **PETITION FOR REVIEW** : **NLRB Case No. 22-CA-167738** : Final Order of May 2, 2018
NATIONAL LABOR RELATIONS BOARD	:
Respondent.	:

Petitioner, Coral Harbor Rehabilitation and Nursing Center, pursuant to Rule 15 of the Federal Rules of Appellate Procedure, hereby petitions for review by this Court of the Final Order entered on behalf of the National Labor Relations Board (NLRB) by three of its members on May 2, 2018, relating to findings that Petitioner committed unfair labor practices in its operations in the State of New Jersey, which is within this Circuit. The Board's Decision and Order is published at 366 NLRB No. 75, a copy of which is attached as Exhibit A. To date, no court has upheld the validity of the order.

Jurisdiction is asserted pursuant to 29 U.S.C. § 160(f).

Venue is asserted pursuant to 29 U.S.C. § 160(f).

This petition is timely filed since there is no time limit established by the National Labor Relations Act for such filing. *See:* Citizens Publishing & Printing Co. v. NLRB, 263 F.3d 224, 232 (3rd Cir. 2001).

Petitioner requests this Court to set aside the Order of May 2, 2018 because it is not consistent with law or supported by substantial evidence of record and because it is otherwise arbitrary and capricious and inconsistent with this Court's prior determination in NLRB v. New Vista Nursing & Rehabilitation, 870 F.3d 113 (3rd Cir. 2017).

Dated: June 1, 2018

Respectfully submitted,

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Coral Harbor Rehabilitation and Nursing Center *and* 1199 SEIU United Healthcare Workers East. Case 22–CA–167738

May 2, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, KAPLAN, AND EMANUEL

On July 13, 2017, Administrative Law Judge Kenneth W. Chu issued the attached decision. The Respondent filed exceptions with supporting argument, the General Counsel and Charging Party 1199 SEIU United Healthcare Workers East (the Union) filed answering briefs, and the Respondent filed a reply brief. The General Counsel also filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.[1]

We agree with the judge that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Respondent's licensed practical nurses (LPNs) and by making unilateral changes to the LPNs' terms and conditions of employment, but we clarify the judge's decision in the following respects.

First, we affirm the judge's finding that the Respondent is a successor under *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972). However, we agree with the General Counsel that the judge mistakenly referred to the Respondent as a "perfectly clear *Burns* successor." While the judge appears to have performed a "perfectly clear" successor analysis, he ultimately concluded that his determination that the Respondent was obligated to bargain with the Union did not turn on whether or not Coral Harbor was a perfectly clear successor. Rather, he found that "the obligation to bargain with the Union turns on whether the Respondent was justified in its refusal to bargain because it had, in fact, converted the LPNs to supervisors."[2] The judge plainly found that the Respondent was an ordinary successor under *Burns*.[3] We therefore do not rely on the judge's analysis of or references to the Respondent as being a "perfectly clear" successor.

Moreover, we agree with the judge that the Respondent failed to establish that the LPNs are Section 2(11) supervisors. Specifically, we affirm the judge's finding, for the reasons stated in his decision, that the Respondent failed to establish that the LPNs have the supervisory authority to discipline or effectively recommend discipline.[4] We also affirm the judge's finding that the Respondent failed to establish that the LPNs possess the supervisory authority to adjust grievances.[5] The Respondent correctly points out that its administrator, Jeremy Schuster, testified that the Respondent has not yet received any grievances involving certified nursing assistants (CNAs). However, both Schuster and the Respondent's director of nursing, Marcie Nowicki, testified that the LPNs are not involved in the formal grievance process.[6]

[1] We shall amend the remedy and modify the judge's recommended Order to conform to his unfair labor practice findings and to the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified.

[2] Had the judge actually found that the Respondent was a "perfectly clear" successor, his Sec. 2(11) supervisor analysis would have been unnecessary because a "perfectly clear" successor is not free to unilaterally set initial terms and conditions of employment, including assigning new supervisory duties and authority to unit employees. See *Burns*, supra at 294–295; see also *Data Monitor Systems, Inc.*, 364 NLRB No. 4, slip op. at 1 (2016) (a "perfectly clear" successor has "an obligation to bargain with the [u]nion prior to setting initial terms and conditions of employment").

[3] The judge stated, "The Respondent's obligation to bargain with the Union matured when two conditions were met: (1) Respondent had hired a substantial and representative complement of LPN[] employees, a majority of whom had been Medicenter bargaining unit employees; and (2) the Union had made an effective demand for recognition and bargaining. Both conditions have been met." (Internal citation omitted.)

[4] No party excepts to the judge's findings that the LPNs do not have the supervisory authority to evaluate, assign, or direct responsibly.

[5] In affirming the judge's conclusion that the LPNs are not statutory supervisors, Member Pearce would additionally rely on the judge's implicit finding that the Respondent's conversion of the LPNs into supervisors was a sham. In Member Pearce's view, the evidentiary record establishes that the Respondent, by purposely not disclosing to LPN applicants that the position was supervisory and by giving LPNs the paper title of "supervisor" while declining to give them actual supervisory authority, engaged in a transparent effort to strip the LPNs of their protection under the Act and evade its successorship bargaining obligation with respect to those employees.

[6] We observe that the same result would obtain under the standards employed by the United States Court of Appeals for the Third Circuit. See *NLRB v. New Vista Nursing & Rehabilitation*, 870 F.3d 113, 130–136 (3d Cir. 2017); see also *NLRB v. Attleboro Associates*, 176 F.3d 154, 164–166 (3d Cir. 1999). In the disciplinary context, the Third Circuit "recognize[s] three facts that together may show an employee is a statutory supervisor: (1) the employee has the discretion to take different actions, including verbally counseling the misbehaving employee or taking more formal action . . . ; (2) the employee's actions 'initiate'

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the LPN unit, we shall order the Respondent to recognize and, on request, bargain with the Union concerning the LPN unit employees' terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.[7]

Additionally, having found that the Respondent violated Section 8(a)(5) and (1) by changing the terms and conditions of employment of its LPN unit employees without first notifying the Union and giving it an opportunity to bargain, we shall order the Respondent to rescind the unlawful unilateral changes that it has made since January 1, 2016.[8] To the extent that unlawful unilateral changes have improved the terms and conditions of the LPN unit employees, the Order set forth below shall not be construed as requiring or authorizing the Respondent to rescind such improvements unless requested to do so by the Union.[9] We shall further order the Respondent to make the LPN unit employees whole for any loss of earnings and other benefits attributable to its unlawful unilateral changes. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283

the disciplinary process . . . ; and (3) the employee's action functions like discipline because it increases severity of the consequences of a future rule violation . . . ." *New Vista*, supra at 132 (internal citations omitted). None of these facts is established on this record. The LPNs plainly do not have the discretion to decide whether to fill out a Notice of Disciplinary Action (disciplinary notice). In every instance where an LPN-witness was questioned about a specific disciplinary notice, the witness testified, without contradiction, that a manager had instructed the LPN to fill out and sign the disciplinary notice, had actually filled out the disciplinary notice and simply instructed the LPN to sign it, or had brought a CNA's infraction to the LPN's attention and suggested that a disciplinary notice was warranted. The Respondent has also failed to establish that the LPNs "initiate" a progressive disciplinary process. Under its written disciplinary policy, the Respondent retains discretion to impose whatever level of discipline it determines is appropriate, and the disciplinary notices in the record do not follow any defined progression. Finally, the Respondent has not demonstrated that the LPNs' perfunctory involvement with disciplinary notices "increases severity of the consequences of a future rule violation" given that, as noted above, the Respondent has authority to impose any level of discipline at any time, and there is record evidence of individual CNAs receiving the same level of discipline for multiple infractions. Moreover, the record does not reveal any instances where a disciplinary notice initiated at the discretion of an LPN was used to increase the severity of discipline for a subsequent infraction.

For similar reasons, the Respondent's reliance on *Oak Park Nursing Care Center*, 351 NLRB 27 (2007), is misplaced. In *Oak Park*, the Board found LPNs to be supervisors based on their role in a structured progressive disciplinary system that was initiated by LPNs' independent decisions to complete employee counseling forms. The counseling forms expressly referenced prior discipline and an accumulation of counseling forms would automatically lead to suspension and ultimately discharge. Id. at 27–29. The *Oak Park* LPNs could also effectively recommend discipline without independent investigation by a higher workplace authority. Id. at 29. Here, by contrast, the LPNs do not independently decide whether to fill out disciplinary notices, or the particular discipline to be imposed. Moreover, as discussed above, the Respondent has discretion to impose any level of discipline that it determines is appropriate, and there is no record evidence that disciplinary notices have been referenced in subsequent notices as support for the next level of discipline under the Respondent's ostensibly progressive disciplinary process. Accordingly, the Respondent has not established that its LPNs "lay the foundation for future discipline" as in *Oak Park*. Ibid.

We further observe that, although the Third Circuit has found, contrary to Board precedent, that the authority to adjust minor grievances is sufficient to establish supervisory status under Sec. 2(11), there is no evidence that the LPNs in this case possess the authority to adjust even minor grievances. See *Attleboro*, supra at 166.

[7] Although the Respondent excepts to the judge's finding that it violated Sec. 8(a)(5) and (1) by failing and refusing to recognize and bargain with the Union, it does not except to the judge's recommended affirmative bargaining order as a remedy for that violation. We therefore find it unnecessary to provide a specific justification for the affirmative bargaining order. See *SKC Electric, Inc.*, 350 NLRB 857, 862 fn. 15 (2007); *Heritage Container, Inc.*, 334 NLRB 455, 455 fn. 4 (2001); see also *Scepter, Inc. v. NLRB*, 280 F.3d 1053, 1057 (D.C. Cir. 2002) (in the absence of particular exceptions, the Board may issue an affirmative bargaining order without specifically stating the basis for the order).

[8] In addressing the appropriate remedy for the unilateral changes, the judge found that the General Counsel "never proffered testimony or evidence of" changes to the LPNs' paid time off (PTO) and health insurance benefits. The General Counsel excepts to that finding, and we find merit in the exception. Joint Exhibit 4 is a chart comparing the LPNs' PTO benefits under the Respondent's predecessor, Medicenter Nursing Center, to the LPNs' PTO benefits under the Respondent, and demonstrating that the Respondent in fact made changes to the LPNs' PTO benefits. Additionally, the Respondent stipulated that it has made changes to the LPNs' health insurance benefits on more than one occasion. No changes to the LPNs' PTO or health insurance benefits were announced in the documents that the LPNs received when they accepted employment with the Respondent. Thus, the Respondent's changes to the LPNs' PTO and health insurance benefits were not part of the initial terms and conditions of employment lawfully set by the Respondent, and the Respondent will be required to rescind those unlawful unilateral changes. See *Paragon Systems, Inc.*, 362 NLRB No. 166, slip op. at 2 (2015) ("Once a *Burns* successor has set initial terms and conditions of employment, . . . a bargaining obligation attaches with respect to any subsequent changes to terms and conditions of employment.") (internal citations omitted). We leave to compliance the determination of the details of those unlawful unilateral changes and the specific steps that the Respondent must take to remedy them.

[9] Therefore, unlike the judge, we shall order the Respondent to rescind the wage increase that it provided to the LPNs (along with the other unilateral changes), but only if the Union requests that it do so.

NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). We shall also order the Respondent to compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and to file with the Regional Director for Region 22, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

ORDER

The National Labor Relations Board orders that the Respondent, Coral Harbor Rehabilitation and Nursing Center, Neptune City, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with 1199 SEIU United Healthcare Workers East (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) Changing the terms and conditions of employment of its unit employees without first notifying the Union and giving it an opportunity to bargain.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time Licensed Practical Nurses ("LPN") employed by the employer at its Neptune City, New Jersey facility, but excluding all office clerical employees, confidential employees, LPN unit managers, other managerial employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

(b) On request by the Union, rescind the changes in the terms and conditions of employment for its unit employees that have been unilaterally implemented since January 1, 2016, including those affecting the unit employees' paid time off benefits, health insurance benefits, and wages.

(c) Make unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful unilateral changes, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(d) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 22, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Neptune City, New Jersey facility copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 2016.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 22 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 2, 2018

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[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Mark Gaston Pearce, Member

Marvin E. Kaplan Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with 1199 SEIU United Healthcare Workers East (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT change your terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time Licensed Practical Nurses ("LPN") employed by the employer at its Neptune City, New Jersey facility, but excluding all office clerical employees, confidential employees, LPN unit managers, other managerial employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

WE WILL, on request by the Union, rescind the changes in the terms and conditions of employment for our unit employees that have been unilaterally implemented since January 1, 2016, including those affecting their paid time off benefits, health insurance benefits, and wages.

WE WILL make our unit employees whole for any loss of earnings and other benefits suffered as a result of our unlawful unilateral changes, plus interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 22, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

CORAL HARBOR REHABILITATION AND NURSING CENTER

The Board's decision can be found at https://www.nlrb.gov/case/22-CA-167738 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Saulo Santiago, Esq., for the General Counsel.
Brandon S. Williams, Esq. and *Bruce G. Baron, Esq.*, of Harrisburg, Pennsylvania, for the Respondent.
Jessica E. Harris. Esq. and *Katherine H. Hansen, Esq.*, of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KENNETH W. CHU, Administrative Law Judge. This case was tried in Newark, New Jersey, on October 13, December 5, 6, 7, 2016, pursuant to an amended complaint issued by Region 22 of the National Labor Relations Board (NLRB) on October 11, 2016.[1]

The amended complaint states that at all times since June 30, 2015, the 1199 SEIU United Healthcare Work-

[1] All dates are in 2016 unless otherwise noted.

ers East (Union) has been the exclusive collective-bargaining representative of the Respondent's employees in the LPN unit of the Coral Harbor Rehabilitation and Nursing Care (Respondent) constituting a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time Licensed Practical Nurses (LPN) employed by the employer at its Neptune City, New Jersey facility, but excluding all office clerical employees, confidential employees, LPN unit managers, other managerial employees, professional employees, guards and supervisors as defined in the Act, and all other employees.[2]

The amended complaint states that on June 30, 2015, the Union was certified as the exclusive collective-bargaining representative of the aforementioned LPN unit of predecessor employer, Medicenter Nursing Center (Medicenter) and that Respondent entered an Asset Purchase Agreement with Medicenter on or about September 11, 2015, to purchase the Neptune City, New Jersey facility.[3]

The amended complaint alleges that Respondent retained a majority of the employees in the LPN unit as of December 14, 2015, that were previously employed by Medicenter and that the Union has been the exclusive collective-bargaining representative of the employees in the LPN unit since January 1, 2016 when the Respondent began operating the Neptune City facility. The complaint alleges that Respondent failed and refused to recognize the Union as the exclusive collective-bargaining representative of the Respondent's employees in the LPN unit and made unilateral changes in the paid time off and health insurance benefits of the employees in the LPN unit on about December 15, 2015. The complaint alleges these items relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining.

The amended complaint further alleges that the Respondent withdrew its recognition of the Union as the exclusive collective-bargaining representative of the Respondent's employee in the LPN unit as of December 15, 2015.

The counsel for the General Counsel asserts that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (Act) by (1) failing and refusing to recognize the Union as the exclusive collective-bargaining representative of the Respondent's employees in the LPN unit; (2) withdrawing recognition of the Union as the exclusive collective-bargaining representative of the LPN unit; and (3) making unilateral changes in the terms and conditions of the Respondent's LPNs in the unit without affording the Union an opportunity to bargain (see GC Br. at 2, 3).

The Respondent timely filed an answer denying the material allegations in the complaint (GC Exhs. 1(K), (E), (G); 2(B)).[4]

On the entire record, including my assessment of the witnesses' credibility[5] and my observation of their demeanor at the hearing and corroborating the same with the adduced evidence of record, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION AND UNION STATUS

The Respondent, a corporation with an office and place of business in Neptune, New Jersey, operates a nursing facility and rehabilitation center, which based upon projected operations since January 1, 2016, will derive gross revenues valued Ain excess of $100,000 and based upon projected operations since January 1, 2016, will annually purchase and receive at its Neptune, New Jersey facility goods valued in excess of $5000 directly from points outside the State of New Jersey. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act as of January 1, 2016. The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

1. Background information

Prior to January 1, Medicenter operated a nursing home and rehabilitation center in Neptune City, New Jersey. The Union has been the exclusive collective-bargaining representative for the service employee unit at the Neptune City facility and since May 7, 2008, through June 15, 2014, the service employee unit at the Neptune City facility enjoyed a collective-bargaining contract with Medicenter, with a memorandum of understanding extending the contract through 2015 (Jt. Exh. 1; Tr. 26, 27).

On June 30, 2015, the Union was certified as the exclusive collective-bargaining representative for the employees in the LPN unit at the Medicenter's Neptune City facility, but the Union and Medicenter never reached a collective-bargaining agreement for the LPN unit (Jt. Exh. 3). Rhina Molina (Molina), who was and is the vice president for the Union, testified that there were two bargaining sessions with Medicenter for a service employee unit contract on July 9 and August 20.[6] Molina was informed by the Medicenter representative at the July

[2] The Licensed Practical Nurses have also been referred as Licensed Professional Nurses in the record.

[3] The Respondent stated in its answer that the Asset Purchase Agreement was entered into on September 11, 2015, by Portfolio Holdings, LLC and was amended by the parties on November 5, 2015, and assigned to Coral Harbor Property, LLC, after it was further amended on December 29, 2015, on behalf of Coral Harbor Property, LLC and the Respondent (GC Exh. 1(G)).

[4] The exhibits for the General Counsel are identified as "GC Exh." and the Respondent's exhibits are identified as "R. Exh." The Charging Party exhibits are identified as "CP. Exh." and Joint Exhibits are identified as "Jt. Exh." The post hearing brief for the General Counsel is identified as "GC Br." and the briefs for the Respondent and Charging Party Union are identified as "R. Br." and "CP. Br.," respectively. The transcript is referenced as "Tr."

[5] Witnesses testifying at the hearing included Rhina Molina, Kathleen H. Hansen, Jennifer Higgins, Mimose Laroc, and Christina Tursi for the General Counsel. Jeremy Schuster, Barry Munk, Marcie Nowicki, and Roberta Bernard testified on behalf of the Respondent.

[6] Molina testified that the first session was on August 20, 2014 (Tr. 19), but she obviously meant 2015 since the Union was not certified as the exclusive collective-bargaining representative for the employees in the LPN unit until June 30, 2015.

9 session it would be too expensive to include the employees of the LPN unit as part of a negotiated contract with the service employees. Molina testified she was informed by Jeff Corradino (Corradino), one of the members of the Medicenter's bargaining team, at the August 20 session that Medicenter was in the process of selling the Neptune City nursing facility (GC Exh. 2; Tr. 19–24).

Corradino confirmed by letter to Molina dated September 17, 2015, that the current owner entered into an Asset Purchase Agreement (APA) on September 11 with Portfolio Holdings, LLC to purchase the operations known as Medicenter of Neptune City (GC Exh. 3).[7]

In response to the September 17 correspondence, Katherine Hansen (Hansen), labor counselor to the Union, wrote to Corradino that his letter failed to state that the "... purchaser has agreed to retain all bargaining unit employees and/or assume all terms and conditions of the CBA" (GC Exh. 4). Hansen wanted assurances that the seller and the buyer respect the obligations in the CBA with the service employee unit and that the seller had notified the purchaser of the existence of a CBA and to maintain the terms of the contact. Hansen also requested a copy of the sales contract and any other documents pertaining to the sale and information on retention of the bargain unit employees and assumption of the contract (Tr. 27–29).

Corradino responded by letter dated September 22, 2015, and attached a copy of the APA and other pertinent information to Hansen (GC Exh. 5). In relevant parts, paragraph 11(g) of the APA states

> Without limiting any other provision of this Article (i) Seller has informed Purchaser that the Facility is a party to the CBA related to the Service Bargaining Unit Employees,(ii) a copy of the CBA had previously been delivered Via electronic mail to Purchaser for its review,(iii) the CBA will expire on August 31, 2015, (iv) Purchaser shall offer retain all eligible Service Bargaining Unit Employees and, if they accept their offers, their employment will continue uninterrupted without loss of seniority; compensation, benefits or other terms and conditions of employment subject to the expired CBA and applicable law, (v) the Purchaser will recognize the 1199 SEIU as the union representing the Service Bargaining Unit Employees; and (vi) Purchaser will not assume the CBA, rather in accordance with Article 37 of the CBA Purchaser will institute new initial terms and conditions of employment which are consistent with the expired CBA effective from and after the Closing Date and agrees to bargain in good faith to negotiate a new CBA with 1199 SEIU after Closing but under no circumstances will Purchaser assume or be deemed to assume the CBA or be deemed a perfectly clear successor.

After several additional exchanges between Hansen and Corradino, Hansen expressed her general satisfaction that the APA provided the protections necessary for the service bargaining unit employees (Tr. 36, 37).

With regard to the LPN unit employees and other facility employees, the APA expressly stated in paragraph 11(b) that

> Excluding the Service Bargaining Unit Employees, Purchaser's obligation as set forth herein to extend offers employment to any other Facility Employees is subject to any new employment terms as determined by the Purchaser and Purchaser is solely responsible to determine which employees it will offer employment. Purchaser's agreement herein to offer employment to Facility Employees is solely between Seller and Purchaser and is not intended for the benefit of third parties, As such, no Property Employee can rely on Purchaser's obligation to offer employment to any of the Facility Employees.

Molina testified that Medicenter did not agree to bargain over the LPN unit during their August 20 bargaining session because it was too expensive to include the LPNs in the negotiations for the service employee contract. Molina testified that there was no mention as to whether there would be changes in LPN duties or whether they would be converted to supervisors at that time (Tr. 23). Hansen agreed that paragraph 11(b) of the APA would include the LPNs. Hansen confirmed that the topic over the LPNs was not discussed after the August 20 bargaining session and that the Union did not raise the changes in the terms and conditions of the LPNs prior to December 15, 2015 (Tr. 57–59).

The Respondent became the operating owner and renamed the facility as Coral Harbor Rehabilitation and Healthcare Center on January 1. The Respondent's chief executive officer was and is Norman Rokeach and the new facility administrator was and is Jeremy Schuster. Barry Munk was and is the Respondent's chief operating officer.

Prior to assuming operations of the facility, the Respondent, on December 15, 2015, informed the Union of its intention to hire the LPNs as supervisors at the facility and to exercise its rights as a *Burns* successor to unilaterally set initial terms and conditions for the LPNs, including the conversion of the LPNs to supervisors (GC Exh. 13). The Union, through Hansen, objected to Louis J. Capozzi, Jr., the counsel for the Respondent, on December 17, 2015, to the Respondent's conversion of LPNs to supervisors or to impose any additional LPN job duties without bargaining with the Union. Her letter stated that the Union demand bargaining on behalf of the LPN bargaining unit upon the Respondent's assumption of the operations (GC Exh. 14; Tr. 38–41).

On December 23, 2015, the counsel for the Respondent informed Hansen that job offers have been sent to LPNs that it intends to hire and that information was provided to them, including their new job description and new employee handbook. The letter reiterated that the Respondent is a *Burns* successor and is entitled to set initial terms and conditions of employment including the conversion of positions to statutory supervisors (GC Exh. 15). It is not disputed by the parties that the Respondent hired a majority of the LPNs, formerly employed at Medicenter (Tr. 51; 446, 447).

The Respondent employs approximately 25 full-time, part-time and per diem LPNs and 36 Certified Nursing Aides (CNA) (GC Exhs. 30–32).

2. The LPNs are hired with the Respondent

The LPNs previously employed by Medicenter received of-

[7] At the time, the owner of Medicenter was Jersey Shore Convalescent Center.

fers of employment on about December 14, 2015, with the new operator. The offer considered the LPNs as new employees and stated that the Respondent would honor their prior vacation, sick and personal time as set forth in the records of the prior employer. The offer stated that their new payroll would begin on January 1, 2016, but there was no mention of any changes in the LPNs' wages. The offer also stated that the Respondent now expects the ". . . LPNs to take an active role in supervising CNAs (certified nurse aides) and that they will be trained to develop the supervisory skills needed to exercise your independent judgment in guiding the performance of CNAs. LPNs will actively participate in CNA evaluations and issue employee disciplines where needed." The offer reminded the job applicants to read the new LPN job description and employee handbook (see job offers to Jennifer Higgins, GC Exh. 25; Mimose Laroc, GC Exh. 39; and Christina Tursi at R. Exh. 3).

Jennifer Higgins (Higgins) began working at Coral Harbor in January 1 as a LPN. Prior to Coral Harbor, she was employed by Medicenter for over 2 years as a LPN. Higgins did not recall the specific date, but testified that she was informed in December by Schuster that Medicenter was sold to a new company. The meeting was held with most of the Medicenter employees and approximately 50 employees from various occupations, including LPNs, maintenance, dietary, and housekeeping, attended the meeting (Tr. 81–84). Higgins, as were others, was informed by Schuster that her job was secure and things would remain the same, but there would be changes. Schuster told the audience that "change is good." Higgins and the other LPNs were informed at the meeting by Schuster that the LPNs accepting a job offer with the Coral Harbor facility would have the authority to write up CNAs with written and verbal warnings (Tr. 141,153).

Higgins testified that she was given a job application by the receptionist after the meeting. Higgins completed the application and returned it to the receptionist before the end of the day. The receptionist called the following day and informed Higgins to pick up her employment offer. Higgins' job offer was dated December 14, 2015 (GC Exh. 25; Tr. 86). Higgins was asked to meet with someone at the facility's library. She was unable to identify the person in the library, but was informed by her that everything was going to remain the same.

Higgins was asked to sign the job offer, which she did. Higgins was also given some paperwork, which she failed to identify at the hearing. Higgins received a job description of her new position and a new employee handbook. Higgins' job description is captioned "Nurse Supervisor (LPN)." The job description informed the new hire that the "The primary purpose of your position is to provide direct nursing care to the residents, and to supervise the day-to-day nursing activities performed by CNAs and by other nursing personnel" (GC Exh. and 27). The handbook received by Higgins states, in part, that the LPNs are considered supervisors by the facility and that they have the responsibility to issue discipline (oral and written warnings) and for evaluating employees in the nursing department.

Higgins testified that she was not aware that she was applying for a supervisory position when offered the position (Tr. 152). Higgins acknowledged and signed her job offer and the job description on December 14. Her job offer stated (GC Exh. 25), in part,

> Furthermore, our Company expects LPNs to take an active role in supervising CNAs. We look forward to working with all LPNs to help you develop the supervisory skills needed to exercise your Independent judgment in guiding the performance of CNAs. LPNs will actively participate in CNA evaluations and issue employee disciplines when needed. During the next couple of weeks we will provide training sessions to review your new duties. Please be sure to read your new Job Description and Employee Handbook for a more thorough explanation to help facilitate the training sessions and a smooth transition.

The employee handbook received by Higgins under "Role of Licensed Professional Nurses (LPNs) and Registered Nurses (RNs)"(GC Exh. 26 at p. 27) stated

> As supervisors, they have the responsibility for assigning work of nursing assistants and attempting to resolve partner problems, complaints and grievances. RN and LPN Supervisors also have the responsibility to issue discipline (oral and written warnings) to nursing assistants when they believe it is warranted. Discipline can be for matters relating to resident care or for violations of the employee rules of conduct under Coral Harbor's Progressive Disciplinary System.
>
> Discipline should only be issued when warranted, and in a consistent fashion. RN and LPN Supervisors are further responsible for evaluating employees in the nursing department. These evaluations are used to help determine continued employment and the amount of discretionary wage increases, if any.

Higgins did not recall if she read the entire applicant packet given to her before signing her job offer on December 14 (Tr. 84–91). Higgins admitted that she was given the opportunity and time to read her job offer and recalled that another employee named Melinda Peavy had in fact reviewed her documents (Tr. 138–142).

Christina Tursi (Tursi) is a LPN and started work at Coral Harbor on January 1. She previously worked at Medicenter as a LPN. Tursi said she was called by the receptionist to apply for the LPN position and did so. After completing the application, Tursi received a call from receptionist to meet at the facility's library. At the library, Tursi received a letter of offer and handbook. Tursi was also told by an unidentified person that nothing was going to change. Tursi was asked to sign the job offer. The job offer was dated December 16 and Tursi signed the offer on that date (R. Exh. 3). Tursi's job offer did not state that she was being hired as a supervisor as was stated in Higgins' job offer. Tursi's job description was captioned "Nurse Supervisor (LPN)" and she signed the document on December 15, 2016 (R. Exh. 4). Tursi recalled two other employees were also presented at the library that she identified as Jennifer Higgins and Medlina Peavy. Tursi signed her job offer, but stated that she did not receive a copy of the job offer (Tr. 190–193).

Mimose Laroc (Laroc) started working at the Coral Harbor facility on January 1 as a LPN. She had also previously worked for Medicenter as a LPN. Laroc remembered a meeting in December with other employees and was informed that Medi-

center was being sold. She recalled that Schuster was also present (Tr. 159–162). Laroc applied for the LPN position and was summoned by the receptionist to get her job offer. The job offer was dated December 14 and was given to her by an unidentified person in the library. Laroc signed her job offer on that day. Laroc's job offer included the same language as in Higgins' offer regarding her role as a LPN supervisor. Laroc said she was given an opportunity to review the packet before signing. Laroc could not recall if she received a job description and a new employee handbook. Laroc's job description was captioned "Nurse Supervisor (LPN)" (R. Exh. 2). Laroc said she did not pay attention to the documents in the packet and just signed the documents. Laroc said she was never told of any changes in the terms and conditions of the LPN position (Tr. 162–165; GC Exh. 39).

Roberta Bernard was hired as a LPN at the Coral Harbor facility in February. She testified to receiving a copy of her job description and an employee handbook. Bernard's job description is captioned "Nurse Supervisor (LPN)." Bernard acknowledged and signed the job description. Bernard did not recall receiving a job offer, but testified that she was being hired as a supervisor when she applied for the LPN position (Tr. 426–428; R. Exh. 7).

Barry Munk (Munk) is the chief operating officer for the Marquis Health Services and oversees the operations for 15 healthcare homes, including Coral Harbor. He works with regional teams to monitor and support the performance of the 15 facilities. Munk has been in the healthcare business for the past 7 years. He testified that there are different structures with the LPNs and a determination was made as to which structure would fit best at a particular facility (Tr. 348–349).

Munk was involved in the transition of Medicenter to Coral Harbor. He was involved in making sure all the pieces were in place, to include payroll, job descriptions, the hiring of personnel for the maintenance, housekeeping, and other departments. Munk said he had very limited role in transitioning the LPNs, but was familiar with the LPN job description and job offers made to the LPN applicants. Munk thought that giving a salary increase to the LPN applicants would encourage them to accept more responsibilities. Munk said that only the LPNs received a salary increase in order to compensate them as a supervisor.

Munk testified that a wage increase for the LPNs was made 2 weeks after the January 1 takeover. He admitted that the raise was not included in the initial job offer. Munk stated that the decision to give the LPNs a wage increase was made shortly after January 1. He stated that the LPNs were informed of their raises at a meeting with Schuster prior to receiving their first paycheck (Tr. 368–371).

Munk wanted the transition of LPNs to supervisors to go "as smooth of possible" at the time of implementation (on January 1). However, Munk testified that he was not particularly involved in the review of the completed LPN job applicant documents and admitted that the new HR person hired to oversee the LPN application process was not fully familiar with the process and that paperwork was lost or not corrected (Tr. 353–363).

Munk said that Chelsea Baumann from the parent company (Tryko) was the one who had distributed the job offers to the LPNs. Munk said that Respondent purposely had Baumann distribute the job offer and package because he knew that the job applicants would have numerous questions about their new responsibilities and he did not want the Respondent to communicate all the aspects of the new model at that time. Munk said that the new HR director was not involved in passing out the job offers Tr. 364–368).

Jeremy Schuster (Schuster) is the administrator for Coral Harbor. Schuster testified that he worked with Medicenter in October/November 2015 to help with the transition. Schuster said he was the "unofficial co-administrator", and was involved in day-to-day operations and focused on making a seamless change of ownership. Schuster became the new administrator of the facility as of January 1, 2016 (Tr. 250, 252).

Schuster was involved in the hiring process of the LPNs but was not involved in the specifics of the individual applicants. He testified overseeing the entire process from getting to know some of the employees, reviewing their personnel files, interviewing and offering jobs. Schuster testified that he discussed the LPNs' supervisory duties in the job offers and answered questions of the job applicants. Schuster said that the job offer was given to the LPN applicants on December 14, 2015 and that every LPN received a 2 percent raise for their additional duties starting with the first payroll in January (Tr. 254, 255).

Schuster admitted that while he oversaw the hiring process for the LPNs, he did not do the actual hiring. He stated that some corporate people assisted in the hiring. Schuster was not involved in distributing the job offers, although he was present at the facility at the time the offers were made. He insisted that he was present on some occasions and was available if there were any questions, but he was not exactly sure what he told the employees (Tr. 270–274).

Schuster explained that LPN applicants were not initially informed that they were applying for a supervisory position, but were informed of changes in their job duties. Schuster noted that Nicole Christ was hired as a LPN on August 10 and not for a supervisory LPN position. (GC Exh. 23L; Tr. 274–277). Schuster was also aware that Marie Derose, who had previously worked as a LPN with Medicenter, was hired by the Respondent and an offer made to her on December 31, 2015. The job offer to Derose did not state that the position was for LPN supervisor and there was no job title in the offer. Schuster testified that the offer omitted the job title and that was a mistake (Tr. 277–279; GC Exh. 51).

Schuster stated that the job posting for LPNs after January 1 did not mention it was for a LPN supervisor. Schuster related that he wanted to have all the job applicants hired first and then the Respondent could subsequently discuss their supervisory duties with them. Schuster testified that with other types of hiring at the facility, a job posting may specifically call for a supervisor and the job offer would state supervisor (Tr. 279–283; GC Exh. 52). Schuster insisted that LPN applicants were aware that they were being hired as a supervisor based on the job offer and job description that accompanied the offer (Tr. 325).

3. The LPN training on December 16

Higgins attended and received an in-service training session on December 16, 2015, that was presented by attorney Brandon S. Williams, the labor counselor for the Respondent. She said the training included information on their new authority as LPNs and their duty in disciplining CNAs. Higgins said the training lasted less than 15 minutes. She insisted that the training did not cover evaluations of CNAs or that LPNs were now responsible for evaluating CNAs (Tr. 95–97; GC Exh. 28).

Tursi also attended LPN training on December 16. She testified that the training was on discipline regarding the CNAs. Tursi said that the training presentation took 30 minutes. Tursi also testified that the training did not cover how to prepare evaluations (Tr. 193, 194; GC Exh. 29).

Laroc attended training on the same date (GC Exh. 29). She recalled that her training cover her new job description and her supervisory duties with the CNAs. Laroc specifically recalled the presenter discussing discipline, training and educating the CNAs. She stated that the presenter told the LPNs that: "We [are] in charge of the CNAs." Laroc said the presenter also discussed training for and evaluation of the CNA employees. Laroc testified that the training was done through a PowerPoint presentation on topics such as the discretion of the LPN to issue discipline or to re-educate the CNA for a performance deficiency and in evaluating CNAs. Laroc believed that the training was over an hour (Tr. Tr. 169–171; 181–183; R. Exh. 1).[8]

Bernard testified that she had not been given training as a LPN supervisor with the Respondent when she was hired in February, but she did attend orientation (Tr. 433, 443).

4. The December 17, 2015 meeting

Higgins recalled a second meeting attended by approximately 50 employees on December 17, 2015. Higgins said that Norman Rokeach (the Respondent's chief executive officer) and Munk were also present. The employees were informed that 97 percent of their jobs were saved and given assurances that nothing would change except for a shift in the laundry department. Higgins said that this meeting lasted about 30 minutes (Tr. 97–99).

Tursi also recalled a second full staff meeting on December 17 that was attended by approximately 40 of the former Medicenter employees at the facility. She said that Rokeach spoke on behalf of the new owner to the group. Tursi recalled that Rokeach told everyone that their jobs were safe, but vacation time would be changed. She did not recall if anything else was said by Rokeach (Tr. 200–202).

Like Higgins and Tursi, Laroc recalled a second staff meeting with the new owners. Laroc was told by Rokeach that 95 percent of the employees would keep their jobs. Laroc said that Rokeach never spoke about their terms and conditions of employment at the meeting (Tr.165–166).

Schuster testified that there was a second staff meeting with approximately 50 Medicenter employees in attendance on December 17, 2015, and that he was present at the meeting along with Rokeach. Schuster stated that this meeting occurred after the LPN training. Schuster gave a general introduction of Marquis, the umbrella company, and its philosophy in caring for patients. He informed the attendees that most would be hired, but there would be some changes because Medicenter was not a successful enterprise. He did not state what the changes were or when they would occur (Tr. 266, 267). He stated that a majority of the employees would be hired, but did not recall stating that 97 percent would be hired (Tr. 288–290).

5. The activities and responsibilities of the LPNs

I. THE TESTIMONY OF MIMOSE LAROC

Laroc testified that she begins her day by clocking in her arrival time at the facility and reviewing the activity log from the night nurse. Laroc said that her chart and other paperwork are done at the nurses' station because she has not been assigned an office. She is aware that the unit manager and the director of nursing have offices. Laroc stated that she would count the prescribed drugs in her med cart and then begin her day in distributing the medication and caring for the residents. She did not testify to any interactions with the CNAs at the start of her day. Laroc has an identification badge that designated her as a LPN supervisor. She testified that the badge was issued to her in September. Her previous identification badge was not titled "supervisor" (Tr. 166–169).

With regard to her authority to discipline CNAs, Laroc testified that she doesn't believe she has the authority to hire and fire employees. She has recommended people for hiring as nurses and CNAs. Laroc has not disciplined anyone, but recalled signing a disciplinary notice on two employees that were completed by the director of nursing (DON), Marcie Nowicki, on January 18 and 26 (Tr. 169–172; GC Exhs. 41 and 42). Laroc testified that she gave discipline to the employees, but the actual disciplinary notice was written by the DON. Laroc testified that she was not present when the employee committed the infraction and so the DON wrote the discipline and gave it to Laroc to issue. Laroc believe that the second discipline was written by the DON because Laroc did not witness the infraction (GC Exh. 42; Tr. 172–176). Laroc testified she did not discipline employees when employed by Medicenter and that disciplining employees was not a requirement for her former position (Tr. 181).

With regard to her authority to evaluate CNAs, Laroc testified that she has signed evaluations at the directions of the DON. She testified that she has completed "a couple" of evaluations. Laroc testified to an evaluation given to employee Marie Marcelus and explained that it was the DON who had approved the evaluation on a date earlier than it was signed by the employee. Laroc testified that the DON had directed and approved the evaluation but Laroc was unable to issue the eval-

[8] The Respondent introduced an exhibit (R. Exh. 1) that represented the training conducted on December 16. The counsel for the General Counsel objected to this exhibit because it was not properly authenticated (Tr. 181–187). The exhibit details some of the supervisory responsibilities of the LPN, which included the discipline, education, evaluation and training duties with the CNAs. The exhibit was not rejected and accepted for its probative value since it is not wholly inconsistent with the testimony of Higgins, Tursi and, in particular Laroc, who had testified that the presentation covered the role of the LPNs in the discipline, training, evaluation, and education of the CNAs. Consequently, the relevant portions of the training were authenticated by the General Counsel's witnesses.

uation to Marcelus and have it signed until July. Laroc testified that the employee's appraisal already had the name of the employee written on top of the form by another person. Laroc stated that she completed the rest of the form, including the evaluation ratings for the employee (Tr. 177–180; GC Exh. 43). Laroc stated that she has completed evaluations for two employees that were independent of any influence from her superiors. She stated that when she received the evaluation form, the only item pre-written on the form was the employee's name on top of the evaluation so that she would know the name of the CNA she was evaluating (Tr. 187–189).

II. THE TESTIMONY OF JENNIFER HIGGINS

Higgins also starts her day by clocking in and going to her assigned unit to review the shift report from the previous nurse. Higgins stated that she does her paperwork at the nurses' station because she has not been assigned an office. Higgins testified that she gives the assignments to the CNAs, but that the assignments and work schedules of the CNAs had already been prepared and completed by either the staffing coordinator or the DON (Tr. 99–104; GC Exhs. 30 and 32). Higgins testified that she does not attend morning meetings with other managers and is not involved in planning the care for the patients. Higgins has no role in the assignment of the CNAs, but is responsible for handwriting the names of the CNAs on an assignment chart to ensure an even distribution ratio of CNA workers to residents for each assignment. Higgins explained that she may add or subtract a patient to or from a CNA to even the distribution. Higgins, on occasions, may also assign CNAs to patients arriving at the facility during the night that were not accounted for by the staffing coordinator or DON (Tr. 108–112).

Higgins has called or texted CNAs about their work schedules, but only if instructed by the DON and only upon approval by a supervisor could she find a replacement when a CNA calls in sick. Higgins said she cannot approve any leave request from a CNA (Tr. 142–144; 197, 198).

Higgins said she had an identification badge designating her as a LPN when she was hired. She testified that in September or October, she received a new ID badge designating her as a "LPN Nursing Supervisor" (Tr. 118–121; 197–200; GC Exh. 34).

In evaluating employees, Higgins testified that she only started completing evaluations of CNAs in April when there was a meeting with Schuster about doing them on a weekly basis just around the time that Higgins visited the NLRB Regional Office to provide an affidavit on a charge against the Respondent. She stated that the meeting was held on April 17 and her visit to the NLRB Regional Office was on April 18. Higgins recalled completing an evaluation for CNA Vanisha Wilson (GC Exh. 35: evaluation of Vanisha Wilson). Higgins testified that she did not complete the front page of the evaluation form and was instructed by her supervisor to complete the evaluation. Higgins stated that her supervisor did not tell her what to fill out on the employee evaluation. Higgins stated that she has completed additional evaluations, but did not recall how many after the two evaluations were done in May (Tr. 122–127).

As to her role in disciplining employees with the Respondent, Higgins testified she cannot hire or fire an employee, but has recommended discipline since May (Tr. 153, 197, 198). Higgins said she has issued discipline on two employees. Higgins said that employee James Daye was given two disciplines on May 4. One discipline was a verbal warning and the second discipline was for re-education.[9] Higgins insisted that Schuster instructed her on the type and severity of the discipline, but also admitted that Schuster told her to proceed with the discipline "as appropriate" (GC Exh. 36; Tr. 149).

Higgins said she needed advice from the DON Nowicki on completing the disciplinary notice that was given to her by Schuster. Higgins needed assistance because she did not witness the infraction and did not have access to the personnel file of the employee to know of any prior progressive discipline (verbal, suspension, etc.). Higgins was informed by the DON as to the type of severity of the discipline. The narrative in the notice of discipline was written by Higgins, but the severity of the discipline was determined and approved by the DON. Higgins admitted she was not aware of the factual situation for the basis of the discipline (GC Exh. 37; Tr. 129–134).

Higgins testified that there was a second discipline she issued involving the same employee. Higgins testified that she recommended re-training (education) for Daye as the corrective action and this was approved by the DON. Higgins said that the re-education of the CNA as a discipline was her decision. Higgins testified that "Yes, it's got to be my final decision because I'm the one handing it to him" (Tr. 131–134; 149; 156; GC Exh. 36). However, in actuality, the severity and approval of the discipline was determined by the DON (GC Exh. 37).

With regard to the training, Higgins has not been involved in conducting in-service training for the CNAs. She said in-service training is performed by DON or by unit manager/physician. Higgins has provided in-service training on a presentation that was already prepared for her, but insisted she had no role in preparing the training (Tr. 112–118).

III. THE TESTIMONY OF CHRISTINA TURSI

Tursi testified that she would begin her day by clocking in for work and then head to the nurses' station to retrieve the previous report on the events that occurred during the night. Tursi testified she has not been assigned an office and would review the daily log at the nurses' station. Tursi does not attend morning managerial staff meetings. Tursi recalled that she received a new ID badge with "supervisor" title in September.

After a review of the log, Tursi would then count the drugs and sit with the CNAs to discuss assignments. Tursi said that the CNAs were already given permanent assignments and she would need permission from a supervisor to reassign a CNA. Tursi said her role was to merely handwrite the name of the CNA on the assignment sheet (Tr. 194–197; GC Exh. 32 is a copy of a CNA assignment sheet).

[9] Higgins testified that she had disciplined Ebony Reed and James Daye (Tr. 129). However, Higgins did not follow up on her testimony with regard to Reed. The General Counsel and the Respondent never proffered any evidence on the circumstances of Ebony Reed's discipline. The Respondent's "proposed findings of fact" at pars. 32 and 33 only suggested that the two disciplines issued by Higgins were for Daye.

Tursi said that the CNA daily assignment sheet is completed by the staffing coordinator and she has no responsibility in the assignments of the CNA. Tursi also confirmed that she does not have the authority to approve leave or revise the work schedules of the CNA (Tr. 197–200).

Tursi has issued disciplinary actions as a LPN with the Respondent. She testified that she would consult with the DON before issuing the discipline and has to get the notice of discipline from the DON. Tursi testified that she cannot discipline without first discussing the matter with the DON or supervisor. Tursi testified that she would be instructed by a supervisor to write up the discipline on a CNA. Tursi would write up the narrative in the notice of discipline in her own language, but the severity and approval of the discipline is decided by the DON or a supervisor (Tr. 202–206; 237, 238; GC Exhs. 44–47).

Specifically, Tursi testified that she wrote the narrative on the notice of discipline for employee Debbie Bartee but the verbal warning and approval of the discipline was determined by the DON (GC Exh. 44). Tursi testified that Michelle King, a weekend supervisor, had written a discipline notice on employee Vanisha Wilson and then King asked Tursi to give the notice of discipline to the employee. Tursi stated that she had no other role with that discipline (GC Exh. 45). On a third discipline involving Kalia Brown, Tursi testified that King also wrote the notice of discipline and she was instructed to issue the discipline by King. King determined and approved the discipline on Kalia Brown (GC Exh. 46). On a fourth discipline of employee Jahasia Weston, Tursi stated that she wrote the narrative on the notice of discipline at the direction of supervisor Lauren Sutton. The discipline notice does not reflect the type of discipline that was issued to Weston and no approving official signed the notice (Tr. 207–211 GC Exh. 47).

Tursi has completed evaluations of the CNAs but stated she did not start until March 2016, shortly after she was subpoenaed by the NLRB. Tursi recalled that she attended a meeting with Higgins, Elsa Ryan (LPN), Schuster and Phil Back and was given a form by Schuster for her to do weekly evaluations on the CNAs. Tursi stated that the LPNs were recently given access to the evaluation forms (in September).

Tursi said that she completed her first evaluation of an employee on May 14. She said that the DON gave her the evaluation form and she was instructed how to evaluate the employee. Tursi testified that the name of the employee was already written on the top of the appraisal when she received the form from Schuster. Tursi insisted that part of the evaluation form was not in her handwriting and some of the numerical ratings of the employees were not done by her (Tr. 211–216; GC Exh. 48: evaluation of Natasha Johnson). Tursi testified that she completed evaluations on at least three other employees on her own without any influence or directions from a manager. She stated that only the employee's name on top portion of the evaluation form was completed by someone else (Tr. 220–223; GC Exh. 50).

With regard to her responsibility in training the CNAs, Tursi testified that she conducted an in-service training with the CNAs. She developed the training because Tursi recognized, along with other nurses, that the CNAs were deficient in a particular area. Tursi said that the training was a group effort and took approximately 10 minutes (Tr. 223–224; R. Exh. 5).

IV. THE TESTIMONY OF ROBERTA BERNARD

Bernard has issued three disciplines and testified she had made the formal recommendations and the subsequent discipline was done by the unit manager. On one occasion, Bernard said that she decided to discipline a CNA for excessive lateness. Bernard did not consult with anyone before issuing the discipline and no superiors influenced her on the decision-making. Bernard testified she issued discipline to a second CNA for lack of patient care. She stated that no one instructed her to do so and she did not consult anyone on the discipline (Tr. 428–431).

However, Bernard also testified that on three other disciplinary actions, she either was instructed to write up the discipline or the discipline was written for her signature. On one occasion, Bernard said that she did not observe the infraction, so the discipline was written by Schuster after a discussion with her and a social worker. Bernard was asked by Schuster whether the severity of the discipline was appropriate and whether Bernard felt that the infraction warranted a disciplinary action. She said that the final outcome was a suspension of the employee done by Schuster (GC Exh. 59; Tr. 436–437). Bernard further testified that on another occasion, she issued two disciplinary actions for the same employee. Bernard said that the two notices of disciplinary action were written by the unit manager based upon information she provided to the manager. Bernard said that the notices were returned to her after they were written and Bernard signed the notices. Bernard admitted that the unit manager made the decision to discipline this employee (Tr. 438–440; GC Exhs. 60 and 61).

Bernard has completed evaluations of CNAs during her employment with the Respondent. She insisted that she was not influenced by management on her evaluations of the employees. Bernard testified she was instructed to complete the evaluations of the employees and someone would give her the evaluation forms for her to complete (Tr. 440–443; GC Exh. 62).

6. The Respondent's rebuttal

Munk testified that he realized through his years of experience that the RNs, LPNs and CNAs would operate separately and independently of each other and there was no coordination of the health care for the residents. Munk felt that placing the responsibilities of the CNAs in the hands of the LPNs would serve to provide coordinated care and allow them to work cohesively together. Munk testified that implementing LPN supervisory positions at Coral Harbor was part of the corporate effort to improve patient care. Munk said that this was a developing new concept and he did not want to roll out this model with the 15 facilities at the same time. Munk said that he started placing the CNAs under the supervision of the LPNs with a facility named Willow Springs, which was located near the Marquis corporate offices to allow closer monitoring of the new model. He stated that Coral Harbor was the second home to have LPNs supervise the CNAs and that the transition began in September 2015 after the signing of the asset purchase agreement (Tr. 350–353). Munk testified that the LPN job description was taken from another facility and revised prior to the signing of the APA on September 11, 2015 (Tr. 371, 373, 374; GC Exh.

5).

Schuster testified that LPNs are supervisors as indicated by their job offer letter, job description, their salary increase, and their supervisory training. Schuster said that LPNs' duties with the CNAs included direct supervision and overseeing their role with their daily work activities and making sure they are performing well in their job. In addition, Schuster said that the LPNs are in charge of discipline; decide if training and further education is needed; and perform evaluations. Schuster related that LPNs have no offices because they need to be in the rooms with the residents for medication and treatment and also to oversee the CNAs' activities. Unit managers and the DON have offices because they perform mostly office work in overseeing the entire unit (Tr. 255–258). Similarly, Schuster stated that LPNs do not attend morning managerial meetings because such meetings are not for the purpose of discussing patient care or the CNAs (Tr. 287, 288).

With regard to discipline, Schuster testified that where a LPN observed a violation, it is the LPN's decision to discipline and LPN has the discretion to discuss the infraction with the CNA as a learning tool in lieu of discipline. Schuster stated that if discipline is necessary, the LPN would initiate the process. Schuster stated that disciplinary notice forms are available in the file cabinet by the nurses' station, on the computer, from the DON, HR or from the administrator. Schuster explained that there are two parts in the disciplinary notice. The first part is what had happened and the decision to give discipline. The second part is the severity of the discipline. The severity of the discipline is decided by the DON or administrator because the LPN would not have knowledge of employee's past record of discipline. The LPN is present when the discipline notice is issued to the CNA by the DON, HR, or the administrator. Schuster insisted that the LPN always fills out the disciplinary notice form (Tr. 258–260). Schuster testified that LPNs are the only ones to fill out the disciplinary forms, but that the DON has the authority to discipline where the LPNs may not have the knowledge of the infraction or there are extraordinary circumstances involved in the discipline. Schuster stated that the unit manager or the DON is usually involved in discipline on time and attendance infractions (Tr. 330).

It is not disputed that on some occasions, the registered nurse or a unit manager had also issued discipline against a CNA (CP Exh. 3 and 4; Tr. 308–312). In rebuttal to Tursi's testimony that she did not issue discipline to two employees, Schuster said that the weekend supervisor, Michelle King, who had issued the discipline on Vanisha Wilson and Kalia Brown, was wrong and is no longer employed at the facility because she could not effectively transition over in giving the authority to the LPNs to issue the discipline (Tr. 327, 328).

With regard to evaluations, Schuster testified that LPNs are the only ones responsible for completing evaluations. He stated that evaluations serve to improve the performance of the CNAs and as a warning for possible future discipline. Schuster testified that there are different types of evaluation. One form of evaluation is required by State regulations. A second evaluation instituted at the facility is a weekly checklist evaluation performed by the LPN. He stated that this evaluation was implemented in March and serves as a tool to help the LPN to focus on how to better evaluate the CNAs. Schuster mentioned a third evaluation, which he described as a 90-day evaluation that was implemented in May. He said that the 90-day evaluation is to see if the new employee is a good match for the position (Tr. 326). Schuster admitted that the implementation took longer than anticipated. Although there is an annual evaluation, Schuster stated that the same evaluation form is used for the 90-day and annual evaluations. He stated that the top portion with the employee's name is filled out by someone other than the LPN because CNAs would work under multiple LPNs. Schuster said it's the DON's responsibility to divide up the evaluations and designate the LPN who had primarily worked with the CNA to do the evaluation. Schuster insisted that he has no knowledge that a LPN would do an evaluation and a different LPN would sign off on the same evaluation (Tr. 260–263; 267–269).

Schuster believe that, similar to the issuance of discipline, there were LPNs and unit managers that had difficulties in transiting to issuing evaluations. Schuster noted that in Laroc's evaluation of David Tucker, the evaluation was not completed by Laroc, who had to be retrained that it was her responsibility to evaluate the employee (Tr. 283, 284; GC Exh. 53). With respect to another evaluation on employee Tucker, Schuster stated that the unit manager (Jacqueline Jenkins) should not have completed the evaluation (Tr. 285–287; GC Exh. 54).

With respect to the LPN's authority over the CNAs, Schuster testified that LPNs may assign and reassign CNAs and to suggest the proper ratio of CNAs to patients during a mealtime. Schuster believe that it is within the LPN's discretion to equalize the ratio of CNAs to patients. Schuster stated that a LPN may also suggest training and education as was the situation with Tursi and the training she provided. Schuster reiterated that LPNs do not regularly attend morning meetings because the meetings are not to discuss a specific CNA activity or the daily working activities of a CNA. He said that unit managers are present because of their knowledge of overall operations from nurses, to LPNs to CNAs and for interacting with the doctors (Tr. 263–266).

Marcie Nowicki (Nowicki) has been employed as the DON since January 1 and had worked as the DON under Medicenter since October 2013. Nowicki said that the LPN job description under Medicenter did not include discipline or evaluations, and she could not recall if the duties included job assignments of the CNAs. Nowicki testified that she was aware that LPNs under Medicenter would ". . . occasionally. Maybe even rarely" discipline CNAs. She was also aware that LPNs did not routinely perform evaluations at Medicenter, but they were involved in the assignments of CNAs to a resident or resident group. Nowicki testified that only LPNs employed at Medicenter during the 11–7 pm shift had completed evaluations because there were no supervisors on duty during that shift (Tr.382–384, 400).

Nowicki stated that there were major changes under Coral Harbor and LPNs were encouraged to evaluate, train, and discipline the CNAs. Nowicki testified that if there is a need for a change in the assignment, the LPNs would use their discretion. In other aspects of their position, Nowicki stated that LPNs are not assigned offices because they work on the floor; they do not

attend morning meetings and have no role in developing monthly schedules for the CNAs (Tr. 391–394, 425).

With respect to discipline, Nowicki stated that the employer wanted the LPNs to use their professional judgment in deciding whether discipline of a CNA would be appropriate. She indicated that nothing may be done or if the infraction is a knowledge-based deficiency, the LPN may decide that training is more appropriate than discipline. Nowicki said that discipline would be appropriate if the LPN believe that the infraction is a chronic issue. Nowicki said that the LPN writes up the infraction; goes over the discipline with the CNA and both individuals would sign the disciplinary notice. Nowicki stated that she might be present on occasions when the discipline is issued. Nowicki stated that she would review the discipline done by the LPNs and sign the notice of discipline. Nowicki insisted that she has never revised a disciplinary notice prepared and issued by a LPN (Tr. 384–387; R. Exh. 6).

Similarly, Nowicki stated that she has not revised an evaluation prepared by a LPN and she encourages suggestions made by the LPN on deficiencies noted in the weekly checklist evaluations. Nowicki cited to Tursi's suggestion for an in-service training based upon her assessment of a deficiency noted in the CNAs' performance. Nowicki testified that she encourages the LPNs to use their discretion in training, evaluating and in disciplining CNAs (Tr. 387–390). Nowicki stated that the weekly checklist began in spring and was a tool designed to train and educate the LPNs in providing them with some helpful ideas as to what to monitor in their supervision of the CNAs when they complete the CNA evaluations. The parties stipulated that the weekly evaluation started on April 22 through May 15 and resumed on September 6 (Tr. 410, 412–414).

Nowicki admitted that there are some difficulties for the LPNs to transition into supervisors and a few LPNs, including Champion, Ryan, Tursi, and Laroc, were disciplined by her for failing to do evaluations of the CNAs (Tr. 390, 391). Nowicki also indicated that she has signed notices of discipline against a CNA (CP. Exh. 7) and on other occasions, the discipline notice was signed by the nurse (CP. Exh. 3; Tr. 414–416).

Discussion and Analysis

The amended complaint alleges that the Respondent violated Section 8(a)(5) of the Act by failing and refusing to bargain with the Union as the exclusive collective-bargaining representative of the Respondent's employees in the LPN unit. It is further alleged that Respondent violated Section 8(a)(5) of the Act when it withdrew recognition of the Union as the exclusive collective-bargaining representative of the LPN unit and by unilaterally changing the terms and conditions of the LPNs without affording the Union the opportunity to bargain over the changes.

The Respondent did not bargain with the Union over the LPNs, but maintains that as a *Burns* successor, it was under no obligation to recognize or bargain with the Union over the changes in the terms and conditions of the LPNs on the grounds that the LPNs were converted into supervisors within the meaning of 2(11) of the Act. The counsel for the Respondent maintains that the General Counsel has failed his burden to show that Coral Harbor is a perfectly clear successor.

1. The *Burns* doctrine

In *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972), a successor employer must bargain with the employee representative when it becomes clear that the successor has hired its full complement of employees and that the union represents a majority of those employees. In *Burns*, the Court stated:

> Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms.

The Board has held that when a business changes hands, the successor employer must take over and honor the collective-bargaining agreement negotiated by the predecessor. In *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987), the Supreme Court clarified the *Burns* doctrine and held that an employer that purchases the assets of another is required to recognize and bargain with a union representing the predecessor's employees when (1) there is a substantial continuity of operations after the takeover and (2) if a majority of the new employer's workforce in an appropriate unit consists of the predecessor's employees at a time when the successor has reached a substantial and representative complement.

Under *Burns*, determining whether a new company is a successor "is primarily factual in nature and is based upon the totality of the circumstances of a given situation." *Fall River Dyeing*, 482 U.S. at 43. Thus, a finding of successorship imposes an obligation on the Respondent to bargain with the union of its predecessor. Absent discrimination, even a successor is ordinarily free to set the initial terms on which it will hire the employees of a predecessor and ". . . is not bound by the substantive provisions of the predecessor's collective bargaining agreement." *Burns Int'l Sec. Servs., Inc.*, at 272, 294.

The rule of successorship imposes an obligation on the Respondent to bargain with the union of its predecessor. *Fall River Dyeing*, 482 U.S. at 36. "If the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation of 8(a) (5) is activated. This makes sense when one considers that the employer intends to take advantage of the training work force of its predecessor." Id. At 41–42.

2. The Respondent did not clearly announce its intent to change working conditions

In *Spruce Up Corp.*, 209 NLRB 194 (1974), the Board interpreted the "perfectly clear" caveat in *Burns* as "restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." Id. at 195 (fn. omitted).

The counsel for the General Counsel argues that ". . . there was substantial continuity of the business enterprise because the Respondent's operation encompasses the same job, with the same working conditions, in the same locations, for the some complement of residents." The General Counsel maintains that there is no evidence of record to show that the Respondent made any significant changes to the nursing tasks performed by the LPNs and view their job functions as ". . . essentially unaltered" citing to *Sierra Realty Corp.*, 317 NLRB 832, 835 (1995) (GC Br. at 48–50).

The counsel for the Respondent argues that the General Counsel failed his burden of proof to show that Coral Harbor was a perfectly clear *Burns* successor ". . . on the basis of the language in paragraph 11(b) of the APA; its pre-hiring notice to the Union about its intent to convert the LPN's positions to supervisors, and the express language of its December 15, 2015 offer letters to the LPNs and job descriptions advising them that they (have) supervisory duties with respect to discipline and evaluation of bargaining unit CNA employees and others, as well as the pre-employment training it provided to them concerning the exercise of their new supervisory functions" (R. Br. at 12).

a. The Union did not fail to act when it received the Asset Purchase Agreement

The Respondent argues that the Asset Purchase Agreement in paragraph 11(b) expressly stated that offers of employment except for the service bargaining unit employees are subject to new employment terms as determined by the buyer and that the Union failed to request bargaining or request further information about the purchaser's intent until December 15, 2015 (R. Br. at 18, 19; GC Exh. 10). The Union, through labor counsel Hansen, had received a copy of the APA on October 7, 2015. Hansen testified that paragraph 11(b) would include other employees, like the LPNs. The Union objected to the change in the terms and conditions of the LPNs when Hansen received the December 15 letter from Louis Capozzi, Jr., legal representative to the Respondent, regarding the Respondent's intent to convert the LPNs to supervisors (GC Exhs. 13 and 14).

In my opinion, the language of the APA is an understanding between the seller and buyer over the terms and conditions of the sale. The Union was not involved in the negotiations of paragraph 11 of the APA and was not party to the signing of the APA on September 11 and could not object to the terms of the APA. I find that in August, the Union was still under the impression at the bargaining table with Medicenter that there would be no changes in the terms and conditions of the LPNs. Molina credibly testified that there was no mention as to whether there would be changes in LPN duties or whether they would be converted to supervisors during the Union's bargaining session with Medicenter on August 20. Hansen confirmed that the topic over the LPNs was not discussed after the August 20 bargaining session because the predecessor complained that including the LPNs in the bargaining with the service and maintenance unit employees would be too expensive. Clearly, this is indicative to me that the parties would be bargaining for a separate LPN contract after completing the agreement on the service and maintenance employees.

I find also that Hansen had indeed complained to Corradino as early as September 24, 2015 that the Respondent is not a perfectly clear successor. In her letter to Corradino, Hansen stated that

> any claim in the sales agreement that the Purchaser is not a "perfectly clear successor" has no legal significance. Whether or not the Purchaser is a perfectly clear successor is a legal determination that can only be made by the National Labor Relations Board (GC Exh. 6).

Further, when the Respondent informed the Union of its intention to hire LPNs as supervisors at the facility and to exercise its rights as a *Burns* successor to unilaterally set initial terms and conditions for the LPNs on December 15, the Union objected on December 17 to the Respondent's intent to convert LPNs to supervisors or to impose any additional LPN job duties without bargaining with the Union (GC Exh. 13). Hansen's reply in a letter date December 17 to Capozzi, Jr. stated that the Union demand bargaining on behalf of the LPN bargaining unit upon the Respondent's assumption of the operations (GC Exh. 14).

Under such circumstances, I find it reasonable for the Union to believe that negotiations for a first contract with the recently certified LPN employee unit would be with the purchaser and that it had in fact disputed the legality of the Respondent's intent to change the terms and conditions of the employees almost 3 months earlier than December 15. In addition, while paragraph 11 of the APA may have put the Union on some notice that changes with the LPNs may be forthcoming, it certainly did not, as argued by the Respondent, put the LPN employees with notice of "sufficient portent of changes in their terms and conditions of employment" (R. Br. at 19). Unlike *Ridgewells, Inc.*, 334 NLRB 37 (2001) cited by counsel for the Respondent, this is not a situation where the employer actually announced changes to put employees on notice that a new set of employment conditions would be in effect. Here, the language to set new employment conditions was imbedded in one paragraph of a 32-page document that was provided to counsel for the Union. Nothing in the record suggest that the APA was provided to the LPNs or that Hansen read the paragraph language to the LPNs. None of the LPN employees read or would reasonably have understood paragraph 11. In my opinion, paragraph 11 of the APA did not serve notice on the LPNs that their employment conditions would be subject to changes.

b. The job description, job offer, employee handbook and in-service training did not clearly establish new set of working conditions

A successor employer has an obligation to bargain over initial terms when it "displays intent to employ the predecessor's employees without making it clear that their employment will be on different terms from those in place with the predecessor." *Creative Vision Resources, LLC,* 364 NLRB No. 91, slip op. at 3 (2016).

The Respondent argues that the job offer, along with the job description and the new employee handbook expressly advised and served clear notice to the LPN applicants of the announced changes in their job duties. Munk wanted the transition of

LPNs to supervisors to go "as smooth of possible" at the time of implementation (on January 1).

The counsel for the General Counsel argues that the job description, job offer, job advertisements, in-service training, and identification badges for LPNs are indicative of a sham that the Respondent was actually hiring LPNs and not supervisors (GC Br. at 46–48).

It is painfully obvious that the hiring process of the LPNs was not as transparent to the applicants as described by Munk and Schuster. For a number of factors, I find that the hiring process was designed to limit the LPN applicants' ability to assess critical information before accepting the position. I find it troublesome that some job offers did not include any mention of a supervisory position; some job descriptions were not acknowledged and signed by the applicants; applicants were informed that there would be no changes in their job duties from their former position with Medicenter and told to just sign the job offer; the individual distributing the job offers was not in the position to answer questions; the testimony of the LPNs was inconsistent as to the nature and duration of the LPN supervisory training; the applicants were not informed of a wage increase until after they accepted the position at least 2 weeks into their employment; and the job advertisements after January 1 did not state that the position was for a supervisor.

Further, Schuster did not want to provide all the information on the LPN's supervisory role until after the applicant accepted the position. Munk testified that he was not particularly involved in the review of the completed LPN job applicant documents. He admitted that the new HR person hired to oversee the LPN application process was not fully familiar with the process and that paperwork was lost or not corrected. Munk purposely placed an individual not involved in the hiring process to give out the job offers in order to limit the inquiries that the applicants may have had about the LPN position.

Contrary to the expressed desire of Munk, the hiring process for the LPNs was far from smooth. At best, the hiring process was haphazardly done. At worst, the process was designed to withhold changes to the duties of the LPNs from the applicants. In my opinion, it is clear that Schuster and Munk did not want to fully inform the LPN applicants as to the extent of their job duties. Munk placed someone who was unfamiliar with the aspects of the position to give out the job offer and testified that this was done purposely to prevent answering questions that the job applicants may have had about their position. Schuster admitted that some job offers did not have the supervisory language stated in the offer and said in hindsight that was a "mistake." His testimony is inconsistent on this point inasmuch as Schuster also testified that when the facility is seeking applicants for supervisory positions in other departments, the job advertisement would specifically state that it was a supervisory position. Here, the job advertisement of the LPN position did not state it was for a supervisory position. Some applicants were not informed that they were applying for a supervisory position (GC Exh. 23(i)).[10] None of the LPN applicants were offered the position with a wage increase commensurate with their supervisory position and the decision to increase wages was not made until after they were hired on January 1.

Higgins attended a meeting along with approximately 50 other employees of Medicenter in December prior to receiving her job offer and was informed by Schuster that their jobs were secure and things would remain the same, but there would be changes and that "change is good." Her testimony was consistent with the other witnesses testifying that there would be some changes. However, the changes in the LPN position was never announced or articulated at the two staff meetings in December. Higgins testified that she was given a job application and was asked to meet with someone at the facility's library. Higgins received a job description of her new position and a new employee handbook. Higgins' job description is captioned "Nurse Supervisor (LPN)." The job description informed the new hire that the "The primary purpose of your position is to provide direct nursing care to the residents, and to supervise the day-to-day nursing activities performed by CNAs and by other nursing personnel" (GC Exh. and 27). The handbook also stated that LPNs are considered supervisors by the facility and that they have the responsibility to issue discipline (oral and written warnings) and for evaluating employees in the nursing department.

However, Higgins credibly testified that she was not aware that she was applying for a supervisory position when offered the position and was informed by the person giving out the job offer that everything was going to remain the same. Higgins was then asked to sign the job offer, which she did. Further, the new employee handbook is voluminous and would have required Higgins and other applicants to go home and review the handbook before accepting the position.

Tursi was called by a receptionist to apply for the LPN position and did so. After completing the application, Tursi received a call from the receptionist to meet at the facility's library. At the library, Tursi received a letter of offer and handbook. Tursi was also told by an unidentified person that nothing was going to change. Tursi was then asked to sign the job offer. Tursi's job offer did not mention that she was hired as a supervisor.

Laroc was called by the receptionist to get a job application for the LPN position. The job offer for Laroc included the same language as in Higgins' offer regarding her role as a LPN supervisor. Laroc could not recall if she received a job description or the new employee handbook. Laroc's job description was captioned "Nurse Supervisor (LPN)" (R. Exh. 2). Laroc said she did not pay attention to the documents in the packet and just signed the documents. Laroc said she was never verbally told there were any changes in the terms and conditions.

Roberta Bernard was hired as a LPN at the Coral Harbor facility in February. She testified receiving a copy of her job description and an employee handbook. Bernard's job description is captioned "Nurse Supervisor (LPN)." She does not recall receiving a job offer. Bernard acknowledged and signed the job description. Bernard did not recall receiving a job offer,

[10] For example, Nicole Christ was offered a position on August 16, 2016 for ". . . the position of Licensed Practical Nurse (LPN) with Marquis Health Services for the nursing facility known as Coral Harbor Rehabilitation and Healthcare Center . . ." Her offer did not mention that it was for a supervisory position.

but was told she was being hired as a supervisor when she applied for the LPN position.

Schuster explained that applicants for the LPN position were not initially informed that they were applying for a supervisory position. Schuster also stated that the job posting for LPNs after January 1 did not state that it was a LPN supervisor position. Schuster related that he wanted to have all the job applicants hired first and then the Respondent could subsequently discuss their supervisory duties with them.

Schuster admitted that while he oversaw the hiring process for the LPNs, he did not do the actual hiring. He stated that some corporate people assisted in the hiring. Schuster was not involved in distributing the job offers, but insisted that he was present on some occasions if there were any questions, but was not sure exactly when and what he told the employees. None of the LPN witnesses testified that they had conversed with Schuster over the prospective changes in the position.

Munk admitted that the wage increase was not included in the initial job offer. Munk stated that the decision to give the LPNs a wage increase was made after the majority of the Medicenter LPNs were hired on January 1. Munk said that Respondent purposely had someone unfamiliar with the LPN job duties distribute the job offer because he knew that the job applicants would have numerous questions with their new duties and responsibilities and he did not want the Respondent to communicate all the aspects of the new model at that time.

It seems strange to me that while some LPN applicants were given job offers with the LPN supervisory language noted above, other LPN applicants before and after January 1 were not informed that they were applying for a supervisory position and their job offers did not include the supervisory language. Job advertisements after January 1 did not mention that the Respondent was hiring for LPN supervisors. It also seems untenable to me that while Munk and Schuster wanted a smooth hiring transition, they also wanted to keep the LPN applicants in the dark about their new position by having someone not familiar with the job duties to give out the job offer and to not have the HR department involved in fielding questions about the position. It makes little sense to me for the Respondent to maintain that everything was going to be explained to the employees *after they accepted the offer* as testified by Schuster.

I would also question the validity that the LPN job applicants actually were offered the time and opportunity to read all the materials given to them when offered the position. All the LPNs hired prior to January 1 consistently testified that they attended a full staff meeting with other employees and then were ushered or summoned to the library and given job offers. Most were told just to sign the offers. None testified that they took the time to read the entire package. Higgins could not recollect what she received. Laroc was given the opportunity to read the job offer but could not recall if she received a job description and the new employee handbook. Tursi was told there were no changes in her former position as a LPN with Medicenter and then instructed to sign the job offer. Tursi's job offer did not mention it was for a supervisor (compared R. Exh. 3 with GC Exh. 25).

Further, 2 days later, the LPNs were given in-service training. The Respondent stated that the training was to explain the new supervisory responsibilities of the LPNs. The training was provided in two sessions, with five LPNs attending in the first session and eight in the second session (GC Exhs. 28, 29). The Respondent argues that the LPN supervisory training clearly articulated the changes and provided the LPNs with skills, such as evaluating and disciplining employees; using independent judgment and discretion as a supervisor and other aspects of the employee handbook.

Higgins said the training lasted less than 15 minutes. She insisted that the training did not cover evaluations of CNAs or that the LPNs were now responsible for evaluating CNAs. Tursi also attended the LPN training. She testified that the training was on discipline regarding the CNAs. Tursi said that the training presentation took 30 minutes and did not cover evaluations. Laroc also attended training. Her training covered the new job description and supervisory duties over the CNAs. Laroc said that the training was also on disciplinary policy and evaluation of employees. Laroc believed that the presentation lasted over an hour.

At best, the testimony by the LPNs on the topics covered and the duration of the training is inconclusive to establish that everything presented in the PowerPoint training (R. Exh. 1) was in fact covered on December 16.

Further, the LPNs' title when hired was reflected on their identification badges as "LPN" and did not clearly state their putative supervisory title. By virtual of their title, the LPN and other employees would not know that they were supervisors. Higgins said she was provided an identification badge designating her as a LPN when she was hired. She testified that in September or October, she received a new ID badge designating her as a "LPN Nursing Supervisor." Tursi recalled that she received a new ID badge with "supervisor" title in September. Laroc has an identification badge that designated her as a LPN supervisor that she received in September. I find the changing of the LPN's badge title from "LPN Nursing Services" when they were initially hired in January to "LPN Supervisor" badges (GC Exhs. 33 and 34) 8 months later and shortly prior to the commencement of this hearing as highly suspect to cloth the LPNs with authority that they did not have.

Credible testimony shows that the timing in changing the identification badges from "LPN" to "LPN Supervisor" was at the time that the investigation on the NLRB charges were proceeding against the Respondent. No explanation was provided as to why the initial identification badges did not have the title "supervisor" and why the title on the badges changed several months after the January 1 takeover of the facility.

I find that at the time the jobs were offered to the LPNs, the Respondent failed to timely inform the applicants their wage and working conditions would change. Here, my findings as to the manner in which the LPN applicants were hired and the effort to obfuscate the duties and responsibilities of the LPNs as supervisors until after their acceptance of the job offer is indicative that the Respondent failed to clearly announce its intent to establish a new set of conditions prior to the acceptance of employment by the LPNs.

My determination that the Respondent was obligated to bargain with the Union does not turn on whether or not Coral Harbor had misled the employees into believing that they will be

retained without changes in their wages and conditions of employment. Rather, the obligation to bargain with the Union turns on whether the Respondent was justified in its refusal to bargain because it had, in fact, converted the LPNs to supervisors within the meaning of 2(11) of the Act. A review below of the actual supervisory authority of the LPNs shows that they are not supervisors within the meaning of 2(11) of the Act.

3. The licensed practical nurses are not supervisors as defined by Section 2(11) of the Act

A "supervisor" is defined by Section 2(11) of the Act as someone who has the authority, in the interest of the employer, to perform and/or effectively recommend at least one supervisory action that indicates alignment with management interests. The list of supervisory tasks to be considered includes the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly direct them, or adjust their grievances, or effectively to recommend such action. Additionally, in order to be deemed a supervisor, the individual must exercise "independent judgment" that is "not of a merely routine or clerical nature" but requires the use of independent judgment when performing one or more of these tasks. *Kentucky River Community Care, Inc.*, 532 U.S. 706, 712, 713 (2001).

A finding of supervisory status is warranted only where the individuals in question possess one or more of the indicia set forth in Section 2(11) of the Act, above. *Providence Hospital*, 320 NLRB 717, 725 (1996); *The Door*, 297 NLRB 601 (1990); *Phelps Community Medical Center*, 295 NLRB 486, 489 (1989). The statutory criteria are read in the disjunctive, and possession of any one of the indicia listed is sufficient to make an individual a supervisor. *Providence Alaska Medical Center*, above, 320 NLRB at 725; *Juniper Industries*, 311 NLRB 109, 110 (1993). The statutory definition specifically indicates that it applies only to individuals who exercise independent judgment in the performance of supervisory functions and who act in the interest of the employer. *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 574 (1994); *Clark Machine* Corp., 308 NLRB 555 (1992).

The Board analyzes each case in order to differentiate between the exercise of independent judgment and the giving of routine instructions, between effective recommendation and forceful suggestions, and between the appearance of supervision and supervision in fact. The exercise of some supervisory authority in a merely routine, clerical or perfunctory manner does not confer supervisory status on an employee. *Juniper Industries*, above, 311 NLRB at 110. The authority effectively to recommend "generally means that the recommended action is taken with no independent investigation by superiors, not simply that the recommendation is ultimately followed." *ITT Lighting Fixtures*, 265 NLRB 1480, 1481 (1982) (emphasis in original). The sporadic exercise of supervisory authority is not sufficient to transform an employee into a supervisor. *Gaines Electric*, 309 NLRB 1077, 1078 (1992); *Ohio River Co.*, 303 NLRB 696, 714 (1991), enfd. 961 F.2d 1578 (6th Cir. 1992).

I note some general principles at the outset. In determining supervisory status, the Board is not guided by an individual's job title or classification but by actual duties, and in determining such duties the Board takes into account, inter alia, the type of work done and the responsibility exercised in the performance of the job.

Contrary to the position of the Respondent, a review as to whether LPNs possess supervisory authority to assign and responsibly direct CNA employees is not based on the job description, identification badge, job title, employee handbook, job offer or training given to the LPNs or through the testimony of Munk and Schuster that LPNs exercise that authority. The Board has consistently held that Section 2(11) supervisory status cannot be established merely by "paper" authority or conclusory testimony. *Lakewood Health Center d/b/a Chi Lake-Wood Health*, 365 NLRB No. 10 at fn. 1 (2016). *Peacock Productions of NBC Universal Media*, 364 NLRB No. 104, slip op. at 2–3 and fn. 6 (2016); *G4S Regulated Security Solutions*, 362 NLRB No. 134, slip op. at 2–3 (2015), and cases cited therein. As such, job descriptions and job titles are merely paper authority and not given controlling weight by the Board. Rather, "what the statute requires is evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority." Id. citing *Oil, Chemical & Atomic Workers v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971), cert. denied 404 U.S. 1039 (1972).

Similarly, the Board's determination is based on the existence of authority rather than on assertions that supervisory authority has been conferred on a particular person. Also, routine direction of the type customarily exercised by experienced employees over those less skilled does not confer supervisory status within the meaning of the Act. Further, responsibility for making work assignments in a routine fashion does not make one a supervisor, nor does the assumption of some supervisory authority for a temporary period create supervisory status. *West Penn Power Co. v. NLRB*, 337 F.2d 993, 996 (3d Cir. 1964); *Southeastern Cast Stone, Inc.*, 185 NLRB 688, 691–692 (1970); *Mid-State Fruit, Inc.*, 186 NLRB 51 (1970); *Beth Israel Medical Center*, 229 NLRB 295, 295 (1977).

The burden of establishing supervisory status is on the party asserting that such status exists. *Northcrest Nursing Home*, 313 NLRB 491, 496 fn. 26 (1993). Here, the Respondent has the burden to prove by direct evidence that the LPNs are supervisors. *Kentucky River*, above; *Franklin Home Health Agency*, 337 NLRB 826, 829 (2002). The Board has cautioned that the supervisory exemption should not be construed too broadly because the inevitable consequence of such a construction would be to remove individuals from the protections of the Act. *Northcrest Nursing Home*, above, 313 NLRB at 491. The Respondent has not met its burden to establish that the licensed practical nurses are supervisors as defined by 2(11) of the Act.

a. The LPNs do Not Have the Authority to Assign, Responsibility to Direct CNAs with use of Independent Judgment

Higgins testified that she gives assignments to the CNAs, but that the assignments and work schedules of the CNAs had already been prepared and completed by either the staff coordinator or the DON. At most, Higgins testified that she would add or subtract CNAs on the assignment chart to ensure an even distribution of workers to residents for each assignment or, on occasions, she would assign a CNA to a patient that may have

arrived to the facility overnight and, as such, would not be accounted for in the work assignment. Higgins testified that she does not attend morning meetings with other managers and is not involved in planning the care for the patients. Higgins testified that she would review the assignment chart for the CNAs, count her medications for the patients and begin her day. Higgins never testified that she was responsible for the daily activities of the CNAs or to provide them with overall assignments that are outside of their routine activities. Higgins has called or texted CNAs about their work schedules, but only if instructed by the DON and only upon approval by a supervisor could she find a replacement to provide coverage when a CNA calls in sick. Higgins cannot approve any leave request from a CNA.

Tursi does not attend morning managerial staff meetings. Tursi said that the CNAs were already given permanent assignments and she would need permission from a supervisor to reassign a CNA. Tursi said her role was to merely put the name of the CNA on the assignment sheet. Tursi said that the CNA daily assignment sheet is completed by the staffing coordinator and she has no responsibility in the assignments of the CNA. Tursi also confirmed that she does not have the authority to approve leave or revise the work schedules of the CNA.

Laroc stated that she would count the prescribed drugs in her med cart and then begin her day in distributing the medication and caring for the residents. She did not testify to any interactions with the CNAs at the start of her day.

With regard to the training, Higgins has not been involved in training for the CNAs. She said in-service training is performed by the DON or by unit manager/physician. Higgins has provided in-service training on a presentation that was already prepared for her. Higgins insisted she had no role in preparing the training. Tursi testified that she conducted an in-service training with CNAs. She developed the training with others because they felt that the CNAs were deficient in a particular area. Tursi said that the training was a group effort and took approximately 10 minutes. Laroc and Bernard did not testify that they were involved in training CNAs or other employees.

There is no record evidence to establish that the LPNs transfer, hire, fire, lay off, recall, promote, or reward CNAs or any other employees. The evidence concerning the authority of the LPNs to recommend effectively the hiring of other employees is inconclusive because only Laroc testified that she recommended individuals for a job, but there were no indications that her recommendation was acted upon.

In *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), the Board found that certain charge nurses in an acute-care hospital fell within the definition of "supervisor" set forth in section 2(11) of the Act. In reaching its decision, the Board evaluated the following terms and phrases: assign, responsible direction, and independent judgment. The Board construed the term "assign" to refer to:

> the act of "designating an employee to a place (such as a location, dept., 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." Additionally, assign for "purposes of Section 2(11) refers to the [presumed supervisor's] designation of significant overall duties to an employee, not to the [presumed supervisor's] ad hoc instruction that the employee perform a discrete task.

Here, the LPNs are not tasked with the responsibility to appoint a CNA to a time or location and to give significant overall duties to an employee. The LPNs credibly testified that the work schedule for the CNAs had already been prepared and completed when the LPNs arrived for their morning shifts. DON Nowicki confirmed that the CNA schedules are determined by her or by the staffing coordinator. At most, a LPN may adjust the assignment ratio of a CNA to the complement of residents to equalize the distribution. Further, the CNAs already know their responsibility and assigned duties. None of the LPNs testified that they were required to revise, modify or change any significant duties of a CNA or to direct an employee to perform significant overall duties. As such, I find that the LPNs did not assign CNAs to work schedules, duties or significant overall duties.

Next, the Board found in *Oakwood Healthcare* that to establish accountability for purposes of responsible direction, it must be shown that: (1) the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary and (2) there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.

In its analysis, the Board found in *Oakwood* that the charge nurses do not responsibly direct nursing staff because the employer failed to show that the individuals were accountable for the performance of the task. Although charge nurses delegated various tasks, the Board found Oakwood offered no evidence that the "charge nurses are subject to discipline or lower evaluations if other staff members fail to adequately perform" these delegated tasks. As in *Oakwood*, there is nothing here to show that the LPNs would be subjected to discipline, adverse consequences or a lower evaluation if a CNA failed to adequately perform his or her duties.

> With respect to independent judgment, the Board found an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data. However, a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement.

The Board found in *Oakwood* that some of the charge nurses on patient-care units exercised "independent judgment" by taking into account such factors as: (1) medical condition and needs of a patient; (2) nurses' particular skill sets in relation to patients' conditions and needs; and (3) the quantity of work that should be assigned to each nurse. However, no such factors exist in this situation. Here, the CNAs already have assignments and no instructions are needed by the CNAs to perform their assignments. None of the LPNs testified that they gave any verbal instructions or monitor the daily activities of the CNAs. The LPNs are too busy with their own assignments in doling out medications and caring for residents to be actively involved with assessing the quality and quantity of work assigned to the CNAs.

The legislative history of Section 2(11) makes it clear that Congress intended to distinguish between employees performing minor supervisory duties and supervisors vested with genuine management prerogatives, and did not intend to remove individuals in the former category from the protections of the Act. S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947). The legislative history also shows that Congress considered true supervisors to be different from lead employees or straw bosses who merely provide routine direction to other employees as a result of superior training or experience. Id. *Providence Alaska Medical Center*, above, 320 NLRB at 725; *Ten Broeck Commons*, 320 NLRB 806, 809 (1996).

Xc0020In sum, I find and conclude that although LPNs perform some scheduling functions and direct employees, the evidence falls short of demonstrating that they exercise independent judgment in these aspects of their duties. The employer provides the LPNs with a master schedule setting forth the hours and shifts on which the CNA employees are to work. A LPN may not adjust the schedule based on employee requests, but, on occasions, adjust the ratio of CNAs to residents. A LPN may not approve or deny leave without permission from a unit manager or the DON. A LPN may not substitute a CNA or to replace one who is unable to work. As to direct the CNAs' daily tasks, the record shows that staffing coordinator or DON dictate the jobs each shift is to perform and the work is already parceled. CNAs know how to perform their tasks and LPNs thus do not need to provide day-to-day direction. The record discloses only very minor instances in which a LPN has directed a CNA to take certain actions, such as reassigning a CNA to a different unit. This is routine, rather than responsible, direction within the meaning of Section 2(11) of the Act. The training provided to the CNAs by Tursi and another LPN was not based upon Tursi's independent judgment but rather, as she testified, by a group determination of the LPNs and the registered nurses that the CNAs needed training in a particular area. The approval of the training was not determined by Tursi. *Providence Alaska Medical Center*, above, 320 NLRB at 725; *Ten Broeck Commons,* above, 320 NLRB at 809.

b. The LPNs do not have authority to discipline CNAs and others

Higgins testified that she cannot fire or hire an employee, but has issued disciplines beginning on May 4. Higgins said she issued two disciplines on the same employees. Although Higgins admittedly was informed by Schuster to proceed with the discipline "as appropriate," it is also clear that DON Nowicki was responsible for reviewing the personnel file, to which Higgins did not have access, and in determining the appropriate severity of the discipline. Higgins was informed by the DON as to the type of severity of the discipline.

Tursi has prepared four disciplinary actions as a LPN but could not independently issue discipline without first consulting with her manager (GC Exhs 44–47). She testified that she would consult with the DON before issuing the discipline and has to get the disciplinary notice forms from the DON. Tursi testified that she cannot discipline without first discussing the matter with DON or a supervisor and she would be instructed by a supervisor to write the discipline on a CNA. Tursi said she has completed the notice of discipline by composing and writing the language herself. However, the severity of the discipline is decided by the DON or a supervisor.

On other occasions, Tursi testified that a supervisor would write the discipline for her signature. Tursi testified that Michelle King, a weekend supervisor, had written a discipline notice on employee Vera Grey and then King asked Tursi to give the notice of discipline to the employee. The written portion of the notice was already completed by King. Tursi said that the same procedure was followed on a second discipline with a different employee. On a third discipline, Tursi wrote the notice of discipline, but was instructed to write the discipline by supervisor Lauren Sutton.

Bernard has issued three disciplines, but the disciplines were prepared by her manager for Bernard's signature and issuance. Bernard testified she had made the formal recommendations and the subsequent discipline was done by the unit manager. Bernard testified that on three other disciplinary actions, she either was instructed to write the discipline or the discipline was written by someone else for her signature. On one occasion, Bernard said that she did not observe the infraction, so the discipline was written by Schuster after a discussion with her and a social worker. Bernard was asked by Schuster whether the severity of the discipline was appropriate and whether Bernard felt that the infraction warranted a disciplinary action. She said that the final outcome was a suspension of the employee done by Schuster. Bernard further testified that on another occasion, she issued two disciplinary actions to the same employee. Bernard said that the two disciplinary actions were written by the unit manager based upon information she provided to the manager. Bernard admitted that the unit manager made the decision to discipline this employee.

Laroc has not disciplined anyone, but recalled signing a disciplinary notice on two employees that was completed by the DON on January 18 and 26. Laroc was merely the conduit for the issuance of discipline by Nowicki. Laroc testified that she gave discipline to the employees, but the actual disciplinary notice was written by Nowicki. Laroc believes that a second discipline was written by the DON because Laroc also did not witness the infraction.

DON Nowicki insisted that she has never revised a disciplinary notice prepared and issued by a LPN. However, the severity and type of discipline was determined by Nowicki. In all disciplinary actions proffered at the hearing, either DON Nowicki or a manager had determined the severity and type of discipline for the employee and not the LPN. Nowicki stated that she would review the discipline done by the LPNs and sign the notice of discipline.

Finally, the collective-bargaining agreement to which the CNAs is a party provides that grievances concerning discipline may be filed in writing with the facility after informal discussions with the employee's immediate supervisor have proven unsuccessful or have not been pursued (JT. Exh. 1). The LPNs testified that they have not been involved in resolving grievances or in meetings involving any grievances on the disciplinary actions that were taken on the CNAs. The record shows that LPNs have not been involved in resolving employee complaints about disciplinary issues, assignments, and other matters within

their purview. Even if LPNs are somewhat involved in the grievance process, and I find that they are not, the Board has held that authority to resolve these sorts of minor disputes is insufficient to establish supervisory status. *Riverchase Health Care Center*, 304 NLRB 861, 865 (1991).

In my opinion, a similar conclusion is warranted with respect to the role of LPNs in the issuance of discipline. All discipline must be cleared with the DON or manager and the DON or manager must approve all recommendations of discipline of employees. LPNs clearly report instances of misconduct and poor performance and have, on some occasions, specifically recommended that discipline be imposed. However, in all instances of record, the employer has determined whether discipline was appropriate and if so, the severity of the discipline. In these circumstances, it cannot be said the LPNs' recommendations are effective or that the record conclusively shows that they possess the indicia of supervisory authority. On other occasions, the narrative in the notice of discipline was written by the unit manager or the DON and the LPN instructed afterwards to issue the discipline. LPNs are also not involved in the grievance proceedings on these disciplines and none testified that their input was requested by the employer in the grievance proceedings. Accordingly, I find that the employer has not met its burden of establishing that LPNs have authority to impose or effectively recommend discipline in the exercise of independent judgment within the meaning of Section 2(11). *Ten Broeck Commons*, above, 320 NLRB at 809; *Northcrest Nursing Home*, above, 313 NLRB at 497; *Hydro Conduit Corp.*, 254 NLRB 433 (1981).

c. The evaluations of the CNAs are not determinative of LPN supervisory status

In *Modesto Radiology Imaging, Inc.*, 361 NLRB 888 (2014), the Board held that

> The authority to evaluate is not one of the indicia of supervisory status set out in Section 2(11) of the Act. See *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 (1999). Nevertheless, the Board analyzes the evaluation of employees to determine whether it is an "effective recommendation" of promotion, wage increase, or discipline. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). If the evaluation does not, by itself, directly affect the wages and/or job status of the individual being evaluated, the Board will not find the individual performing the evaluation to be a statutory supervisor on that basis. See *Williamette Industries, Inc.*, 336 NLRB 743, 743 (2001). There must be a direct correlation between the employees' evaluation and their wage increases and/or job status. See, e.g., *Ten Broeck Commons*, 320 NLRB 806, 813 (1996).

In evaluating employees, Higgins testified that she only started completing evaluations of CNAs in April. Higgins recalled completing evaluations for two CNAs. Higgins was instructed by her supervisor to complete the evaluations. Higgins stated that her supervisor did not tell her what to fill out on the evaluation of the two employees. Higgins stated that she has completed additional evaluations, but did not recall how many since the two evaluations done in May.

Tursi has completed evaluations of the CNAs but stated she did not start until March 2016, shortly after she was subpoenaed by the NLRB. Tursi said that she completed her first evaluation of an employee on May 14. She said that the form was received from the DON and Tursi was given instructions on how to evaluate the employee. Tursi insisted that part of this evaluation form was not in her handwriting and some of the numerical ratings of the employees were not done by her. Tursi has completed evaluations on at least three other employees on her own without any influence or directions from a manager.

Laroc testified that she has signed evaluations at the directions of the DON. She testified that she has completed "a couple" of evaluations. Except for the name of the employee to be evaluated on the top front of the appraisal form, Laroc completed the rest of the form, including the evaluation ratings for the employee. Laroc stated that she has completed evaluations for two employees and had done so independent of any influence from her superiors.

Bernard has completed evaluations of CNAs during her employment with the Respondent. She insisted that she was not influenced by management on her evaluations of the employees.

I find that LPNs are involved in the evaluations of the CNAs. All LPNs, as noted above, testified that they evaluate the employee by providing a numerical rating for each of the job elements, although in some instances, the ratings had already been provided in the evaluation by someone else. The name of the employee is completed by a manager of the DON, which is not unusual. I also do not find it noteworthy that the responsibility of completing the evaluations occurred during the commencement of the NLRB charges in this complaint. The timing could merely be happenstance given the transition of the facility to the new owners a short 2 month earlier.

However, I also find that the employer failed to meet its burden of establishing that LPNs exercise Section 2(11) supervisory authority in preparing performance evaluations for the CNAs at the facility. The evaluations do not directly affect employees' wages. The record contains no evidence of an evaluation having such an impact on any CNA's wages or terms and conditions of employment. The evaluations are not tied to employee wage increases or promotions, nor do they directly affect any employee term or condition of employment. Although Schuster testified that evaluations can have an impact on the employer's decisions regarding discharge, promotions, work improvement plans, transfers and discipline, the Respondent presented no evidence of an employee evaluation having any specific positive or negative impact on any employee's terms or conditions or employment. In the absence of specific evidence demonstrating such an impact, the Respondent's unsubstantiated assertions are insufficient to establish supervisory authority based on this aspect of LPNs' duties. *Ahrens Aircraft*, 259 NLRB 839, 843 (1981), enfd. 703 F.2d 23 (1st Cir. 1983). As a result, I find that the record fails to establish that the evaluation prepared by the LPNs have a direct correlation between the numerical ratings and increase in wages, promotions, discipline, or any other terms and conditions of employment.

d. The LPNs do not have accountability and responsibly direct

In *Golden Crest Healthcare*, 348 NLRB 727 (2006), the Board found that charge nurses at a nursing home were not supervisors. Golden Crest operates an 80-bed nursing home. Among the various staff members, the nursing department consists of 8 RNS who work as charge nurses, 12 LPNs, 11 of whom occasionally work as charge nurses, and 36 certified nursing assistants. The Board defined the element of "accountability" as follows

[T]o establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps. Id. at 7.

The Board first addresses the question of whether Golden Crest established that its charge nurses *direct* other employees within the meaning of Section 2(11). Should that question be answered in the affirmative, the Board then inquires whether the Employer established that the charge nurses are *accountable* for their direction of other employees.

The employer Golden Crest argued that its charge nurses 'assign' employees in several ways: ordering CNAs to go home early; assigning first-floor CNAs to work on the second floor if that floor is understaffed; ordering CNAs to stay past the end of their shifts; and mandating that CNAs come in to work from home. The Board found the charge nurses merely had the authority to request that a certain action be taken; to be a supervisor under *Oakwood Healthcare* a charge nurse must have authority to "require" that an action be taken. With respect to "mandating employees to come into work," the Board found that the charge nurses exercised a ministerial function that was authorized by an admitted supervisor or the collective-bargaining agreement.

Here, as noted above, the LPNs did not have the independent authority and discretion to assign CNAs for work; or to require the CNA to take a certain action or to mandate an employee to come to work.

Next, in *Golden Crest*, the Board examined whether the charge nurses had authority to "responsibly direct." First, the employer must establish that the [presumed supervisor] has the ability to direct others employees, and if the question is answered in the affirmative, then the employer must establish that the [presumed supervisor] is accountable for the direction of other employees. The Board found, that although the employer proved the charge nurses have the authority to direct other nurses, the employer failed to meet its burden of establishing that the charge nurses were accountable for their actions in directing other nurses.

Similar to the finding in *Golden Crest*, there is no evidence here that the LPNs are accountable for their action in directing the CNAs. The Respondent had not met its burden to show that the LPNs' performance ratings are assessed by the employer such "that any action, either positive or negative, has been or might be taken as a result of the [LPNs'] evaluation on this factor." *Golden Crest*, above, 348 NLRB at 731. The mere existence of accountability on paper is not enough and must extend to an actual or prospective consequence of the LPNs in the performance of their duties as putative supervisors.[11]

Further, there is no record evidence to establish that LPNs transfer, lay off, recall, promote, or reward direct CNA workers or any other employees. The evidence concerning the authority of LPNs to recommend effectively the hiring of CNAs is inconclusive. As discussed above, only one LPN testified that she recommended an individual for the position and is unsure if anything happened with her recommendation. Laroc was never contacted by the human resources department for input after her initial recommendation was made. It is obvious that the ultimate decision rests with the human resources department, which may or may not adopt the LPN's recommendation. In these circumstances, I find that the record does not show that the LPNs have the authority claimed by the Employer. *Ryder Truck Rental*, 326 NLRB 1386 (1998); *Bowne of Houston*, 280 NLRB 1222 (1986); *Oregon State Employees Assn.*, 242 NLRB 976 (1979).

A similar conclusion is warranted with respect to the role of LPNs in the issuance of discipline. LPNs clearly report instances of misconduct and poor performance and have, on some occasions, specifically recommended that discipline be imposed. However, since the manager or DON decide and approve the discipline, they could adopt or ignore the LPN's disciplinary recommendations altogether. In these circumstances, it cannot be said that the LPNs' recommendations are effective or that the record conclusively shows that they possess the indicia of supervisory authority.

Further, LPNs do not perform independent scheduling functions or direct employees in their assignments. The evidence falls short of demonstrating that they exercise independent judgment in these aspects of their duties. The Respondent provides LPNs with a master daily schedule setting forth the hours and shifts on which CNA employees are to work. A LPN may, on occasion, adjust the schedule based on equalizing the ratio of residents to CNAs or when a patient arrives overnight and a CNA must be assigned to that patient, but that is far from exercising independent decision authority in assigning and scheduling the CNAs and others. As to the direct CNA workers' daily tasks, the record shows that the staffing coordinator or DON dictates the assignment shift for each CNA is to perform and the LPNs have little input to those assignments. The CNA workers know how to perform their assignments and LPNs do not need to provide day-to-day direction. As such, "supervisory direction" of other employees must be distinguished from direction incidental to an individual's technical training and expertise, and employees will not be found to be supervisors merely because they direct and monitor support personnel in the performance of specific job functions related to the discharge of their duties. *Robert Greenspan, DDS*, 318 NLRB 70, 76 (1995); *New York University*, 221 NLRB 1148, 156 (1975). Also, LPNs cannot effectuate changes in employer policy. LPNs do not attend morning managerial meetings where critical policy changes and modifications affecting themselves and

[11] Nowicki testified that a LPN may be disciplined for failing to perform supervisory duties, such as evaluations. However, no evidence was proffered to substantiate this testimony and without more, there is nothing to corroborate her statement of LPN accountability.

CNAs may be discussed and implemented.

Accordingly, I find that no primary indicia of supervisory status have been established for LPNs. Based on the above, I find that licensed practical nurses are not supervisors within the meaning of Section 2(11) of the Act.[12]

4. The Respondent violated Section 8(a)(5) and (1) of the Act when it refused and failed to bargain with the Union

Having found that the Respondent had not altered or substantially changed the duties and responsibilities of the LPNs, I now find that the General Counsel has met its burden to demonstrate that the Respondent is a perfectly clear *Burns* successor and is therefore obligated to bargain with the Union as the exclusive bargaining representative of the LPN employee unit.

Accordingly, the Respondent's bargaining obligation turns on whether a majority of its employees in an appropriate bargaining unit were employed by the predecessor, and if there exist substantial continuity between the enterprises. *A.J. Myers & Sons, Inc.*, 362 NLRB No. 51, slip op. at 7 (2015); *Specialty Hospital of Washington-Hadley, LLC*, 357 NLRB 814, 815 (2011); *Van Lear Equipment*, 336 NLRB 1059, 1063 (2001).

First, there is no dispute, and the Respondent concedes, as it must, that a majority of the unit alleged appropriate in the complaint was composed, at all relevant times, of former LPN employees from Medicenter. Turning to substantial continuity, with regard to that factor "the focus is on whether there is a 'substantial continuity' between the enterprises." *Fall River*, 482 U.S. at 43. Under this approach, the Board examines a number of factors:

> whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers [Id.].

Most importantly, the question of the substantial continuity of the enterprises is to be analyzed primarily from the "employees' perspective." *Fall River*, 482 U.S. at 43. In its analysis, the Board is mindful of whether "those employees who have been retained will understandably view their job situations as essentially unaltered." Id. (internal quotation omitted); *Vermont Foundry Co.*, 292 NLRB 1003, 1008 (1989) (calling this "the core question"); *Derby Refining Co.*, 292 NLRB 1015 (1989), enfd. 915 F.2d 1448 (10th Cir. 1990). As noted in my findings above, the former Medicenter LPNs upon applying for the LPN position with the Respondent were under the distinct impression that they were applying for their former position. From their perspective, the job offer was a continuation of their previous employment with Medicenter. In finding that the LPNs are not supervisors, the duties of the LPNs under Coral Harbor were essentially unchanged from their duties with Medicenter.

From the "employee perspective," I find it difficult to see how the Respondent can be anything but a successor. From the employees' perspective, there was no change in the operations or their job situations that would support the belief that their duties had actually changed. Consequently, I find as of January 1, 2016, there were both continuity in the workforce and continuity of the business enterprise when Respondent Coral Harbor commenced operations as the new owner of the purchased healthcare facility and an obligation attached for the Respondent to continue bargaining with 1199 SEIU. There was "substantial continuity" between the enterprises to the extent that the business of both employers is essentially the same and the employees of the new company were performing the same jobs under the same working conditions as of January 1. While this doctrine involves a multitude of factors, typically, the new employer must "hire a majority of its employees from the predecessor." *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 263 (1974).

Continuity of work force is easily established here as Respondent retained a majority of the predecessor's employees and the LPN employee unit remained unchanged. The critical inquiry in such an analysis is whether the Respondent conducts essentially the same business as the predecessor, in other words, whether the similarities between the two operations manifest a substantial continuity between the enterprises. *Hydrolines Inc.*, 305 NLRB 416, 421 (1991), citing *Fall River Dyeing*, above 482 U.S. at 41–43 and *Burns Security Services*, above 406 U.S. at 280, fn. 4. The factors include whether the business is essentially the same, whether the employees of the new company are doing the same jobs under the same supervisors, and whether the new entity has the same production process, produces the same products and has the same body of customers. These factors are assessed primarily from the perspective of the employees; that is, whether those employees who have been retained will view their job situation was essentially unaltered. *Hydrolines*, above at 421.

The evidence establishes that Respondent provides the same services and engaged in the same functions as its predecessor Medicenter. The Respondent continues to provide short-term and long-term health care, and its LPN employees continue to

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[12] The counsel for the Respondent argues that the framework articulated by Board Chairman Miscimarra should be utilized involving disputed supervisor status (R. Br. at 13, 14). Chairman Miscimarra stated in his dissenting opinion in *Lakewood Health Center*, 365 NLRB No. 10 slip op. at 3, 4 (2016).

> As indicated in *Buchanan Marine* and other cases, when applying the factors outlined in Section 2(11), I believe the Board in every situation should take into account the following considerations: (i) the nature of the employer's operations, (ii) the work performed by undisputed statutory employees, and (iii) whether it is plausible to conclude that all supervisory authority is vested in persons other than those whose supervisory status is in dispute.

As noted above, the LPNs are not the only persons present the majority of the time who can direct and assign the subordinate CNAs. The registered nurses, unit managers, the director of nursing, and the facility administrator are present at some point during the working hours of the CNAs. As such, the record has not shown that the LPNs are the highest authority under factor (iii) of the framework analysis. Further, the putative supervisors possess none of the primary indicia of supervisory status, so the reliance of "highest authority" as a secondary indicium of supervisory status would not confer 2(11) status. Secondary indicia are insufficient by themselves to establish supervisory status. *Sam's Club*, 349 NLRB 1007 (2007); *Golden Crest Healthcare Center*, above, 348 NLRB 727, 730 fn. 10; *Lakewood Health Center*, 365 NLRB No. 10 slip op at 1 fn. 1.

perform the same patient care duties with the same equipment and materials. DON Nowicki and other unit managers under Medicenter continued their supervisory roles at Harbor Coral. The job functions of the LPNs are "essentially unaltered." *O.G.S. Technologies, Inc.*, 356 NLRB 642, 645 (2011); *Torrington Industries*, 307 NLRB 809, 810 (1992). There is no evidence that Respondent had abandoned a line of business or otherwise made a change in its overall scope of its operations, made a substantial capital commitment, or implemented more sophisticated technologies which have changed the nature of its business.[13]

The Respondent's obligation to bargain with the Union matured when two conditions were met: (1) Respondent had hired a substantial and representative complement of LPNs employees, a majority of whom had been Medicenter bargaining unit employees; and (2) the Union had made an effective demand for recognition and bargaining. *MSK Corp.*, 341 NLRB 43, 44 (2004). Both conditions have been met. As noted, there is no dispute among the parties that the Respondent hired a majority of the former LPNs at Medicenter. Second, there is no dispute that the Union demanded bargaining on December 17, 2015 (GC Exh. 14).

It is now axiomatic that employers must bargain with the collective-bargaining representative of its employees regarding significant, material changes to their wages, hours, and health insurance benefits or working conditions before changing the status quo. An employer violates Section 8(a)(5) and (1) if it makes a unilateral change in a mandatory subject of bargaining without first giving the Union notice and an opportunity to bargain. See *NLRB v. Katz*, 369 U.S. 736, 743 (1962); *Western Cab Co.*, 365 NLRB No. 78 (2017) (unilateral changes to its healthcare plan). Under Section 8(d), "wages, hours, and other terms and conditions of employment" are mandatory subjects of bargaining.

Accordingly, I find that Respondent Coral Harbor is a perfectly clear *Burns* successor as of January 1, 2016 with an obligation to bargain with the Union regarding the LPN employee unit.

Having determined that the Respondent violated Section 8(a)(5) and (1) of the Act when they refused to recognize and bargain with the exclusive collective-bargaining representative of the LPN unit employees, I now find that Respondent made unilateral changes in the terms and conditions of employment of the LPN unit employees at the facility without notifying and bargaining with the Union in violation of Section 8(a)(5) and (1) of the Act. *Champion Parts Rebuilders*, 260 NLRB 731, 733–734 (1982).

By failing to reach out to the Union and consult with the Union as to the substantial changes in wages and working conditions of the LPNs, the Respondent intended to implement and by providing piecemeal information directly to the employees about those changes, the Respondent has engaged in unilateral changes and bypassed and undermined the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent Coral Harbor is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, 1199 SEIU United Healthcare Workers East is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union, 1199 SEIU is, and at all material times, has been the exclusive joint bargaining representative for the following appropriate unit:

> All full-time and regular part-time Licensed Practical Nurses (LPN) employed by the employer at its Neptune City, New Jersey facility, but excluding all office clerical employees, confidential employees, LPN unit managers, other managerial employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

4. Since January 1, 2016, the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union as the exclusive collective-bargaining representative of the above-described unit of employees and thereafter continu-

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[13] On October 11, 2016, the Respondent filed a motion in Limine to dismiss the complaint, relying upon the General Counsel's advice memorandum in the matter of *Chestnut Health* (01–CA–133937) (March 6, 2015). In *Chestnut Health*, the General Counsel determined that the employer intended to hire registered nurses as supervisors. The General Counsel found that the employer was a *Burns* successor and privileged to set initial terms and conditions, including converting nurses to supervisors. The advice memorandum noted that

> The Union arguably acquiesced in Blue Hills' decision to give the RNs supervisory duties by saying in the May 30 meeting that it had already been told duties by saying at the May 30 meeting that it had already been told of this change by the RNs and it had assumed Blue Hills would not recognize the Union and then failing to demand bargaining over the change or its effects. Moreover, Blue Hills provided evidence that it gave RNs supervisory authority in accordance with its operating model at all the facilities that it operates. There is also no evidence that Blue Hills made the change to destroy the bargaining unit or to avoid a bargaining obligation. In fact, Blue Hills recognized 1199 SEIU as the representative.

This is not the factual situation here. Here, the Respondent is a perfectly clear *Burns* successor for the reason that the LPNs' duties are essentially unaltered from their former duties with Medicenter, as noted above. Second, the Union never acquiesced or agreed with the decision to convert the LPNs to supervisors. On the contrary, the Union vigorously objected to the Respondent's intent to convert the LPNs. Third, Marquis owns 15 healthcare facilities and the operating models of having LPNs act as supervisors are evident in only one facility with the change occurring shortly prior to the purchase of Coral Harbor by Marquis and is not indicative of a clear operating model of using LPNs as supervisor. Finally, there is evidence that Marquis attempted to change or destroy the bargaining unit by initiating unilateral changes with respect to the service bargaining unit (GC Exh. 16) and with the filing of NLRB unfair labor charges against the Respondent for its attempt to initiate unilateral changes and failing to recognize and refusing to bargain with 1199 SEIU as the representative of the service workers (GC Exh. 21). For all these reasons, I find that the factual situation here is distinctly at variant to the facts in the General Counsel's advice memorandum and reliance on the memorandum to the facts in this complaint would be inappropriate. Further, as noted in my October 24, 2016 Order dismissing the motion in Limine, the General Counsel's advice memorandum is not precedential authority and not binding on the Board, citing to *Fun Striders, Inc.*, 250 NLRB 520 (1980), and *KFMB Stations*, 343 NLRB 748, 762 fn. 21 (2004).

ously failing and refusing to bargain on request with 1199 SEIU as the exclusive collective-bargaining representative of the unit employees concerning wages, hours, and other terms and conditions of employment.

5. Since January 1, 2016, the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the terms and conditions of employment of the LPNs without providing notice to the Union and an opportunity to bargain over the changes.

6. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(5) and (1) of the act by failing and refusing to recognize and bargain collectively with the Union as the collective-bargaining representative of an appropriate bargaining unit of employees, the Respondent shall recognize, and, upon request, bargain with the Union as the exclusive representative of the designated unit of employees (described above), and, if an understanding is reached, embody the understanding in a signed agreement.

Having found that the Respondent violated Section 8(a)(5) and (1) of the act by making unilateral changes to the wages and working conditions of the LPN unit employees, the Respondent shall rescind its unlawful unilateral changes to the working conditions of the LPN unit employees.[14]

The Respondent shall further be ordered to refrain from in any like or related manner abridging any of the rights guaranteed to employees by Section 7 of the Act.

The Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in the Employer's facility or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 2016. When the notice is issued to the Employer, it shall sign it or otherwise notify Region 22 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The Respondent, Coral Harbor Rehabilitation and Nursing Center, with a nursing facility in Neptune City, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and collectively bargain with 1199 Service Employees International Union, United Healthcare Workers East, New Jersey (the Union) as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time Licensed Practical Nurses (LPN) employed by the employer at its Neptune City, New Jersey facility, but excluding all office clerical employees, confidential employees, LPN unit managers, other managerial employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize, and on request, collectively bargain with the Union as the exclusive representative of the above-described unit of employees and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Rescind the unlawful unilateral changes in the working conditions of the LPN unit employees.

(c) Within 14 days after service by the Region, post at its facility in Neptune City, New Jersey, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other mate-

[14] The amended complaint alleges in par. 16 that the Respondent unilaterally changed paid time off and health insurance benefits. However, the counsel for the General Counsel never proffered testimony or evidence of these changes. As such, what remedy, if any, would be appropriate with regard to these alleged changes is unclear. Further, I shall not recommend the rescission of the wage increase effective after January 1, 2016, inasmuch as the LPN unit employees should not be penalized by the unlawful unilateral change in their wages and it is unclear how the Respondent would restore the status quo ante without depriving recently hired LPNs of their increased wages.

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purpose.

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

rial. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 2016.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 22 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 13, 2017

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with the 1199 SEIU United Healthcare Workers East (the Union) as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

> All full-time and regular part-time Licensed Practical Nurses (LPN) employed by the employer at its Neptune City, New Jersey facility, but excluding all office clerical employees, confidential employees, LPN unit managers, other managerial employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

WE WILL NOT change the unit employees' wages, hours, or other terms and conditions of employment without first notifying 1199 SEIU and giving it a meaningful opportunity to bargain about such changes to agreement or impasse regarding such changes in the wages, hours, and working conditions of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL recognize and, on request, collectively bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit.

CORAL HARBOR REHABILITATION AND NURSING CENTER

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/22–CA–167738 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CORAL HARBOR REHABILITATION AND NURSING CENTER,	:
	:
	: **Case No.**
Petitioner,	:
	: **PETITION FOR REVIEW**
v.	: **NLRB Case No. 22-CA-167738**
	: Final Order of May 2, 2018
NATIONAL LABOR RELATIONS BOARD	:
	:
Respondent.	:

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Review was served by first class mail, postage prepaid, this 1st day of June 2018 on all parties of record as follows:

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