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November 14, 2019

Dennis P. Walsh, Regional Director  
NLRB  
100 Penn Square East  
Suite 403  
Philadelphia, Pennsylvania 19107

**Re: Lesisure Knoll at Manchester - Case No. 04-RC-249476**

Dear Mr. Walsh:

This firm is counsel to Leisure Knoll at Manchester (“Leisure Knoll”) in connection with the above referenced matter. Please accept this letter brief in support of Leisure Knoll’s request for review of the Regional Director’s October 31, 2019 Decision, pursuant to 29 C.F.R. §102.67(c). The issues decided were whether the Employer has rebutted the presumptive appropriateness of the employer-wide unit and whether one of the office employees (Diana Gregg) is a statutory supervisor. A hearing was held on October 16, 2019 during which testimonial and documentary evidence were presented by the parties. Thereafter, the Regional Director ruled that the Petition filed by SEIU Local 32BJ was granted and ordered “a self-determination election to determine whether the office employees wish to be included in the existing [maintenance workers] bargaining unit.” In so ordering, the Regional Director found

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that the employer-wide unit is appropriate, and a community of interest exists between the office employees and maintenance employees. The Regional Director also found that the Office Manager, Diana Gregg, did not have any of the indicia of supervisory status under Section 2(11) of the Act and, therefore, could be a member of the bargaining unit.

Several compelling reasons exist for the review of this decision. As will be discussed in more detail below, the decision relies upon Board decisions which are distinguishable from the facts of the instant case. Further, the decision mischaracterizes the record, leading to the improper conclusion that Leisure Knoll's office manager is not a statutory supervisor and that Leisure Knoll failed to rebut the appropriateness of the office and maintenance employee bargaining unit.

### **Procedural History and Background**

On October 7, 2019, Petitioner, SEIU Local 32BJ ("Petitioner" or "Local 32BJ") filed a Second Amended RC petition, stating that Leisure Knoll at Manchester ("Leisure Knoll" or the Employer) employees wished to be represented by Petitioner for purposes of collective bargaining. Petitioner's RC Petition also stated that SEIU Local 32BJ desires to be certified as representative of these employees. The unit involved is described as a "residual unit of all unrepresented employees not in the maintenance unit." Excluded from the unit involved would

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be “supervisors and guards as described in the Act.” Of note, this was the third Petition filed by the Union; the first two being withdrawn and re-filed after issues regarding the unit and potential members were raised by the Employer.

The Petition requested an “Armour-Globe election to add these employees to the maintenance unit.” In that regard, and through the Board, the Union indicated that it was seeking a wall to wall unit which would include all Leisure Knoll employees except supervisors and guards. Leisure Knoll employs a total of nine (9) people, four (4) of whom currently belong to a bargaining unit represented by SEIU Local 32BJ. Those four people are employed in the maintenance department and are covered by a Collective Bargaining Agreement (“CBA”) entered into between Leisure Knoll and Local 32BJ.

In a residual election, the employees who are not represented, but would have been appropriate for inclusion in the bargaining unit at the time of the election, may vote for inclusion into that unit. Such a “self-determination election permits employees sharing a community of interest with an already represented unit of employees to vote whether to join that unit.” In Re Unisys Corp., 354 NLRB 825, 829 (2009). Alternatively, the Board may first determine whether the petitioned for employees are appropriate for a separate unit. Id.

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The voting unit under the Petition has three employees. Apart from the Maintenance Department, Leisure Knoll employs the following employees, each in its front office operation: Mary D’Ime, Executive Director, Diana Gregg, Office Manager, Vickie Brechka/Smizlowicz, Accounts Payable and Michelle Biggin, Receptionist. The proposed residual unit is comprised of Diana Gregg, Vickie Brechka/Smizlowicz, and Michelle Biggin. Leisure Knoll asserted three objections to the appropriateness of this unit: (1) Diana Gregg is appropriately excluded from the bargaining unit as she is a “supervisor” as that term is defined by the Act and applicable case law; (2) office clericals are categorically excluded from rank and file bargaining units; and (3) the proposed residual unit does not share a “community of interest” with the maintenance employees’ unit. These objections were further analyzed via a supplement to Leisure Knoll’s Position Statement.

A hearing was held before Hearing Officer, Mary Leach, on October 16, 2019. At the hearing, Tony Silva, Union Representative, appeared on behalf of the Union and Stacy Landau, Esq. appeared on behalf of the employer, Leisure Knoll. Testimony was taken from Leisure Knoll’s Community Manager, Mary D’ime, as well as Diana Gregg, Leisure Knoll’s Office Manager. In addition to Leisure Knoll’s Position Statement, Leisure Knoll entered the following documents into evidence without objection by the union:

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- 1) Diana Gregg's 2018-19 Annual Employee Review;
- 2) Victoria Smialowicz's 2018-19 Annual Employee Review – Self Evaluation (indicating Diana Gregg as her supervisor);
- 3) Victoria Smialowicz's 2018-19 Annual Employee review – Supervisor Evaluation (conducted by Diana Gregg);
- 4) Leisure Knoll's Accounts Payable job description;
- 5) Leisure Knoll's Front Desk Receptionist job description;
- 6) Michelle Biggin's 2018-19 Annual Employee Review – Supervisor evaluation (conducted by Diana Gregg)
- 7) Maintenance department responsibilities; and
  
- 8) Table of Cases, each submitted by the Employer.

No post-hearing briefing was permitted. As such, all remaining arguments were placed on the record prior to the closing of the hearing via closing statements. The Regional Director issued his decision on October 31, 2019.

## **ARGUMENT**

### **I. Diana Gregg Should Have Been Deemed a Statutory Supervisor**

A bargaining unit is not appropriate if it includes a supervisor or management official. 5 U.S.C. §7112(b)(1). Diana Gregg is employed as a supervisor as that term is defined by the NLRA and relevant case law and should not be included as part of the bargaining unit. Pursuant

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to 29 U.S.C. § 152(11), supervisors are not appropriately included in a bargaining unit. The purpose of this bar is to avoid division of loyalty between management and the union. The Act defines “supervisor” as follows:

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

29 U.S.C.A. § 152(11)(West).

The text of § 2(11) of the Act quoted above sets forth a three-part test for determining supervisory status. Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,” and (3) their authority is held “in the interest of the employer.” N.L.R.B. v. Kentucky River Cmty. Care, Inc., 532 U.S. 706, 712–13 (2001), citing NLRB v. Health Care & Retirement Corp. of America, 511 U.S. 571, 573–574, (1994).

Diana Gregg supervises Michelle Biggins and Victoria Smialowicz, participating in and performing their annual evaluations, available to receive their grievances, and with the authority to assign work to them when necessary. Ms. Gregg steps into the Community Manager role in

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her supervisor, Mary D'ime's absence, with the authority to release employees from work if sick. Though discipline, hiring and firing is rare, Ms. Gregg is part of the process, participating in interviews and giving her feedback on candidates, and even reprimanding an employee who was not performing her given duties. Of the office employees, Ms. Gregg is the only one whose supervisory attributes were evaluated in the annual employee evaluation. As will be discussed in more detail below, the record supports Ms. Gregg is a statutory supervisor who should not be permitted to be in the bargaining unit.

**A. Assignment and Responsible Direction**

The Board's analysis of the supervisory factors neglected to recognize the evidence supporting the indicia of Ms. Gregg's supervisory authority. With respect to assignment and responsible direction, the Board concluded that the employer's reliance on the supervisee's job descriptions, which each indicate they must "perform any other duties requested by the Office Manager," was insufficient evidence. See Decision at p. 5-6. The Board reasons "there is no evidence that the Office Manager was held accountable for the quality of the other office employees' work." It is unclear what relation that fact has to any applicable standard. It is especially irrelevant where the record was clear that each of the employees were strong performers and, thus, there did not arise an opportunity for Ms. Gregg to be held accountable for

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her subordinate's conduct. See T26:4-7 (Q: [H]ave you ever had much of a problem with the performance of Vickie or Michelle that's been reported to you by Diana? A: No, it's a good team.)<sup>1</sup>

The Board's conclusion that Ms. Gregg being named as the supervisor on the evaluations is insufficient erroneously concludes this as mere "paper authority." This evidence demonstrates it is Gregg who evaluated these employee's performance, managed operations of the office, and provided mentoring to those she supervised. See T23:17-22 (Q: So teaching others is part of Diana's responsibilities. A: Yes. Q: And overseeing office operations is part of – Yes.). Far from mere paper authority, the record demonstrated that Gregg had authority in D'ime's absence, to, for example, allow the employees to go home or to make other day to day decisions. None of these significant factors were rebutted by the Union. In fact, Diana Gregg, similar to D'ime and Jack Gregg, both of whom are acknowledged statutory supervisors, cannot take significant actions without the approval of the board. If this statutory factor turned on whether the employee had authority without consulting the board, none of these three would be considered statutory supervisors.

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<sup>1</sup> The transcript for the October 16, 2019 hearing will be referenced herein by "T" followed by the page number and line numbers being identified.

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Finally, as with many other factors analyzed herein, the record acknowledges there are few opportunities for such authority to be exercised within this organization. When asked if there has been a time extra duties had to be assigned, Ms. Gregg replied, “I mean, it’s rare.” See T88:1-4. In this regard, the record is clear Ms. Gregg has the authority to dole out additional responsibilities on the occasion it is required.

**B. Discipline**

Similar to the analysis under Section A, the Board erred in concluding there was insufficient evidence that Gregg has the authority to discipline. Reasoning the lack of a paper write up where Ms. Gregg had disciplined another employee regarding his job performance, the Board’s decision failed to recognize her job description, her annual review, testimony that she had such authority and the evidence that write ups have not historically been part of Leisure Knoll’s procedures. See T114:2-7 (Q: What type of discipline happens at Leisure Knoll for the employees? Is there a system? Like, is there a write-up, is there a suspension? A: If someone were, yeah, I believe that they would be written up if there was something – we don’t have it, so – you know, it’s just so rare that it happens.). Indeed, the record contains several references like this, speaking to the small and informal nature of the Leisure Knoll operation.

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Further, Ms. Gregg herself even acknowledges she is involved in the discipline process. See T86:13-15 (Q: Are you involved in the process of giving out discipline? Like, if there's a problem at work, are you involved in that meeting if that's to occur? A: It depends on what it is.). Indeed, Ms. Gregg alone disciplined an employee who was not performing her job duties adequately. See T87:4-9.

### **C. Other Supervisory Indicia**

The Board's decision erroneously asserts that Ms. Gregg's evaluation of those she supervises is insufficient because her evaluations do not necessarily affect the wages or job status of those other employees. Ms. D'ime's evaluations do not necessarily affect wages or job status directly either, as only the Board has the discretion to set compensation. As managers of the community budget, the Board must necessarily determine whether the budget will allow for wage or other compensatory increases. See T72:16-25 (D'ime testifies the board decides compensation based upon the budget.). It is reasonable to infer the Board's involvement in the evaluatory process takes the input of the evaluations into consideration when making decisions on compensation.

Further, the record reflects that Ms. Gregg attends interviews with new candidates on the rare occasion they occurred (given the small nature of the operations) and gives her feedback on

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the candidate. See T36:11-16 (D’ime’s testimony that during her 3 ½ year tenure, only two part-time employees were hired and no permanent employees) and one maintenance employee was terminated. Only Ms. Gregg attended those interviews, not Ms. Biggins or Ms. Smialowicz. The record is clear that Ms. Gregg’s feedback was part of the hiring decision. Id. at T111:17-20.

The Board’s decision focuses on the lack of examples of discipline and adjusting employee grievances but fails to recognize that is not because Ms. Gregg lacks authority, but rather because these situations rarely arise. See T115:21-23 (Q: What about any issues amongst the office employees with each other? A: We don’t have those.). In fact, Ms. D’ime testified regarding examples of Ms. Gregg’s decision making and judgment, “At this moment, I can’t think of anything. But that doesn’t mean there aren’t any.” She went on to confirm, however, “[w]hen things come up that need a decision, I always felt that Diana was able to make it and carry it through and make a good decision.” Id. at T60:21-24 Ultimately, a statutory “supervisor” means any individual having authority, making the lack of examples where that authority is exercised non-dispositive where, as here, the lack of such examples is merely indicative of the nature of the overall operations, not of Ms. Gregg’s lack of authority.

#### **D. Secondary Indicia**

The Board's reasoning under this category rests on its conclusion that Ms. Gregg's significantly higher salary than those she supervises, is a result of her years of service and not her job role. See Decision at p. 8. The record does not support such a conclusion. Instead, the record makes clear that longevity may be a factor the board considers when making compensatory decisions, but Ms. D'ime surmises it is more so for short-term employees than long term ones. See T49:23-T50:3. Moreover, it belies common sense to conclude that an office manager should have equivalent salary to a front desk receptionist, regardless of the years in the position, simply by virtue of the job responsibilities and training and expertise required.

In conclusion, the record supports that Ms. Gregg is a statutory supervisor and not appropriately included in this unit.

#### **II. Community of Interest**

The unit of office employees does not share a community of interest with the already represented maintenance employees, making an Armour-Globe election inappropriate. Whether there is a community of interest depends on factors including: whether employees sought are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work; are functionally integrated with the other employees; have frequent

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contact with other employees; interchange with other employees; have distinct terms and conditions of employment and are separately supervised. PCC Structurals, Inc., 365 NLRB No. 160 (2017). Even in an employer-wide unit, the unit is inappropriate where the interests of the classification are disparate from the other employees to the extent they “cannot be represented in the same unit.” Airco, Inc., 273 NLRB No. 53 (1984). It is the employer’s burden to rebut the presumption of the unit’s appropriateness, which can be done by showing evidence regarding:

the lack of central control over daily operations, the extent of local autonomy, the similarity of skills, functions, and working conditions; the degree of employee interchange and the history of collective bargaining.

D&L Transportation, 324 NLRB No. 31 (1997).

However, some circuit have rejected the single plant presumption, declining to follow the Board’s direction in that regard. See e.g. N.L.R.B. v. Cell Agr. Mfg. Co., 41 F.3d 389 (8th Cir. 1994).

A proposed wall to wall unit was appropriate when the unit employees reported to the same management and performed the same work, such that they shared a community of interest. State of Delaware, Department of Health and Social Services, Plaintiff in Error v. Public Employment Relations Board, Defendant in Error v. Delaware Public Employees AFSCME Council 81, AFL-CIO, Defendant in Error, III DE PERB 1953 (2000). Unlike State of

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Delaware, in the instant case, the proposed unit members do not at all perform any of the same work nor do they report to the same manager.

In this regard, the Board erred when concluding that the employees of Leisure Knoll “share traditional community of interest factors, including common overall supervision, common terms and conditions, and functional integration.” See Decision at p. 9. The decision asserts the maintenance employees ultimately report to the Community Manager, making all employees have a common supervisor. That is not supported by the record and in fact is refuted by it. See T32:6-10 (Q: Do you [D’ime] ever supervise the maintenance people? A: Not directly, no. A: So each group has a separate supervisor, and they generally operate separately? A: Generally, yes.). Ms. D’ime is only generally aware of the job description of the maintenance employees, who report directly to the Maintenance Manager. Were the fact that the Community Manager supervises the Office Manager and Maintenance Manager dispositive to common supervision, it is difficult to imagine a business where there would not be common supervision. In any business, the department managers report to some ultimate manager, perhaps a Chief Executive Officer, but the existence of an ultimate supervisor should not be an indicator of common supervision as that is being analyzed herein.

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Next, the reliance on G.C. Murphy Company, 171 NLRB 370, 371 (1976) in the decision in support of the holding that office clericals are appropriately included in small bargaining units, fails to recognize the additional analysis conducted. Specifically, in concluding that the office clericals should be included in a noncompany-wide unit, the Board reasoned “in view of the relatively small employee complement having similar working conditions and related, overlapping work functions, that office clericals and merchandise girls share a community of interest with other unit employees.” Id. (emphasis added). The office clericals in G.C. Murphy spent a portion of their time working in the same physical space, the office clericals spending all their time in the office and the merchandise girls in the unit spending one-third of their time in the office. Id. Moreover, the office clericals had initially been hired as sales girls before assuming their current roles. Id.

Similarly, the Board’s reliance on Berenson Liquor Mart, 223 NLRB 1115 (1976) for the same proposition as G.C. Murphy is misplaced. This case involved a unit including sales personnel, cashiers, and stock clerks as well as courier, warehousemen, drivers and outside salesmen. Id. The premise of the analysis is Board policy to include office clericals in “small retail bargaining units.” Id. (emphasis added). The office clericals in Berenson worked in the store at times where the sales employees worked and were transferred to sales positions during heavy season.

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Unlike in G.C. Murphy, the Leisure Knoll office clericals do not have similar working conditions or overlapping work functions. In light of the job descriptions and discussion of responsibilities in the record, there is absolutely no overlap in work functions between the office and maintenance employees. See T31:16-18 (Q: Do the maintenance people ever substitute in for the office personnel, or vice versa? A: No.). Contrary to Berenson, no Leisure Knoll employees are ever transferred to the other department nor do they work in the same physical space. Given the office employees are responsible for things like answering phones, accounts receivable/payable, ordering office supplies and record keeping while maintenance is responsible for repairing common areas, snow removal, landscaping and janitorial tasks, there is literally no overlap between the two.

The decision asserts there is a degree of functional integration between the office and maintenance employees because the homeowners notice maintenance issues by contacting the office. This mischaracterizes the record, where it reflects that emergency calls are the only times when the office contacts maintenance directly and emergencies are rare, estimated to be zero out of the 275 calls received per quarter. See T31:3-9. For non-emergency calls, they are input into an automated computer system, with no contact made between the office and maintenance. In fact, Ms. D'ime testified that on a daily basis, the maintenance department rarely has interactions with the office personnel. Id. at T31:12-15.

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The Leisure Knoll office clericals who share no overlapping work and rarely interact should not be included with the maintenance workers.

Respectfully submitted,

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