

Louis J. Capozzi, Jr., Esquire\*  
Daniel K. Natirboff, Esquire  
Donald R. Reavey, Esquire  
Craig I. Adler, Esquire\*\*  
Andrew R. Eisemann, Esquire\*\*\*  
Glenn A. Parno, Esquire\*\*  
Bruce G. Baron, Esquire  
Brandon S. Williams, Esquire  
Nicholas J. Luciano, Esquire  
Garrett H. Rothman, Esquire, of Counsel  
Donna M. Desfor, Esquire, of Counsel  
Timothy T. Ziegler, Sr. Reimb. Analyst  
Karen L. Fisher, Paralegal  
Linda Gussler, Paralegal  
Kelly A. Galski, Paralegal  
\*(Licensed in PA, NJ and MD)  
\*\*(Licensed in PA and NJ)  
\*\*\* (Licensed in PA and NY)

# Capozzi Adler, P.C.

*Attorneys at Law*



**Primary Office:**  
2933 North Front Street  
Harrisburg, PA 17110  
Telephone: (717) 233-4101  
Facsimile: (717) 233-4103  
[www.capozziadler.com](http://www.capozziadler.com)

**Mid-Penn Abstract Company**  
355 N. 21<sup>st</sup> Street, Suite 205  
Camp Hill, PA 17011  
Telephone: (717) 234-3289  
Facsimile: (717) 234-1670

August 14, 2019

Executive Secretary  
National Labor Relations Board  
Washington, DC

E-FILED

RE: REQUEST FOR BOARD REVIEW  
CASE 04-RC-242288  
Decision of Region Director of July 31, 2019  
29 CFR § 102.67(c)  
Our Matter No. 342-19

Dear Members of the National Labor Relations Board:

Pursuant to 29 CFR § 102.67(c), the Employer, Mountain View Care and Rehabilitation Center, LLC, by its attorneys ("Mountain View"), requests the Board's review of the Regional Director's July 31, 2019 Decision and Direction of Election for a unit of LPN employees (copy attached hereto) for this Pennsylvania nursing facility. Where, as here, the Regional Director's Decision as to the LPNs' supervisory status is incorrect, the Board dismisses the representational petition encompassing it. *Oak Park Nursing Care Center*, 351 NLRB No. 9, at 28 (2007).

Mountain View submits that there are compelling reasons supporting Board review, as required under 29 CFR § 102.67(d)(1) (the absence of or a departure from officially reported Board precedent) and (d)(4) (reconsideration of important Board rule or policy), of the Regional Director's Decision that Mountain View failed to meet its burden of proof to establish that its LPNs are statutory supervisors in that they possess the authority to assign CNAs and the authority to discipline or effectively recommend discipline as defined by Section 2(11) of the NLRA.<sup>1</sup>

The Regional Director's Decision was issued on July 31, 2019, the same day that the Board issued its most recent decision on supervisory status in health care facilities, *The Arc of South Norfolk*, 368 NLRB No. 32 (July 31, 2019) (reversing the Regional Director and finding program coordinators were Section 2(11) supervisors). Since, as discussed further below, the Regional Director's Decision is inconsistent with principles applied by the Board that same day to determine whether putative supervisors utilized independent judgment to assign staff to patients (one of the issues involved in this matter), the Regional Director's Decision should be reviewed and reversed as the Record here demonstrates that here, as in *The Arc of South Norfolk*, the LPNs exercise independent judgment to

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<sup>1</sup> Mountain View is not seeking review as to the Regional Director's findings as to the "responsibly direct" indicator in Section 2(11); or, his determination of the community of interest issue.

alter the scheduled assignments of CNAs through informed judgments using substantive professional analysis of which CNA on any given day has the best skills and ability to care for different resident needs on their shift, considering their individualized strengths and weaknesses. The Board in *The Arc of South Norfolk*, 368 NLRB No. 32, at page 4, confirmed that, in the healthcare context, “assignment encompasses the responsibility to assign employees to care for particular patients,” citing *Oakwood Healthcare, Inc.*, 348 NLRB 686, 689 (2006). While this test for possession of the authority to assign was cited in the Regional Director’s Decision, at page 16, his analysis and conclusions concerning the evidence are inconsistent with and not supported by the record.

The Board has not to date determined, after the remand in NLRB v. New Vista Nursing and Rehabilitation, 870 F3d 113 (3<sup>rd</sup> Cir. 2017), the applicable principles for determining supervisory status based on possession of authority to effectively recommend discipline, another of the issues involved here. Since, as discussed further below, the Regional Director’s Decision is inconsistent with the principles applied by the Third Circuit in New Vista, this case gives the Board an opportunity to review the issues and conform Board policy on this important and recurring issue.

This case provides the Board with the opportunity to reconsider and clarify its policies relating to the requirements for technical employees such as LPN’s in

nursing homes to qualify as statutory supervisors and be exempt from election orders in light of the experience from Board and Court decisions, including the critiques from former Chairman/Member Miscimarra that the Board's current framework for analyzing supervisory status issues has become "increasingly abstract and out of touch with the practical realities of the workplace." *See: Veolia Transportations Servs., Inc.* [Veolia II], 363 NLRB No. 188, slip op. 10-15 (2016) (Member Miscimarra, dissenting); *Buchanan Marine, L.P.*, 363 NLRB No. 58, Slip. Op. 3-10 (2015) (Member Miscimarra, dissenting); *Veolia I*, 363 NLRB No. 98, slip op. 12-14 (Member Miscimarra, dissenting); *G4S Government Solutions, Inc.*, 363 NLRB No. 113, slip op. 4-7 (2016) (Member Miscimarra, dissenting).

The Board has refrained from using rulemaking to deal with such issues relating to nursing homes, *Park Manor Care Center*, 305 NLRB 872, 874-874 (1991), recognizing that it lacks sufficient information to deal with the great differences nursing homes have in organization, regulations, and staffing patterns (including evidence that regulations with respect to staffing patterns vary widely from State to State) as well as that the nursing home industry is in a period of rapid transition requiring different staffing needs.

The Regional Director's Decision does not dispute that, under Pennsylvania law, the LPNs involved in this matter, can be full-time supervisors for the CNAs.

*See:* 28 Pa. Code § 201.3 (definition of “charge nurse”).<sup>2</sup> There is also no dispute that Pennsylvania law requires Mountain View to staff 1 RN and 1 LPN on each shift, 28 Pa. Code § 211.12(f)(1) (for facilities with census of 180 beds, as here, Tr. 38, lines 9-14). That Mountain View’s LPNs see themselves and document their role as a “charge nurse” is undisputed below. Tr. 37, lines 1-2 (“we put that we’re the charge nurse....”).

There is also no dispute below that the secondary indicia presented below buttress the LPNs supervisory status. *See also: The Arc of South Norfolk*, 368 NLRB No. 32, at page 4 (“Secondary indicia may be relevant where, as here, at least one of the primary indicia set forth in Section 2(11) is present.”). Mountain View’s Employee Handbook (Exhibit E-2 at page 62) expressly provides that the

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<sup>2</sup> “*Charge nurse*—A person designated by the facility who is experienced in nursing service administration and supervision and in areas such as rehabilitative or geriatric nursing or who acquires the preparation through formal staff development programs and who is licensed by the Commonwealth as one of the following: (i) A registered nurse; (ii) A registered nurse licensed by another state as a registered nurse and who has applied for endorsement from the State Board of Nursing and has received written notice that the application has been received by the State Board of Nursing. This subparagraph applies for 1 year, or until Commonwealth licensure is completed, whichever period is shorter; (iii) A practical nurse who is a graduate of a Commonwealth recognized school of practical nursing or who has 2 years of appropriate experience following licensure by waiver as a practical nurse ; (iv) A practical nurse shall be designated by the facility as a charge nurse only on the night tour of duty in a facility with a census of 59 or less.”

LPNs “as supervisors shall discipline CNAs pursuant to the Facility’s Progressive Discipline Policy.” The LPNs’ Job Descriptions (Exhibit E-1, E-3 and E-6) expressly state the job as “Nurse Supervisor (LPN) and include in their duties and responsibilities: “Issue verbal and written disciplinary warnings to assigned CNAs for violations of current rules, regulations and guidelines for the Center” and “Issue discipline and evaluations of assigned CNAs....” The LPNs attended training as supervisors. Exhibit E-5; Tr. 68.

The Employee Handbook (Exhibit E-2, at pages 62-66) defines Mountain View’s Discipline and Progressive Discipline Policy, including verbal and written disciplinary warnings; and, provides, at page 65:

Should a supervisor or the Administrator determine that an act of any employee merits disciplinary action, appropriate action will be taken. Except as necessary to deal with unusual circumstances, the Progressive Discipline System should be followed whenever an employee commits conduct that is subject to disciplinary action.

The Employee Handbook (Exhibit E-2, at page 65) provides that for the First Offense Involving a Group I Violation: “The employee’s supervisor will issue a verbal warning, and a notation shall be made in the employee’s file”; while, for a second such offense or the first for a Group II Violation: “The employee’s supervisor shall issue a written warning to the employee and shall include a reference to any prior verbal warnings, where appropriate” and that: “The Department Director may institute a disciplinary probationary period.”

Disciplinary probation is further described at page 66 of Exhibit E-2 as follows:

“Any employee placed on a Disciplinary Probation Period may be suspended without pay or terminated without regard to Mountain View Care and Rehabilitation Center’s progressive disciplinary system.” The Employee

Handbook also provides for cases of Multiple Violations (Exhibit E-2 at page 66):

“An employee who accumulates four (4) or more violations within a rolling twelve (12) month period may be dismissed immediately by the Administrator.

In this case, Mountain View argued that the LPNs met the requirements for statutory supervisors as defined in *New Vista Nursing and Rehabilitation*, 870 F.3d 113 (3<sup>rd</sup> Cir. 2017) (“*New Vista*”) and in *GGNSC Springfield LLC v. NLRB*, 721 F.3d 403 (6<sup>th</sup> Cir. 2013) (“*GGNSC*”), and that Mountain View met its burden of proof under applicable standards (copy of Mountain View’s Post-Hearing Brief attached). The Regional Director’s Decision does not cite the specific portions of the Hearing Transcript on which the Regional Director based his statements of the facts or his conclusions from them. The Board should require here that these decisions, like those of an ALJ, provide an independent and careful analysis of the factual issues and legal arguments involved that includes citations to the Hearing Transcript. *See: Babcock & Wilcox*, 112 NLRB 546 (1955); *Waterbury Hotel Mgmt. LLC*, 333 NLRB 482 (2001).

When the Board last addressed the holding in *New Vista*, in *Coral Harbor Rehabilitation and Nursing Center*, 366 NLRB No. 75 at FN 6 (2018), *appeal pending decision at Nos. 18-2220 and 18-2619 (3<sup>rd</sup> Cir.)*, the Board concluded that its determination comported with *New Vista* because it found the record in that case did not meet the burden of proof required under *New Vista*:

“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’ the disciplinary process . . . ; and (3) the employee's action functions like discipline because it increases severity of the consequences of a future rule violation . . .”

The *New Vista* Court, 870 F.3d at 130, however, stated:

“In its August 26, 2011 order, the Board applied a test that is incompatible with our caselaw. Specifically, the Board relied on the evidence that management independently investigated the LPNs' written complaints and that few LPNs apparently submitted written complaints. Our caselaw holds that those are inappropriate factors on which to rely. We will therefore remand for further consideration.”

and, further, at 131:

“...we concluded that “an acceptance of the Board’s reading of the NLRA in this case ‘would ... render the statutory phrase “effectively to recommend” nugatory.””

and, further, at 132-133:

“...we recognize 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, *see Attleboro*, 176 F.3d at 165 (“Attleboro’s LPN charge nurses make a decision to counsel an offending CNA directly, or initiate a progressive disciplinary process...”); (2) the employee’s actions “initiate” the disciplinary process, *see id.* (“The circumstances clearly are different here inasmuch as Attleboro’s charge nurses initiate a progressive disciplinary process...”); and (3) the employee’s action functions like discipline because it increases severity of the consequences of a future rule violation, *see id.* (“[T]heir decisions to write up a CNA become a permanent part of the CNA’s personnel file and could lead to the CNA’s termination.”). ...we also derive two facts that do not disprove supervisory status: (1) whether a nurse’s supervisor undertakes an independent investigation, *see Attleboro*, 176 F.3d at 164 (“[T]he ‘relevant consideration is effective recommendation or control rather than final authority.’ ... [T]he NLRA does not preclude a charge nurse from having supervisory status merely because her recommendation is subject to a superior’s investigation.” (citations omitted) (describing *Glenmark*)); and (2) whether the employees exercise their supervisory authority only a few times (or even just one time), *see Prime Energy Ltd. P’ship*, 224 F.3d [206,] at 210 [3<sup>rd</sup> Cir. 2000].”

The Board has not issued a determination on remand in *New Vista* to date. In this case, the Board is confronted with a similar clash of decision principles as in *Coral Harbor*; and, since the Regional Director’s reliance is on caselaw and decision principles rejected by the *New Vista* Court and that are otherwise unreasonable for the reasons discussed by former Chairman/Member Miscimarra, the Board should here clarify and define decision principles for the determination of statutory supervisors in nursing homes consistent with those in *New Vista*; the rights of employers under Section 14(a) of the NLRA to the loyalty of the

employers' designated supervisors, *Florida Power & Light Co. v. Int'l. Bhd. Of Elec. Workers, Local 641*, 417 U.S. 790, 807-812 (1974) (Congress sought, in enacting Section 14(a), "to assure the employer of the loyalty of his supervisors by reserving to him... the right to refuse to engage in collective bargaining with them."); and, the practical realities of nursing home operations. Here, the Regional Director fails to recognize that nursing homes require a reasonable number of individuals exercising supervisory authority at the facility during each shift; and, that the "charge nurse"/LPNs involved here are those individuals. *See also: prior comments of former Chairman/Member Miscimarra*, cited above.

The Regional Director's Decision does not make findings sufficient to rebut Mountain View's meeting its burden of proof under the *New Vista* standards. As previously argued by former Chairman/Member Miscimarra, *G4S Government Solutions, Inc.*, 363 NLRB No. 113, at page 5, where, as here, the evidence is sufficient, it does violence to the NLRA's preponderance of the evidence standard to disregard relevant evidence on the belief that the Employer should have introduced yet more. *See also: The Arc of South Norfolk*, 368 NLRB No. 32, at page 3 ("a party seeking to prove supervisory status need only establish it by a preponderance of the evidence").

**Supervisory Authority as to Discipline or Effectively Recommend Discipline Is Established in the Record**

The Regional Director's Decision, at pages 13 and 21, agreed that the Hearing Record had documented evidence of LPN involvement in CNA discipline (Employer's Exhibit 4; Tr. 58-60, Testimony of Amy Matuska). His Decision fails to acknowledge or apply the *New Vista* standard, 870 F.3d at 132-133, that: "the number of instances of supervision does not determine whether employees are supervisors since that is 'hardly a reasonable basis to conclude that the authority was lacking' because it 'simply suggests that the authority was rarely needed.'" citing NLRB v. Prime Energy Ltd. P'ship., 224 F.3d 206 (3<sup>rd</sup> Cir. 2000). As the Sixth Circuit noted in *GGNSC*, at 411, absent the LPNs' decisions to write up an employee, there would be no resulting discipline; *see also: NLRB v. Lakepoint Senior Care & Rehab Center, LLC*, 680 Fed.Appx. 400, 402-403 (6<sup>th</sup> Cir. 2017) (same). The Board has previously held that: "possession of authority consistent with any of the indicia of Section 2(11), is sufficient to establish supervisory status, even if this authority has not yet been exercised." *Fred Meyer Alaska, Inc.*, 334 NLRB 646, 649 FN8 (2001); *Community Education Centers, Inc.*, 360 NLRB 85, 90-91 (2014).

The Regional Director's Decision, bottom of page 19-20 (discussing the lack of additional documented instances of discipline) is inconsistent with the *New Vista* standard and with the requirements of the NLRA. While the Regional

Director acknowledges the *New Vista* standard, at the bottom of page 20, his effort to distinguish the facts here from those required under *New Vista*, at page 21, misreads and misapplies *New Vista*. The Regional Director's premise is also inconsistent with the standards applied by the *New Vista* Court, at 132 ("it is clear that a nurse can be a statutory supervisor if he or she has the authority to effectively recommend less onerous discipline, including calling a manager's attention to instances of violations or work rules.").

Contrary to the conclusions of the Regional Director Decision at pages 20-21, this case meets each of the standards established by the *New Vista* Court:

1. The LPNs have shown that they have the discretion to take different actions, including verbally counselling CNAs or taking more formal action. Employer's Exhibit 4; Testimony of Jacklyn Partyka (Tr. 22-24); Testimony of Amy Matuska (Tr. 57-60); Testimony of Michelle Thompson (Tr. 79-80). The Board has accepted that such a choice process demonstrates the exercise of "independent judgment," *In re Progressive Transportations Services, Inc.*, 340 NLRB No. 126 at 1046 (2003); *see also: GGNSC* at 409, 411.
2. The LPNs' actions initiate the disciplinary process. Employer Exhibit 4; Testimony of Amy Matuska (Tr. 57-60).

3. The LPNs' actions function like discipline because their decisions to write up the CNAs could lead to termination (Employer's Exhibit 4; Employer's Exhibit 2); Testimony of Jacklyn Partyka (Tr. 26, 33); Testimony of Amy Matuska (Tr. 67). The Regional Director's analysis, at page 21 concerning Employer's Exhibit 4 actually proves this point, since he found that this documented specific example of an LPN's informed judgment to write up the CNA actually led to a discipline determination that would ordinarily result in the termination of the employee. The Regional Director's citation to *New Vista*, 870 F.3d at 132, fails to include the Third Circuit's clarification there that: "Their decisions to write up a CNA become a permanent part of the CNA's personnel file and could lead to the CNA's termination." The fact that the write up did not result in either termination or suspension, is based on "Work Not Satisfactory" and not on "Resident Care" or "Resident Safety", as well as the description of the violation and the descriptions of the different Group Levels of violations in Employer's Exhibit 2, pages 62-63 (Group I includes: "Failure to follow instructions or to perform work according to procedure or policy") indicates that the Group IV designation was an error and the Verbal Warning given was consistent with Mountain View's Progressive Discipline Policy on page 65 of

Employer's Exhibit 2. Either way, Employer's Exhibit 4 meets this standard.

Further, the Board should reject the Regional Director's reliance of standards precluded by the *New Vista* Court: (1) that further investigation by others with respect to a write up precludes a finding of supervisory status; and, (2) that the number of times such authority is exercised matters.

This case, like *Coral Harbor* and *New Vista*, presents the Board with the problem of establishing practical standards for the determination of statutory supervisor status that can be applied at whatever point in time the issue presents. The Board is charged to strike a balance between employers' legitimate business interests and the statutorily protected workplace rights to organize. *See: Beth Israel Hospital v. NLRB*, 437 U.S. 483, 504 (1978). In order to strike that balance and uphold the intent of Section 14(a), the Board must have an objective test for statutory supervisor status that can be applied at any point in the relationship, even on the very first day of operations. The standards applied by the Regional Director in this case fail that test, while those of the *New Vista* Court meet it. To have standards that cannot be applied on the first day of operations or even during a limited period when a new operator is permitted to change the job functions of employees, does not comport with standards that recognize the practical realities of the nursing home industry.

### **Supervisory Authority to Assign is Established in the Record**

In *The Arc of South Norfolk*, the Board reversed the Regional Director's determination that the facility's program coordinators did not possess the authority to assign clients to case managers and that the record was insufficient to prove that they exercised independent judgment in doing so. The Board noted, slip op. at page 3, that, in the healthcare context, "the Board has held that assignment encompasses the responsibility to assign employees to care for particular patients." The Regional Director found, at page 16, that some LPNs "may occasionally adjust these assignments to account for a CNA's familiarity with the resident for continuity of care purposes, or to rebalance a workload, particularly if the CNA requests such a change...[T]he evidence does not suggest such adjustments are frequent." The Regional Director found the testimony here "in sharp contrast the charge nurses in *Oakwood Healthcare*" whom the Board found exercised independent judgment by taking into account the medical condition and needs of the patient, a nurse's particular skill set in relation to the patient's condition and needs, and the quantity of work that should be assigned to each nurse." The Regional Director also found no showing that the LPNs use independent judgment in assigning the CNAs tasks. The Regional Director at FN13 on page 16 discounted testimony to the contrary as "conclusory." The Regional Director, at pages 16-17, conceded that there was a specific example of an LPN reassigning a

CNA, but that one example was not enough and that that example did not involve an application of independent judgment. The Regional Director, at page 16, found the evidence inadequate to suggest that LPNs assess the CNAs to determine which one is best suited for their patient needs. The evidence in this case does not support his analysis.

First, the Regional Director's conclusion that one example is insufficient to demonstrate supervisory authority is contrary to the standards discussed above from *New Vista*, since the NLRA, at Section 2(11), only requires possession of such authority, not its exercise. The Board has previously held that: "possession of authority consistent with any of the indicia of Section 2(11), is sufficient to establish supervisory status, even if this authority has not yet been exercised."

*Fred Meyer Alaska, Inc.*, 334 NLRB 646, 649 FN8 (2001); *Community Education Centers, Inc.*, 360 NLRB 85, 90-91 (2014). As noted above, the Board needs objective standards to make this determination that can be applied at any stage of examination to be consistent with that requirement of the NLRA. The evidence in this case supports such authority; and, the criteria applied by the Regional Director improperly dilutes the standard of proof required to demonstrate such authority.

Second, here, as in *The Arc of South Norfolk*, Mountain View provided testimony concerning LPNs authority to assign and reassign CNAs, Tr. 19, 20-22, 28-20, 38-40, 63-64, 75, 86 (cited in Attachment – Excerpts from June 6, 2019

Hearing Transcript attached). The Union's witness admitted that she did not know what happens in the rest of the building. Tr. 105.

The testimony of Jaclyn Partyka above at Tr. 38-40 is mischaracterized in the Regional Director's Decision, at page 16-17, including FN13. Contrary to Regional Director's analysis that this example, which the Regional Director agreed was specific and not conclusory evidence and would otherwise support a finding of supervisory status, was based on the preferences of the CNAs involved, the witness plainly testified that the switch in assignments was done based on her [the LPN's] independent judgment that the one specific CNA worked better on a different unit. The testimony of Amy Matuska at Tr. 63-54, cited above, similarly demonstrates that the LPNs make informed judgments of the fit between the needs of the residents and the available skill sets of the scheduled CNAs on each shift.

Those informed judgments are the kinds the Board has found to support supervisory status to assign in *Oakwood Healthcare* and in *The Arc at South Norfolk*. Given such evidence and the additional corroborating testimony and standards noted above, the Regional Director's conclusions otherwise are inconsistent with the record and should be reviewed and reversed.

WHEREFORE, the Employer requests the Board to review the Regional Director's Decision and Direction of Election in this case and to reverse it.

Respectfully submitted,

  
Brandon S. Williams, Esquire  
Attorney for the Employer

Attachments:  
Excerpts from June 6, 2019 Hearing Transcript  
Regional Director's Decision  
Employer's Post-Hearing Brief

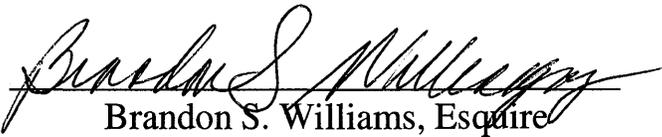
## CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Section 102.67 of the Board's Rules and Regulations, a true and correct copy of the Request for Board Review was served by email, as follows:

Christopher S. Baluzy, Esq.  
Cary Kane LLP  
1350 Broadway, 5<sup>th</sup> Floor  
Suite 1400  
New York, NY 10018  
[cbaluzy@carykane.com](mailto:cbaluzy@carykane.com)  
(Union's Legal Counsel)

Paul Bazemore, Organizer  
Retail Wholesale and Department Store Union (RWDSU)  
370 Seventh Ave  
Suite 501  
New York, NY 10001  
[pbazemore@rwdsu.org](mailto:pbazemore@rwdsu.org)

Dennis P. Walsh, Regional Director  
National Labor Relations Board  
Region 4  
100 E Penn Square, Suite 403  
Philadelphia, PA 19107  
[Dennis.Walsh@nlrb.gov](mailto:Dennis.Walsh@nlrb.gov)

  
Brandon S. Williams, Esquire

DATE: August 14, 2019

## HEARING TRANSCRIPT EXCERPT

IN THE MATTER OF:

MOUNTAIN VIEW CARE AND REHAB CENTER, LLC and RETAIL,  
WHOLESALE and DEPARTMENT STORE UNION

Case No. 04-RC-242288

Hearing Date: June 6, 2019

Tr. 19 – “We do not do the scheduling, but we do however choose where they go in the facility. If I like recommend that a CNA is to be like on my unit, then I go ahead and tell the scheduler to schedule them on my unit.

Tr. 20-22 – “...we don't tell them [the CNAs] which days they're working. We have a scheduler in house for that. However, scheduling them, their tasks and everything within our shift, we do provide where they go. We like to – like a nurse, we delegate which section of the unit they're going to take over to provide care to a resident.

Q: And how do you make that determination? Do you talk with a supervisor?

A: No. That's our own personal - we see how they work with the residents. We're able to assign them to the resident that they more like – continuity of care. And, life from day to day, it changes because there's different CNAs

that get put on our hallway. And we know a little bit about each one of them, so....

Q: And could you explain what factors you consider in assigning them?

A: Pretty much, especially if like I notice – if I work with someone like a CNA for a week, I end up seeing if they're getting harder assignments, and then there's a little bit of more like I don't want to say easy assignments but – the actual type of care that's given some residents are where they're more of a two-person and heavier assignment. So pretty much, if they start getting tired or you can see the exhaustion, then you'd like put them down the other hallway just to relieve them of that.

Q: An is that your judgment?

A: Yes.”

Tr. 28-29 – Q: “And you said that you will tell the scheduler not to schedule aides on your hall; is that correct? A: Yes.

Q: And what happens when you tell her that? A: She will swap the aides out.

Q: And do you have to seek the approval of anybody in order – before telling the scheduler to do this? A: No.

Q: ... how often do you assign the CNAs to their specific tasks?

A: Pretty much every day. We're given who is to work on that unit, and we decide which section they take of that unit.

Q: And what criteria do you use to make that decision?

A: Mainly, what they – like how they work and the welfare of the resident, if there's any issues with how they interact with them or anything like that.

Q: And do you seek approval from a superior before making those decisions? A: No.”

Tr. 38-40 – Q: And so, again, the scheduler puts the CNAs in your section; is that right?

A: Yes, unless we see an issue with it. I did have a CNA that doesn't work well around my section, and I ended up swapping her to a different like unit.

Q: And so how did that go? When you saw that swap, who did you ask to do the swap?

A: Well, I swapped it out, and then I told the supervisor, like the nursing supervisor that I'm going to make the switch. [The witness thereafter named the nursing supervisor and the CNA and the time of the swap].

Q: Did you tell [the CNA] to go to a different section?

A: Yeah. And she was agreeable. ... And then I removed another CNA from that section that usually works over in my section and placed her on my section to work that night.

Q: And was that movement, was that cleared with anyone? A: No.

Q: And was that just for one shift, or what that a permanent change?

A: No, that's for my shift alone. It's not a permanent situation. They can schedule them on different shifts wherever they wanted to be, but I just clearly stated that she works out better on A Wing than C Wing.

Tr. 63-64 – Q: “Do you every – have you even had need to pull an aide from another floor or remove an aide from your floor or from your unit?”

A: Yes, I have. Down my hall in particular, I have a very meaty assignment that is very particular. So some CNAs might know it a little bit better than others. And for the safety of the residents, it's just easier if I get the CNAs that know that assignment. So they would be assigned a CNA that doesn't know it, so then I will move them over to either a different hall or a different unit and move a CNA that knows it into that spot.

Q: Do you talk with the scheduler about this? A: After it's done.

Q: Do you seek anybody's approval before you move these aides around?

A: No.”

Tr. 75 – Q: “And is it just a matter of division, or do you assign specific residents to specific aides?”

A: In the assignment book there is a list that goes according to how many aides we have. If, in fact, I feel that the aides fit that assignment, I will leave

them there. If there's any problems or discretions where the CNA feels that she's not a good fit there, I will switch the schedule around to put her in another section where she feels more comfortable.

Q: Do you talk to a supervisor before making that decision? A: No.

Tr. 86 – Q: Do they [the LPNs] do assignments of CNAs? A: Yes they do.

Q: Do they need to seek approval from somebody above them in the chain of command to assign CNAs? A: No, they do not.”

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 4

**MOUNTAIN VIEW HEALTH CARE AND  
REHABILITATION CENTER, LLC**

**Employer**

and

**Case 04-RC-242288**

**RETAIL WHOLESALE AND DEPARTMENT  
STORE UNION (RWDSU)**

**Petitioner**

**REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION**

The supervisory status of a group of Licensed Practical Nurses (LPNs) employed by the Employer, a nursing home, is determinative in this case of whether those employees will be able to vote on whether they want to join an existing unit of the Employer's employees. In this case, Mountain View Health Care and Rehabilitation Center, LLC (Employer), contends that its LPNs are statutory supervisors because they use their independent judgment to assign work to CNAs, discipline them, and responsibly direct them in their daily job functions, while Petitioner argues that the LPNs are employees. As explained fully below, and mindful of the directive to interpret broadly the Act's definition of employee, I find that the Employer has failed to carry its burden to establish that LPNs are supervisors excluded from the Act's coverage. There was insufficient evidence that LPNs exercised independent judgment to satisfy the statutory definition of supervisor. Any LPN involvement in discipline was minimal, existed in a reporting context, and did not amount to effective recommendation. Any assignment or direction of work was shown to be dictated by established Employer guidelines, of a routine nature, and was not frequent. There was also insufficient evidence that LPNs were held accountable for the work of CNAs.

The Petitioner, Retail Wholesale and Department Store Union, seeks a self-determination election, commonly referred to as an *Armour-Globe*<sup>1</sup> election, to ascertain whether approximately 25 full-time and regular part-time Licensed Practical Nurses (LPNs) and 11 PRN LPNs, Flex-time LPNs, Super Flex-Time LPNs, and Per Diem LPNs (collectively referred to as PRN LPNs)<sup>2</sup> employed by the Employer wish to be included in an existing bargaining unit of CNAs and Restorative Aides (collectively referred to as CNAs).<sup>3</sup>

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<sup>1</sup> This procedure is named because it originated in *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937), and was refined in *Armour & Co.*, 40 NLRB 1333 (1942).

<sup>2</sup> The term PRN, flex, super flex and per diem refer to the same grouping of employees and the parties have stipulated that there are no relevant differences between these categories of employees for purposes of determining their eligibility. As PRN LPNs have the same job duties and responsibilities as other LPNs, the Employer contends that PRN LPNs are likewise statutory supervisors.

<sup>3</sup> The record does not indicate the precise number of employees in the existing unit of CNAs.

Additionally, the Employer argues that that the petitioned-for unit is inappropriate even if LPNs are employees because the PRN LPNs do not share a sufficient community of interest with the full-time and regular part-time employees because they have different wages and benefits and are subject to different rules for assignment to their shifts. I reject this argument and find that the PRN LPNs share a community of interest with the full-time and regular part-time LPNs as well as with the CNAs in the existing bargaining unit because they perform similar duties, have frequent contact, and share common supervision. Accordingly, based on the hearing conducted by the Hearing Officer of the Board on June 6, 2019, and after carefully considering the evidence and arguments presented by the parties, including in their post-hearing briefs, I have concluded that the petitioned-for unit of all full-time and regular part-time LPNs, Flex-Time LPNs, Super Flex-Time LPNs, Per Diem LPNs, and PRN LPNs is an appropriate voting group for the purposes of a self-determination election, and I shall order an election in the petitioned-for unit.

## **I. OVERVIEW OF OPERATIONS**

The Employer, a Pennsylvania corporation, provides rehabilitation services and nursing home care to approximately 180 residents at its facility in Scranton, Pennsylvania (the Facility). The Employer assumed the operation of the Facility from another operator some time prior to July 2018. Since July 2018, Donna Molinaro has been the Employer's Administrator and she is responsible for the overall operations of the Facility. Under Molinaro is Tracy Burkhard, the Director of Nursing, who oversees the entire Facility in Molinaro's absence and oversees the clinical staff including Registered Nurses, LPNs, and CNAs. Heather Rogers is the Assistant Director of Nursing and Debbie Gibbs is the Scheduler/Staffing Coordinator, who is responsible for creating the daily work schedule. The Employer also employs an unspecified number of Unit Managers or Nursing Supervisors, who are Registered Nurses, and who supervise the clinical staff consisting of LPNs and CNAs. There are three wings at the Facility – Alcore (or "A Wing"), Bella Bay (or "B Wing"), and Camelot (or "C Wing"), which is the memory care section and which contains a 24-bed secured Alzheimer's wing called "Magical Court." The Employer's operation is 24 hours a day, seven days a week, and consists of multiple shifts.

## **II. BARGAINING HISTORY**

The Petitioner has represented the unit of full-time and regular part-time CNAs at the Facility since it was certified as the collective-bargaining representative on June 14, 2018 in Case 04-RC-220072. On May 20, 2019, the Petitioner filed a petition in Case 04-RC-241150 seeking an *Armour-Globe* election to include approximately 47 PRN CNAs, Flex-time CNAs, Super Flex-Time CNAs, and Per Diem CNAs in that existing unit. A hearing was held before a Hearing Officer on May 22, 2019 and a decision issued in that case on June 24, 2019, ordering that an election be held on July 15, 2019. On July 25, 2019, the Acting Regional Director issued a Certification of Representative to include the PRN CNAs after the July 15 election resulted in these employees designating Petitioner as their collective-bargaining representative. There is no evidence of any bargaining history with respect to any of the LPNs at the Facility.

### **III. THE RELEVANT LEGAL STANDARDS**

#### **A. *Armour-Globe* Elections**

An *Armour-Globe* self-determination election permits employees who share a community of interest with a unit of already represented employees to vote on whether to join the existing unit. *NLRB v. Raytheon Co.*, 918 F.2d 249, 251 (1st Cir. 1990); *Armour & Co.*, 40 NLRB 1333 (1942); *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937). The Board has long recognized that a self-determination election is the proper mechanism by which an incumbent union adds unrepresented employees to its existing unit if the employees sought to be included share a community of interest with unit employees and “constitute an identifiable, distinct segment so as to constitute an appropriate voting group.” *Warner-Lambert Co.*, 298 NLRB 993, 995 (1990).

#### **B. Supervisory Status**

The National Labor Relations Act specifically excludes supervisors from its coverage. It is well settled that the party asserting supervisory status bears the burden of establishing it by a preponderance of the evidence. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-12 (2001); *Shaw Inc.*, 350 NLRB 354, 355 (2007); *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006); *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006). The evidentiary burden is significant and substantial, and purely conclusory evidence is insufficient to establish supervisory status. *Golden Crest Healthcare Center*, 348 NLRB 727, 729 (2006); *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006). The Board must not construe the statutory language too broadly because an individual found to be a supervisor is denied the Act's protections. *Avante at Wilson, supra* at 1057; *Oakwood Healthcare, supra* at 687-88, quoting *Chevron Shipping Co.*, 317 NLRB 379, 381 n.6 (1995). The party seeking exclusion must therefore demonstrate specific details or circumstances clearly showing that the claimed supervisory authority exists and is not merely paper authority, and that the authority is exercised on more than a sporadic basis. *Avante at Wilson, supra* at 1057-58; *Shaw, supra* at 357, fn. 21; *Oakwood Healthcare, supra* at 693; *Kanahwa Stone Co.*, 334 NLRB 235, 237 (2001). Although the Act demands only the possession of Section 2(11) authority, not its exercise, the evidence still must be persuasive that such authority exists. *Avante at Wilson, supra* at 1057. Job titles, job descriptions, or similar documents are not given controlling weight and will be rejected as mere paper authority, absent independent evidence of the possession of the described authority. *Golden Crest Healthcare Center, supra* at 731, citing *Training School at Vineland*, 332 NLRB 1412, 1416 (2000); see also *Chevron Shipping Co., supra* at 381 fn. 6. Conclusory statements without specific explanation are not enough. Further, where the evidence conflicts or is inconclusive regarding particular indicia of supervisory authority, the Board will find that a party has not established supervisory status on the basis of those indicia. *The Republican Co.*, 361 NLRB 93, 97 (2014); *Dole Fresh Vegetables, Inc.*, 339 NLRB 785, 792 (2003).

Section 2(11) of the Act sets forth a three-part test for determining whether an individual is a supervisor. Under that test, employees are statutory supervisors if: (1) they hold the authority to engage in any one of the 12 listed supervisory functions; (2) the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment; and (3) the

authority is held in the interest of the employer. *Kentucky River, supra*, 532 U.S. at 712-13; *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-74 (1994). The 12 supervisory functions listed in the statute are the authority to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend any of these actions. 29 U.S.C. § 152(11).

The criteria for supervisory status enumerated in Section 2(11) are read in the disjunctive; possession of any one of the 12 indicia listed will confer supervisory status, as long as they are exercised using independent judgment. *Kentucky River, supra* at 713; *Shaw, supra* at 355. On a case-by-case basis, the Board differentiates between exercising independent judgment and giving routine instruction, between effective recommendation and forceful suggestion, and between the appearance of supervision and supervision in fact. The exercise of some supervisory authority in a routine, clerical, or perfunctory manner is insufficient to render an employee a statutory supervisor. *Oakwood Healthcare, supra* at 693; *J.C. Brock Corp.*, 314 NLRB 157, 158 (1994). Under Board precedent, effective recommendation involves an action without independent investigation by supervisors, not simply a recommendation that is ultimately adopted. *The Republican Co., supra* at 97; *Children's Farm Home*, 324 NLRB 61 (1997); *ITT Lighting Fixtures*, 265 NLRB 1480, 1481 (1982)

In *Oakwood Healthcare*, the Board clarified the definitions of "assign" and "responsibly to direct" in the context of charge nurses. The Board determined that the term "assign" refers to the "act of designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or overtime period) or giving significant overall duties, i.e., tasks, to an employee." *Oakwood Healthcare, supra* at 689. The authority to "assign" requires more than choosing the order in which an employee will perform discrete tasks within an overall significant assignment of duties. *Id.*

Responsible direction, unlike the authority to assign, encompasses the delegation of discrete tasks rather than overall duties. *Oakwood Healthcare, supra* at 690-92. However, the authority to responsibly direct other employees requires that the delegation of discrete tasks result in accountability for the putative supervisor. The Board has explained that "to 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 692; *see also Community Education Centers*, 360 NLRB 85, 85-86 (2014); *Entergy Mississippi, Inc.*, 357 NLRB No. 178, slip op at 5-7 (2011).

A finding of supervisory status based on either the authority to assign or to responsibly direct must also involve an exercise of independent judgment. *Oakwood Healthcare, supra* at 692-93. In *Oakwood Healthcare*, the Board undertook a lengthy discussion of the "contours of 'independent judgment,'" and explained that it requires that an individual act or effectively recommend action free from the control of others and form an opinion or evaluation by discerning and comparing data, provided that the act is not of a routine or clerical nature. Judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, a collective-bargaining agreement, or a higher authority's verbal instruction.

*Oakwood Healthcare, supra* at 692-93; *PPG Aerospace Industries, Inc.*, 353 NLRB 223, 223 (2008). In *Oakwood Healthcare*, the Board found that the employer failed to establish that rotating charge nurses exercised supervisory authority for a substantial part of their work time where the patient rooms were assigned to CNAs in a routine and established manner. The Board has consistently found these types of decisions do not establish the use of independent judgment. *Id.* The Board has found that LPNs do not use independent judgment when assigning CNAs to patients or temporarily transferring them to another floor when patient assignments involve only a routine division of patients among CNAs. *Regal Health & Rehab Ctr., Inc.* 354 NLRB 466, 472 (2009). Further, the Board's interpretation of the term "independent judgement" applies regardless of the supervisory function implicated and without regard to whether the individual exercising the judgment is relying on professional or technical expertise. *Oakwood Healthcare, supra* at 692.

To confer supervisory status based on the authority to discipline, "the exercise of disciplinary authority must lead to personnel action without the independent investigation or review of other management personnel." *Lucky Cab Co.*, 360 NLRB 271, 272 (2014) (quoting *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002)). Warnings that simply bring substandard performance to the employer's attention without recommendations for future discipline serve nothing more than a reporting function and are not evidence of supervisory authority. See *Williamette Industries, Inc.*, 336 NLRB 743, 744 (2001); *Loyalhanna Health Care Associates*, 332 NLRB 933, 934 (2000) (warning merely reportorial where it simply described incident, did not recommend disposition, and higher authority determined what, if any, discipline was warranted); *Ten Broeck Commons*, 320 NLRB 806, 812 (1996) (written warnings that are merely reportorial and not linked to disciplinary action affecting job status are not evidence of supervisory authority). The Board has found that putative supervisors do not possess disciplinary authority where counselings, warnings, or reports do not constitute an initial step in a progressive disciplinary system, and thus do not impact job status. See, e.g., *Vencor Hospital-Los Angeles*, 328 NLRB at 1139.

Thus, a "warning may qualify as disciplinary within the meaning of Section 2(11) if it 'automatically' or 'routinely' leads to job-affecting discipline, by operation of a defined progressive disciplinary system." *Veolia Transportation Services, Inc.*, 363 NLRB No. 98, slip op. at 9 (2016); *The Republican Co., supra* at 97 (citing *Oak Park Nursing Care Center*, 351 NLRB 27, 30 (2007)); *Ohio Masonic Home, supra* at 394. It is the Employer's burden to prove the existence of such a system, as well as the role warnings issued by putative supervisors play within it. *Id.* If an ostensibly progressive system is not consistently applied, progressive discipline has not been established. See, e.g., *Ken-Crest Services*, 335 NLRB 777, 777-778 (2001) (verbal warnings not disciplinary, notwithstanding purported progressive discipline system, because employees could receive numerous counselings and verbal warnings without further discipline); *The Republican Co., supra* at 99 (progressive discipline not established where, inter alia, testimony indicated employees had been suspended without prior warning, but other employees received multiple verbal warnings without any escalation); *Ten Broeck Commons, supra* at 809 (warnings not disciplinary where no showing of "premeditated discipline based solely on the receipt of a certain, set number of warnings").

### C. Community of Interest

The Act requires that a petitioner seek representation of employees in *an* appropriate unit, not the most appropriate unit possible. *Overnite Transportation Co.*, 322 NLRB 723 (1996); *P.J. Dick Contracting, Inc.*, 290 NLRB 150 (1988); *Morand Bros. Beverage*, 91 NLRB 409, 418 (1950), *enfd.* 190 F.2d 576 (7th Cir. 1951). Procedurally, the Board examines the petitioned-for unit first. If that unit is appropriate, the inquiry ends. *Wheeling Island Gaming, Inc.*, 355 NLRB 637, *fn.* 2 (2010); *Bartlett Collins Co.*, 334 NLRB 484 (2001). It is only where the petitioned-for unit is not appropriate that the Board will consider alternative units which may or may not be units suggested by the parties. *Bartlett Collins Co.*, *supra*; *Overnite Transportation Co.*, 331 NLRB 662, 663 (2000).

In *PCC Structural, Inc.*, 365 NLRB No. 160 (2017), the Board reinstated the traditional community-of-interest standard for assessing the appropriateness of a petitioned-for unit. When deciding whether a group of employees shares a community of interest, the Board considers whether the employees sought are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised. *Id.* slip op. at 11 (quoting *United Operations, Inc.*, 338 NLRB 123, 123 (2002)); In *Park Manor Care Center, Inc.*, 305 NLRB 872 (1992), the Board reaffirmed that the same analysis applies in a non-acute healthcare facility.

In determining whether per diem or on-call employees should be included in a unit with regular full-time employees, the Board considers the similarity of the work performed and the regularity and continuity of employment. *S.S. Joachim & Anne Residence*, 314 NLRB 1191, 1193 (1994); *Trump Taj Mahal Casino Resort*, 306 NLRB 294, 295 (1992). The Board's objective in deciding the eligibility, for example, per diem nurses, is "to distinguish 'regular part-time employees from those whose job history with the employer is sufficiently sporadic that it is most accurately characterized as 'casual.'" *Sisters of Mercy Health Corp.*, 298 NLRB 483, 483 (1990).

The Board has included per-diem RNs in a single bargaining unit with regularly scheduled RNs when they performed the same work and are regularly employed. *Id.* To determine whether they are regularly employed, the Board has utilized the eligibility formula set forth in *Davison-Paxon Co.*, 185 NLRB 21, 24 (1970). To be eligible to vote under this formula, per-diem employees must work an average of four or more hours per week in the 13 weeks preceding the election eligibility date. *S.S. Joachim & Anne Residence*, *supra*; *Sisters of Mercy Health Corp.*, *supra*. The Board has generally not found that per-diem RNs have a separate community-of-interest warranting a unit separate from other RNs at a single medical facility. See *S.S. Joachim & Anne Residence*, *supra*; *Sisters of Mercy Health Corp.*, *supra*.

The Board has generally recognized LPNs as being technical employees who nevertheless may be included in units of service and maintenance employees where they otherwise share a sufficient community of interest with such employees. See *Ten Broeck Commons*, *supra*, 320 NLRB at 814; *Memorial Medical*, 230 NLRB 976 (1977).

#### IV. FACTS

It is undisputed that LPNs and CNAs share the same primary function – to provide high quality care to the residents at the Facility. To achieve this imperative, CNAs are responsible for all of the tasks that are associated with the residents' daily care, including: showering; weighing; toileting; providing ice and water; and ensuring that the shower rooms and nourishment rooms are clean and free from debris.<sup>4</sup> These tasks are evenly distributed among the CNAs on a particular shift. CNAs are also responsible for documenting resident behaviors and activities such as bowel movements, incontinence, exercise, and how much a resident ate or drank. LPNs are generally responsible for overseeing the CNAs on their floors as they complete these tasks and for ensuring that all of these tasks are completed in a satisfactory manner. They also confirm that CNAs' documentation is correct, medication is administered to the residents properly, and that CNAs schedule the residents' activities around appointments or lab work. LPNs may also perform CNAs' tasks if CNAs are unable to complete them as assigned.

The parties stipulated that LPNs do not have the authority to hire, layoff, recall, or reward employees under Section 2(11) of the Act, and it appears the Employer is also not contending that LPNs are able to adjust CNAs' grievances.<sup>5</sup> In addition to Administrator Molinaro, the Employer proffered the testimony of three full-time LPNs: Jaclyn Partyka, who had worked at the Facility for a total of 3.5 years, Amy Matuska, who worked at the Facility for 4-5 years, and Michelle Thompson, who worked at the Facility for less than a year. The Petitioner presented testimony from three full-time LPNs: Mary Utter, who worked at the Facility for 10 years, Michelle Buchspics, who worked at the facility for 18 years, and Theresa Nicholais, who worked at the facility for 20 years. The Employer's and the Petitioner's witnesses provided varied, albeit not entirely inconsistent, testimony as to the authority of LPNs to assign work, responsibly direct, and discipline CNAs.<sup>6</sup>

##### A. Assignment of Work

Both the Employer's and the Petitioner's witnesses consistently testified that the Scheduler/Staffing Coordinator, Debbie Gibbs, prepares the daily schedule for all of the Employer's clinical employees, which includes all of the CNAs, LPNs, and RNs who are assigned

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<sup>4</sup> The CNA job descriptions are not in the record.

<sup>5</sup> The Employer has not argued either on the record or in its post-hearing brief that LPNs had the authority to adjust grievances. The only evidence proffered on this point was from LPN Partyka, who testified generally that she has adjusted CNAs' grievances, but when pressed, was only able to provide a single instance of how she attempted to resolve a disagreement between two CNAs by bringing them together. This unclear testimony, by itself, is insufficient to establish that LPNs regularly adjust CNAs' grievances.

<sup>6</sup> Although the Employer asserted during the hearing that LPNs also had the authority to suspend employees, there is no evidence in the record that any LPN has ever done so.

to work at the Facility. The schedule or "assignment sheet," which is prepared based upon a ratio system, includes the names of the employees as well as the section of the Facility (i.e., A, B, or C Wing or Unit) to which they are assigned by the Scheduler/Staffing Coordinator. The schedule also contains the name of each resident. Each unit has five sections, and each section has one LPN and about four to five CNAs assigned at a given time, with more clinical staff assigned during the day shift than the two evening shifts. However, the Employer's and the Petitioner's witnesses' testimony differed as to their individual practices after they received the schedule from the Scheduler/Staffing Coordinator; and in particular, as to their authority to deviate from the assignments made by the Scheduler/Staffing Coordinator, and to request or to effectuate reassignments.

In general, the Employer's witnesses testified that they believed they had the ability to make changes to the schedule but provided little evidence to support that they did so. For example, Partyka, who is regularly assigned to the Alzheimer's Unit in Camelot or the "C Wing," testified that she believed that she had the authority to reassign CNAs from her floor to other floors but provided only one example of such reassignment from about two weeks prior to the hearing, when she reassigned a CNA to the A Wing and then reassigned another CNA from the A Wing. However, Partyka testified that she did so because the two CNAs were assigned to wings different from those in which they typically worked, the CNA did not feel comfortable on the C Wing, and because she believed that the CNA was a better fit on the A Wing. Partyka stated that although she did not secure permission from Nursing Supervisor Ann Lamani prior to doing so, she advised Lamani of the switch after the fact. Partyka also testified that she has asked the Scheduler/Staffing Coordinator not to schedule certain CNAs on her unit and that the Scheduler/Staffing Coordinator has changed CNAs' assignments as a result of this request. However, the record does not indicate the frequency with which this occurred or contain specific evidence concerning when it occurred.

Similarly, Matuska testified that she had switched or removed CNAs from her floor or unit, and that in those circumstances, she informed the Scheduler/Staffing Coordinator after she made the change so that it was reflected on the schedule. However, Matuska also failed to provide any specific examples of when she did so or how frequently it occurred.

Michelle Thompson acknowledged that if the CNA was a good fit for their assigned unit, that she would typically just "leave them there" but stated that if a CNA requested to be reassigned, or if she felt that they were "not a good fit" for their assignment, that she could move them to a different floor without approval from a Nursing Supervisor. Despite this testimony, Thompson provided only one example of such reassignment -- from the week prior to the hearing -- when she reassigned a CNA from her floor after the CNA requested the reassignment.

In contrast, the Petitioner's witnesses consistently testified that in their experience, LPNs left the CNAs as they appeared on the assignment sheet and that LPNs were required to ask the Scheduler/Staffing Coordinator or a Unit Manager for permission to make any changes to the schedule or move CNAs to another wing or unit. Accordingly, Mary Utter, who is regularly assigned to the Magical Court, testified that the same staff is always assigned to her unit, and she had never adjusted a CNA's assignment in the Magical Court. Similarly, Michelle Buchspics

testified that she had never made any changes to the schedule without first asking for permission from the Scheduler/Staffing Coordinator.

There is no indication in the record that LPNs determine the number of CNAs working on a shift, or that they can approve time off, monitor tardiness or absenteeism, or assign times for breaks or lunches.

### **B. Responsible Direction**

After the Scheduler/Staffing Coordinator prepares the overall schedule, CNAs are given more specific assignments on their floors or units. Once again, the Employer's and Petitioner's witnesses' testimony differed as to LPNs' roles in making those assignments. Partyka testified that she determines where on her floor each CNA will work and that she assigns specific residents to CNAs without approval from the Nursing Supervisor. According to Partyka, she determines these placements using her own judgment and considers how the CNA has worked with the residents on the floor or unit in the past; their familiarity with the residents; the difficulty of the assignment; the CNA's working style; and whether the CNA appears to be fatigued. However, she provided no specific evidence concerning when she had done so, nor did she indicate the frequency with which this occurs. Partyka provided only one example of when she had reassigned a CNA from a resident, from about 1.5 months prior to the hearing, when she removed a CNA from an assignment and replaced her with another CNA because she thought that she was "agitated" with the resident. Matuska testified that the Scheduler/Staffing Coordinator determines where on the floor or unit that the CNAs are assigned but stated that LPNs may assign residents to the CNAs based upon workload and can rebalance work accordingly based upon the number of CNAs assigned to a shift to ensure the proper ratio of CNAs to residents.

Conversely, the Petitioner's witnesses consistently testified that the assignments within a particular floor or wing are pre-determined based upon a "points sheet," which was created by the Scheduler/Staffing Coordinator, and upon an "assignment book" which is found at the nurse's station and which LPNs do not generate themselves. LPNs then assign CNAs to specific areas on the floor or wing in the order that they appear on the points sheet and need authorization from the Scheduler/Staffing Coordinator or a Nursing Supervisor to deviate from such assignments. Moreover, once CNAs are assigned to their residents, they follow specific instructions from physicians concerning the residents' care. These instructions come from the "lab book," the "cardex," the "care plan" and the "appointment book," which are pre-established. For example, with respect to showering, the shower schedule is created in advance by Nursing Supervision, and each unit or wing contains the list of shower assignments per shift, which is evenly assigned to the CNAs. CNAs may change residents' shower days only if it is requested by a resident's family. Similarly, weights must be taken as scheduled, and CNAs are not free to deviate from the schedule.

With respect to tasks other than showering, although Partyka testified that LPNs are responsible for "directing" CNAs to perform particular tasks on the shift, the record disclosed no specific evidence of such direction other than when Partyka would temporarily assign a second CNA to assist with a resident transfer (i.e. from a bed to a wheelchair or a wheelchair to the bathroom), and the record is silent as to how frequently that occurred. Similarly, although Partyka

and Matuska testified that they had the authority to reassign tasks to CNAs based upon work imbalances, they did not indicate the frequency with which this occurs, nor did they provide any specific evidence of such reassignment.

Finally, although the Employer's witnesses testified generally that they were advised they would be held accountable for CNA misconduct or poor performance, there is no record evidence that any LPN has ever been held so accountable. Administrator Molinaro admitted that she was not aware of any time when an LPN received discipline based on a CNA's failure to complete a task. Although Administrator Molinaro testified that she intends to take disciplinary actions into account when completing CNAs' annual evaluations, there is no evidence that discipline issued by LPNs (including verbal warnings) has been included in any CNA evaluation to date. Rather, the record indicates that the Employer has not issued any evaluations to any employees since it began operating the facility in the summer of 2018.

### **C. Discipline**

#### *Paper Authority*

The testimony of the Employer's and the Petitioner's witnesses with respect to the LPNs' role in CNAs' discipline was similarly divergent, and much of the Employer's proffered testimony pertained to what the Board has characterized as "paper authority." The record established that on July 26, 2018 -- about six weeks after Petitioner was certified as the collective-bargaining representative of the CNAs, and shortly after the Employer took over the operation of the Facility -- the Employer's attorney conducted mandatory trainings with some of its LPNs<sup>7</sup> and RNs entitled "RN and LPN Management Training -- Supervising the Disciplinary and Performance Process."<sup>8</sup> During this training, LPNs were advised that they could issue discipline to CNAs if they felt that CNAs were not completing their tasks in a satisfactory manner. LPNs were also provided with new six-page job descriptions, which state:

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 other nursing personnel. To monitor the performance of CNAs, nursing and non-licensed personnel, provide education and counseling, perform disciplinary action as necessary, and complete performance evaluations.

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<sup>7</sup> Partyka was not asked about the training and her name does not appear on the training sign-in sheet (Employer Exhibit 8); Matuska testified about the training but inexplicably, her name is also not on the sign-in sheet; and Buchspics testified that she did not attend the training.

<sup>8</sup> The Petitioner argues in its post-hearing brief that one can infer that this meeting and the documentation presented therein was a direct response to the unionization of the CNAs, citing *Matson Terminals v. NLRB*, 114 F.3d 300 (D.C. Cir. 1977). The record is silent as to why the Employer held the training and put into effect such rules and policies at that particular time. It is not necessary, nor is it appropriate, to make such a finding in this context; however, in any event, as discussed later in this decision, I do not find that the LPNs possessed actual supervisory authority.

The new LPN job description states in the “Administrative Functions” section that LPNs “Issue verbal and written disciplinary warnings to assigned CNAs for violations of current rules, regulations, and guidelines of the Center.” However, in the section entitled “Personnel Functions,” it also states that LPNs should, “Document any disciplinary issues and report problem areas or disciplinary actions to the Nurse Supervisor and/or Unit Manager.”<sup>9</sup>

The record reflects that the Employer also issued a new 70-page employee handbook to the LPNs on August 1, 2018, which similarly purported to give LPNs supervisory authority. Page 24 of the handbook states:

The Facility considers all of our RN and LPN Supervisors to be part of our management team. As nursing professionals, RN and LPN Supervisors are responsible for assuring that we continue to provide the best in resident care. RN and LPN Supervisors also perform other important duties. As supervisors, they have the responsibility for assigning work to nursing assistants and attempting to resolve partner problems, concerns, 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 related to resident care or for violations of the employee rules of conduct. In cases of serious infractions, the RN supervisors have the authority to independently issue disciplinary suspensions without pay pending further investigation. 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.

*The Employer’s Progressive Discipline Policy*

The Employer’s Handbook also contains a Progressive Discipline Policy, at pages 61-62, which states that “LPNs, as supervisors, shall discipline CNAs pursuant to the Facility’s Progressive Discipline Policy.” It then sets forth four categories of violations – Group I through Group IV Violations – and mandates that the Progressive Discipline System should be followed whenever an employee commits conduct that is subject to disciplinary action. For a first offense involving a Group I Violation, a verbal warning is given by the employee’s supervisor. For a second offense involving a Group I Violation or a first offense involving a Group II Violation, a written warning is given by the employee’s supervisor and the Department Director may institute a disciplinary probationary period. For a third offense involving a Group I Violation, a second Offense involving a Group II Violation, or a first offense involving a Group III Violation, the Administrator or Department Head issues a three-day suspension without pay and may institute a disciplinary probationary period. For a fourth offense involving a Group I Violation, a third offense involving a Group II Violation, a second offense involving a Group III Violation, or a

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<sup>9</sup> As discussed later, this suggests that LPNs function in a reporting role with respect to discipline and do not have the actual authority to issue discipline on their own.

first offense involving a Group IV Violation, the Administrator or Department Head terminates the employee.

Any employee who accumulates four or more violations within a rolling 12-month period is subject to immediate termination by the Administrator. Accordingly, only the Administrator or the Department Director has the authority to issue suspensions and terminate employees pursuant to this policy. In addition, the Administrator can skip any steps in the progression and impose disciplinary action. Administrator Molinaro testified that the Employer strictly adheres to its Progressive Discipline Policy.

*Notice of Disciplinary Action Forms*

When formal discipline is necessary, it is memorialized on a "Notice of Disciplinary Action Form," which LPNs have access to at the Nurses' Station. LPNs complete the first portion of the form containing the name of the CNA; the date; department; shift worked; nature of the violation; violation group; a short summary of how the CNA violated the rule or regulation; and the signature of the LPN. The second portion of the form, which is completed by a Nursing Supervisor, contains the statement, "I have reviewed the personnel file of the above-named employee. Based upon the Progressive Discipline Program, this action has resulted in the following violation: Verbal Warning; First Written Warning; Second Written Warning; Suspension; and Termination" and contains a series of boxes to be checked by the Nursing Supervisor or Administrator to determine the severity of discipline. There is also a third section of the form which pertains to the disciplinary meeting.

There is no dispute that the Director of Nursing makes the ultimate determination as to whether discipline will issue and at what level. In making that decision, he or she considers many factors including the CNA's prior disciplinary record and where they are in the Employer's Progressive Discipline Policy. Since LPNs are not permitted access to CNAs' personnel files (only the Administrator and Human Resources have such access), LPNs necessarily cannot make any decisions as to what level of discipline should issue.

*"Verbal Counseling" or "Education"*

The testimony of both the Employer's and the Petitioner's witnesses established that LPNs provide education to CNAs as a first step before advancing through the disciplinary process. Education, which is not discipline, involves talking to the CNA, explaining their error or transgression, and, depending on the infraction and whether the CNA reported it to Nursing Supervision, occasionally verbally advising the CNA that further occurrences could result in disciplinary action.

Thus, Partyka testified that Nursing Supervisors had, on a few occasions, directed her to counsel CNAs for various infractions witnessed by the Nursing Supervisors. For example, about three months prior to the hearing, Nursing Supervisor Ann Lamani observed a CNA playing games on her cellphone and advised Partyka to address the issue with her. Partyka spoke to the CNA but never reported back to Lamani and there is no evidence that any discipline resulted from this

infraction. Matuska described several situations in which she verbally counseled or educated CNAs but it is clear that she did not make any written record of such counseling; nor did it become discipline. For example, in the week prior to the hearing, Matuska educated a CNA for leaving a resident with a clip alarm alone while at the toilet. Also, in the week prior to the hearing, Matuska spoke with a CNA about being late to work and cautioned that if it continued, it could result in discipline. Additionally, about four days prior to the hearing, Matuska's RN Supervisor directed her to speak to a CNA about failing to put a resident's teeth in, but Matuska had already done this so they agreed that no further action was necessary. While Thompson testified that she had given what she characterized as "verbal warnings" to CNAs and had done so most recently on June 5, 2019 with respect to a CNA after she made an inappropriate comment to a resident. Thompson also acknowledged that these counselings were never reduced to writing.

#### *Testimony Concerning Discipline*

The record contains little support that LPNs were involved in the discipline of CNAs. The evidence of LPN involvement in disciplining CNAs showed that it was infrequent, largely in a reporting context, and did not involve effective recommendation or the use of independent judgement.

Although the Employer's witnesses testified generally that as a result of the above-referenced training by the Employer, they believed that they had the authority to issue discipline to CNAs and used their judgment to recommend a certain level of discipline, those occasions appear to be isolated and infrequent. In fact, the record disclosed only two instances of documentary evidence of LPN involvement in CNA discipline since the Employer took over at the Facility about a year ago. Both of those involved verbal warnings and failed to establish effective recommendation.

First, on April 23, 2019, after noticing that a resident was not wearing her clip alarm, in violation of the resident's care plan, Matuska recommended to her Nursing Supervisor that the CNA receive a written warning. While LPN Matuska testified that it was her own decision to issue the warning to the CNA, and that she did not discuss it with a Nursing Supervisor before she presented it to the CNA, the record reflects that the CNA ultimately received a verbal warning for a "Group IV Violation." That warning indicates that Nursing Manager April Brannigan reviewed the CNA's personnel file prior to issuing the discipline, and that Brannigan determined, based upon the Employer's Progressive Discipline Policy, that a verbal warning was warranted rather than the written warning that LPN Matuska believed was appropriate. Matuska acknowledged that Brannigan did not consult with her or solicit her recommendation as to which level of discipline to issue before making the decision to issue a verbal warning to the CNA.

Second, on April 15, 2019, RN Supervisor Siravan Supromasai informed Utter that a CNA failed to complete her documentation and instructed Utter to issue "a write up." Utter requested that the CNA be given an opportunity to complete the documentation first, but Supromasai insisted that Utter issue the write up. Since Utter had never prepared a write up before in her 10 years of working as an LPN at the Facility, Supromasai provided her with a sample. Utter testified that she

erroneously checked the box indicating a verbal warning and certifying that she had reviewed the CNA's personnel file when she had not in fact done so. She also testified that she selected the verbal warning because it was the first time that she had ever counseled the CNA. After Utter prepared the write up, she gave it to Supromasai. However, Supromasai informed Utter that the CNA was in the building that day and directed Utter to present the warning to her. Utter then presented the warning to the CNA in the presence of a Union representative and Supromasai.

The Employer's witnesses also described a few other examples, but there is no evidence that any of these instances led to discipline or that they made any effective recommendations concerning whether discipline should issue. For example, Partyka testified that about 2.5 months prior to the hearing, she assigned a CNA to take a weight, and that the CNA refused to do so several times, even after Partyka cautioned that she might receive a write up. Partyka testified that she issued a "write up" to the CNA, and that she did not obtain approval from a Nursing Supervisor before doing so but gave the discipline to the Nursing Supervisor after she issued it. However, the Employer did not introduce this purported write-up into the record. Further, Partyka acknowledged that she was not aware of where the CNA was in the Employer's Progressive Disciplinary Policy so that she could not have made a recommendation or a decision as to the level of discipline. Partyka also admitted that she did not know what level of discipline ultimately issued, if any, and that she has never recommended a negative consequence for a CNA as a result of a write up.

The Petitioner's witnesses also reported minimal involvement in discipline and described circumstances in which they were directed by their superiors to prepare write-ups. For example, about a month prior to the hearing, Utter's Nursing Supervisor advised her that a CNA failed to complete any of her documentation during an unusually busy day and directed Utter to "write up" the CNA. Although Utter was responsible for ensuring that the CNA complete her documentation, she had been unaware that she had not done so.<sup>10</sup> Utter testified that she completed some form of write-up, checked the box indicating that a verbal warning was warranted, and gave it to the Nursing Supervisor as she was instructed to do. This document was not introduced into evidence by the Employer and Utter also testified that she did not know whether any discipline issued to CNA because of the incident.

Buchspics testified that she was only involved in CNA discipline on two occasions within the last year. First, about two months prior to the hearing, Buchspics noticed that a CNA had not changed any of the residents and was instead sitting at the nurses' station. When she questioned the CNA about it, the CNA incorrectly stated that she had changed the residents. Buchspics spoke to Nursing Supervisor Ann Lamani, and then spoke to the CNA about the infraction, counseling her verbally. After that, Lamani instructed Buchspics to prepare a write up. Buchspics did so and gave it to Lamani. There is no evidence that this write up became discipline and it is not in the record. Second, about 1.5 months prior to the hearing, Buchspics witnessed a CNA using unprofessional language in response to a resident who became agitated during a changing. Buchspics told the CNA that her conduct was unacceptable and then went with the CNA to Unit Manager Benvinda Notz, requesting that Notz take some further action against her – confirming that Buchspics did not have the authority to do so herself. Notz conducted her own investigation

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<sup>10</sup> Utter suffered no adverse consequences as a result of the CNA's failure.

into the incident, questioning the CNA and several other CNAs who witnessed the event. Buchspics filled out a Notice of Disciplinary Action Form before the investigation was completed, checking the box indicating a verbal warning. She did not know, however, whether any discipline issued to the CNA or at what level, and this write up is also not in the record. Buchspics was not involved in any discussions concerning whether discipline should issue.

Theresa Nicolais, who worked at the facility for 20 years, testified that she had never written up any CNA, although she had verbally counseled them on a one-on-one basis.

#### **D. Community of Interest**

The PRN LPNs have identical job duties and responsibilities, skills, training, and the same supervision as the full-time and regular part-time LPNs. The only differences established in the record were their wages, benefits and rules of assignment. There are minor differences in their compensation as PRN LPNs receive an additional \$3.00/hour and all PRN, Flex and Super-Flex LPNs receive a shift differential for working from 3:00 p.m. until 11:00 p.m. and from 11:00 p.m. until 7:00 a.m. Unlike full-time and regular part-time LPNs, PRN LPNs are ineligible to receive benefits including: paid time off; health; dental, and vision insurance; 401(k); life insurance; and bereavement leave. LPNs typically earn \$19 to \$23 per hour, depending on the years of experience.<sup>11</sup>

As to scheduling, PRN LPNs are required to obtain approval from the Scheduler/Staffing Coordinator or Administrator before they may "cover" or "switch" shifts with full-time or part-time LPNs. For example, six months prior to the hearing, Buchspics asked PRN LPN Carlos Montero to switch shifts with her. She and Montero then completed a "switch form" with the Scheduler/Staffing Coordinator, which was approved. PRN LPNs are also required to work one shift within a 90-day period of their last day worked.

There are different assignment requirements for PRN LPNs that vary based upon their date of hire. For example, PRN LPNs hired after February 2018<sup>12</sup> are required to work one weekday shift and one weekend shift per month, while PRN LPNs hired prior to February 2018 only have to work one shift in a 90-day period. Super-Flex LPNs are required to work eight weekday shifts and one weekend shift per month. PRN/Flex LPNs must also work one holiday in the summer and one holiday in the winter, and they are paid time and a half for working such holidays. In contrast, full-time and regular part-time LPNs are required to work every other weekend and every other holiday, receiving time and a half pay for the holiday work. They have the option of receiving an additional day's pay or an additional day off within 30 days.

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<sup>11</sup> There is no record evidence regarding the hourly rate for the full-time and regular part-time CNAs.

<sup>12</sup> Since this pre-dates the Employer's operation of the facility, this presumably refers to hire by the Employer's predecessor.

## ANALYSIS

### A. The Supervisory Issue

#### *Assignment*

As discussed above, in *Oakwood Healthcare, Inc.*, *supra*, 348 NLRB at 689, the Board stated that the term “assign” refers to “the act of designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or overtime period) or giving significant overall duties, i.e., tasks, to an employee.” The Board has further noted that in a health care setting, designating aides to care for particular residents is a form of “assignment.”

The evidence in this case establishes that LPNs do not routinely determine on which unit or wing CNAs work or to which shifts they are assigned, as the Scheduler/Staffing Coordinator makes these decisions prior to the start of the shifts based upon an established practice and staffing formula. The Scheduler/Staffing Coordinator makes the initial resident assignments based upon a points system. The evidence does not support that LPNs typically deviate from this schedule or authorize the CNAs to do so. Some LPNs may occasionally adjust these assignments to account for a CNA’s familiarity with the resident for continuity of care purposes, or to rebalance a workload, particularly if the CNA requests such a change. The evidence does not suggest that such adjustments are frequent. It also appears that they are merely designed to equalize CNAs’ workloads. The Board has repeatedly indicated that assignments made for purposes of equalizing workloads do not involve a sufficient exercise of independent judgment to confer supervisory status. *Lynwood Manor*, 350 NLRB 489, 490 (2007); *Golden Crest Healthcare, supra*, 348 NLRB at 730, n.9. Rather, an individual must normally consider relative employee skill and ability when making assignments in order to be deemed a supervisor. *Golden Crest Healthcare, supra* at 730, fn. 9 (2006). There is inadequate evidence in this case to suggest that the LPNs assess the CNAs to determine which one is best suited for the patients’ needs,<sup>13</sup> and they stand in sharp contrast to the charge nurses in *Oakwood Healthcare, supra*, whom the Board found exercised independent judgment by taking into account the medical condition and needs of the patient, a nurse’s particular skill set in relation to the patient’s condition and needs, and the quantity of work that should be assigned to each nurse. As the tasks performed by the CNAs are routine in nature, regular, and recurrent, there is no showing that LPNs use independent judgment in assigning these tasks. *Shaw, Inc., supra*, 350 NLRB at 355-356.

The only specific example in the record of an LPN reassigning a CNA from their floor or wing occurred two weeks prior to the hearing, when Partyka switched a CNA on the C Wing with a CNA from the A Wing. However, by her own testimony, Partyka made the switch because the two CNAs had been assigned to areas where they did not typically work and because a CNA did

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<sup>13</sup> Although Partyka testified that she might have occasion to adjust CNAs’ assignments based upon other considerations, including the difficulty of the assignment, neither she nor any of the other witnesses described specific instances of such adjustments. Conclusory testimony without detailed specific evidence is insufficient to establish supervisory authority. *Lynwood Manor, supra*, 350 NLRB at 490; *Avante at Wilson, Inc., supra*, 348 NLRB at 1057.

not feel comfortable on that wing. This lone example in a facility operating three shifts a day, 365 days per year, can hardly be said to support the Employer's assertion that LPNs have the authority to assign CNAs to their floors or wings. The Board cautions against finding supervisory authority based only on infrequent instances of its existence. *Family Healthcare, Inc.*, 354 NLRB 254, 259-260 (2009) *Golden Crest Healthcare, supra*, 348 NLRB at 730, n.9. Moreover, assignment based upon the expressed preference of the employee involved, or their availability, without an individualized assessment of the CNAs' skills in relation to the resident is routine and does not reflect the use of independent judgment. *Children's Farm Home, supra*, 324 NLRB at 64. The exercise of some supervisory authority in a merely routine, clerical, perfunctory or sporadic manner does not confer supervisory status on an employee. *Somerset Welding & Steel, Inc.*, 291 NLRB 913 (1988), quoting *Feralloy West Co.*, 277 NLRB 1083, 1084 (1985). I therefore find that the Employer has not demonstrated that the LPNs exercise supervisory authority in assigning work to CNAs.

#### *Responsible Direction*

"Direction" encompasses both monitoring employee performance to make certain that tasks are performed correctly and making discrete assignments of specific jobs. *Golden Crest Healthcare Center, supra* at 730. The Board defines "discrete assignments" as deciding what job will be performed next or who shall do it, provided that such direction is both responsible and carried out with independent judgment. *Oakwood Healthcare, supra* at 694. The evidence must establish that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. Here, the Employer must show that LPNs exercise independent judgment in deciding whether CNA performance meets appropriate standards; that they can take corrective action in response to deficient performance; and that they are held accountable for CNAs' performance and can suffer adverse consequences if those employees perform poorly. *Community Education Centers, supra*, 360 NLRB at 85; *WSI Savannah River Site*, 363 NLRB No. 113, slip op. at 2 (2016). There is no question that the LPNs herein do not satisfy any of these criteria.

The Employer's claim of direction in this case is based upon the LPNs monitoring CNAs' work. It is undisputed that part of the LPNs' duties involve observing CNAs to make certain they are performing their jobs properly. LPNs can take corrective action in the form of counseling or education if they uncover deficiencies in CNAs' performance so as to maintain a high level of patient care. LPNs may even intervene when CNAs' performance is not up to the Employer's standards and can document performance deficiencies or problems for upper level supervision. LPNs can also report infractions to a Nursing Supervisor. Critically, however, there is no record evidence in this case to suggest that such documentation is placed in a CNA's personnel file or that it is considered by the Nursing Supervisor or Administrator in deciding whether discipline is appropriate if problems persist. While the record discloses that there may be occasions in which a Nursing Supervisor directs an LPN to prepare a Notice of Disciplinary Action, which could, in certain circumstances, constitute an initial step in the Employer's disciplinary process, Nursing Supervisors, the Director of Nursing, and the Administrator must review those notices before they become discipline, and make their own judgments, without LPNs' input, into whether discipline should issue, and at what level.

Accordingly, while the Employer has shown that LPNs monitor CNA performance and may initiate some form of corrective action, it has not demonstrated that performance of these functions involves independent judgment. A CNA's work is routine and repetitive, involving the same tasks on a daily basis (showering, toileting, providing ice and water, etc.) and CNAs are undoubtedly already familiar with their duties and responsibilities. The Board has found that monitoring the performance of such work is itself a routine task which does not require a sufficient exercise of independent judgment to establish supervisory authority. *Heritage Hall*, 333 NLRB 458, 459-460 (2001). In monitoring CNA work, the LPNs are simply checking to make certain the daily tasks are completed and that the Employer's policies are followed. Direction controlled by employer policies does not involve a degree of discretion qualifying as independent judgment. *Community Education Centers, supra*, 360 NLRB at 86; *Oakwood Healthcare, supra*, 348 NLRB at 692-693. Despite Partyka's conclusory testimony, there is no direct evidence that she or any of the LPNs in this case have ever revised, modified, or changed any significant CNA duties or directed CNAs to perform significant overall duties. *Coral Harbor Rehabilitation and Nursing*, 366 NLRB No. 75, slip. op. at 6 (2018). Even if LPNs reassigned CNAs to such tasks, such as getting water or ice for a resident, or assisting with moving a resident from a bed to a chair, those tasks themselves are routine and do not require the use of independent judgment. Simply put, directing employees in the performance of tasks that are well-known to them and require minimal guidance does not require the degree of judgment necessary to constitute independent judgment. *Croft Metals, Inc., supra*, 348 NLRB at 722; *Franklin Home Health Agency*, 337 NLRB 826, 831 (2002).

Lastly, the Employer has failed to demonstrate that LPNs are held accountable for CNAs' performance or that they are subject to discipline or adverse consequences if a CNA fails to adequately perform their duties. Nor is there any evidence that LPNs' performance ratings are affected, either positively or negatively, in directing CNAs. *Golden Crest, supra* at 731. To the contrary, all of the witnesses who testified at the hearing -- including Administrator Molinaro -- confirmed that LPNs have never been held accountable for CNAs' poor performance, errors, or misconduct, and the Employer has failed to present evidence of a single instance in which an LPN was ever held accountable for a CNA's behavior. *Oakwood Healthcare, supra* at 695; *Mars Home for Youth v. NLRB*, 666 F.3d 850, 854 (3d Cir. 2011); *Community Education Centers, Inc., supra*. In light of the above, I find that the Employer has not established that its LPNs responsibly direct CNAs in their job performance.

### *Discipline*

To establish disciplinary authority, the Employer must produce detailed and specific evidence as to the role the individuals who signed the disciplinary notice played in the decision to discipline the employee and establish that they had the authority to independently issue discipline. See *Regal Health & Rehab Ctr., supra*, 354 NLRB at 472-473. As an initial matter, the witnesses in this case indicated contradictory understandings of their authority to issue discipline. While the Employer's three LPN witnesses claimed to possess such independent authority, the Petitioner's three LPN witnesses insisted that they lacked such authority. The Board normally refuses to find supervisory authority on the basis of such inconclusive evidence, so this testimony would not be

sufficient to prove that the LPNs are supervisors. *Phelps Community Medical Center*, 295 NLRB 486, 490-491 (1989).

As part of their responsibility for monitoring the CNAs on their shifts, LPNs may report infractions or perceived wrongdoing of CNAs to their superiors. But the record does not support that they decide what action should be taken in response to the reports or that they are consulted for any such recommendations. The authority to point out and correct deficiencies in the job performance of other employees does not establish the authority to discipline, and the reporting of misconduct is also not supervisory if the reports do not routinely result in disciplinary action without investigation by higher-level managers. *The Republican Co.*, *supra* at 97; *Franklin Home Health Agency*, *supra* at 830; *Crittenton Hospital*, 328 NLRB 879 (1999); *Pine Brook Care Center, Inc.* 322 NLRB 740, 747-748 (1996). To the extent that the LPNs report patient neglect and abuse, all employees are required by the Employer and by State and Federal regulations to make such reports. Reporting such obvious violations of the Employer's rules does not require the exercise of independent judgment. See *Regal Health & Rehab Ctr.*, *supra*, 354 NLRB at 473; *Michigan Masonic Home*, 332 NLRB 1409, 1411 fn. 5 (2000).

More importantly, any such authority possessed by the LPNs in this case was clearly subject to the approval of Nursing Supervisors and upper management, and the record makes clear that LPNs cannot issue discipline more severe than a written warning. The Employer presented documentary evidence of only two situations within the last year in which LPNs played any role in discipline which was ultimately issued to CNAs. As to one of those instances, Matuska testified that she recommended that a CNA receive a written warning, but the CNA received a verbal warning instead. Not only was her purported recommendation not adopted, but there is no evidence that Matuska was consulted at all as to the decision to issue discipline. Indeed, even if the section of the Disciplinary Action Form completed by the LPN is treated as a recommendation, the Nursing Supervisor or Administrator is free to ignore it. The incident with the CNA involved a Group IV Violation (a deviation from a resident's course of treatment which creates the risk of, or results in, serious or substantial harm to the resident) for which termination is indicated under the Employer's Progressive Discipline Policy. The fact that the CNA received only a verbal warning demonstrates that not only did the Administrator fail to accept Matuska's "recommendation," but she also failed to adhere to the Employer's established policy. Mere involvement in discipline, which is what Matuska's conduct was, does not render LPNs supervisors within the meaning of the Act. See *Ten Broeck Commons*, *supra*, 320 NLRB at 812.

As to the other instance of discipline in the record, Utter testified that RN Supervisor Siravan Supromasai instructed her to issue a write up to a CNA even though Utter did not believe that the conduct warranted a write up. The fact that Utter had never prepared a write up before as an LPN at the Facility, and had to be provided with a sample, underscores the point that LPNs simply were not involved in the disciplinary process in any meaningful way.

The fact that there is documentary evidence of only two instances of such involvement -- both in the context of verbal warnings -- in an operation open 365 days a year, for three shifts a day, is also telling. Assuming there are over 40 CNAs in the existing bargaining unit, there would be 43,800 shifts on which CNAs worked and could have been disciplined in the last year, during

which time only two CNAs received such discipline. Such evidence is clearly insufficient to demonstrate that LPNs have the authority to discipline CNAs. See *Vencor Hospital-Los Angeles, supra*, 328 NLRB at 1139; *Ohio Masonic Home, supra*.

As to the testimony concerning the few other instances in which LPNs were involved in decisions concerning the issuance of discipline, there is no evidence that any of these instances led to actual discipline. To establish supervisory authority, evidence of actual authority to discipline as opposed to theoretical power is required. *Avante at Wilson, Inc., supra* at 1057. There is similarly no evidence that any of the LPNs made any recommendations concerning whether discipline should issue in any of these instances, much less that they made effective recommendations. *Hogan Manufacturing*, 305 NLRB 806, 807 (1991). Thus, with respect to the example involving a CNA failing to take a weight, there is no evidence that the write up prepared by Partyka was placed in the CNA's personnel file, or that it became discipline. As to the instance when a CNA was playing on her cellphone, Partyka was directed to speak to the can, but there is no evidence that the infraction was ever memorialized in writing or that it constituted discipline. Similarly, while Matuska testified that she educated CNAs, it is clear that she did not make any written record of such counseling nor did it become discipline. In one case, she was directed to write up a CNA for failing to complete documentation, and the record does not indicate whether any discipline issued to the CNA or at what level. Buchspics testified that she was instructed by her Nursing Supervisor to prepare documentation when a CNA had not changed any of the residents, but there is no evidence that any discipline resulted. Buchspics also testified that after she witnessed a CNA using unprofessional language with a resident, she reported it to Unit Manager Benvinda Notz and requested that Notz take some further action against the CNA. Notz then conducted her own investigation, and Buchspics was unaware as to whether any discipline issued and she was not involved in any discussions concerning discipline.

Further, for warnings to constitute statutory authority to discipline or recommend discipline, the warning must be considered in determining future disciplinary action and be the basis for later personnel action without independent investigation or review by higher authority. *Phelps Community Medical Center, supra* at 490. *The Republican Co., supra*, at 97. The authority to recommend discipline means generally that the recommended action is taken without investigation by superiors, not simply that the recommendation is followed. *Children's Farm Home*, 324 NLRB 61, 61 (1997). In all the situations discussed above, if warnings were issued, it was only after Nursing Supervisors became involved, and conducted their own investigations, and in many of these situations, the LPNs were directed to take some action determined by their supervisors. Even if one or two of these LPNs presented a warning or write up to the CNA without higher-level participation, that is not sufficient to transform all of the Employer's LPNs into statutory supervisors as the Board does not find supervisory status based on isolated incidents. *The Republican Co., supra* at 100.

The Employer argues, citing *NLRB v. Prime Energy Ltd. P'ship*, 224 F.3d 206 (3<sup>rd</sup> Cir. 2000) and *NLRB v. New Vista Nursing and Rehabilitation*, 870 F.3d 113, 132 (3<sup>rd</sup> Cir. 2017), that the fact that LPNs may have rarely used their authority to discipline does not mean that they lacked such authority. But in *New Vista*, the Third Circuit recognized the following three facts in the context of discipline, which, taken together, may show an employee is a supervisor: the employee

has the discretion to take a different action, including verbally counseling the misbehaving employee or taking more formal action; the employee's action initiates the disciplinary process; and the employee's action functions like discipline because it increases the severity of the consequences of a future violation of a rule. 870 F. 3d at 132. The Employer has not established that its LPNs possess any of these abilities, much less all three of them. Rather, the evidence overwhelmingly establishes that the LPNs do not have the discretion to refuse a directive from a Nursing Supervisor to complete a Notice of Disciplinary Action Form. For example, LPN Utter insisted that she did not want to issue a write up to a CNA, but Supromasai overruled her, insisting that she do so. The record similarly does not support that LPNs' actions initiate the disciplinary process, as there is only evidence that one such instance – Matuska's write up of one CNA – became discipline. As to whether Matuska's write up increased the severity of potential consequences for the CNA in case of future misconduct, according to the Employer's policy, such a Group IV violation is already grounds for immediate termination by the Administrator or Department Director yet the CNA was not terminated. In short, there is no evidence that any of these instances of LPN involvement formed the basis for subsequent more severe discipline.

To the extent the Employer relies upon the LPN "job description" to support its claim of supervisory status, it is well-settled that job descriptions, job titles, employee handbooks, and similar items that constitute "paper authority" do not, without more, demonstrate actual supervisory authority. *Golden Crest Healthcare Center, supra*, 348 NLRB at 731; *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). Rather, the statute requires evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority, rather than unsupported assertions that supervisory authority has been conferred on a particular person. *Golden Crest Healthcare Center, supra* at 731; *Avante at Wilson, supra* at 1057. Recently, in *Coral Harbor Rehabilitation*, a case involving an identical job description as herein, the Board found that LPNs did not possess the supervisory authority to assign and responsibly direct CNA employees despite that their job description stated otherwise, and notwithstanding the conclusory testimony of an administrator that LPNs in fact exercised such authority. 366 NLRB at 6.

The Employer also cites to *Oak Park Nursing Care Center*, 351 NLRB 27 (2007), arguing that the authority to initiate disciplinary action as part of a progressive discipline system is sufficient evidence of supervisory status. However, only Partyka's warning was initiated by an LPN. Moreover, even if the testimony clearly established that LPNs could independently initiate the disciplinary process, it is undisputed that they do not decide what level of discipline should be imposed. Under the Employer's policy, such decisions are reserved for Nursing Supervisors, the Director of Nursing, the Administrator, and Human Resources, who independently investigate the conduct and examine any disciplinary history before making their determination as to whether and what kind of discipline should issue, if any. *Ten Broeck Commons, supra*, 320 NLRB at 809. Patently, LPNs cannot determine whether discipline will issue or at what level because they do not have access to the CNAs' personnel records. The Employer's Progressive Discipline Policy requires a review of such files prior to making any decision concerning discipline, and as Administrator Molinaro testified, that policy is rigidly followed, and there are no instances when steps were skipped. Thus, the evidence does not support the Employer's argument that the verbal

warnings automatically or routinely lead to job-affecting discipline, by operation of a defined progressive disciplinary system. *Veolia Transportation Services, Inc., supra*; *Ohio Home, supra*.

Finally, the Employer has not established that it consistently applies its Progressive Disciplinary Policy, nor has it shown that the “discipline” described by the LPNs is anything more than counselings, warnings, or reports that make no recommendation for discipline and do not automatically lead to discipline. See *Vencor Hospital-Los Angeles, supra*, 328 NLRB at 1139; *Ohio Masonic Home, supra* at 394. The lack of evidence concerning what happens to these Notice of Disciplinary Action Forms after they are submitted, combined with evidence that the Nursing Supervisors and Administrator are involved in deciding whether to issue discipline and have overruled any recommendations made by LPNs, supports the conclusion that any recommendations made by LPNs are independently investigated. I therefore find the Employer has not established that the LPNs possess disciplinary authority.

#### **B. Community of Interest: the Inclusion of the PRN LPNs**

The record establishes a community of interest between the PRN LPNs with LPNs as well as the employees in the recognized unit. LPNs and CNAs, including those who are PRNs, assist each other on a frequent basis in the performance of daily resident care functions. These employees all play a part in providing care to residents in a functionally integrated nursing home facility. Unit Managers or Nursing Supervisors supervise both LPNs and CNAs under the overall common supervision of Administrator Molinaro and Director of Nursing Burkhard.

The Board has long held that part-time employees who do not receive the Employer's fringe benefits will not be excluded from the bargaining unit solely on that basis, especially when the employees share a community of interest with the rest of the bargaining unit. *Quigley Industries, Inc.*, 180 NLRB 486 (1969); see also *Six Flags/White Water & American Adventures*, 333 NLRB 662 (2001) (seasonal maintenance employees' exclusion from participating in various fringe benefits does not, by itself, support excluding them from the bargaining unit). Although the Employer argues that there are dramatic differences in the terms and conditions of employment between the PRN LPNs and the full-time and regular part-time LPNs, the evidence does not support that assertion. Rather, the evidence amply demonstrates that the PRN LPNs' work is essentially identical to the full-time and regular part-time LPNs. They perform exactly the same duties alongside each other, on the same wings or units, with the same CNAs, caring for the same residents, and the differences in their scheduling and benefits, including any difference in compensation, are not significant enough to require separate units. See *Wheeling Island Gaming, Inc.*, 355 NLRB 637 fn. 2 (2010). There is interchange between the two groups, as PRN LPNs may fill in or cover shifts for full-time or regular part-time LPNs with supervisory approval.

In its Notices of Proposed Rulemaking generally setting forth the appropriate units in acute care hospitals, the Board commented that in non-acute hospitals:

[T]here is less diversity in nursing homes among professional, technical and service employees, and the staff is more functionally integrated [cites to testimony omitted].

Generally, nurses provide a less intensive, lower level of care to patients in skilled and extended care facilities, and thus receive lower salaries than that paid in acute care hospitals [cites to testimony omitted]...[T]here is for the most part little difference in the duties of LPNs and nurses' aides [cites testimony omitted]. Both are primarily responsible for providing nursing care to patients.

*Park Manor, supra*, 365 NLRB at 876 (citing 53 Fed. Reg. 33928, 284 NLRB 1516, 1567 (1987)). In this case, the LPNs -- whether full-time, part-time, or PRN -- are primarily responsible for providing care to patients and share a common purpose with the CNAs.

To be clear, the Employer did not contend that LPNs and CNAs did not share a community of interest, but only argues that the PRN LPNs do not share a community of interest with other full-time and regular part-time employees. Although the Employer cited *Hillhaven Convalescent Center*, 318 NLRB 1017 (1995),<sup>14</sup> in its brief and Statement of Position, it did so in support of its argument that PRN LPNs should be excluded from the other employees and an 11-member bargaining unit is a sufficient size to warrant their separation. I reject the Employer's argument that the size of the petitioned-for unit requires a separate bargaining unit as this would not outweigh all the other substantial factors in favor of finding a community of interest among the employees.

I find that the petitioned-for-unit of full-time, regular part-time, and PRN LPNs constitutes a readily identifiable group, and that they share a community of interest with each other as well as with the existing bargaining unit of CNAs based on all the community of interest factors that they share, including: performing similar duties; common supervision; interchange; frequent contact; and functional integration. Contrary to the Employer's position, any differences in scheduling and benefits are not significant enough to warrant a finding that the PRN LPNs do not share such a community of interest with other employees. Since the petitioned-for LPNs and PRN LPNs share a community of interest with the employees in the existing bargaining unit of CNAs, I find that an *Armour-Globe* election is appropriate and I shall order an *Armour-Globe* election to determine whether the petitioned-for employees wish to be included in the existing bargaining unit.

### CONCLUSION

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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<sup>14</sup> Although the Board in *Hillhaven* found a unit of all nonprofessional nontechnical employees, excluding LPNs, at a nursing home facility was *an appropriate* unit, the petitioner therein was seeking to exclude the LPNs. When a petitioner has requested combining technical with service employees in a single unit, the Board has found such units were appropriate as well. See *Ten Broeck Commons, supra*, 320 NLRB at 814; *Memorial Medical, supra*.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

**Included:** All full-time and regular part-time Licensed Practical Nurses (LPNs), Flex-Time LPNs, Super Flex-Time LPNs, Per Diem LPNs, and PRN LPNs employed by the Employer at its facility located at 2309 Stafford Avenue, Scranton, Pennsylvania.

**Excluded:** All other employees, guards and supervisors as defined in the Act.

### **DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by Retail Wholesale and Department Store Union (RWDSU) as part of the existing unit of full-time and regular part-time Certified Nursing Assistants (CNAs), Restorative Aids, and PRN Certified Nursing Assistants (CNAs), Flex-time CNAs, Super FlexTime CNAs, and Per Diem CNAs employed by the Employer at its 2309 Stafford Avenue, Scranton, Pennsylvania facility.

#### **A. Election Details**

The election will be held on **Thursday, August 8, 2019** from **6:00 a.m. – 8:00 a.m. and 2:00 p.m. until 4:00 p.m.** in the Chapel at the Employer's facility located at 2309 Stafford Avenue, Scranton, Pennsylvania.

#### **B. Voting Eligibility**

Eligible to vote are those in the unit who were employed during the payroll period ending July 20, 2019 including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Eligible to vote include those under the *Davison-Paxon* formula who have worked an average of four hours or more in the 13 weeks preceding the payroll period ending date.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such

strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

### C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the Regional Director and the parties by August 2, 2019. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at [www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015](http://www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015).

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at [www.nlr.gov](http://www.nlr.gov). Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

**D. Posting of Notices of Election**

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice and the ballots will be published in the following languages: English and Spanish. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting, and likewise shall be estopped from objecting to the non-distribution of notices if it is responsible for the non-distribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

**RIGHT TO REQUEST REVIEW**

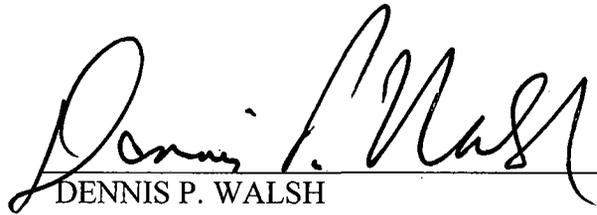
Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to [www.nlr.gov](http://www.nlr.gov), select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Mountain View Care and Rehabilitation Center  
Case 04-RC-242288

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: July 31, 2019

A handwritten signature in black ink, appearing to read "Dennis P. Walsh", is written over a horizontal line.

DENNIS P. WALSH  
REGIONAL DIRECTOR  
NATIONAL LABOR RELATIONS BOARD  
REGION 04  
100 E Penn Square  
Suite 403  
Philadelphia, PA 19107

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 4**

**MOUNTAIN VIEW CARE AND  
REHAB CENTER**

**Respondent,**

**Case No. 04-RC-242288**

**AND**

**RETAIL, WHOLESALE, AND DEPARTMENT  
STORE UNION, UFCW**

**Petitioner.**

**POST-HEARING BRIEF OF EMPLOYER/RESPONDENT MOUNTAIN  
VIEW CARE AND REHABILITATION CENTER**

Respondent Mountain View Care and Rehabilitation Center (hereinafter “Mountain View”), by its attorneys, pursuant to the direction of Hearing Officer Joshua Rosenberg that briefs are due from the parties on June 12, 2019, and Case Handling Manual 11244.1 (relating to filing of briefs), hereby submits this Post-Hearing Brief in support of its position that the Proposed Bargaining unit of Licensed Practical Nurses could not be appropriately represented by the Retail, Wholesale, and Department Store Union, UFCW (hereinafter “Union”) as these employees are statutory supervisors under the National Labor Relations Act and, therefore, cannot have Collective Bargaining protections. *See, NLRB v. New Vista Nursing and Rehabilitation*, 870 F.3 113, 132 (3rd Cir. 2017) (it is clear that staff

can be statutory supervisor if he/she has the authority to effectively recommend less onerous discipline....). *GGNSC Springfield LLC v. NLRB*, 721 F.3d 403, 408 (6th Cir.)(Employees, but not Statutory Supervisors, have the right to have CBA protections). Additionally, the PRN and Superflex employees in the proposed unit do not share a community of interests with the Full Time and Regular Part-Time CNA employees who constitute the current bargaining unit.

### **PROCEDURAL HISTORY AND STATUS**

The Union filed a Petition for Election on or about May 29, 2019. The Union's Election Petition seeks to add the following employees:

All Regular Full time and Regular Part time Licensed Practical Nurses (LPN's), All Flex Time Licensed Practical Nurses, Super Flex Time LPNs, Per Diem LPNs and PRN LPNs

in to an already existing unit of:

All full-time and regular part-time Certified Nursing Assistant (CNAs) and Restorative Aids employed by the Employer at its 2309 Stafford Avenue, Scranton, PA facility

via an *Armour-Globe* election.

Mountain View timely filed its Position Statement on June 5, 2019 and objected to this proposed unit on the grounds that the described employees are statutory supervisors, and also that the PRN/Superflex LPNs do not share a community of interests with full-time and regular part-time employees.

A hearing was held before Hearing Officer Joshua Rosenberg on Thursday, June 6, 2019, with both Mountain View and the Union presenting witnesses and documentary evidence. At the close of the hearing, the Hearing Officer directed that the parties file Briefs on or before Thursday, June 13, 2019 at 5:00 p.m.

**LPN EMPLOYEES AT MOUNTAIN VIEW ARE STATUTORY SUPERVISORS WHO DISCIPLINE AND ASSIGN CERTIFIED NURSING ASSISTANTS AND THEREFORE CANNOT HAVE THE PROTECTIONS OF A COLLECTIVE BARGAINING AGREEMENT**

LPN Employees at Mountain View are Statutory Supervisors who use their independent judgment to issue disciplines to Certified Nursing Assistants and who assign job duties to Certified Nursing Assistants. Mountain View's policies, procedures, and job descriptions reflect these job responsibilities. But most tellingly, the testimony of witness confirmed these job duties and responsibilities-- even if the authority is not exercised, it does not mean there is not authority.

The National Labor Relations Act makes it clear that not all persons a company employs are covered by the Act's bargaining rights; specifically, the Act at Section 2(3), in its definition of "employee," excludes "any individual employed as a supervisor" from the Act's protections. *NLRB v. NSTAR Elec. Co.*, 798 F.3d 1, 5-7 (1<sup>st</sup> Cir. 2015); *NLRB v. Sub Acute Rehabilitation Center of Kearny, LLC*, 2017 WL 108002 at \*2, \_\_\_ Fed.Appx. \_\_\_ (3<sup>rd</sup> Cir. 2017) ("*Sub Acute*"); *see also*:

29 U.S.C. § 164(a)(Nothing in the Act shall prohibit individuals employed as supervisors from remaining a member of a union, but no employer shall be compelled to deem individuals defined by the Act as Supervisors as employees for any purpose relating to collective bargaining); *NLRB v. Lakepointe Senior Care & Rehab Center, LLC*, \_\_Fed.Appx. \_\_, 2017 WL 715900 (6<sup>th</sup> Cir. 2017) (denying enforcement of 363 NLRB No. 114 (2016)) (“*Lakepointe*”). The NLRA gives nursing home owners the ability to insist on the undivided loyalty of its nurses since they may want to implement policies to ensure their patients receive the best possible care despite potential adverse reaction from employees working their nurses’ direction. *NLRB v. Health Care & Ret. Corp.*, 511 U.S. 571, 581 (1994). Thus, an election for representation is not appropriate where those employees to be represented cannot enjoy the protections of a collective bargaining agreement. *Id.*; *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 709 (2001) “*Kentucky River*”).

The Act, at 29 U.S.C. § 152(11), established that individuals are supervisors and not “employees” covered by the Act if: (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions; (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and, (3) their authority is held in the interest of the employer. *Kentucky River* at 713. An individual who recommends discipline may also be a

“supervisor” under the Act, but only if her recommendations are “effective,” which means that higher managers give weight to them. *Lakepointe* at \*2 citing *Caremore, Inc. v. NLRB*, 129 F.3d 365, 369-370 (6<sup>th</sup> Cir. 1997).

The Board’s interpretation of “independent judgment” turns on the degree of discretion exercised by a putative supervisor. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 693 (2006), cited in *Sub Acute* at \*2, III. Under this standard, a person exercises independent judgment if she acts or effectively recommends action, above the “routine or clerical,” free of the control of others and forms an opinion or evaluation by discerning and comparing data; however, 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 higher authority, or in the provisions of a collective bargaining agreement. *Id.*

The testimony of the witnesses supported the position that LPNs at Mountain View are Supervisors and use their discretion to discipline (or not discipline) CNAs.

### **The Testimony of LPN Jacklyn Partyka**

At the hearing before Hearing Officer Rosenberg, LPN Jacklyn Partyka has most recently worked at Mountain View since August of 2018. Transcript p. 18, Ins. 7-8. Ms. Partyka described her responsibilities at work:

Basically, we are to oversee the CNAs. . . . We do assign the CNAs like to their assignments. We don’t, like we don’t do their scheduling, bet we do, however choose where they go in the facility. If like I recommend a CAN is to be like on my

unit, then I go ahead and tell the scheduler to schedule them on my unit.

Transcript p. 19, lns. 6-15. Later in her testimony, Ms. Partyka elaborated:

. . . we don't tell them which days they're working. We have a scheduler in house for that. However, scheduling time, their tasks and everything within our shift, we do provide where they go. We like to – like as the nurse, we delegate which section of the unit they're going to take over to provide care to that resident.

Q. And how do you make that determination? Do you talk with a supervisor?

A. No. That's our own personal – we see how they work with the residents. We're able to assign them to the residents that they more – like continuity of care. And like from day to day, it changes because there's different CNAs that get put on our hallway. And we know a little bit about each one of them . . .

Q. And could you explain more of what factors you take into consideration in assigning them?

A. Pretty much, especially if like I notice -- if I work with someone like a CNA for the week, I end up seeing if they're getting -- there's harder assignments, and then there's a little bit of more like I don't want to say easy assignments but – the actual type of care that's given some residents are where they're more of a two-person and heavier assignment. So, pretty much, if they start getting tired or you can see the exhaustion, then you'd like put them down the other hallway just to relieve them of that.

Q. And is that your judgment?

A. Yes.

Transcript p. 20 ln. 25 – p. 22 ln. 1. Ms. Partyka gives assignments to CNAs on a daily basis. Transcript p. 28 lns. 16-18.

Ms. Partyka also described her discretion to discipline CNAs as needed:

Q. Do you ever have cause to issue a discipline to a CNA?

A. Yes. There was one time that there was a CNA that refused to do something that I asked of them. Pretty much, she was delegated a task to go obtain a weight, and she ended up telling me that I can't right now. So then I gave her the chance to obtain it approximately two or three more times, and I stated to her that I can give you a disciplinary action, like a write-up for that if you don't obtain it by the end of the shift. And she didn't, so I did write up that CNA. . . .

Q. And the first time you spoke with [the CNA] about her failure to obtain the weight, did you write her up at that time?

A. No. I always feel that a write-up should not come first. If you're able to ask them, give them another chance and know the importance of it to go obtain the weight.

Q. Whose decision was that?

A. That was my decision.

Q. Did you talk with any superior about that?

A. No. . . . .

Q. Have there ever been incidences where you've talked with an employee such as you talked with [this CNA] but it didn't lead to a discipline? . . .

A. Yes. Actually, there is one. I had to switch a CNA from an assignment due to I heard her in the room speaking to the resident and I could tell by – there's a little bit of like agitation in her voice. The resident was not being receptive to her. So, pretty much, what I did was I went into the room and I had to remove her from that situation. And I made that decision myself. I didn't have to go to anybody for that. But she was removed, and I put in a different CNA at that time.

Q. Did you write up this CNA at that time?

A. I did not have to write her up because she was compliant to remove herself from that assignment. . . .

Q. Whose decision was it to not write her up?

A. My decision.

Q. Did you talk with anybody before making that decision?

A. No.

Transcript p. 22 ln. 2 - p. 24 ln. 16.

Ms. Partyka further agreed that the Employee Job Description marked as Employer's Exhibit 1 accurately described her job duties relative to supervising CNAs. Transcript p. 20, lns. 15-19. The Nurse Supervisor (LPN) job description specifically indicates that:

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 other nursing personnel. To monitor the performance of CNAs, nursing and non licensed personnel, provide education and counseling, perform disciplinary action as necessary, and complete performance evaluations.

Exhibit Employer 1. Ms. Partyka also confirmed that the section of the employee handbook that describes LPN responsibilities to supervise CNAs accurately described her job duties and authority. Transcript p. 27 lns. 1-13. That section details LPN responsibilities for supervising LPNs and recommending disciplines. See, Employer's Exhibit 2 at p. 24.

## **The Testimony of LPN Amy Matuska**

Ms. Matuska, who has been an LPN at Mountain View for almost five years (Transcript p. 55, ln. 7) also testified at the hearing as to her responsibilities as an LPN with regard to supervising the CNAs with whom she works:

Q. . . . So could you tell us what your experiences are as far as whether you supervise CNAs or not?

A. Every day.

Q. Okay. Can you explain?

A. Just supervising them in whether they complete their tasks and how they complete their tasks, assigning them their assignments for the residents, their showers, assigning them their weights, and the individual tasks in between as they come.

Q. Have you ever had cause to discipline a CNA?

A. Yes.

Q. Have you ever had cause to educate a CNA?

A. Yes.

Q. Have you ever had cause to discuss an issue with a CNA where you didn't feel that discipline was necessary?

A. Yes.

Transcript p. 57 ln. 8 – 24. Ms. Matuska then proceeded to discuss specific instances where she had used her discretion to informally discuss issues with

a CNA, issue a formal education, and issue a discipline. She also explained how she needs to assign CNAs within her shift when the scheduler hasn't taken into account the needs of residents:

Q. . . . – have you ever had need to pull an aide from another floor or remove an aide from your floor or from your unit?

A. Yes, I have. Down my hall in particular, I have a very [needy] assignment that is very particular. So some CNAs might know it a little bit better than others. And for the safety of the residents, it's just easier if I get the CNAs that know that assignment. So they would be assigned a CNA that doesn't know it, so then I will move them over to either a different hall or a different unit and move the CNA that knows it into that spot.

Q. Do you talk with the scheduler about this?

A. After it's done.

Q. Do you seek anybody's approval before you move these aides around?

A. No.

Transcript p. 63 ln. 14 – p. 64 ln. 3.

Ms. Matuska was in agreement with Ms. Partyka that the LPN Job Responsibilities section of the Employee Handbook and the Nurse Supervisor (LPN) Job Description accurately reflected their job responsibilities. Transcript p. 66 lns. 5-13; Transcript p. 56 lns. 1-24. Employer's Exhibits 2 and 3.

Ms. Matuska also recounted a training that was provided in July of 2018

where supervisory duties were explained to LPNs:

I believe it was right after the time new management came, so you came to us to explain, you know, employment law and what's expected of us. You also informed us that we can, at the discretion of ourselves, discipline our CNAs as we feel necessary and that we are expected to.

Transcript p. 67 lns. 15-19. She noted that during that training "every single page" of the handout (Employer's Exhibit 5) was reviewed. Transcript. P. 68, ln. 18.

### **The Testimony of LPN Michelle Thompson**

Ms. Thompson, an LPN at Mountain View for just under one year, agreed with her colleagues who had testified before her. She agreed that the Nurse Supervisor (LPN) job description accurately reflected her job responsibilities. Transcript p. 73 lns. 16-25, Employer's Exhibit 6. Ms. Thompson recounted assigning and reassigning CNAs during the course of a shift. Transcript p. 75 ln. 9 - p. 77 ln. 13. Ms. Thompson does not seek approval before changing assignments. Transcript p. 77 lns. 6-8. Ms. Thompson also explained how she could use her discretion to not issue a discipline after discussing an issue with a CNA. Transcript p. 79 ln.12 – p. 80 ln. 13.

### **The Testimony of the Union's LPN Witnesses**

During the afternoon session of the hearing, the Union presented its witnesses-- LPNs Mary Utter and Michelle Buchspics described incidents where they were encouraged to write up CNAs. Although the Union paints these as lack of discretion, the incidents should be more accurately viewed as a new Supervisors being instructed in how and when to exercise their supervisory authority. Simply because a particular employee does not feel comfortable exercising her authority, and does not do so frequently does not mean that employee does not have the authority to act. Ms. Buchspics admitted that when she wrote up a CNA for cursing at a resident that no one told her to write up the aide and that she did not ask anyone for advice before writing up the aide. Transcript p. 120 lns. 16-21.

The Union's final witness, Theresa Nichols, described a more cooperative supervisory style that she uses as her "personal style" but again, choosing to not exercise authority is an exercise of discretion. Transcript p. 128 ln. 23 – 24.

### **Argument**

Here, all of the LPN have the authority to issue disciplines to CNAs. All of them have made decision whether to issue a discipline, or a staff education, or even to do nothing formal at all. The fact that the LPNs have a choice to do nothing,

conduct education, or write up the employee shows they used independent judgment when deciding to write up the employees. *GGNSC Springfield LLC* at 409, 411; *In re Progressive Transportations Services, Inc.*, 340 NLRB No. 126 at 1046 (2003). The Board has previously determined in *Oak Park Nursing Care Center*, 351 NLRB 27 (2007) that the authority to initiate disciplinary action as part of a progressive discipline system, as here, was sufficient evidence of statutory supervisor status. Here the Employer's Progressive Disciplinary System is described in it's Employee Handbook. Employer's Exhibit 2 at pp. 62-66. Also, the fact that the LPNs may have rarely exercised their authority is not determinative of whether they are statutory supervisors. See, *NLRB v. Prime Energy Ltd. P'ship*. 224 F.3d 206 (3rd Cir. 2000) Given the short period of time at issue at the hearing, it would be unusual to have such subsequent events in the record as recognized in *New Vista* at 132-133, citing *NLRB v. Prime Energy Ltd. P'ship*. ("The mere fact that the regional director found only one instance...is hardly a reasonable basis to conclude that the authority was lacking. It simply suggests that the authority was rarely needed.").

Furthermore, the various witnesses identified current job descriptions which they indicated accurately reflected their job duties, provisions in the employee handbook which they indicated accurately reflected their relationship with CNAs,

and a training session reviewing their supervisory duties-- all of which indicated that these employees are supervisors of LPNs.

**PRN/FLEX AND SUPER FLEX LPNS DO NOT SHARE A COMMUNITY OF INTERESTS WITH FULL-TIME AND REGULAR PART-TIME NURSING AIDES AT MOUNTAINVIEW BECAUSE OF THE DIFFERENCE IN TERMS AND CONDITIONS OF EMPLOYMENT**

PRN/Flex and Super Flex LPNs do not share a community of interests with Full-Time and Regular Part-Time nursing aides at Mountain View because of the difference in terms and conditions of employment.

As described in Joint Exhibit E-2, PRN/Flex and Super Flex Employees do not receive any benefits, in lieu of higher wages received by full-time and regular part-time aides. The PRN/Flex and Super Flex employees receive no paid time off. They receive no health, dental, or vision insurance. They receive no 401(k) benefit. They receive no life insurance coverage. And they receive no bereavement leave or holiday pay. See Exhibit "J-2". Full-time and regular Part-time employees at Mountain View receive all of these benefits in some form.

In *Pcc Structurals, Incl*, the Board overruled *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), and reinstated the traditional community-of-interest standard for determining an appropriate bargaining unit in union representation cases. Under that test, the Board will assess whether employees in the proposed bargaining unit share interests that are

sufficiently separate and distinct from those of the remainder of the workforce to constitute an appropriate unit for bargaining, considering whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised. *Pcc Structurals, Inc.*, 365 NLRB No. 160 (Dec. 15, 2017).

Here, the dramatic differences in terms and conditions of employment are sufficient to require that the PRN/Flex and Super Flex LPNs not be included with the Full Time and Regular Part Time Aides. Although the Union contends that the difference can be worked out in the collective bargaining process, these economic terms of employment constitute the vast majority of subjects between bargaining parties.

Additionally, in *Cargill, Inc. Employer & United Food & Commercial Workers Union Local No. 324 Petitioner*, current Chairman of the National Labor Relations Board Miscimarra (then Member) noted that the interchangeability of employees warranted examination as a factor to be considered in the community of interests analysis as well. Here, Joint Exhibit 1, which reflects the PRN Scheduling and Attendance Policy, shows that Employer's policies strictly forbid PRN employees

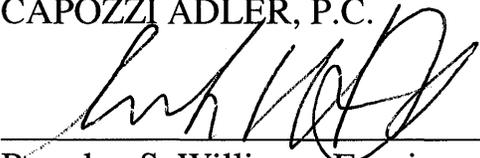
from covering schedule changes with Full-Time and Regular Part-Time employees. without approval. See Exhibit J-1.

Finally, the Employees subject to this proposed election are sufficient in number to support a separate Bargaining Unit. Attachment “D” to Employer’s Position Statement included a list of employees in the Petitioned for Unit. That list includes 11 LPNs at Mountain View who are either PRN/Flex or Super Flex employees. As the Board indicated in *Hillhaven Convalescent Ctr. of Delray Beach*, a “12-or 13-member . . . unit, although not large, is a sufficient size to warrant separation. *Id.*, 318 NLRB 1017, 1018–19 (1995).

WHEREFORE, Employer Mountain View requests the Board to dismiss the Union’s Election Petition for an election of LPNs at Mountain View because those employees are Statutory Supervisors and because the PRN/Flex LPNs and SuperFlex LPNs do not share a community of interests with the already existing bargaining unit of Full Time and Regular Part time CNA.

Respectfully submitted,

CAPOZZI ADLER, P.C.



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Brandon S. Williams, Esquire  
2933 North Front Street  
Harrisburg, PA 17110  
[Attorneys for Employer]

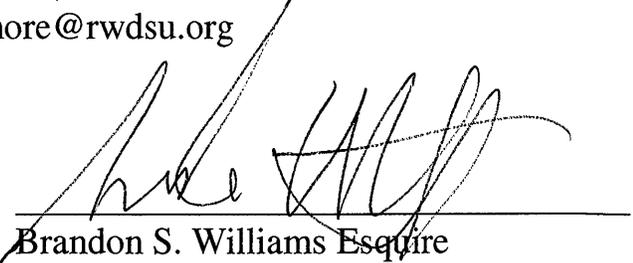
DATE: June 13, 2019

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Section 102.21 of the Board's Rules and Regulations, a true and correct copy of the Brief of the Respondent was served by email, addressed as follows:

Christopher S. Baluzy, Esq.  
Cary Kane LLP  
1350 Broadway, 5th Floor  
Suite 1400  
New York, NY 10018  
cbaluzy@carykane.com  
(Union's Legal Counsel)

Paul Bazemore  
Retail Wholesale and Department Store Union (RWDSU)  
370 Seventh Ave  
Suite 501  
New York, NY 10001  
pbasemore@rwdsu.org



Brandon S. Williams Esquire  
[Legal Representative for Respondents]

DATE: June 13, 2019