

EMILY M. MAGLIO (Cal. Bar No. 267190)
ELIZABETH R. GROPMAN (Cal. Bar No. 294156)
LEONARD CARDER, LLP
1188 Franklin Street, Suite 201
San Francisco, CA 94109
Tel: (415) 771-6400
Fax: (415) 771-7010
emaglio@leonardcarder.com

*Attorneys for Petitioner,
NVPU*

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 19**

National Veterinary Professionals Union

Petitioner,

and

BluePearl (North Seattle) Specialty + Emergency

Pet Hospital

Employer.

Case No. 19-UC-239832

**National Veterinary Professionals Union's Opposition to BluePearl's Request for Review of
the Regional Director's Decision and Order Clarifying Unit**

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	RELEVANT BACKGROUND	1
A.	Procedural Background.....	1
B.	BluePearl’s Business and Organizational Structure	2
III.	ARGUMENT	7
A.	No Substantial Factual Issue is Clearly Erroneous on the Record, As the Regional Director’s Decision Properly Considered Differences in Shift Supervisors’ Alleged Supervisory Authority	8
B.	The Regional Director’s Finding that Shift Supervisors and the Blood Bank Director Do Not Possess Indicia of Supervisory Authority is Consistent with Officially Reported Precedent and Amply Supported by the Record.....	11
1.	Legal Standard Applicable to Section 2(11).....	11
2.	The Record Evidence Supports the Regional Director’s Finding that Shift Supervisors Do Not Have the Authority to “Assign”	12
i.	Assigning Technicians/Assistants to Patients or Tasks Does Not Require Independent Judgment; Decisions are Made Collaboratively or are Merely Routine and Clerical Pursuant to Detailed Instructions.....	12
ii.	ER Shift Supervisors Do Not “Assign” Patients to Staff; Assignments are Made Collaboratively, Based on Whether a Tech/Assistant is Authorized by BluePearl to Perform a Necessary Task, or to Equalize Workload.....	14
iii.	ER Shift Supervisors do not “Assign” Techs/Assistants to Inpatient/Outpatient Rotation Within the Meaning of Act.....	20
iv.	Shift Supervisors Cannot Require Techs/Associates to Change Their Schedules	21
v.	Shift Supervisors Do Not Have the Authority to Change Shifts	21
vi.	Ms. Futran’s Scheduling Responsibilities Do Not Confer Supervisory Status As Scheduling is Based on Established Protocols, Conflicts Resolved by Management	24
3.	The Regional Director Did Not Err in Concluding that Shift Supervisors Do Not Effectively Recommend Hiring	29

i.	BluePearl’s hiring protocol	29
ii.	The evidence does not establish that Shift Supervisors, the Client Services Manager, or the Blood Bank Director hire or transfer absent independent investigation by their superiors.....	31
4.	Shift Supervisors Do Not Effectively Recommend Discipline.....	35
5.	Shift Supervisors’ Participation in Evaluation Process Does Not Establish Supervisory Status Absent a Direct Correlation Between the Evaluation and Merit Wage Increase	42
6.	There is No Basis to Conclude that All Shift Supervisors Have the Same Supervisory Authority; Supervisory Determination Must Be Based on Concrete Evidence in the Record.....	46
7.	Shift Supervisors Do Not Possess Secondary Indicia of Supervisory Status	47
IV.	CONCLUSION.....	50

TABLE OF AUTHORITIES

	Page(s)
 Federal Cases	
<i>Beverly Enters.-Mass., Inc. v. NLRB</i> , 165 F.3d 960 (D.C. Cir. 1999)	13
<i>Jochims v. NLRB</i> , 480 F.3d 1161 (D.C. Cir. 2007)	36
<i>Lynwood Health Care Center, Minnesota v. NLRB</i> , 148 F.3d 1042 (8th Cir. 1998).....	13
<i>NLRB v. Hilliard Dev. Corp.</i> , 187 F.3d 133 (1st Cir. 1999)	42
<i>NLRB v. Kentucky River Comm. Care, Inc.</i> , 532 U.S. 706 (2001)	11
<i>NLRB v. Res-Care, Inc.</i> , 705 F.3d 1461 (7th Cir. 1983).....	47
<i>NLRB v. Sub Acute Rehab Ctr. at Kearny</i> , 675 Fed. App'x 173 (3d Cir. 2017).....	11
<i>Shift Supervisor Technician/Assistants. See, e.g., Beverly California Corp. v. NLRB</i> , 370 F.2d 1548 (6th Cir. 1992).....	47
<i>Thyme Holdings</i> , 2018 WL 3040701.....	passim
 NLRB Cases	
<i>Airkaman, Inc.</i> , 230 NLRB 924 (1997).....	47
<i>Bakersfied California</i> , 316 NLRB 1211 (1995).....	28
<i>Beverly Enters.-Mass., Inc. v. NLRB</i> , 165 F.3d 960 (D.C. Cir. 1999)	13

<i>Brusco Tug and Barge, Inc.</i> , 359 NLRB No. 43 (2012).....	11
<i>Children’s Farm Home</i> , 324 NLRB 61 (1997).....	32, 33
<i>Coral Harbor Rehab. and Nursing Ctr. (1199 SEIU United Healthcare Workers East)</i> , 336 NLRB No. 75 (2001).....	12
<i>Coral Harbor</i> , 366 NLRB No. 75 (2001).....	13, 19, 43, 48
<i>Crest Healthcare Ctr.</i> , 348 NLRB No. 39 (2006).....	22
<i>Franklin Hospital Med. Ctr.</i> , 337 NLRB 826 (2002).....	18
<i>G4S Regulated Security Solutions</i> , 362 NLRB No. 134, slip op. at 1-3 (2015).....	36
<i>Golden Crest</i> , 348 NLRB (2006).....	13
<i>Heritage Hall, E.P.I.</i> , 333 NLRB 458 (2001).....	22
<i>J.C. Penney Corp.</i> , 347 NLRB 127 (2006).....	29, 31
<i>Jochims v. NLRB</i> , 480 F.3d 1161 (D.C. Cir. 2007)	36
<i>Ken-Crest Svcs.</i> , 335 NLRB 777 (2001).....	46
<i>Loparex</i> , 353 NLRB 1224 (2009).....	43
<i>Loyalhanna Care Ctr.</i> , 352 NLRB 863 (2008).....	46
<i>Loyalhanna Health Care Assocs.</i> , 332 NLRB 933 (2006).....	36

<i>Lynwood Health Care Center, Minnesota v. NLRB</i> , 148 F.3d 1042 (8th Cir. 1998).....	13
<i>Modesto Radiology Imagine, Inc.</i> , 361 NLRB 888 (2014).....	42
<i>NLRB v. Hilliard Dev. Corp.</i> , 187 F.3d 133 (1st Cir. 1999)	42
<i>NLRB v. Kentucky River Comm. Care, Inc.</i> , 532 U.S. 706 (2001)	11
<i>NLRB v. Res-Care, Inc.</i> , 705 F.3d 1461 (7th Cir. 1983).....	47
<i>NLRB v. Sub Acute Rehab Ctr. at Kearny</i> , 675 Fed. App’x 173 (3d Cir. 2017).....	11
<i>Oakwood Healthcare</i> , 348 NLRB 686 (2006).....	passim
<i>Passavant Health Ctr.</i> , 284 NLRB 887 (1987).....	42
<i>Peacock Prods. of NBC Universal Media</i> , 364 NLRB No. 104, slip op. at 6 (2016)	28
<i>Penn. Truck Lines</i> , 199 NLRB 641 (1972.).....	46
<i>Regal Health and Rehab Ctr., Inc.</i> , 354 NLRB 466 (2009).....	37, 38, 40
<i>Ross Porta-Plan, Inc.</i> , 166 NLRB 494 (1967).....	15
<i>Ryder Truck Rental, Inc.</i> , 326 NLRB 1386 (1998).....	31
<i>Sheraton Universal Hotel</i> , 350 NLRB 1114 (2007).....	32, 35
<i>Veolia Transp. Svcs.</i> , 363 NLRB No. 98 (2016).....	passim

<i>Waverly-Cedar Falls Health Care, Inc.</i> , 297 NLRB 390 (1989).....	31, 36
--	--------

<i>Williamette Indus.</i> , 336 NLRB 743 (2001).....	36
---	----

Federal Statutes

29 U.S.C. § 152(11)	11
---------------------------	----

State Statutes

Wash. Rev. Code § 18.92.013.....	9, 18
----------------------------------	-------

Federal Regulations

29 C.F.R. § 102.67(c).....	7
----------------------------	---

State Regulations

Wash. Admin. Code §§ 246-935-040, 246-935	9, 18
---	-------

I. INTRODUCTION

Petitioner BluePearl, LLC, et al. (“BluePearl”) initiated this action to exclude from the bargaining unit certain employees, including Shift Supervisors and the Blood Bank Director, on the basis that they are statutory supervisors. Based on the extensive record evidence presented at a lengthy hearing, the Regional Director of Region 19 found that BluePearl failed to meet its burden of establishing that Shift Supervisors and the Blood Bank Director are supervisors as defined by section 2(11) of the Act.¹ The Regional Director’s Decision and Order Clarifying Unit (“Decision”) on August 1, 2019 and, on August 22, 2019, BluePearl requested the Board’s decision of the Decision.

National Veterinary Professionals Union (“NVPU” or “Union”) opposes BluePearl’s request on the ground that it has failed to meet its burden of showing that compelling reasons exist to review the Decision. BluePearl contends that the Decision departs from Board precedent and is clearly erroneous as to substantial factual issues. BluePearl’s arguments, however, misconstrue the relevant case law and ignore the thoughtful and detailed analysis conducted by the Regional Director. Contrary to BluePearl’s contention, the Regional Director’s Decision is consistent with Board Precedent and amply supported by the record. For these reasons, NVPU requests that the Board deny BluePearl’s request for review.

II. RELEVANT BACKGROUND

A. Procedural Background

Non-professional employees at BluePearl voted form a union and requested recognition of NVPU as its exclusive bargaining representative on May 3, 2018. (Board Exs. 3, 4.) On June

¹ The original petition also challenged the status of the Client Services Manager and an office clerical employee. BluePearl does not appeal that portion of the Decision.

8, 2018, the Board certified NVPU as the exclusive bargaining representative of a unit excluding “Professional employees, assistant practice managers, doctors/veterinarians, veterinary technician managers, medical directors, practice managers, office clericals, managers, and guards and supervisors as defined in the Act.” (Board Exs. 2, 3.) All Shift Supervisors and the Blood Bank Director voted in the election without challenge from BluePearl. There is no collective bargaining agreement between the parties covering the unit. (Board Ex. 2.)

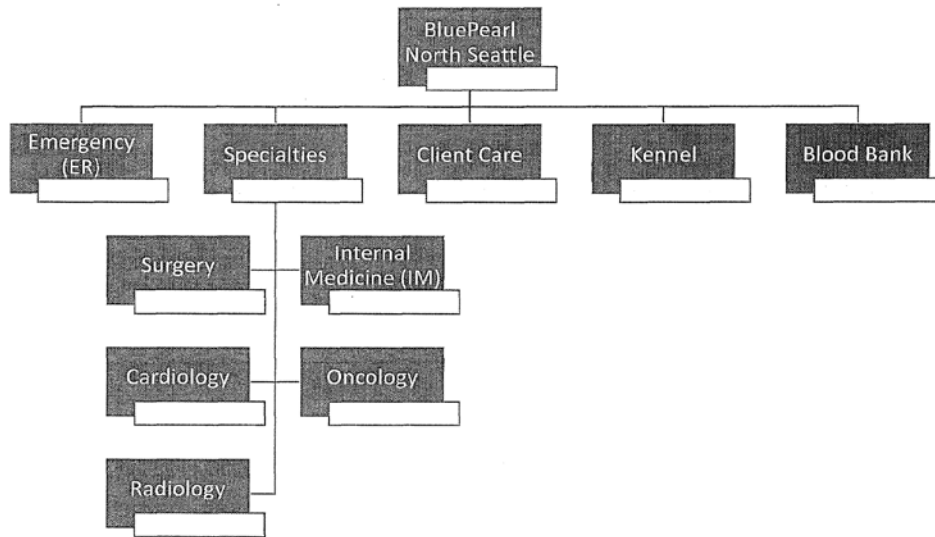
On April 17, 2019, BluePearl petitioned the Board to exclude “shift supervisors,” “client service managers,” and “purchasing coordinators” from the unit. (Board Ex. 1(a).) Specifically, BluePearl challenged the classification of ten Shift Supervisors, including the Blood Bank Director, one Client Services Manager, and one office clerical employee. (*Id.*; Joint Ex. 1.)²

The Regional Director issued a Decision and Order on August 1, 2019. The Decision found that the Client Services Manager was a statutory supervisor, but that the Shift Supervisors and Blood Bank Director were not statutory supervisors. (Decision at 19.) Accordingly, the Regional Director held the Shift Supervisors and Blood Bank Director were properly in the unit.

B. BluePearl’s Business and Organizational Structure

BluePearl provides specialty and emergency veterinary care of animals. (Tr. 14 [PM Baker]; Board Ex. 2, ¶ 10.) The hospital operates several departments, organized as follows:

² BluePearl’s original petition also challenged a second purchasing coordinator, Rachel Taicz, but subsequently the parties stipulated that she is included in the bargaining unit. (Board Ex. 2, ¶ 7.)



(Employer Ex. 66, at 2; *see also* Tr. 18-19, 53-55 [PM Baker].)³ The Kennel department is sometimes considered part of the Emergency department. (Tr. 54 [PM Baker].)

The highest-ranking manager on site is the Practice Manager (“PM”), Katy Baker,⁴ who is responsible for overseeing “all things financial, organizational, of the business,” as well as for “staffing.” (Tr. 11 [PM Baker].) The Veterinary Technician Manager (“TM”), Jessica Anderson, and Assistant Practice Manager (“APM”), Lindsay Walker, report to the PM, as do the Blood Bank Director, Michelle Mensing, and the administrative employee, Lacy Tianna. (Tr. 16-17 [PM Baker].) The TM “oversees all Veterinary Technicians and Assistants in the hospital,” including “matters impacting Technicians/Assistants including scheduling, performance management, hiring and training along with oversight of quality of nurse care.” (Employer Ex., 24; Tr. 155-156 [TM Anderson].) The APM completes payroll, is “involved in interviewing, hiring, onboarding

³ BluePearl prepared the organizational charts in Employer Exhibit 66 at the request for the hearing officer for reference in the hearing and to assist the reader of the record; they are not maintained in the normal course of business. (Tr. 725-727 [PM Baker].)

⁴ Ms. Baker has been the PM since approximately June 2018, a month after the Board certified the election in this case. (Tr. 11 [PM Baker].) Before that, Allison Dietz who did not testify in this proceeding, was the PM. (Tr. 27 [PM Baker].)

new team members, managing client conflict and helping to resolve that, providing feedback to team members based on the feedback [she] receive[s] from shift leads, shift supervisors, and other people on the floor,” and has been involved in the yearly review process. (Tr. 69-71 [APM Walker].) The Emergency and Specialties departments report to the TM and the Kennel and Client Care departments report to the APM. (Tr. 15-17 [PM Baker].)⁵

Emergency, Specialty, and Kennel Departments. In these departments, BluePearl employs doctors, approximately 17 Licensed Veterinary Technicians, 10 Assistants, and 7 referral coordinators. (Tr. 14, 19 [PM Baker]; *see also* Tr. 74 [APM Walker]; Employer Ex. 66.) Internally, BluePearl has four levels of Technicians⁶ and three levels of Assistants; the Technician/Assistant’s level dictates what tasks they can perform at the hospital. (Tr. 305-307 [TM Anderson].) The Emergency department is staffed 24/7 and there are generally two doctors and four Technicians/Assistants on duty at a given time. (Tr. 772 [Futran].) In the Specialty departments, there is usually a doctor and two to three Technicians and/or Assistants on staff. (*See, e.g.*, Tr. 380 [Bjorland].) The Kennel departments is also staffed 24/7, but generally only has one Assistant working at a time. (Tr. 128 [APM Walker].)

Within each department, one or more Technician and/or Assistant is designated as a Shift Supervisor – the employees who are challenged in this Petition. (Employer Ex. 66; Tr. 20 [PM Baker], 298-299 [TM Anderson].) There is not always a Shift Supervisor working during a given shift. (*See, e.g.*, Tr. 127-128 [APM Walker], 788 [Futran].) Shift Supervisors were selected

⁵ PM Baker testified that the Technicians/Assistants report to their “shift supervisors” (Tr. 15-17), but the organizational charts – also prepared by PM Baker (Tr. 733-734) – do not reflect that hierarchy. Those charts show the Shift Supervisors on the same organizational level as the Techs/Assistants. (Employer Ex. 66.)

⁶ BluePearl also has a special designation for a veterinarian technician specialty license (VTS) within a specific department. (Tr. 306-307 [TM Anderson].)

through an employee voting process instituted by TM Anderson, where each employee answered two questions: “whether or not they themselves felt like they were a good fit for a shift supervisor, and who their choice would be of any employee within the hospital to come up to shift supervisor.” (Tr. 373 [TM Anderson]; *see also* Decision at 7 [“When the Employer instituted the shift supervisor classification it did not select the employees for the position, but allowed the employees in each department to vote and select among themselves for the position.”].)⁷

Because the Shift Supervisors are Technicians/Assistants themselves, they share many of the duties with the Technicians/Assistants with whom they work; in fact, their primary duties and responsibilities are the duties and responsibilities of Technicians and/or Assistants. (*See, e.g.*, 378 [Bjorland: as a Technician in surgery, duties are to “ready . . . surgery patients for the procedure itself”]; 478 [A. Pawlik: “I help perform diagnostic and treatment procedures on internal medicine patients and provide support for internal medicine clients.”].) In addition to their technical duties, Shift Supervisors act as liaisons between their teams (Technician/Assistants, Referral Coordinators and doctors) and management. (Tr. 378-379 [Bjorland], 478 [A. Pawlik], 676 [J. Pawlik: “I support the people that I work with, create an environment that everyone feels safe and support [sic] and wants to be there, and help facilitate any growth for them and myself within the veterinary field”].) Overall, Shift Supervisors have no authority to set employees’ wages, increase or decrease employees’ wages, or award bonuses. (Tr. 696 [Mensing], 511, 531-532 [A. Pawlik], 606, 608 [J. Pawlik], 1087 [Smith], 1131 [Ohashi], 955 [Berge].)

Shift Supervisors also help with the “flow of the day,” including helping ensure that tasks are finished in a timely manner. (Tr. 630 [J. Pawlik], 1022 [Rich].) As discussed in detail below,

⁷ Ms. Anderson instituted the voting process around the time she became Technician Manager, shortly before the union election. (Tr. 373-374 [TM Anderson]; *see also* Tr. 154.)

the Shift Supervisors and other Hospital staff also provide feedback to management during the BluePearl’s hiring process, can sign off on whether employees have successfully performed procedures, and counsel employees on technical skills. Ms. Futran, an Emergency Technician and Shift Supervisor, participates in scheduling for Technicians, Assistants, and Referral Coordinators. (Tr. 742 [Futran].) The Shift Supervisors testified that they spend very little time on the allegedly supervisory-type duties. (*See, e.g.*, Tr. 448-449, 451 [Bjorland: participates in hiring maybe “once a year, to once every couple years” and about a day or two per year on evaluations, and has an “admin day” for about 4 hours every other week]; 550 [A. Pawlik: has performed a working interview once, and spends “very little” time on supervisor check-ins]; Tr. 833 [Futran: scheduled for 5 hours of admin time a week for updating the technician schedule].) Therefore, the Regional Director found, “[t]here is no dispute that the employees designated as shift supervisors spend most of their time performing the same duties as others in their department[.]” (Decision at 7.)

Blood Bank: The hospital’s Blood Bank “takes and supplies and sells blood to clinics and other hospitals.” (Tr. 50 [PM Baker].) It is staffed by the Blood Bank Director, Ms. Mensing, is a Veterinary Assistant who assists with donation appointments, restrains pets, gives treats, schedules appointments, and recruits donors, as well as conducting outreach, orders supplies, and informs staff of protocols and answers questions. (Tr. 50 [PM Baker], 684-685 [Mensing].) Though there was once a Technician assigned to the Blood Bank, Ms. Mensing is currently the only employee in this department. (Tr. 46 [PM Baker].)

In this petition, BluePearl asserts that the following individuals are statutory supervisors under the Act:

Kandice Beier ⁸	Emergency Assistant; Kennel Shift Supervisor
----------------------------	--

⁸ Ms. Beier did not testify at the hearing.

Taylor Berge	Emergency Technician; Emergency Shift Supervisor
Melissa Bjorland	Surgery Technician; Surgery Shift Supervisor
Alexandra Futran	Emergency Technician; Emergency Shift Supervisor
Michelle Mensing	Blood Bank Director ⁹
Amanda Pawlik	Internal Medicine Technician; Internal Medicine, Radiology, and Cardiology Shift Supervisor
Jamie Pawlik	Oncology Technician; Oncology Shift Supervisor
Makinzie Rich	Emergency Assistant; Emergency Shift Supervisor
Kiley Smith	Emergency Technician; Emergency Shift Supervisor
Emily Spahr ¹⁰	Emergency Assistant; Emergency Shift Supervisor

(Joint Ex. 1; Employer Ex. 66.)

III. ARGUMENT

Pursuant to section 102.67(c) of the Board’s Rules and Regulations, a request for review of the Regional Director’s decision will only be granted “where compelling reasons exist” for doing so. 29 C.F.R. § 102.67(c). A compelling reason exists only if the request for review is based on the one or more of the grounds set out in the Rules and Regulations. *Id.* §§ 102.67(c)(1)-(4). Here, BluePearl asserts that the Board should grant review on the basis that the Regional Director’s decision: (1) on “substantial factual issue[s] is clearly erroneous on the record and such error

⁹ Ms. Mensing testified that her title is “blood bank director,” her badge says “blood bank coordinator,” her business cards say “blood bank supervisor,” and BluePearl’s timekeeping system refers to her as “patient float technician lead or something like that.” (Tr. 682-683 [Mensing].)

¹⁰ Ms. Spahr did not testify at the hearing.

prejudicially affects the rights of BluePearl” and (2) raises a “substantial question of law and policy because” it fails to apply Board precedent regarding the analysis and application of the Board’s Section (11) test. *Id.* at §§ 102.67(c)(1), 102.67(c)(2). (*See also* Request at 1-2.)

For the reasons set forth below, these arguments lack merit and do not constitute “compelling reasons” for revisiting the Regional Director’s decision.

A. No Substantial Factual Issue is Clearly Erroneous on the Record, As the Regional Director’s Decision Properly Considered Differences in Shift Supervisors’ Alleged Supervisory Authority

The Decision is not “clearly erroneous on the record” as to a substantial factual issue because, contrary to BluePearl’s contention, the Regional Director considered and evaluated alleged differences in supervisory authority on a case-by-case basis. While conceding that, “Shift Supervisor’s [sic] authority in this case is generally uniform,” BluePearl specifically argues that the Regional Director ignored its argument that Shift Supervisors in the ER exercise greater authority in assigning patients to Technicians/Assistants. (Decision at 15-16.)

Contrary to BluePearl’s contention, the Decision plainly discussed the differences between the ER and Specialty Departments. (*See* Decision at 4, 9-10, 18.) Moreover, the Regional Director identified facts particular to the ER department, identifying BluePearl’s written directive regarding ICU (*i.e.*, ER) and discussing the fact that Technicians/Assistants in the ER may deviate from the inpatient and outpatient rotation for various reasons. (Decision at 4, 9-10.) The Regional Director analyzed that evidence, yet concluded that “the evidence establishes work assignments, who will be assigned to what patient and where in the emergency department any employee will work, are collaborative decisions and . . . most shift supervisors are guiding working assignments to equalize work among employee’s well known skills[.]” (Decision at 8.)¹¹

¹¹ That the Regional Director conducted separate analyses for the “supervisors” in different departments, such as the Client Care Manager, Blood Bank Director, and Shift Supervisors, further

At BluePearl, a Technician/Assistant's position and level dictates what tasks they can perform. First, State law identifies which tasks that must be performed by Technicians, not by Assistants. (Tr. 306; *see also* Wash. Admin. Code §§ 246-935-040, 246-935,050; Wash. Rev. Code § 18.92.013.) Second, BluePearl classifies Technicians/Assistants at different Levels based on internal protocols require a Technician/Assistant to be signed-off on specific skills in order to perform them. (Tr. 305-307.) For example, an employee could be classified as "Emergency Technician, Level 3" or "Surgery Assistant, Level 1." In order to "level up," the Technician/Assistant has to have "sign-off" on 90 percent of the "training blocks" for that level and pass a written test developed by BluePearl and administered by the TM. (Tr. 210-211 [TM Anderson].) "Training blocks" are "essentially a list of skills and things that people need to be proficient at in order to do their job at the level" BluePearl expects of them. (Tr. 116-117 [APM Walker].)¹² A particular skill is "signed off" when the Technician/Assistant has been introduced to, become competent at, and mastered the protocol for that skill, based on specifications in BluePearl's "Sign Off Details" documents that correspond to the level and position. (Tr. 131-132 [APM Walker]; 315-317, 328-331 [TM Anderson]; *See, e.g.*, Union Ex. 17 [Assistant Block Sign Off Details]; Union Ex. 18 [Technician Blocks Sign Off Details].) BluePearl's "Technician and Assistant Manual" sets forth the hospital's specific and objective protocols in even greater detail. (Tr. 134-136 [APM Walker]; Union Ex. 4.)

undermines BluePearl's generalized assertion that the Regional Director failed to analyze each Shift Supervisor individually.

¹² Training blocks are unique to departments and positions, but "[a]ll the blocks look similar." (Tr. 131, 141 [APM Walker], 322-323, 325-327 [TM Anderson]; *See e.g.*, Union Exs. 1, 3 [Kennel Assistants]; Union Ex. 6 [Emergency Techs training blocks, levels 1-4]; Union Ex. 7 [Emergency Assistants, levels 1-3], Union Ex. 8 [Oncology Techs, levels 1-4]; Union Ex. 9 [Internal Medicine Techs, levels 1-4]; Union Ex. 10 [Internal Medicine Assistants, levels 1-3]; Union Ex. 13[Surgery Assistants, levels 1-2].)

Accordingly, what tasks any particular Technician/Assistant can perform will be determined by (1) whether they are a licensed technician or non-licensed assistant and (2) whether they are at a BluePearl level that is authorized to perform a given task. As discussed in detail in sections B.2.ii and B.2.iii below, the record evidence amply supports the Regional Director's conclusion that, despite any differences between assignment protocols in the ER and Specialties departments, the Shift Supervisors in the ER do not have the authority to "assign" within the meaning of Section 2(11).

BluePearl also contends that the Regional Director erred by not discussing the fact that "Shift Supervisors manage teams of up to six or seven direct reports while other Shift Supervisors have no direct reports." (Request at 16.)¹³ This number appears to be misleadingly based on the total number of Technicians/Assistants in a department, but all Technicians/Assistants do not work at the same time and there is often more than one Shift Supervisor in a department. In fact, on a given shift there is generally one Shift Supervisor and 2-4 non-Shift Supervisor Technicians/Assistants, except during Emergency nights when there are 2 Shift Supervisors and 2-3 non-Shift Supervisor Technician/Assistants. Moreover, BluePearl makes no argument as to how that consideration should have altered the Regional Director's conclusion.

Accordingly, BluePearl has failed to demonstrate that the Regional Director erred on factual matters such that a "compelling reason" exists to grant review.

¹³ BluePearl uses the term "direct reports" but it is unclear what that means in this context. Rather, Shift Supervisors are part of a team that is working in a given department during a given shift. The Shift Supervisors are Technicians or Assistants themselves and spend very little time on allegedly supervisory duties. (Decision at 7. ["There is no dispute that the employees designated as shift supervisors spend most of their time performing the same duties as others in their department[.]".]) The disputed employees are better described as the Regional Director did, as "first-line supervisor[s] or working lead[s]." (Decision at 3.)

B. The Regional Director’s Finding that Shift Supervisors and the Blood Bank Director Do Not Possess Indicia of Supervisory Authority is Consistent with Officially Reported Precedent and Amply Supported by the Record

1. Legal Standard Applicable to Section 2(11)

As the party asserting Section 2(11) supervisory status, BluePearl bears the burden of proving by a preponderance of the evidence that the workers in the disputed classifications – the Shift Supervisors – are supervisors within the meaning of the Act. *See G4S Gov’t Sol’ns, Ins.*, 363 No. 113, slip op. at 1 (2016); *accord NLRB v. Kentucky River Comm. Care, Inc.*, 532 U.S. 706, 713 (2001); *Oakwood Healthcare*, 348 NLRB 686, 687 (2006). Section 2(11) defines a “supervisor” as:

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

29 U.S.C. § 152(11). BluePearl must show that (1) the challenged employees have the authority to perform or effectively recommend any 1 of the 12 enumerated supervisory functions; (2) that their “exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment;” and (3) that their authority is exercised “in the interest of the employer.” *Kentucky River Comm.*, 532 U.S. at 711. “The Board construes a lack of evidence on any of the elements necessary to establish supervisory status against the party asserting that status.” *Brusco Tug and Barge, Inc.*, 359 NLRB No. 43, at *5 (2012).

True supervisors exercise “genuine management prerogatives,” while “straw bosses, leadmen [and] set up men” are still entitled to the Act’s protections, despite the exercise of minor supervisory duties. *NLRB v. Sub Acute Rehab Ctr. at Kearny*, 675 Fed. App’x 173, 177 (3d Cir. 2017) (finding *Oakwood Healthcare*, 348 NLRB 686, consistent with this standard). As BluePearl acknowledges, a “judgment is not independent if it is dictated or controlled by detailed

instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement.” (Request at 18, quoting *Oakwood Healthcare*, 348 NLRB 686, 693 (2006).) The “authority effectively to recommend generally means that the recommended action is taken with no independent investigation by superiors, not simply that the recommendation is ultimately followed.” *Coral Harbor Rehab. and Nursing Ctr. (1199 SEIU United Healthcare Workers East)*, 336 NLRB No. 75, slip op. at *6 (May 2, 2018). The Board refrains from construing the supervisory exemption “too broadly because the inevitable consequence of such a construction would be to remove individuals from the protections of the Act.” *Id.*

Applying these standards to this case, the Regional Director correctly found that BluePearl failed to meet its burden of establishing supervisory status as to the Shift Supervisors and the Blood Bank Director.

2. The Record Evidence Supports the Regional Director’s Finding that Shift Supervisors Do Not Have the Authority to “Assign”

- i. Assigning Technicians/Assistants to Patients or Tasks Does Not Require Independent Judgment; Decisions are Made Collaboratively or are Merely Routine and Clerical Pursuant to Detailed Instructions

The term “assign” refers to “the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” *Oakwood Healthcare*, 348 NLRB at 689. It refers to the “designation of significant overall duties to an employee, not [] *ad hoc* [sic] instruction that the employee perform a discrete task.” *Id.* By contrast, “responsibly to direct” may encompass such *ad hoc* instructions, but it must be shown that “some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly.” *Id.* at 689-690, 692. In other words, the emphasis is on the putative

supervisor's accountability. Either duty must be performed with "independent judgment," which the Board has found is somewhere between "situations where they are detailed instructions for the actor to follow" and "where the actor is wholly free from constraint." *Id.* at 693.

The authority to assign overall duties to employees is not supervisory if it does not require the use of independent judgment, but instead is merely routine and clerical. A "judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement." *Oakwood Healthcare*, 348 NLRB at 693. Thus:

If there is only one obvious and self-evidence choice . . . , or if the assignment is made solely on the basis of equalizing workloads, then the assignment is routine or clerical in nature and does not implicate independent judgment, even if it is free from the control of others and involves forming an opinion or evaluation by discerning and comparing data.

Id. "[R]esponsibility for making work assignments in a routine fashion does not make one a supervisor." *Coral Harbor*, 366 NLRB No. 75, slip op. at *6. Here, the process for assigning tasks and/or patients requires Shift Supervisors to delegate based on the employees' position – *i.e.*, Technician or Assistant – and level, as well as a desire to equalize work. The managers' "conclusory or generalized testimony that Leads are in charge of assigning patients" (*See, e.g.* 259, 263-264, 272), must be construed against BluePearl. *Beverly Enters.-Mass., Inc. v. NLRB*, 165 F.3d 960, 962–63 (D.C. Cir. 1999) ("*Beverly*"). "In order to show supervisory status, the purported supervisor must have the ability to *require* that a certain action be taken; it is not sufficient to show that an employee merely has the authority to *request* that a certain action be taken." (Decision at 19 [emphasis in original], quoting *Golden Crest*, 348 NLRB at 729; *Lynwood Health Care Center, Minnesota v. NLRB*, 148 F.3d 1042, 1047 (8th Cir. 1998).)

BluePearl’s argument that Shift Supervisors use independent judgment to “assign” patients to staff ignores the clear record evidence to the contrary. As such, the Regional Director correctly found that – in both the Specialty and ER departments – assignments are made collaboratively and, when they are not, “most shift supervisors are guiding working assignments to equalize work among employee’s well known skills.” (Decision at 18.) BluePearl wholly ignores the reality that, as a result of staffing levels, BluePearl policy, and state law, a Shift Supervisor often has only one choice of Technician/Assistant to assign to a given patient. BluePearl’s evidence is therefore insufficient to demonstrate that Shift Supervisors’ involvement in delegating patients to Technicians/Assistants constitutes “assigning” under the Act.¹⁴ Further, BluePearl admits that “shift Supervisors cannot require associates to come in late/leave early if they do not want to,” a fact that is fatal to its argument that Shift Supervisors can adjust shift times or fill open shifts. (Request at 28.) For the reasons discussed below, the Regional Director did not err in concluding that the Shift Supervisors do not have the authority to “assign” within the meaning of the Act.

- ii. ER Shift Supervisors Do Not “Assign” Patients to Staff; Assignments are Made Collaboratively, Based on Whether a Tech/Assistant is Authorized by BluePearl to Perform a Necessary Task, or to Equalize Workload

BluePearl asserts that the Regional Director erroneously relied on testimony from Shift Supervisors in the Specialty departments as a basis for concluding that ER Shift Supervisors do not have the authority to “assign” patients to staff. Specifically, BluePearl argues that assignments are not made collaboratively in the ER department. (Decision at 20.) However, Ms. Futran – who

¹⁴ Even if the Shift Supervisors “direct” Technicians/Assistants’ work, BluePearl has offered no evidence that Shift Supervisors are accountable for those employees’ work and thus cannot asserted that Shift Supervisors “responsibly direct” employees within the meaning of Section 2(11).

is an ER Shift Supervisor during the day shift – explained that, before the election, Shift Supervisors in the ER did not assign patients, but rather:

[I]t was a little haphazard, and people kind of worked from one side to the middle, and you know, calls it good. And you know, one person would then end up like taking care of like all the cats, and one person would end up taking care of all the dogs. Since our IC[U] is kind of a U shape and kind of -- they'd meet somewhere in the middle or they'd say, you know, I'll do the dogs, and I'm going to start with the dogs. Okay, I'm going to start with the cats.

(Tr. 776; *see generally* Tr. 775-780 [Futran]; *see also* Board Ex. 4.)¹⁵ After the election, BluePearl management changed the protocol to make the Shift Supervisor in the ER assign Techs/Assistants to patients in inpatient and outpatient. (Tr. 776, 782-784, 916 [Futran].)¹⁶ Yet, in outpatient, where Techs/Assistants are triaging and either admitting or discharging patients, the collaborative system for assignments has remained unchanged: “whoever is available.” (Tr. 773, 780-781 [Futran].) Likewise, on the nightshift, the Techs/Assistants who are working, including any Shift Supervisors, get together to “divide them up amongst themselves.” (Tr. 935 [Berge].)¹⁷ The Regional Director therefore did not err in concluding that “the evidence establishes work assignments, who will be assigned to what patient and where in the emergency department an employee will work, are collaborative decisions and are resolved by consensus.” (Decision at 18.)

¹⁵ To the extent BluePearl changed the duties of the Shift Supervisors to exercise independent judgment during the critical period between the filing of the petition and the election or after the election, BluePearl acted unlawfully and unilaterally and cannot benefit from its unlawful acts. Thus, only the protocol before the unlawful act can be considered to determine whether the Shift Supervisors are § 2(11) supervisors.

¹⁶ *See Ross Porta-Plan, Inc.*, 166 NLRB 494, 496 (when employer attempts to “‘beef-up’ the authority and responsibilities of employees after a union organization campaign begins in the attempt to remove them from the bargaining unit, the Board carefully scrutinizes all the surrounding facts and circumstances in determining whether the authority conferred was real or only theoretical”).

¹⁷ There are currently two shifts that do not have a Shift Supervisor staffed. (Tr. 788 [Futran]; *see also* Tr. 127-128 [APM Walker].)

BluePearl further claims that the Regional Director erred in concluding that the postelection assignment protocol does not involve the use of independent judgment. BluePearl asserts that ER Shift Supervisors make assignment “decisions independently – there is no protocol, policy, or training block governing how such decision are made.” (Decision at 21.) However, BluePearl’s characterization of the protocol omits important context supporting the conclusion that any assignment decisions the ER Shift Supervisors make are dictated by hospital policy – *i.e.*, whether a given Technician/Associate is authorized per the hospital’s “level” system to perform the care a patient needs – and equalizing workload. (*See* Decision at 18 “[I]n practice the shift supervisors themselves describe their role more as an experienced employee leading a group decision about how to divide up available resources.”].)

As BluePearl acknowledges, Technicians/Assistants generally rotate between inpatient and outpatient each week, with one Technician and one Assistant assigned to each department. (Request at 11, n. 8; *see also* Tr. 774 [Futran].) The Shift Supervisors work staggered schedules, so they overlap with each other.¹⁸

As discussed above, in outpatient, assignments are usually made ad hoc. In inpatient, the Shift Supervisor first uses the treatment sheets, listening in on rounds, and following up with the doctors to determine what treatments a patient will need. (Tr. 786-787 [Futran].) The Shift Supervisor then matches a patient to either the Technician or Assistant on duty based on position and blocks: “So if I know that there is a patient that needs specialized skills that only an LVT can do, that patient obviously needs to be assigned to an LVT.” (Tr. 784 [Futran]; *see also* Tr. 774-

¹⁸ Ms. Futran works from 6:00 a.m. to 4:00 p.m. (274 [TM Anderson]; 788 [Futran].) Ms. Rich works from 3:00 p.m. to 1:00 a.m. (Tr. 931, 1001 [Rich].) Ms. Berge works almost her whole shift, from 3:30 p.m. to 1:30 a.m., at the same as Ms. Rich. (Tr. 929-930 [Berge].) Ms. Smith works the overnight, from 5:00 p.m. to 7:00 a.m. (Tr. 1077 [Smith].) Ms. Spahr, a “floater” and Shift Supervisor, is currently covering one of the open shifts (Tr. 788 [Futran].)

775 [assign based on what can be performed by Technician and on blocks], 781 [“There are certain procedures that are prohibited unless you’re [a Technician] . . . So depending on who is available in the treatment area, they may or may not be able to get certain things done.”], 917 [“if she didn’t have her med clerk license . . . I wouldn’t give her a patient that was on ten medications because she would need lots and lots of help with that”].) The Technicians/Assistants themselves are also aware of the treatments they are authorized to perform and will not perform tasks that they are not permitted to perform. (*See, e.g.*, Tr. 915.) Doctors will also sometimes determine the order in which pets are treated. (Tr. 780 [Futran]; *see also* Tr. 1057-1058 [Rich].)¹⁹ The record thus supports the Regional Director’s finding that “skill level may also dictate an assignment, as a technician may be the only one on a shift that is certified to perform a certain procedure.” (Decision at 18.)

On the night shift, there are generally three Shift Supervisors working between 5:00 p.m. and 1:00 a.m. (*See, supra*, n. 18.) The overnight Emergency Shift Supervisors generally do not assign patients because they are already assigned from the previous shift. For example, Ms. Berge explained that she and the Assistant on the night shift will usually already have tasks assigned to them from the day shift but, if not, they get together to “divide them up amongst themselves.” (Tr. 935 [Berge].)²⁰ “Red dot” patients – patients designated as critical by the doctors – are treated by Technicians or high-level Assistants because they require treatments that, based on licensing, can only be performed by employees at those levels. (Tr. 937-937 [Berge].) Generally, one night ER Technician/Assistant works in inpatient while the other works in outpatient; variations from that

¹⁹ The parties stipulated on the record that testimony from ER Shift Supervisor Emily Spahr would be duplicative of the testimony in the record from other ER Shift Supervisors. (Tr. 1240-1241.)

²⁰ In that example, the assistant on night duty with Ms. Berge is Ms. Beier, acting in her role as Emergency assistant (not as the Kennel Shift Supervisor, for which her status is challenged). (Tr. 935 [Berge].)

assignment depends on the position and level needed to treat specific patients and are assigned by the doctor. (Tr. 958-960 [Berge].)

Because the ER Techs/Assistants are assigned to patients based on their authority to perform certain tasks per hospital and state law requirements, the Shift Supervisors do not “assign” within the meaning of the Act. As the Board noted in *Oakwood Healthcare*, “[i]f there is only one obvious and self-evident choice (for example, assigning the one available nurse fluent in American Sign Language (ASL) to a patient dependent upon ASL for communicating) . . . then the assignment is routine or clerical in nature and does not implicate independent judgment, even if it is made free of the control of others and involves forming an opinion or evaluation by discerning and comparing data.” 348 NLRB at 693. As APM Walker testified, patients are assigned to specific people “depending on [the nurses’] level of experience.” (Tr. 258-259.) Here, a Technician/Assistant’s position and level dictates what tasks they can perform because (1) State law identifies which tasks that must be performed by Technicians, not by Assistants, (Tr. 306; *see also* Wash. Admin. Code §§ 246-935-040, 246-935,050; Wash. Rev. Code § 18.92.013) and (2) BluePearl’s internal protocols require a Technician/Assistant to be signed-off on specific skills in order to perform them. (Tr. 305-307.) *See, e.g., Oakwood Healthcare*, 348 NLRB at 693 (“if a collective-bargaining agreement required that only seniority be followed in making an assignment, that act of assignment would not be supervisory”). Such decisions, made on the basis of well-known and limited skills are simply routine and do not require meaningful discretion. *Franklin Hospital Med. Ctr.*, 337 NLRB 826, 831 (2002); *Cook Inlet Tug & Barge, Inc.*, 362 NLRB No.11 at *1 (instructions to perform ad hoc tasks constitute “important but nonsupervisory task of

ensuring that the crewmembers carry out the duties the [regulations and procedures] specif[y]”).²¹ Shift Supervisors therefore do not have the discretion to assess the relative competence of staff, unlike the charge nurses in *Oakwood*. Cf. *Oakwood*, 348 NLRB at 695 (“A charge nurse’s analysis of an available nurse’s skill set and level of proficiency at performing certain tasks, and her application of that analysis in matching that nurse to the condition and needs of a particular patient, involves a degree of discretion[.]”). The Regional Director did not err in concluding that the Shift Supervisors participation in the assignments protocol is routine and does not involve independent judgment.

Finally, if a patient is appropriate for either a Technician or Assistant, the ER Shift Supervisors divide the patients to equalize the workload:

So if I know that a patient is stable and not getting very many vital checks, then I know that that patient is not going to be -- is appropriate to assign to either of those people, also it might be appropriate to assign someone two of those very minimally -- minimal workload patients for someone -- for patient (sic) that has a very large workload to -- to make the workload equal basically.

So I want to kind of equalize the workload and maximum the efficiency for the best patient care possible.

(Tr. 784-785, *see also* Tr. 917 [Futran].) Assignments “simply to equalize workloads and ensure timely completion of tasks” are not supervisory. *Thyme Holdings*, 2018 WL 3040701 at *3.

Furthermore, like in *Thyme Holdings*, the Shift Supervisors work “side by side performing many of the same patient care duties and much of the assistant’s work is performed with significant instruction or oversight by a [Shift Supervisor].” *Id.*; *see also Coral Harbor*, 366 NLRB No. 75,

²¹ The record is devoid of evidence that the Blood Bank Director, Ms. Mensing, assigns tasks using any independent judgment. First, she is the only full-time employee in the Blood Bank and therefore cannot assign tasks to any “subordinates.” Second, she explained that when she does have a Technician, the delegation of tasks is based on the law: “[I]t’s the law in the state that . . . if you’re not a licensed technician, you cannot monitor anesthesia. So for cats, we sedate them for donation. And so I need a technician there.” (Tr. 689 [Mensing].)

slip op. at *6 (where Licensed Practical Nurses only adjusted to equalize work and nursing assistants already knew their responsibilities, LVNs did not have authority to “assign”). Thus, any minimal assessment of the quantity of work made by the Shift Supervisors does not confer supervisor status. Based on this record, the Regional Director properly found that the independent judgment requirement was not satisfied as to ER Shift Supervisors.

iii. ER Shift Supervisors do not “Assign” Techs/Assistants to Inpatient/Outpatient Rotation Within the Meaning of Act

BluePearl acknowledges that, as the Regional Director found, Techs/Assistants in the ER department rotate weekly between working on the inpatient and outpatient side of the department. (Request at 24; Decision at 10.) But, contrary to BluePearl’s assertion, Shift Supervisors do not use independent judgment to decide whether to deviate from that rotation. (Request at 24.) Rather, as with the general ER patient assignments discussed in the previous section, deviations from the normal rotation occur if there is a patient that requires a certain level of care that only certain team members are qualified to provide. (Tr. 774-775 [Futran], 1023-1024, 1055-1056 [Rich].)

When there is only one obvious choice for an assignment, supervisory status cannot be established. *Oakwood Healthcare*, 348 NLRB at 693. The testimony relied on by BluePearl confirms that deviations from the rotation are based on such necessity. For example, Ms. Berge testified that when a patient needs to be intubated, “then an assistant can’t do that” and that an assistant might care for a “red dot” patient “up until a certain point . . . but they get to a point where they now need more medicates or they need to be intubated or, you know, a technician level – they’re going to end up needing a technician [.]” (Tr. 964:15-965:18.) Similarly, Ms. Furtran explained: “if that technician shift isn’t filled, and it’s just two assistants and myself and I’m the only licensed technician, it means I’m the only one who can do certain types of procedures, that means I’m the only one that can access controlled drugs, it means I’m the only one who can do a

handful of things.” (Tr. 774-775 [Futran].) Based on the record evidence, the Regional Director correctly concluded that “employees may move back and forth if needed either because a specific skill or ability is needed on the other side, or because of staffing levels.” (Decision at 10.) The Regional Director therefore did not err in concluding that Technician and Assistant deviations from the inpatient/outpatient rotation fail to confer supervisory status of the ER Shift Supervisors.

iv. Shift Supervisors Cannot Require Techs/Associates to Change Their Schedules

BluePearl’s assertion that the Regional Director “dismissed evidence of supervisory status based on the erroneous belief that supervisors cannot require schedule changes” is contrary to record. (Decision at 26.) It is undisputed that Shift Supervisors cannot *require* Technicians/Assistants to leave early if they do not want to. (Request at 28.) Instead, BluePearl relies on Ms. Futran’s testimony that she could involuntarily send a Technician/Associate home *if* they are in overtime. (Request at 26.) Sending a Technician/Assistant who is working overtime home is not changing that person’s schedule, because they are already working outside the scope of their schedule. Moreover, the Regional Director correctly noted that Shift Supervisors do not have the authority to grant overtime. (Decision at 10; *see also* Tr. 387 [Bjorland], 482 [A. Pawlik], 573 [J. Pawlik], 690 [Mensing], 940-941 [Berge].) Therefore, the Regional Director did not err in concluding that Shift Supervisors cannot require Techs/Associates to change their schedules.

v. Shift Supervisors Do Not Have the Authority to Change Shifts

BluePearl acknowledges that “Shift Supervisors cannot require associates to come in late/leave early if they do not want to[.]” (Decision at 28.) Yet, it argues nonetheless that Shift Supervisors have the authority to change shifts or decide to fill open shifts. The Regional Director aptly concluded: “Critically, in regard to any of these schedule adjustments, participation is

voluntary; shift supervisors cannot require employees to leave early or come to work when not scheduled.” (Decision at 10.)

Shift Supervisors’ ability to *request* that Technicians/Assistants leave early, use the call in list to *request* that someone cover a shift on less than 24 hours’ notice, request that a Technician/Assistant arrive early, or fill out a form for payroll purposes when Technicians/Assistants work late does not constitute appointing employees to a time or shift. “It is well established [] that the party seeking to establish supervisory authority must show that the putative supervisor has the ability to *require* that a certain action be taken; supervisory authority is not established where the putative supervisor has the authority merely to *request* that the certain action be taken.” *Gold Crest Healthcare Ctr.*, 348 NLRB No. 39, at 729 (citing *Heritage Hall, E.P.I.*, 333 NLRB 458, 459 (2001)). Therefore, in *Gold Crest Healthcare*, the Board determined that the ability of charge nurse to “assign” CNAs to go home early, work on a floor that was understaffed, keep CNAs after their shift ends, or call in CNAs to work did not confer supervisor status where the record established that the charge nurses, “did not, in fact, have the authority to require the CNAs to undertake any of these actions.” *Id.*

Here, the record is undisputed that, per BluePearl policy, Shift Supervisors *cannot require* someone go home early, or be called in to work. (Tr. 141 [APM Walker], 332 [TM Anderson], 389 [Bjorland], 573 [J. Pawlik], 690 [Mensing], 801, 804[Futran], 943 [Berge].) They likewise cannot require employees to work overtime. (Tr. 387 [Bjorland], 482 [A. Pawlik], 573 [J. Pawlik], 690 [Mensing], 940-941 [Berge].) As the Shift Supervisors do not have the authority to require Technicians/Assistants to undertake those actions, any argument that Shift Supervisors can request that employees do any of those things without approval from managers is irrelevant.

This is especially so because, as the Regional Director found, “reducing staffing due to low patient volume generally is collaborative and follows a pattern, with certain employees being the ones to volunteer.” (Decision at 10.) The decision of when to send someone home or seek additional coverage is a group decision, including doctors and non-Shift Supervisor Technicians/Assistants. (*See* Tr. 388-389 [Bjorland], 482-483 [A. Pawlik], 574 [J. Pawlik], 941, 943, 944-945, 967-968 [Berge], 1056 [Rich], 1095-1096 [Smith]; *see e.g.*, Tr. 986-987 [Berge: “[W]e generally make our decisions as like a team and a group; it’s not just one person making a decision without consulting the other people that are on.”].) The example of Ms. A. Pawlik illustrates that these are decisions are made collectively by the people working the shift in question. Ms. A. Pawlik is the “Shift Supervisor” for Internal Medicine, Radiology, and Cardiology, but is only a Technician in Internal Medicine; while she describes deciding “among the group” working Internal Medicine when someone should go home early, she “does not have any involvement” in sending people home early in the Radiology and Cardiology departments. (Tr. 482-483 [A. Pawlik].) BluePearl thus also fails to demonstrate that Shift Supervisors determine when to send someone home or call someone in to work in a way that confers supervisory status.

Furthermore, even if Shift Supervisors could require employees to leave early or come in to work, the processes for determining both who will leave early and who to call in do not require “independent judgment.” Both follow a rote protocol. First, when a shift is slow, the process for sending someone home is to first see if anyone is in overtime - if so, that is the first person to go home early - and then to ask for volunteers, starting with the employee whose shift started earliest. (Tr. 85-86.) Similarly, when a shift is short-staffed, the determination of who to call in is based on going down the pre-determined call in list. As TM Anderson described: “We have a call-in form, so [the Shift Supervisor] would go down that list and try to get somebody to come in.” (Tr. 176

[TM Anderson]; Decision at 10 [“If an employee calls in sick, or is otherwise unavailable on short notice, a shift supervisor similarity may attempt to fill that opening by calling other employees from a short list generated by the employer.”].) The call-in list is alphabetical by position (Technician/Assistant). (Tr. 356 [TM Anderson].)²² Therefore, even if Shift Supervisors could require individuals to come in, which they cannot, processes controlled by such detailed instructions do not support a finding of supervisory status, as they do not require the use of any independent judgment.

The Regional Director therefore properly found that, because schedule changes are requests, they do not confer supervisory status. (Decision at 19.)

vi. Ms. Futran’s Scheduling Responsibilities Do Not Confer Supervisory Status As Scheduling is Based on Established Protocols, Conflicts Resolved by Management

BluePearl’s contends that the Regional Director erred by ignoring evidence regarding Ms. Futran’s scheduling duties. The record evidence, however, amply supports the Regional Director’s conclusion that Ms. Furtran does not exercise independent judgment in scheduling because, as described below, Ms. Furtran conducts her duties according to hospital procedures and protocols that preclude any use of “independent judgment.”

²² Furthermore, BluePearl cannot argue, based on the incorrect assumption that Shift Supervisors can request employees to fill call in shifts, that Shift Supervisors can “reward” employees with a call-in bonus. Shift Supervisors do not have the authority to *require* any employee to come in to work a shift, they can only *request* that they do by calling individuals on the call in list. *Supra*, Section III.A.2.b. In any event, the call in bonus associated with coming in to work off the call in list is non-discretionary. (Tr. 87 [APM Walker], 176 [TM Anderson].) The amount - \$150 for Emergency and Specialty departments and \$100 for Client Care – is predetermined by the hospital (Tr. 821), and awarded automatically. (Tr. 87 [APM Walker: “There’s a call in bonus if you’re called in and you’re not scheduled to work.”], 821 [Futran: employee gets bonus if they work 4 hours after being called in within 24 hours of shift].) The Shift Supervisors, therefore, do not exercise any independent judgment in “rewarding” an employee who voluntarily picks up a call in shift with a non-discretionary bonus.

Ms. Furtran does not assign employees to specific shifts based on their “independent judgment.” Instead, she conducts her scheduling duties in accordance with protocols that they learned while they were in a non-Shift Supervisor position from the previous scheduler, Carmen King, who was also not a Shift Supervisor. (*See, e.g.*, Tr. 740 [Futran].) Basing decisions on such objective criteria does not require the use of independent judgment and therefore is not supervisory. *See, e.g. Oakwood Healthcare*, 348 NLRB at 693 (“for example, a decision to staff a shift with a certain number of nurses would not involve independent judgment if it is determined by a fixed nurse-to-patient ratio”).²³ The clear processes for scheduling that are followed by Ms. Futran confirm that she does not use discretion and independent judgment and therefore do not “assign” employees to times or shifts within the meaning of the Act. First, regular employees have set, repeating schedules that Ms. Futran simply enters into the scheduling software program. (Tr. 741 [Futran]].)

Ms. Furtan also follows clear protocols in irregular scheduling situations. The scheduler’s duties primarily consist of slotting volunteers in to cover open shifts. (*See, e.g.*, Tr. 827 [Futran].) In deciding which employees meet the criteria to cover an open shift, the schedulers do not use their judgment to determine who might be best to fill that shift. Rather, as the Regional Director pointed out, employees are notified of open shifts and may volunteer to work; “[i]f insufficient

²³ The scheduling duties performed by Ms. Futran have been and are performed by non-supervisory employees. Most notably, Ms. King – who was the previous scheduler, trained Ms. Futran, and provided many of the templates and protocols that the schedulers use – was not a Shift Supervisor. (Tr. 740 [Futran].) Ms. Futran performed the same scheduling duties that they perform now when they were in undisputed non-supervisory roles. Of the numerous e-mails BluePearl produced in an effort to paint Ms. Futran’s scheduling duties as supervisory, many were from the time period that she was *not* a Shift Supervisor. (*See, e.g.* Tr. 892 [Employer Ex. 68], 894 [Employer Ex. 69], 901 [Employer Ex. 76].) In fact, the e-mail sent answering frequently asked questions about scheduling was prepared by Ms. King and Ms. Futran together, by editing a preexisting document, while *neither of them* were Shift Supervisors. (Tr. 891-892, 908 [Futran]; Employer Ex. 68.)

volunteers are available then an employee will be assigned to cover that shift based on an established set of factors, including: the number of days off the employee has previously had approved, whether it is the employees' regularly scheduled day to work, and seniority." (Decision at 11.)

For example, in order to fill holiday shifts, Ms. Futran sends out a sign-up sheet to the departments for people to sign up if they are willing to work holidays. (Tr. 743 [Futran].) Ms. Futran testified that she would then take the list of volunteers and plug the volunteers in to open shifts. (Tr. 743 [Futran].) If Ms. Futran cannot fill a shift, an employee will be assigned and the assigned employee will have an opportunity to either work it as overtime or swap it for another day. (Tr. 827 [Futran].) Ms. Futran was trained to use the following process for picking who is assigned: (1) position, (2) how many holidays they have already worked, (3) whether the person is assigned to work other holidays, (4) whether it is their regularly scheduled day, and (5) how long the employee has been employed by BluePearl.

Similarly, there will often be open shifts available throughout the week. Any employee that accesses BluePearl's online scheduling platform can select an open shift so long as it does not overlap with another shift they are working. (Tr. 745 [Futran].) Ms. Futran is notified to "approve" it; she approves it if there is only one person and they fit the criteria needed for the shift. (Tr. 747 [Futran]; *see also* 748 [criteria are position and sign-off level].) If multiple people requested to fill the shift, Ms. Futran was trained to decide who will fill it by looking first at whether a person would go into overtime, second if they are the correct position (Technician or Assistant; Specialty Department or Emergency Room), and finally slotting in on a first-come, first-served basis. (Tr. 747 [Futran].) Ms. Futran was taught to prioritize filling specialty shifts (Tr. 763-764 [Futran].); there is a subset of people who are designated as qualified to fill specialty positions, based on what

level they are signed off on and a preexisting list maintained by Ms. King. (Tr. 885-886 [Futran].) Because she follows predetermined protocols, Ms. Futran does not exercise independent judgment in filling open shifts.

Ms. Furtan will sometimes schedule a relief employee, *i.e.*, someone who is not full- or part-time with the hospital but rather will pick up shifts on a non-regular basis. (Tr. 748 [Futran].) Approximately every two weeks, she sends out a mass e-mail with open shifts to a group email list she inherited from Ms. King. (Tr. 749 [Futran]; *see also* Tr. 750 [the same open shifts that are posted in the scheduling software for BluePearl employees].) If a relief employee responds, Ms. Futran will enter the information into the schedule. (Tr. 751 [Futran].) Ms. Futran uses similar criteria to determine a relief employee can fill a shift: the correct position and level for the shift. (Tr. 752-753 [Futran].) When a new relief person is added to the list, the TM will let Ms. Futran know which departments are appropriate for that person, based on the TMs' discussion with those people and Ms. Futran will implement the TM's instruction as to what departments and classifications a relief employee can work. (Tr. 753 [Futran].) None of these scheduling functions require Ms. Furtan to use discretion and independent judgment.

BluePearl specifically argues that Ms. Furtan's involvement in PTO requests and training schedules evince the use of independent judgment. However, consistent with the rest of her scheduling responsibilities, Ms. Futran only approves PTO and training schedules pursuant to defined protocols and with manager approval:

Approving PTO: Ms. Futran does not exercise discretion in approving PTO; and decisions about unpaid PTO that require discretion are made by managers. (Tr. 758-759 [Futran].) Employees request PTO through the scheduling software system. If the person has enough PTO available and there are not multiple people already scheduled out that day, the PTO is approved.

(Tr. 758 [Futran].) If the person does not have enough PTO, the employee has to either trade a shift with another employee or request unpaid time off with a manager. (*Id.*) Ms. Futran reviews the PTO requests with the PM and TM because, while they have access to the requests, she does not. (Tr. 759 [Futran].) About 80% are automatically approved because the employee has enough PTO. (Tr. 759-760 [Futran].) Ms. Futran does not have the authority to approve unpaid time off. (Tr. 761 [only managers can approve].)

Training Schedules: Ms. King also trained Ms. Futran on creating training schedules; the scheduler is responsible for sending out an email to everyone who will be involved in the training and inputting the schedule into the software. (Tr. 754 [Futran].) Ms. Futran has created a few training schedules, which she sends to the PM, TM, and APM for approval. (Tr. 755, 757 [Futran].) In fact, she e-mails them to the TM first before the rest of the team. (Tr. 757 [Futran].) By default, Ms. Futran tries to pair a training employee with a Shift Supervisor, but she will pair them with an experienced Technician if a Shift Supervisor is not available, subject to the managers' approval. (Tr. 830-831 [Futran].) Ms. Futran could not make the decision to change a training schedule on her own. (Tr. 895-896 [Futran].)

Based on the evidence in the record, the Regional Director correctly relied on *Bakersfield California*, 316 NLRB 1211 (1995). Like in *Bakersfield California*, Ms. Furtan does not exercise independent judgment because the employees work regular schedules and request PTO in advance. Moreover, she does not make discretionary choices about filling shifts, but rather follows clear protocols based on objective criteria. Accordingly, the Regional Director did not err in finding that Ms. Futran's scheduling duties are not supervisory under the Act.

//

//

3. The Regional Director Did Not Err in Concluding that Shift Supervisors Do Not Effectively Recommend Hiring

“A supervisor exercises the power to effectively recommend hire if the supervisor’s recommendations are followed *with no independent investigation by superiors.*” *Peacock Prods. of NBC Universal Media*, 364 NLRB No. 104, slip op. at 6 (2016) [emphasis added]; *see also Thyme Holdings, LLC v. NLRB*, No 17-1191, 2018 WL 3040701, at *3 (D.C. Cir. May 22, 2018) (same) (affirming Board’s cross-application for enforcement of order finding Licensed Vocational Nurses were not supervisors). “[M]inisterial participation’ does not suffice.” *Thyme Holdings*, 2018 WL 3040701 at *3 (quoting *J.C. Penney Corp.*, 347 NLRB 127, 129 (2006)).

BluePearl’s argument that the Regional Director took a “narrow” view of the legal standard is unpersuasive. Rather, the Regional Director’s Decision properly concluded that Shift Supervisors do not effectively recommend hiring because BluePearl’s hiring process necessarily involves independent investigation by managers, who pre-screen candidates and conduct their own interviews before making a decision on whether to make an offer of employment.

i. BluePearl’s hiring protocol

BluePearl’s hiring process is consistent across departments. (Tr. 105-108 [APM Walker describing process for Kennel], 157-158 [TM Anderson describing process for Emergency and Specialties], 691 [Mensing describing process for Blood Bank].) First, the hospital’s recruiter “phone screens and looks at applicants’ initial resumes and job applications” (Tr. 105 [APM Walker]), then sends “qualified” applicants to the APM or TM. (*Id.*; Tr. 157 [TM Anderson].) The manager then determines whether they want to set up a formal sit-down interview. (Tr. 105 [APM Walker: “I then determine if I want to do a formal sit-down interview with them and will do so if I determine that they are a qualified applicant.”]; Tr. 158, 212-213 [if TM Anderson believes candidate is qualified, “then I will call the applicants and set up an interview”].) The managers

interview the candidates for employment or transfer in-person. (Tr. 106 [APM Walker], 157 [TM Anderson]; *see also* Tr. 43 [PM Baker].)

The manager then decides whether to set up a “working interview” after they have interviewed the candidate. (Tr. 106 [if APM Walker likes the candidate, she schedules a working interview], 158 [TM Anderson pre-schedules working interviews for the same day she interviews the candidate “because I like to get everything done in one day”].)²⁴ If a candidate is not sent to a working interview, they are not hired. (Tr. 1171 [Ohashi].) The working interview “provides the applicant an opportunity to experience what the job really is” and gives BluePearl “an opportunity to evaluate their skill and competency level.” (Tr. 107-108 [APM Walker]; *see also* Tr. 43 [PM Baker: opportunity to “see how they will mesh with the team”], 213 [TM Anderson: gives Shift Supervisor “a chance to sense the level of engagement and interaction that they have with their team to determine whether or not they’ll be a good fit for the hospital.”].) The candidate “shadows” the Shift Supervisor and/or team, and typically the team collectively evaluates whether the candidate is a good fit. (*See, e.g.*, Tr. 391-392 [Bjorland], 518 [A. Pawlik], 575-576 [J. Pawlik], 805 [Futran], 970-971 [Berge]). Technicians/Assistants within the department participate in the working interviews; doctors will also sometimes participate. (Tr. 60-61 [PM Baker]; *see also* Tr. 517-518 [A. Pawlik: “Everybody on my team is involved in working interviews.”].)

After the working interview, the Shift Supervisors generally discuss how they feel about the candidate with their teams (i.e., Technicians/Assistants and doctors) before providing feedback

²⁴ As the Regional Director pointed out: “The record does contain an example of a shift supervisor arranging a working interview for a potential transfer from another of the Employer’s facilities. However, after that occurred the technician manager, while not overly critical, did correct the shift supervisor that in the future the shift supervisor need communicate better with the technician manager as department manager.” (Decision at 8.)

to the manager who scheduled the interview. (Tr. 61, 107 [APM Walker]; *see also* Tr. 392-393 [Bjorland]; 504-505, 518-519 [A. Pawlik].) The feedback is generally along the lines of whether the candidate “has a good personality, they seem like they’re really eager and willing to learn, either they’re really good at these skills or they might need a little bit of work, or they’re green, as we call people that are newer, that they don’t have like a really strong skill set or anything.” (Tr. 953 [Berge]; *see also* Tr. 1079 [Smith provided feedback that she observed candidate was “helpful” and “was very willing to help everybody out, whatever anybody needed”].) When that feedback is positive, the candidate generally, but not always, receives an offer of employment and vice versa. (Tr. 107 [APM Walker], 213 [TM Anderson].) The Shift Supervisors do not have any role in deciding the wages offered to the new hire, nor do they ultimately make the decision to hire. (*See, e.g.*, Tr. 413 [Bjorland], Tr. 507 [A. Pawlik]; 694 [Mensing]; 806-807 [Futran].). “At the end of the day, it was management’s decision.” (Tr. 695 [Mensing].)

- ii. The evidence does not establish that Shift Supervisors, the Client Services Manager, or the Blood Bank Director hire or transfer absent independent investigation by their superiors

BluePearl’s hiring protocol establishes that the Shift Supervisors do not have the authority to hire or transfer employees without independent investigation by managers. *Veolia Transp. Svcs.*, 363 NLRB No. 98, at *9 (2016) (a “recommendation is only effective if it is not independently investigated”). An individual does not effectively recommend hiring (or transferring through the process described above) where acknowledged managers like the TM and AMP also interview the candidates. *J.C. Penney Corp.*, 347 NLRB 127, 129 (2006); *Ryder Truck Rental, Inc.* 326 NLRB 1386, 1387 n. 9 (technicians-in-charge did not effectively recommend hiring where, even though they interviewed candidates and offered “opinions or recommendations” that were given “significant” weight, higher level officials also participated in the interview and hiring process). The independent interviews conducted by those managers undermine BluePearl’s argument that

any Shift Supervisors' feedback after working interviews confers supervisory status. *See Waverly-Cedar Falls Health Care, Inc.*, 297 NLRB 390, 392 (1989) (licensed practical nurses did not effectively recommend hiring where no contention or finding that the director of nursing relied solely on the LPNs' recommendations without further inquiries). Furthermore, the fact that Shift Supervisors are not "involved in initial screening or the final decision-making stages of hiring" supports the conclusion that Shift Supervisors "involvement in hiring [is] limited and largely ministerial. *Thyme Holdings*, 2018 WL 3040701. Therefore, the Regional Director did not err in finding that, "[u]nder the Employer's hiring practice it is the department manager that is making an initial assessment, by selecting a candidate for a working interview, collecting information from that working interview, and then making an effective recommendation to the practice manager." (Decision at 15.)

Shift Supervisors' involvement in the hiring process here is distinguishable from that of the supervisor in the case BluePearl relies on, *Sheraton Universal Hotel*, 350 NLRB 1114 (2007). Though the desk supervisor's manager interviewed applicants as "part of the process," it was the desk supervisor who "reviewed applications and resumes, interviewed applicants, and made hiring recommendations." *Sheraton Universal Hotel*, 350 NLRB at 1115. Here, it is the managers and recruiter who review applications and resumes, interview applicants, and make the final hiring recommendations, with Shift Supervisors playing an advisory role after the working interview.

The managers' testimony that they generally accepted the Shift Supervisors' "recommendations" is likewise insufficient to show that Shift Supervisors hire or "effectively recommend" hiring within the meaning of the Act. *Children's Farm Home*, 324 NLRB 61 (1997) (authority to effectively recommend means the recommended action is taken without independent

investigation, “not simply that the recommendation is ultimately followed”).²⁵ The record shows that the feedback communicated by Shift Supervisors generally reflected the team’s general feedback, including the opinions of the doctors and undisputed non-supervisory employees in the department. Further, the fact that undisputed non-supervisors sometimes conducted working interviews in the same manner as Shift Supervisors suggests the alleged participation in the hiring process is insufficient to establish supervisory authority. (*See, e.g.*, Tr. 904-905, 954 [A. Pawlik: no difference in participation in working interview before and after became shift lead].) Finally, there is no evidence in the record – nor could there be given the managers’ participation in interviews – that the TM or APM relies *solely* on the Shift Supervisor or Blood Bank Director’s feedback in deciding whether to extend an offer to a candidate. (*See* Decision at 15 [record did not support reaching the conclusion that Shift Supervisors effectively recommend hiring “due to the level of independent investigation the department manager has in the decision.” (Decision at 15.)

The Oncology department’s failure to succeed in transferring Tasia Autio²⁶ to the referral coordinator position illustrates that the hiring process involves group feedback among all members of the team (Shift Supervisor, non-Shift Supervisor, and doctors), and that the Shift Supervisor is not empowered to “effectively recommend” hiring absent management’s independent

²⁵ BluePearl’s assertion that *Children’s Farm Home* did not concern hiring recommendations is inaccurate. In *Children’s Farm Home*, the Board determined that team leaders did not effectively recommend hiring, despite participating in panel interviews and providing recommendations. 324 NLRB at 64; *see also* 66 (decision that Board affirmed found: “Typically the role of TTLs in the hiring process is limited to participation in rating candidates and in arriving at a consensus with other panel members on those occasions in which there is serious disagreement.”). As the working interviews that Shift Supervisors participate in are analogous to the panels there, the Regional Director did not err in relying on *Children’s Farm Home*.

²⁶ Throughout the transcript, Ms. Autio is referred to as “Tasha Audiosa,” “Tasha,” “Ms. Audio,” “Ms. Autio,” and “Tasia.”

investigation.²⁷ After being “recruited” to transfer by a non-Shift Supervisor Technician, TM Anderson asked Ms. J. Pawlik to organize a “shadow day” for Ms. Autio to get a feeling for the flow the day in Oncology. (Tr. 577-578, 581-582 [J. Pawlik].) After the shadow day, the team discussed and agreed that she was a “good fit for our team,” so PM Baker and TM Anderson advised that they set up a meeting with the whole department, including doctors. (Tr. 581-582 [J. Pawlik].) The whole team agreed they were “on board” with bringing Ms. Autio on to the team.²⁸ (Tr. 582 [J. Pawlik].) TM Anderson offered her the job at a higher rate than other referral coordinators, but subsequently rescinded it and offered her a lower rate, which Ms. Autio declined. (Tr. 346-347 [TM Anderson], 583-584 [J. Pawlik].) On behalf of her team, Ms. J. Pawlik directly appealed to PM Baker to offer Ms. Autio a higher rate of pay. (Tr. 584 [J. Pawlik].) Management said no. (Tr. 345 [TM Anderson], 584 [J. Pawlik].)

The record evidence related to the Blood Bank Director likewise demonstrates that those individuals did not have authority to hire absent independent investigation. The Blood Bank Director, Ms. Mensing, described merely providing positive feedback, on behalf of herself and the Blood Bank doctor, on a candidate who was eventually hired; TM Anderson independently interviewed the candidate. (Tr. 692-694 [Mensing].)

BluePearl contends that the Regional Director unfairly found that Shift Supervisors’ recommendations were evaluating the “the candidate’s communication skills and perceived attitude.” (Decision at 15; Request at 36.) However, the Regional Director did not rely on that

²⁷ See, e.g. Tr. 228-229 (TM Anderson: “Jamie and I did the formal interview together.”).

²⁸ Under BluePearl’s theory of the case, every employee in the Oncology Department – the doctors, Technicians, Assistant, and Referral Coordinator would be a Section 2(11) supervisor because they all “recommended” that management transfer her to their department.

conclusion to conclude that Shift Supervisors do not effectively recommend hiring;²⁹ rather, the Regional Director based his determination on the clear evidence that Shift Supervisors do not make recommendations absent independent investigation by managers. (Decision at 15.)

Accordingly, the Regional Director did not err in finding that Shift Supervisors do not effectively recommend hiring.

4. Shift Supervisors Do Not Effectively Recommend Discipline

For discipline to confer supervisory status the exercise of disciplinary authority must lead to personnel action without independent investigation by management (Decision at 16, citing *Sheraton Universal Hotel*, 350 NLRB 1114, 1116 (2007).) *See also Veolia Transp. Svcs., Inc.*, 363 NLRB No. 98, slip op. at 8 (2016). The record evidence supports the Regional Director's determination that he "cannot conclude that a shift supervisor has identified a problem, recommended discipline, and that recommendation has been accepted by the departmental manager or practice manager without independent investigation or an assessment of the situation by the department manager." (Decision at 16.)

As a preliminary matter, all Shift Supervisors and the Blood Bank Director testified that they have not disciplined employees and cannot issue written warnings. (Tr. 507 [A. Pawlik], 589 [J. Pawlik], 695 [Mensing], 808, 815 [Futran], 954 [Berge], 1036 [Rich], 1080 [Smith].) They also have never terminated an employee. (Tr. 507 [A. Pawlik], 589 [J. Pawlik], 695 [Mensing], 816

²⁹ Moreover, the Regional Director's observations that Shift Supervisors provided feedback after working interviews based on "fit" is supported by the record. The evidence shows that fit, including personality, are components of what the department members are evaluating during working interviews. (Tr. 953 [Berge: feedback is generally along the lines of whether the candidate "has a good personality, they seem like they're really eager and willing to learn, either they're really good at these skills or they might need a little bit of work, or they're green, as we call people that are newer, that they don't have like a really strong skill set or anything"]; *see also* Tr. 1079 [Smith provided feedback that she observed candidate was "helpful" and "was very willing to help everybody out, whatever anybody needed"].)

[Futran], 954 [Berge], 1015 [Rich], 1080 [Smith].) Furthermore, the fact that Shift Supervisors do not have access to employees' personnel records (Tr. 294-296 [TM Anderson]) and that there is no evidence that Shift Supervisors have been trained on how to deal with disciplinary issues suggests that Shift Supervisors do not have authority to discipline. *Thyme Holdings*, 2018 WL 3040701 at *3.

The authority to discipline, or to effectively recommend such action, does not exist where superior managers conduct their own investigation of the matter or where those managers must review the putative supervisor's disciplinary action or recommendation. *Jochims v. NLRB*, 480 F.3d 1161, 1170 (D.C. Cir. 2007). Here, the managers' testimony confirms that, once an issue escalates to the level of a written warning, the managers become involved in the process. (Tr. 45 [PM Baker: "Q If a shift supervisor wanted to escalate or wanted to do a written warning for an employee is that when the shift supervisor would partner with Jessica or Lindsay? A Yes."]) Though the managers testified that they incorporate feedback from the challenged employees into formal discipline, BluePearl did not produce a single written warning or documented verbal warning to corroborate that testimony. *G4S Regulated Security Solutions*, 362 NLRB No. 134, slip op. at 1-3 (2015) (where evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established).

As the Regional Director pointed out, the Shift Supervisors position description suggests a merely reportorial function in discipline; it states "a shift supervisor 'identifies performance issues and works with hospital manage to coach for improvement.'" (Decision at 8.) The mere exercise of a reporting function, however, that does not automatically lead to further discipline or adverse action against an employee does not establish supervisory authority. *See Loyalhanna Health Care Assocs.*, 332 NLRB 933, 934 (warning merely reportorial where it simply described incident, did

not recommend disposition, and higher authority determined what if any discipline was warranted). In cases where oral and/or written warnings simply brought to the employer's attention performance issues, without recommending future discipline, the role of those delivering the warnings is nothing more than reportorial. *Williamette Indus.*, 336 NLRB 743, 744 (2001); *Waverly-Cedar Falls Health Care Ctr.*, 297 NLRB 390, 392 (1989). Such is the case here, where the record shows that Shift Supervisors' "provid[e] other employees in the department with guidance or suggestions on improvement, described by [BluePearl] as an opportunity to 'coach in the moment.'" (Decision at 8; *see, e.g.*, Employer Exs. 29, 30.)

Such "verbal coaching" does not qualify as discipline because it does not "automatically or routinely leads to job-affecting discipline, by operation of a defined progressive disciplinary system." *Veolia Transp. Svcs., Inc.*, 363 NLRB No. 98, slip op. at 8 (2016). "Warnings that imply bringing substandard performance to the employer's attention without recommendations for further discipline serve nothing more than a reporting function, and are not evidence of supervisory authority." *Id.* (See also Decision at 16.) Shift Supervisors generally do not see conversations that they have with other employees about issues as "verbal warnings." (See Tr. 507 [A. Pawlik], 589 [J. Pawlik], 695 [Mensing], 815 [Futran], 954 [Berge], 1036 [Rich] [testifying they have never issued a verbal warning]; *see also* Tr. 62 [PM Baker acknowledging difference between coaching in the moment and disciplinary "verbal warning" that results in a form].) The authority to point out and correct deficiencies in job performance of other employees does not establish the authority to discipline. *Regal Health and Rehab Ctr., Inc.*, 354 NLRB 466, 473 (2009) (citing *Franklin Hosp. Med. Ctr.*, *supra* at 830.) Here, the record shows that "coaching in the moment" regularly did not lead to job-affecting discipline, even when issues were recorded or reported to upper managers. For example:

- Ms. Rich and Kareena Story: Ms. Rich’s conversations with Kareena Story about time management, improving focus, and not using her phone on the floor were not discipline, but “coach[ing] in the moment.” (Tr. 269 [TM Anderson].) Ms. Smith did not consider those conversations verbal warnings and she is not aware of Ms. Story receiving any discipline. (Tr. 1033-1034 [Rich].) TM Anderson also saw Ms. Spahr’s conversations with Ms. Story as “coaching.” (Tr. 262 [TM Anderson].) There is no evidence in the record that any job-affecting discipline resulted.
- Ms. Rich and Abigail O’Donnell: Ms. Rich’s recent conversation with Abigail O’Donnell after an issue arose on the floor likewise did not result in any discipline. (Tr. 1048-1049 [Rich].) Ms. Smith recorded the conversation in a Google doc but does not know if any managers have followed up. (Tr. 1051 [Rich].) There is no evidence in the record that any job-affecting discipline resulted.
- Ms. Smith and Ms. O’Donnell: Though Ms. Smith had multiple conversations with Ms. O’Donnell about issues on the floor, she did not consider those coachings to be discipline. (Tr. 1095 [Smith].) Ms. Smith testified that, after she reported the issues to TM Anderson, TM Anderson took it upon herself to speak with Ms. O’Donnell (Tr. 1082, 1091 [Smith]), but there is no evidence that any job-affecting discipline resulted let alone that Ms. Smith recommended any discipline should issue.
- Ms. Futran and Taryn Holley: Ms. Futran reported a patient safety issue committed by Ms. Holley to TM Anderson and APM Walker. (Tr. 810-813 [Futran].) They agreed that it was an issue and told her to have a conversation with Ms. Holley about the patient safety issue. (*Id.*) Ms. Futran did not understand this discussion to be a verbal warning that could lead to further discipline. (Tr. 815 [Futran].)

Even when discipline does result after a shift supervisor conveys a correction or coaching to an upper manager, the Regional Director correctly concluded that the “shift supervisor’s input is merely reportorial.” (Decision at 16.) BluePearl’s argument that the examples they highlight show that Shift Supervisors “initiated discipline” overstates the record. Rather, they demonstrate exactly what the Regional Director found: issues reported by Shift Supervisors may become the basis of discipline but such reports do not result in discipline without independent investigation by managers:

- Ms. Futran and Amira Leon: BluePearl has not offered sufficient evidence to show that Ms. Furtan “effectively recommended” that Ms. Leon be demoted. (*See* Request at 39.) First, Ms. Furtan made a report about Ms. Leon’s performance when she was in an undisputed bargaining unit position (Technician), *before she was a Shift Supervisor*. (Tr. 906-907 [Futran].) Second, BluePearl cannot meet its burden of proof because it failed to submit any evidence to establish that Ms. Furtan’s recommendation was taken without independent investigation by the three managers she reported it to.
- Ms. Rich and Micah Burton: The record regarding this example includes evidence of TM Anderson’s independent investigation into Mr. Burton’s before discipline issued. Ms. Rich described ongoing problems with Micah Burton, who was not progressing through his training at the expected rate. (Tr. 194 [TM Anderson].) Ms. Rich testified that TM Anderson told her she would put Mr. Burton on a modified training program concluding with a written test and that, if he did not pass the test, changes would be made. (Tr. 1061 [Rich].) Ms. Rich assumed that decision was made by the PM, TM, or APM, but was not involved in any decision about whether changes should be made and, if so, what those changes should be. (Tr. 1061 [Rich].) Though TM Anderson said that Ms. Rich

recommended that Mr. Burton would be demoted to Kennel, Ms. Rich testified that TM Anderson informed her of the decision to make a change if he did not pass the test. (Tr. 1062 [Rich].) Further, while Ms. Rich gave Mr. Burton the test at the conclusion of his modified training program, TM Anderson prepared the special test for Mr. Burton and Ms. Rich did not grade the test. (Tr. 1010-1011 [Rich].) Thus, the record shows that Mr. Burton's demotion resulted from an objective independent investigation – passing a test – that was created and reviewed by TM Anderson, not Ms. Rich.

- Ms. Bjorland and Eric Fuller: BluePearl likewise omits evidence of management's involvement in Mr. Fuller's discipline. Ms. Bjorland informed TM Anderson that she had done multiple in the moment coachings with Mr. Fuller about issues of efficiency, attention to detail, willingness to help and laziness, but he was continuing to make the same mistakes. (Tr. 199-200 [TM Anderson]; Tr. 399 [Bjorland].) TM Anderson instructed Ms. Bjorland to have a sit-down conversation with Mr. Fuller, which she did. (Tr. 402 [Bjorland].) Eventually, Dr. Robinson and PM Baker spoke with Ms. Bjorland about a Performance Improvement Plan ("PIP"). (Tr. 404-405 [Bjorland].) PM Baker instructed Ms. Bjorland to prepare a PIP, a task that Ms. Bjorland had never done before was never trained to do—it was PM Baker's idea to issue a PIP, not Ms. Bjorland's suggestion. (Tr. 405-407 [Bjorland].) The PIP was not completed or issued because Mr. Fuller quit before Ms. Bjorland completed a draft PIP. (Tr. 406 [Bjorland].) This example therefore again shows management's involvement in the disciplinary process and fails to establish that Ms. Bjorland "effectively recommended" discipline.

Taken together, along with several other examples in the record, these examples demonstrate that Shift Supervisors' involvement is merely reportorial.³⁰ Instead of making "effective

³⁰ Ms. A. Pawlik and Laura Alston: Ms. A. Pawlik described how she and the doctor in the department had multiple conversations with PM Baker and TM Anderson about ongoing issues with Laura Alston. (Tr. 487-490 [A. Pawlik].) After multiple meetings about Ms. Alston, the doctor and Ms. A. Pawlik prepared a list of Ms. Alston's shortcomings together in "direct response to management's request to have dates of events and specifics that had happened during workdays so that they would have some very specific situations to reference." (Tr. 492 [A. Pawlik]; *see also* 494-495 [discussing Union Ex. 25 and Employer Ex. 29].) The doctor sent Ms. A. Pawlik a list of such incidences, which the doctor and she then supplemented together, before Ms. A. Pawlik sent the report to the management. (*Id.*) PM Baker then met with Ms. Alston again and then informed the doctor and Ms. A. Pawlik that it was probably best for Ms. Alston to no longer be on their team. (Tr. 498, 500 [A. Pawlik].)

Ms. J. Pawlik and Cassandra Gill: Ms. J. Pawlik discussed a similar situation. There, Ms. J. Pawlik and her team had ongoing issues with Cassandra Gill being unable to fulfill her duties in a timely manner. (Tr. 199 [TM Anderson].) Ms. J. Pawlik reported the issues to TM Anderson, who instructed her to speak with Ms. Gill. (Tr. 592 [J. Pawlik].) When the issues did not resolve, Ms. J. Pawlik had another conversation with TM Anderson who told her that she was going to write Ms. Gill up. (Tr. 593 [J. Pawlik].) Ms. J. Pawlik never had a one-on-one meeting with Ms. Gill and, after meeting with Ms. Gill that included PM Baker, Ms. J. Pawlik had no more conversations about her work performance. (Tr. 599, 602-603 [J. Pawlik].) Though TM Anderson stated that she recommended writing her up, Ms. J. Pawlik testified that she did not ask the TM to issue written discipline. (Tr. 594 [J. Pawlik].) In fact, Ms. J. Pawlik did not learn that there had been any corrective action taken until Ms. Gill made a comment about it during the meeting. (Tr. 599 [J. Pawlik].) BluePearl did not submit into evidence any written discipline issued to Ms. Gill.

Ms. Futran and Taryn Holley: Ms. Futran reported to PM Baker that Taryn Holley had been significantly late for two months in a row and TM Anderson took it upon herself to write her up. (Tr. 276-277 [TM Anderson].) Ms. Futran was not involved in any way in TM Anderson's decision to write Ms. Holley up – all she did was report to Ms. Anderson that Ms. Holley was repeatedly late. BluePearl did not enter into evidence the written discipline issued by TM Anderson.

Ms. Smith and Vicki Adams: Ms. Smith had multiple in the moment coachings with Vicki Adams about pulling her weight and helping her team. (Tr. 195-196 [TM Anderson].) After one incident when Ms. Adams overdosed a patient in clear violation of hospital protocol, she texted TM Anderson who responded that she would "handle it." (Tr. 1020 [Smith].) Ms. Smith did not have any role in deciding whether Ms. Adams should be disciplined or receive a write up: though she was asked "what I saw and what happened," she was not asked what consequences she recommended. (Tr. 1020-1021 [Smith].) There is no evidence in the record of any resulting discipline.

recommendations” that are followed without “independent investigation,” managers routinely instruct Shift Supervisors on disciplinary steps to follow and participate in meetings with the employees at issue. The Shift Supervisors therefore do not have the authority to discipline within the meaning of the Act.

The Regional Director properly concluded that Shift Supervisors do not “effectively recommend” discipline without the independent investigation of managers and therefore do not discipline within the meaning of section 2(11).

5. Shift Supervisors’ Participation in Evaluation Process Does Not Establish Supervisory Status Absent a Direct Correlation Between the Evaluation and Merit Wage Increase

BluePearl’s argument that Shift Supervisors’ participation in the evaluation process constitutes supervisory authority fails because it has no evidence that there is a direct correlation between Shift Supervisors’ evaluation and merit wage increases. Rather, as the Regional Director found, “there is no contention that an evaluation results in a merit pay increase without the involvement of the department manager.” (Decision at 17.) The record evidence supports this conclusion.

“The authority simply to evaluate employees without more is insufficient to find supervisory status.” *Passavant Health Ctr.*, 284 NLRB 887, 891 (1987); *see also Modesto Radiology Imagine, Inc.*, 361 NLRB 888 (2014) (“authority to evaluate is not one of the indicia of supervisory status”). The evaluation of other employees is therefore “only relevant to the extent

Ms. Rich and Joe Gallegos: Ms. Rich reported to TM Anderson that Joe Gallegos had issues with leaving early and calling out frequently. (Tr. 1038 [Rich].) Though TM Anderson suggested that she wrote him up based on Ms. Rich’s recommendation, Ms. Rich testified that she does not know if he has been disciplined, did not discuss discipline with TM Anderson, and did not recommend that Mr. Gallegos be disciplined. (Tr. 1038-1039, 1060 [Rich].) BluePearl did not produce the written discipline issued by TM Anderson.

the evaluation ‘is an effective recommendation of promotion, wage increase, or discipline.’ *Modesto Radiology Imagine, Inc.*, 361 NLRB 888. The “employer must show a ‘direct correlation’ between the evaluation and the reward, in that the pay changes without management ‘independently investigat[ing] or chang[ing] the rankings.’” *Thyme Holdings*, 2018 WL 3040701 at *1-2 (quoting *NLRB v. Hilliard Dev. Corp.*, 187 F.3d 133, 145 (1st Cir. 1999)).

The annual review process is consistent across departments: Shift Supervisors and the Blood Bank Director, along with other staff, provide written feedback and give a score, write feedback and notes, “then that is inputted into the annual review.” (Tr. 29 [PM Baker]; *see e.g.* Tr. 817 [PM asked Futran to fill out evaluation “so that she can give feedback on these people for their annual reviews”], Employer Ex. 3.) Similar evaluation processes were found insufficient to establish supervisory authority in both *Coral Harbor* and *Thyme Holdings*. 366 NLRB No. 75, slip op. at *5 (nurses completed evaluations of employees by providing numerical ratings on job elements); 2018 WL 3040701, at *102 (nurses completed evaluations with numerical ratings and had the option of providing narrative comments). As the Regional Director pointed out: “Employer’s list of shift supervisor responsibilities states “shift supervisors ‘may provide feedback on Technician/Assistant performance to be utilized during annual review.’ This phrasing, that feedback is ‘utilized’ reflects the reality of the evaluation process, that the department manager uses the input of shift supervisors, among others, in completing evaluations.” (Decision at 17.)

BluePearl has failed to carry its burden of showing a direct link between evaluation and reward. First, BluePearl offered only conclusory testimony from managers that yearly wage increases based off the yearly performance reviews. (Tr. 80, 83 [APM Walker], 210 [TM Anderson].) In the absence of “evidence of any employee evaluation have any specific positive or negative impact on any employee’s terms or conditions of employment[,]” the employer’s

“unsubstantiated assertions are insufficient to establish supervisory authority.” *Coral Harbor*, 366 NLRB No. 75, slip op. at *6. In *Thyme Holdings*, the Court affirmed the Regional Director’s finding that the employer could not establish a direct link based on manager testimony alone. 2018 WL 3040701, *2. Like the employer in *Thyme*, BluePearl has not offered “any payroll records into evidence that establish that assistants received wage increases as a result of the evaluations” and presented no evidence otherwise linking the evaluations to the managers’ accounts. *Id.*; *see also Loparex*, 353 NLRB 1224, 1225 (2009) (even though shift leaders filled out evaluation forms, served merely reportorial function where performance evaluations do not on their fact contain any recommendation regarding raises, promotions, or any other type of employee reward). Shift Supervisors consistently testified that no one ever informed them that the number ratings in the evaluations were directly correlated to pay increase. (*See, e.g.* Tr. 411-412 [Bjorland], 510 [A. Pawlik], 820 [Futran].)

Second, the record shows that it is management, rather than the Shift Supervisors, who “retain ultimate control over the ratings received by the [other employees] and consequently the amount of their raises.” *Thyme*, 2018 WL 3040701, *2. The evaluation process was performed pursuant to the instructions of the former PM, Ms. Dietz.³¹ Some Shift Supervisors testified that they sat down with former PM Dietz to discuss their feedback and that PM Dietz changed the numerical ratings they had given employees and the wording of their feedback. (Tr. 417-419 [Bjorland], 819-820 [Futran].) Others testified that they were not asked for final input on the

³¹ BluePearl suspended the annual review process after the Union election during the pendency of the supervisor status challenge. A few months ago, shortly before BluePearl challenged the Shift Supervisors classification, BluePearl attempted to change the evaluation process to increase Shift Supervisors’ participation. (Tr. 957-958.) Ms. Berge went to speak to the Tech Manager and told her: “that’s not something that we’ve ever done, and it’s not something that I’m comfortable doing, it wasn’t something I wanted to do, and it wasn’t actually on my list of responsibilities.” (*Id.*) The new evaluation system did not go into effect pending resolution of this hearing.

evaluations. (*See, e.g.* Tr. 510 [A. Pawlik], 605-606 [J. Pawlik].) That former PM Dietz made changes to the numerical ratings provided by the Shift Supervisors is apparent in the record. For example, while Ms. Futran gave a Kennel Assistant, Kathy Fox de Ramirez, a 2 for “Learning on the Fly,” Ms. Fox de Ramirez’s final review gives her a 3 in that category. (*Compare* Employer Ex. 3 at BP000028 *with* Employer Ex. 11 at BP000208.) The final narrative review in that category also includes comments that were not included in Ms. Futran’s feedback. (*Id.*) Shift Supervisors’ feedback is therefore not an “effective recommendation” of any reward, as it necessarily includes independent participation and investigation by managers. The Regional Director therefore properly concluded that “it is the department manager who is responsible for the evaluation.” (Decision at 17.)

Finally, BluePearl cannot establish a direct link between the Shift Supervisors’ feedback and any merit increase due to the number of people who provide feedback that is factored into the annual evaluation. For example, current PM Baker testified that she found feedback forms from non-Shift Supervisors in former PM Dietz’s file (Tr. 59-60 [PM Baker]; *see* Tr. 466-468 introducing Union Exs. 19 [evaluations from S. Nelson, surgeon], 20 [evaluations from Dr. Waldrop, criticalist], , 22 [evaluations from Dr. Robinson, surgeon]). Ms. Futran testified that Ms. Dietz had told her other people had reviewed same employees as Ms. Futran (Tr. 817-819 [Futran]); and Ms. Mensing testified that she had filled out a “360 review . . . they used to send out to everybody, so anyone in the hospital could give input about any employee.” (Tr. 695-696 [Mensing]; *see also* Tr. 417-419 [Bjorland: PM Dietz gave higher or lower numerical ratings than Ms. Bjorland had].)³² In fact, the evaluations in the record show that other employees’ feedback

³² Mollyrose Dunn, an undisputed non-supervisory bargaining unit member testified that she has filled out the same annual feedback form as the Shift Supervisors “[p]retty much annually since I started.” (Tr. 470-471 [discussing Employer Ex. 4].)

was incorporated in final reviews. For example, Dr. Robinson’s feedback on Ms. Greatorex is included verbatim in parts of Ms. Greatorex’s final review and incorporated general throughout. (*Compare* Union Ex. 22 *with* Employer Ex. 7.) As evaluations include opinions that are not from the Shift Supervisors³³ and that managers are meaningfully involved in the process, the Regional Director did not err in concluding that BluePearl cannot establish a direct correlation between the Shift Supervisors’ feedback and any reward that accrues to the employee.

6. There is No Basis to Conclude that All Shift Supervisors Have the Same Supervisory Authority; Supervisory Determination Must Be Based on Concrete Evidence in the Record

Finally, BluePearl argues that all Shift Supervisors have the same authority to assign, hire, discipline, and reward, regardless of whether they have exercised such authority. (Request at 44-45.) But it has not identified any basis for that authority other than the conclusory statements in its argument. As BluePearl itself points out, job titles are not controlling and the board looks at specific evidence in the record to establish supervisory authority. As BluePearl bears the burden of demonstrating supervisory status, it cannot establish supervisory authority based on the unsupported statement that all Shift Supervisors “have authority” to perform any of the elements of section 2(11). The Regional Director correctly determined, based on the ample record evidence discussed in the previous sections, that the Shift Supervisors are not statutory supervisors within the meaning of the Act.

//

//

//

³³ Dr. Robinson wrote that Ms. Greatorex “does not gossip or get caught up in the drama of the clinic” (Union Ex. 22 at BP000300); Ms. Greatorex’s final review notes, “Tana does not gossip or get involved in the hospital drama” (Employer Ex. 7 at BP000248.) Ms. Bjorland’s review of Ms. Greatorex, by contrast, does not mention gossip or drama at all. (Employer Ex. 4 at BP000015.)

7. Shift Supervisors Do Not Possess Secondary Indicia of Supervisory Status

The Regional Director did not err by declining to consider secondary indicia of supervisory status. Secondary indicia are always insufficient to show supervisory status where, as here, primary indicia are lacking. *See, e.g., Loyalhanna Care Ctr.*, 352 NLRB 863 (2008); *Ken-Crest Svcs.*, 335 NLRB 777 (2001); *Penn. Truck Lines*, 199 NLRB 641 (1972.) In any event, the secondary indicia arguments made by BluePearl are unpersuasive.

Ratio of Supervisors to Non-Supervisors. BluePearl argues that, without shift supervisors, there would be an unrealistic ration of supervisors to non-supervisory employees. Namely, it asserts, without citation, that the Technician Manager would supervise “approximately 43 associates across a number of departments.” BluePearl does not, however, cite any authority that such a ration is unrealistic. Furthermore, its argument that no supervisors would be on duty on the weekends is unpersuasive, as Technicians/Assistants will still be working with doctors on site and there are currently some shifts that do not have any Shift Supervisors on duty.

To the contrary, if the Shift Supervisors are found to be statutory supervisors, the ratio weighs *against* finding that the Shift Supervisors and Blood Bank Manager are supervisors. In the Emergency and Specialty departments, there are 9 Shift Supervisors and approximately 27 non-Shift Supervisor Technicians and Assistants; on a given shift there is generally one Shift Supervisor and 2-4 non-Shift Supervisor Technicians/Assistants, except during Emergency nights when there are 2 Shift Supervisors and 2-3 non-Shift Supervisor Technician/Assistants. *See, e.g., Beverly California Corp. v. NLRB*, 370 F.2d 1548, 1555-1556 (6th Cir. 1992) (classifying 25% of nursing home staff as supervisors make ranks of supervisors “pretty populous”); *NLRB v. Res-Care, Inc.*, 705 F.3d 1461, 1468 (7th Cir. 1983) (33% ratio found to be high); *Airkaman, Inc.*, 230

NLRB 924, 926 (1997) (one to three ratio is unrealistic and excessively high). In the Blood Bank, of course, Ms. Mensing has no “subordinate;” and when she did the ratio was 1-to-1.

Additional Pay. Shift Supervisors are paid approximately one dollar more than Unit Technicians/Assistants. (Decision at 11.) This “modest increase,” as the Regional Director termed it, does not support a finding of supervisory status. (Decision at 19.)

Held Out as Supervisors. BluePearl cites no evidence for its assertion that, “associates frequently approach shift supervisors to discuss issues they may be having at work or to discuss their career path.” Furthermore, Ms. Holley did not request a *Weingarten* representative for a discussion with a Shift Supervisor, nor would she have needed to as the conversation was not an investigatory meeting that could lead to discipline. Rather, Ms. Holley requested that a “union person,” Technician Tana Greatorex, be present at a three- to five-minute meeting Ms. Futran had with her regarding Ms. Holley’s tardiness. (Tr. 814, 882.) Ms. Futran testified that she told Ms. Holley: “I’m happy to have anyone with you anytime you want to talk.[.]” (Tr. 814.) Ms. Futran did not understand this discussion to be a verbal warning that could lead to further discipline. (Tr. 815 [Futran].)

It is likewise immaterial whether BluePearl holds out the Shift Supervisors as “supervisors.” Supervisory status “is not based on the job description, identification badge, job title, employee handbook, job offer or training given” to the employees. *Coral Harbor*, 366 NLRB No. 75, slip op. at *6. In light of the evidence above that the Shift Supervisors do not have any primary indicia of supervisor status, any of BluePearl’s arguments regarding secondary indicia must fail.

Blood Bank Director. Blue Pearl has not met its burden of proof that Ms. Mensing is a statutory supervisor. In addition to the evidence discussed above, the only testimony concerning

Ms. Mensing concerns her work with outside organizations and her interactions with upper management – none of which show that she has any authority over other employees. (*See, e.g.*, Tr. 697-703 [Mensing; discussing profitability numbers, working with a marketing employee in Tampa to create brochures, attending trade shows].) There is no evidence in the record that supports BluePearl’s inference that Ms. Mensing was viewed as a supervisor. Much of the testimony elicited by BluePearl’s counsel for Ms. Mensing concerned her role in budgets and finances. Per the stipulation of the parties, however, the only grounds on which BluePearl can challenge Ms. Mensing’s inclusion in the unit is if she is a Section 2(11) supervisor, not on the grounds that she is a managerial employee. (Board Ex. 2, ¶ 6(b); Joint Ex. 1.)

Attendance at Meetings. BluePearl also argues that Shift Supervisors’ attendance at “lead meetings” confer supervisory authority, but it does not. Though the Shift Supervisors regularly attended monthly meetings with the TM until recently,³⁴ the content of those meetings was not supervisory in nature. The meetings covered “protocol changes, information that came down from either the company or through doctors’ meetings, leadership development topics, relationship building, and coaching support,” as well as concerns that any Shift Supervisor had. (Tr. 49 [PM Baker]; Tr. 414 [Bjorland].)³⁵ They did not discuss hiring, firing, discipline, wage increases or decreases, or bonuses. (Tr. 415 [Bjorland], 515 [A. Pawlik], 618 [J. Pawlik], 823-824 [Futran].) The Shift Supervisors did not attend any actual management meeting, including meetings referred

³⁴ BluePearl stopped holding lead meetings as a result of the employer’s petition to exclude Shift Supervisors from the bargaining unit. (Tr. 218, 292 [TM Anderson].) The Union did not request that change. (Tr. 292 [TM Anderson].)

³⁵ The only purported lead meeting agenda in the record was admitted as a business record, as BluePearl was not able to authenticate it. (Tr. 639-641.) It therefore cannot be used to establish what was discussed at lead meetings because there is no corroborating testimony and there is no testimony explaining who created this document, when, for what purpose, or whether it was ever even distributed.

to as the “SALT” meeting, which are attended by the PM, APM, and TM. (Tr. 289 [TM Anderson: SALT stands for Super Awesome Leadership Team].) Ms. Futran’s attendance at weekly scheduling meetings with managers and Ms. Mensing’s attendance at quarterly Blood Bank meetings with PM Baker do not support finding that they are supervisors; the underlying job duties that necessitated their attendance at those meetings are not supervisory, as discussed above.

IV. CONCLUSION

For the foregoing reasons, NVPU respectfully requests that the Board deny BluePearl’s request for review of the Regional Director’s Decision and Order.

Respectfully submitted,

LEONARD CARDER LLP

A handwritten signature in blue ink, appearing to read "emj" followed by a stylized name, positioned above a horizontal line.

Emily M. Maglio
Elizabeth R. Gropman

Attorneys for NVPU

Dated: August 29, 2019

PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 years old and not a party to the within action; my business address is 1188 Franklin Street, Suite 201, San Francisco, CA 94109.

I hereby certify that on **August 29, 2019**, I caused the following document(s):

NVPU's Opposition to BluePearl's Request for Review of the Regional Director's Decision and Order Clarifying Unit.

to be filed electronically with the National Labor Relations Board, and a true and correct copy of the same was served on all interested parties in this action as follows:

Ronald K. Hooks, Regional Director
National Labor Relations Board, Region 19
915 2nd Ave., Room 2948
Seattle, WA 98174-1078
(ronald.hooks@nrlrb.gov)

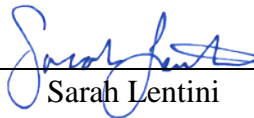
Bryan O'Connor
JACKSON LEWIS, PC
520 Pike Street, Suite 2300
Seattle, WA 98101
(Bryan.OConnor@jacksonlewis.com)

April Upchurch Frederickson
JACKSON LEWIS, PC
200 SW Market Street, Suite 540
Portland, OR 97201
(April.Fredrickson@jacksonlewis.com)

- ☒ **BY E-MAIL:** I caused the documents to be sent to the person at the electronic notification address(es) listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under the penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **August 29, 2019** at San Francisco, California.



Sarah Lentini