

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 25
SUBREGION 33

BROADSTEP ACADEMY-ILLINOIS, INC., f/k/a
WILLOWGLEN ACADEMY-IL, INC.¹

Employer

and

Case 25-RC-259155

AFSCME (THE AMERICAN FEDERATION OF
STATE, COUNTY & MUNICIPAL EMPLOYEES)
COUNCIL 31, AFL-CIO²

Petitioner

DECISION AND DIRECTION OF ELECTION

Petitioner seeks to represent a unit of all full-time and regular part-time registered nurses (RNs), qualified intellectual disability professionals (QIDPs), behavior consultants (BCs), teachers and counselors employed by the Employer at and out of its main building/facility located in Freeport, Illinois. The unit sought by Petitioner consists of approximately 13 employees: three RNs, two QIDPs, two BCs, five teachers and one counselor. The teachers and counselor work primarily at the special education school located on the single building Freeport facility premises, while the RNs, QIDPs and BCs perform work at the school as well as at nearby group homes operated by the Employer. The parties stipulated that all of the petitioned-for employees are professional employees within the meaning of Section 2(12) of the Act. Petitioner seeks a self-determination election under the Board's *Armour-Globe*³ doctrine to determine whether these employees wish to be included in the existing non-professional bargaining unit of direct support providers (DSPs), paraprofessionals, food handlers and maintenance employees, and administrative assistants. In this regard, the parties stipulated that in the event any of the petitioned-for employees are not found to be supervisors, they possess a sufficient community of interest among themselves as well as with the existing non-professional unit employees to comprise either a stand-alone unit of professional employees or a combined unit of professional and non-professional employees.

I. ISSUES AND PARTIES' POSITIONS

The only issue raised by the parties is whether the petitioned-for employees are statutory supervisors as defined by Section 2(11) of the Act. The Employer contends that the petition should be dismissed on the ground that all of the petitioned-for employees are statutory

¹ The Employer's name appears as amended at the hearing.

² The Petitioner's name appears as amended at the hearing.

³ *Globe Machining & Stamping Co.*, 3 NLRB 294 (1937); *Armour & Co.*, 40 NLRB 1333 (1942).

supervisors and thus ineligible to vote in the election based on their authority to assign work, responsibly direct, and reward other employees; effectively recommend the hire, discipline, up to and including discharge, and reward of other employees; and other secondary indicia of supervisory status. Petitioner contends that the petitioned-for employees are not supervisors under the Act, and that the petitioned-for unit is an appropriate unit for the purposes of collective bargaining.

II. DECISION

A hearing officer of the Board held a hearing in this matter and the parties orally argued their respective positions prior to the close of the hearing. As explained below, based on the record and relevant Board law, I find that the Employer has not satisfied its burden of proof regarding the petitioned-for employees, and I conclude that they are not statutory supervisors and are eligible to vote. They do not exercise authority in the interest of the Employer requiring the use of independent judgment to assign, responsibly direct, or reward other employees, or effectively recommend the hiring, discipline or reward of other employees required for a finding of supervisory status, and their role in the evaluation procedure does not affect the job status or tenure of other employees. Thus, I find that the petitioned-for unit of RNs, QIDPs, BCs, teachers and counselors are professional non-supervisory employees who constitute an appropriate voting group for a self-determination election.

Accordingly, I am directing an election in this matter among the professional petitioned-for employees at the Employer's Freeport facility to determine whether they wish to be represented as a stand-alone unit or included in the current unit of non-professional employees represented by Petitioner.

III. THE EMPLOYER'S OPERATIONS

The Employer provides behavioral health and medical services at and out of its Freeport, Illinois facility, including residential treatment and academic instruction to individuals with intellectual and developmental disabilities, mental illness, and other diagnoses that may impact their behaviors. According to the Employer's website, of which I take administrative notice, the Employer maintains other facilities in New Jersey, South Carolina, and Wisconsin. The Freeport facility consists of a single building in which the Employer operates an eight-room Illinois State Board of Education-approved private special education school and an adult vocational day program and maintains administrative offices. The Employer operates 10 group convalescent homes located outside of the Freeport facility including five child/adolescent homes and five adult homes called community integrated living arrangements (CILAs). Eight of the ten homes (three child/adolescent homes and five CILAs) are currently in operation. State Director Michelle Young is in charge of the Freeport facility and reports to Chief Operating Officer Robert Conrad who does not work at the Freeport facility. Young is the direct report supervisor for Human Resources (HR)

Manager Kathleen Miller;⁴ Quality Assurance (QA) Manager Kelly Bismark-Scott;⁵ Principal Lee Genandt; and the Clinical Director position which has been vacant since about August 2019.⁶ The petitioned-for RNs, QIDPs, and BCs normally report directly to the Clinical Director, however, since the Clinical Director position has been vacant they have been reporting to Young. The teachers and counselors report directly to Principal Genandt.

The residents in the group homes all have IQs less than 70 as well as diagnosed mental and behavioral illnesses such as attention deficit disorder (ADD), oppositional defiance disorder (ODD), bipolar depression, and psychotic disorder. They are not able to be independent and require round-the-clock care to monitor their behaviors and assist in their activities of daily living (ADLs) such as dressing, bathing and eating. Medical services are also provided to residents who are commonly prescribed medications for chronic medical conditions such as epilepsy, seizure disorders, and various genetic conditions. Each resident has a behavioral intervention plan (BIP), related to required behavioral services, and a medication administration record (MAR), related to medical services, in place as discussed further below. The child/adolescent homes currently service approximately 19 children and adolescents ages six to 21, and the CILAs currently service approximately 36 adults ages 18 and above. The homes are managed by two house managers (HMs), formerly called residential supervisors, whose responsibilities are divided equally among the eight homes. The HMs normally report directly to the Employer's Clinical Director⁷; however, since the Clinical Director position has been vacant, they have been reporting to Young. The parties stipulated that the HMs are statutory supervisors based on their authority to assign and responsibly direct other employees.

Principal Genandt is in charge of the special education school in which academic instruction as well as counseling, occupational and speech therapy, and nursing services are provided. Currently five classrooms are being used to provide services to approximately 23 students.⁸ A majority of the students reside in and are transported from the group homes while a few are day students who commute to and from the school. There is one teacher per classroom with generally five to ten students, depending on the number of aides (paraprofessionals and school DSPs) assigned to each classroom. Each student is educated pursuant to an annual individualized education plan (IEP) which is created, maintained and updated as needed between the school district and school staff (primarily teacher, principal and counselor) as well as the student's parent/guardian. The IEP is a guide for school staff to follow to educate the students while ensuring they receive the services, support and accommodations they require. It sets forth the functional levels of the student, incorporates the student's BIP and counseling plan, and provides an overall educational plan for the school year including the level of classroom support required for each student from a paraprofessional and/or school DSP; speech and language,

⁴ Miller works between the Freeport facility and the Wisconsin facility.

⁵ The QA Manager oversees administrative assistants and maintenance employees who are part represented in the existing bargaining unit in question but are not related to this proceeding. This position is also referred to as Compliance Liaison.

⁶ Mishea Boggs was the last Clinical Director. According to the record, Young is transitioning into the Clinical Director position and will be replaced by David Hicks as State Director.

⁷ The most recent HM job description states that the HMs report directly to the Executive Director.

⁸ The school can accommodate a maximum of 48 students.

occupational and other therapy services; individual counseling services; and nursing services. Generally, at least one paraprofessional and one school DSP are assigned to each classroom. However, individual students often require one-on-one paraprofessional and/or DSP support. As further discussed below, the paraprofessionals assist in the classroom with a focus on academic instruction per the students' IEPs while the DSPs assist in the classroom with issues related to student behaviors and safety. However, the duties of the paraprofessionals and DSPs in many ways overlap regarding student interaction and assisting them with ADLs throughout the school day.

Principal Genandt is also in charge of the Employer's adult vocational day training program at the Freeport facility which provides vocational training for adults in maintaining skills learned during special education school years to grow into a vocation. There are currently approximately 36 adults in the adult vocational program. Vocational day training students no longer have IEPs; rather, services provided in the program are guided by their BIPs which are monitored by the QIDPs and BCs as discussed further below. Principal Genandt is assisted in this program by DSPs assigned to the program.⁹

A. Bargaining History

Petitioner has represented direct care staff employees employed at and out of its Freeport facility since 2018 including those classified as DSPs, paraprofessionals, food handlers, maintenance employees, and administrative assistants.¹⁰ The most recent collective bargaining agreement (CBA) is effective from May 2, 2019 through October 28, 2020. The petitioned-for employees have never been represented by a labor organization.

B. The Petitioned-for employees

All of the petitioned-for employees are paid by salary, except for the RNs who are paid hourly, and are eligible for benefits as are all non-represented full-time employees regardless of supervisory status. All of the petitioned-for employees accrue vacation time at the same rate as the Employer's management employees, except for the teachers and counselor who, with the Principal, are covered by a separate vacation policy based on the academic school year. All of the petitioned-for employees have offices located at the Freeport facility; however, as further described below, they spend most of their work time away from their offices in direct contact with the group home residents and students.

1. RNs

The RNs report to the Clinical Director and are primarily responsible for monitoring the MARs of the group home residents and students. There are approximately 85 individuals who receive round-the-clock scheduled prescription medications and a large part of the RNs' work

⁹ The record indicates that a bargaining unit employee classified as a day training supervisor, also known as day vocational program coordinator, used to be in charge of this program.

¹⁰ A Certification of Representative issued under my name on October 25, 2018 in Case 25-RC-227858.

includes administering medications to them when they are in school or the adult vocational program and after school at their group homes, as well as overseeing medication administration by other employees. Two RNs work primarily at the school from 8:00 a.m. to 4:30 p.m. and one RN works at the school and among the group homes from 11:00 a.m. to 7:00 p.m. They also rotate after-hours on-call duties for the group homes. They are required to possess an RN license and any licensing requirements required by the State. The average hourly wage rate for RNs is \$27.00.

The Employer maintains healthcare procedures and policies regarding medication administration which are in line with Illinois state nursing regulations including Rule 116 which designates nurses as “nurse trainers” concerning the delegation of tasks related to medication administration. Accordingly, all of the RNs herein have undergone mandatory state training to become Rule 116 nurse trainers. As nurse trainers, the RNs train direct care staff, mainly the DSPs, in medication passing. The DSPs are then required to pass a State-administered test to become authorized medication passers. In overseeing the DSPs’ medication administration duties, the RNs must document all medications administered to each resident/student on all shifts. RNs are also mandated by Rule 116 as well as Employer policies and procedures to report all medication administration errors by any employees, including themselves. In this regard, when the DSPs commit errors in passing medications or following proper medication administration protocols, the RNs report such errors by completing a non-disciplinary “clinical administrative supervision training and guidance” form which results in retraining by an RN. The RN completing such a report meets with the DSP to discuss the matter, usually along with HR Manager Miller. This is referred to as a counseling. Training/counseling forms are typically signed by the RN as nurse trainer; by a direct supervisor (HM or Principal) depending on the DSP’s work location (group home or school); and by Young and/or Miller and placed in the employee personnel file. The Employer is subject to citation by the state for violations of Rule 116.

Besides directing the DSPs in medication administration duties as described, the record contains limited evidence that the RNs direct DSPs in other areas such as dietary needs of the residents/students and issues related to health and safety. For example, the RNs oversee physical restraints placed on residents/students as directed by HMs, QIDPs, BCs, teachers and counselors. There is some limited record evidence that they can recommend discipline of a DSP to a HM, mostly in cases involving medication administration errors in which a mandatory training/counseling report has been completed. There is no record evidence demonstrating that the RNs can issue discipline to other employees on their own. The RN job description references supervisory responsibilities as “[i]ndirectly supervises all staff during their provision of healthcare service implementation to ensure optimum health, safety, and wellbeing for all consumers.”

2. *QIDPs and BCs*

The work of QIDPs and BCs is similar and intertwined. They report to the Clinical Director and are primarily responsible for crafting, implementing and monitoring BIPs as well as overseeing behavioral programming at the group homes and school. This includes monitoring

residents/students at the group homes and school; working with HMs in the group homes and school staff regarding programming issues and implementation strategies¹¹ for reaching individual behavioral goals; and contacting parents and appointed guardians to discuss behavioral issues. Two QIDPs and two BCs work 8:00 a.m. to 4:30 p.m., Monday through Friday, plus one late night per week. They are also on-call in 24-hour shifts for emergencies at the group homes to assist and provide guidance regarding behavioral issues such as a requested change in routine for a resident – most of these issues are resolved via phone after consulting with the designated HM. The record demonstrates that all BCs are qualified as QIDPs, and they all possess bachelor's degrees and are State-certified by the Illinois Department of Human Services.¹² School counselor Judy Cunningham is also qualified as a QIDP and fills in as needed; she currently spends 40 percent of her time working as a QIDP. Under the Illinois Department of Child and Family Services licensing requirements, QIDPs are also designated as “qualifying supervisors” responsible for monitoring the operations and personnel at group homes. If a QIDP is found in violation of these licensing requirements, the Employer is subject to lose its license and privileges to operate group homes. The average annual salary for the QIDPs and BCs is \$38,000.

While the QIDPs and BCs spend most of their time at the group homes, they also regularly visit the school and adult vocational program and work with school staff in overseeing and implementing the BIPs as they relate to student IEPs. In this regard, they provide direction related to ongoing behavior issues and implementation of BIPs to all group home and school staff but mainly the DSPs who assist most directly with the residents and students. The QIDPs and BCs also assist management in training DSPs at the time of hire and continuing throughout their employment regarding behavior-related matters. There is some record evidence that the QIDPs also lead team meetings along with HMs for the group homes. Like the RNs, the QIDPs and BCs have completed non-disciplinary training and counseling reports mostly in the form of short-handwritten notes related to DSP job performance. In this regard, the record contains an example of a QIDP reporting a DSP who refused to assist with a resident transport and another example of a BC reporting a DSP who was texting on a cell phone during work. There is one other example in the record of a QIDP completing a “training documentation form” similar to the RN training/counseling form described above recommending training for a DSP for documentation, communication and overall performance duties. There is also one example in the record of an unsigned correction notice¹³ completed by a QIDP and a BC recommending the suspension of a DSP who cut a resident's hair while sleeping. The QIDP job description references supervisory responsibilities as “responsible for the active and timely management and direction of all direct and/or indirect reports and all functions within his/her treatment environment...[and] responsible to participate, as requested, in the interviewing, selection, evaluation and development of all program-level employees. ...” The BC job description, like the RN job description, references supervisory responsibilities as “[i]ndirectly supervises all staff

¹¹The Employer primarily utilizes a replacement therapy plan which focuses on target replacement behaviors for unwanted behaviors.

¹² The QIDP job description states that QIDPs must possess a master's degree in human services or a related field. The BC job description states that BCs must be State-licensed and board-certified.

¹³ Correction Notices are the official disciplinary forms used for the DSPs and paraprofessionals.

during their provision of service implementation to ensure optimum care, safety, and wellbeing for all consumers.”

3. *Teachers*

The teachers work exclusively at the school and report directly to Principal Genandt. As noted, there is one teacher per classroom and the majority of the teacher’s time is spent in the classroom providing educational instruction pursuant to student IEPs. Teachers have no authority to change existing IEPs; rather, IEP modifications require parental/guardian consent and a formal IEP process meeting. They also spend some time in their offices completing paperwork and meeting with students, parents/guardians and other staff. Their regular work hours are 7:30 a.m. to 3:30 p.m. and they rotate weekly on-call hours for the purpose of receiving call-offs from paraprofessionals and school DSPs to ensure proper paraprofessional and DSP coverage at the school and group homes. They are required to possess a bachelor’s degree and special education certification by the State. The average annual salary for teachers is \$43,000.

The teachers work with the same students for the duration of the school year and generally with the same paraprofessionals and school DSPs. Teachers are not involved in any scheduling of paraprofessional or DSP regarding hours or classroom placement. Rather, scheduling is accomplished by management at the time of hiring. As noted below, the paraprofessionals and school DSPs spend 85 to 90 percent of their time performing daily tasks which are routine in nature and the teachers provide routine instruction to paraprofessionals and school DSPs assigned to their classroom related to student IEPs. Teachers also instruct paraprofessionals and school DSPs to assist them in placing restraints on students when necessary as a last resort safety measure. Teachers report incidents and sometimes make recommendations to Principal Genandt regarding the deficient performance of paraprofessionals and school DSPs. In this regard, Principal Genandt has placed paraprofessionals on corrective action plans (CAPs) as recommended by a teacher and has communicated with the involved teacher regarding employee performance and progress while on the CAP. In all cases, Principal Genandt is responsible for writing, issuing and resolving all CAPs. There is no evidence that the teachers have made any recommendations resolving CAPs one way or another or that any CAPs have resulted in any discipline, suspension or discharge of the paraprofessionals, or that a teacher has recommended any such action. There is record evidence that on-call teachers sometimes verbally report incidents, mostly related to paraprofessional and DSP coverage issues, to Principal Genandt who independently decides whether to do nothing, counsel, or issue discipline to the offending employee. As discussed further below, teachers are involved in the annual employee performance evaluations of the paraprofessionals and school DSPs. The teacher job description references supervisory responsibilities as “responsible for the active and timely management and direction of all direct and/or indirect reports and all functions within his/her treatment room environment...[and] responsible to participate, as requested, in the interviewing, selection, evaluation and development of all program-level employees in accordance with [Employer] policies and procedures.”

4. *Counselors*

Counselor Judy Cunningham works primarily at the school and reports directly to Principal Genandt. She primarily assists and monitors students in furtherance of their social and emotional goals related to the classroom. In this regard, she provides individual, small group, and large group counseling to students as well as adults in the vocational program. She is also responsible for regular reporting duties to state case workers concerning certain individuals managed by the Illinois Department of Children and Family Services. She works during school hours from 8:00 a.m. to 4:00 p.m. Per the school counselor job description, counselors are required to possess a master's degree in school counseling or related program as well as meet all state licensing and certification requirements. As noted, Cunningham is also qualified as a QIDP and currently spends about 40 percent of her time in that position. Cunningham's annual salary is \$43,000.

Cunningham meets daily with Principal Genandt, Young, QA Manager Bismark-Scott and sometimes an RN in a "hand-off meeting" to review the overall status of individual students. She also regularly consults with QIDPs and BCs related to BIPs. During the school day, she provides direction to paraprofessionals and school DSPs to assist with social and emotional therapeutic strategies in and outside of the classroom. For example, Cunningham has provided direction to paraprofessionals and school DSPs to assist her with students in conducting therapeutic lessons or playing therapeutic games related to the student's social and/or emotional goals. She also directs the paraprofessionals and DSPs in assisting her with group counseling activities. As a counselor, Cunningham does not have as much classroom interaction with the paraprofessionals and school DSPs as the teachers. The record contains one example of Cunningham verbally reporting an incident of deficient performance by a school DSP to Principal Genandt. In this example, Cunningham was implementing a strategy to help a student who wanted to go home to focus on something else and the DSP did not agree with Cunningham's strategy. Without making any recommendation, Cunningham verbally reported the incident to Principal Genandt who decided to speak with the DSP without issuing discipline. The counselor job description, like the RN and BC job descriptions, references supervisory responsibilities as "[i]ndirectly supervises all staff during their provision of service implementation to ensure optimum care, safety, and wellbeing for all consumers."

C. The existing bargaining unit employees

All of the non-professional represented employees are paid hourly and their wage and benefit rates are set by their CBA. Only the DSPs and paraprofessionals are in question as being supervised by the purported supervisors.

1. *The DSPs and Paraprofessionals*

DSPs are assigned to work in the group homes and at the Freeport facility school and adult vocational program. The DSPs assigned to work at the Freeport facility school and adult

vocational program are called school DSPs.¹⁴ They report directly to Principal Genandt and work during school hours from 7:00 a.m. to 3:00 p.m. The DSPs assigned to work among the group homes¹⁵ report directly to the two HMs and are scheduled in round-the-clock shifts, Monday through Friday, from 7:00 a.m. to 3:00 p.m.; 3:00 p.m. to 11:00 p.m.; and 11:00 p.m. to 7:00 a.m. The HMs work among the homes from 1:00 p.m. to 9:00 p.m., Monday through Friday, with on-call duties for outside hours. The record is not clear as to which residential staff covers weekend hours at the group homes. The DSPs who work in the group homes are not assigned to a single home; rather, like the HMs, they go back and forth between the eight operating homes as needed. The HMs are responsible for scheduling the DSPs among the homes and monitoring their attendance. There is some record evidence of a senior or lead DSP assigned to the group homes who acts as an assistant HM and is part of the existing non-professional bargaining unit. The average hourly wage rate for group home DSPs is \$13.

The school DSPs are usually assigned to the same classroom for the duration of the school year and work alongside teachers and paraprofessionals. As noted, like the paraprofessionals, they generally work with the same students in one classroom and receive routine direction from the classroom teacher as well as the school counselor as needed. They also assist with students in other classrooms as needed. Their primary responsibility is toward ensuring student safety and assisting students with ADLs. The DSPs assigned to work in the adult vocational program have the same duties and responsibilities and are additionally responsible for transporting adult vocational students from their CILAs to the program. The DSPs working in the group homes are primarily responsible for administering medications to residents under the direction of RNs and monitoring resident behaviors to ensure resident safety under the primary direction of the HMs with additional guidance from the QIDPs and BCs. The average hourly wage rate for school DSPs is \$13.

The paraprofessionals¹⁶ work exclusively at the school from 7:00 a.m. to 3:00 p.m. and report directly to Principal Genandt. They primarily assist teachers in the classroom in implementing student IEPs. In this regard, they spend the majority of their time working one-on-one with students to meet IEP goals. This includes setting out student work folders at the start of the school day; assisting students in completing lessons, worksheets, games and puzzles; keeping track of in-school therapy and counseling schedules; transporting students to gym class and other outside classes; and assisting students during snack time, quiet time, choir, and lunch time. Paraprofessionals are required to be certified by the Illinois State Board of Education. Some of the paraprofessionals possess two-year associate degrees. The average hourly wage rate for paraprofessionals is \$14 to \$15 per hour.

¹⁴ DSPs assigned to work in the classroom are also known as front-line educational specialists, and DSPs assigned to work in the adult vocational program are also known as front-line vocational specialists.

¹⁵ DSPs assigned to work in the group homes are also known as personal care aides (PCAs) and front-line workers.

¹⁶ Paraprofessionals are also known as front-line education specialists and classroom aides.

IV. BOARD LAW

Pursuant to Section 2(11) of the Act, 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 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. To qualify as a supervisor, it is not necessary that an individual possess all the powers specified in Section 2(11) of the Act. Rather, possession of any one of them is sufficient to confer supervisory status. *Chicago Metallic Corp.*, 273 NLRB 1677, 1689 (1985). The status of a supervisor under the Act is determined by an individual's duties, not by his title or job classification. *New Fern Restorium Co.*, 175 NLRB 871 (1969). The Board will refrain from construing supervisory status too broadly, because the inevitable consequence of such a construction is to remove individuals from the protection of the Act. *Quadrex Environmental Co.*, 308 NLRB 101, 102 (1992).

The burden of proving supervisory status within the meaning of Section 2(11) of the Act rests with the party asserting that such supervisory status exists. *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003); *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 121 S. Ct. 1861, 167 LRRM 2164 (2001). Thus, that party must show: (1) that the alleged supervisor has the authority to engage in any one of the supervisory functions enumerated above; (2) that the exercise of such authority is not of a merely routine or clerical nature, but requires the use of "independent judgment;" and (3) that the authority is exercised "in the interest of the Employer." See *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). The Board also held in *Oakwood* that to establish that an individual possesses supervisory authority with respect to any of the statutory functions, the individual must also exercise independent judgment in exercising that authority, which depends on the degree of discretion with which the function is exercised. The Board has explained that "to exercise independent judgment, an individual must 'at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.' 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.'" *Modesto Radiology Imaging, Inc.*, 361 NLRB 888, 888-89 (2014) (citing *Oakwood.*, supra at 687).

V. APPLICATION OF BOARD LAW TO THE FACTS OF THIS CASE

A. The Supervisory Status of the Petitioned-For Employees

There is no claim that any of the petitioned-for employees possess authority to directly hire, transfer, suspend, lay off, recall, promote, or discharge employees, or to adjust their grievances. The record is absent of any evidence that other employees report directly to the petitioned-for employees. Rather, the Employer primarily asserts that the petitioned-for employees are all statutory supervisors based on their authority to assign work, responsibly direct, and reward other employees; effectively recommend the hire, discipline, up to and

including discharge, and reward of other employees; and other secondary indicia of supervisory status.

1. *Assignment of Work*

The Board in *Oakwood* defined assigning work as “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*, supra at 689.

a. *Time*

There is no record evidence that the petitioned-for employees are involved in the scheduling of any employees. Rather, the record establishes that the group homes DSPs are scheduled by the HMs and paraprofessional and school DSP hours are determined by management at the time of hiring. Additionally, there is no evidence that any of the petitioned-for employees have any authority to approve schedule changes. The Employer has not established any exercise of supervisory authority regarding the scheduling other employees. See *Golden Crest Healthcare Center*, 348 NLRB 727, 728-730 (2006).

With regard to the purported authority of the on-call teachers to receive call-offs from paraprofessionals and DSPs and ensure proper coverage at the school and group homes, this does not establish supervisory authority where there is no evidence that teachers have any authority to request that off-duty employees come into work or that on-duty employees work overtime. The authority to assign overtime or to have off-duty employees come in to work may establish assignment authority within the meaning of Section 2(11), but only if the evidence shows that the putative supervisor can require employees to work overtime or come in when off-duty. *Entergy Mississippi, Inc.*, 357 NLRB 2150, 2156-2157 (2011); *Golden Crest Healthcare*, supra at 729 (2006); *Heritage Hall, E.P.I. Corp.*, 333 NLRB 458, 459 (2001).

b. *Place and Tasks*

In *Oakwood*, the Board found that emergency room charge nurses designated nursing staff to geographic areas within the emergency room. The Board found that this assignment of nursing staff to specific geographic locations within the emergency room fell within the definition of “assign” for purposes of Section 2(11). *Oakwood*, supra at 695. Here, the DSPs in the group homes are assigned as needed among the eight homes by the HMs. The paraprofessionals and school DSPs are assigned to specific classrooms and students for the entire school year by management at the time of hire. The paraprofessionals’ and school DSPs’ daily tasks are routine in nature; they spend 85-90% of their day doing the same things in assisting students in the classroom to ensure the students are safe and their IEPs are being properly administered. The same is true for the DSPs working in the group homes; they routinely assist with medication administration and ADLs as well as monitor behaviors to ensure the residents are safe and their MARs and BIPs are being properly administered. This may involve petitioned-for employees assigning a discrete task to a DSP or paraprofessional. However, such

assignments of these “discrete task[s]” in these circumstances is closer to “ad hoc assignments” described in *Croft Metals*, 348 NLRB 717, 721 (2006), rather than the emergency room assignments discussed in *Oakwood*. In *Croft Metals*, supra at 721, the Board found that the switching of tasks by lead persons among employees assigned to their line or department was insufficient to confer supervisory status. Here, the petitioned-for employees’ assignment of discrete tasks to DSPs and paraprofessionals is insufficient to confer supervisory status.

c. *Independent Judgment*

The Employer argues that petitioned-for employees use independent judgment in assigning and directing the paraprofessionals and DSPs. In *Oakwood*, the Board, consistent with *Kentucky River*, adopted an interpretation of “independent judgment” that applies to any supervisory function at issue “without regard to whether the judgment is exercised using professional or technical expertise.” The Board explained that “professional or technical judgments involving the use of independent judgment are supervisory if they involve one of the 12 supervisory functions of Section 2(11).” *Oakwood*, supra at 692. The Board then set forth standards governing whether the exercise of the Section 2(11) acts are carried out with independent judgment: “actions form a spectrum between the extremes of completely free actions and completely controlled ones, and the degree of independence necessary to constitute a judgment as ‘independent’ under the Act lies somewhere in between these extremes.” *Oakwood*, supra at 693. The Board found that the relevant test for supervisory status utilizing independent judgment is that “an individual must at minimum act, or effectively recommend action, *free of the control of others* and form an opinion or evaluation by discerning and comparing data.” *Oakwood*, supra at 693. (emphasis added). Further, the judgment must involve a degree of discretion that rises above the “routine or clerical.” *Oakwood*, supra at 693.

Here, there is scant record evidence regarding specific assignments made to DSPs in the group homes concerning tasks and residents. Unlike the RNs, QIDPs and BCs, who all possess advanced training and skills, the DSPs do not possess specific training or skills in various medical or behavioral areas. Their routine assignments in the group homes (medication administration, bathing, toileting, feeding) are generated by the HMs, not the RNs, QIDPs or BCs. Overall, the record does not support that the RNs, QIDPs or BCs working among the homes perform any detailed analysis of the DSPs’ abilities in relation to the residents’ needs to direct the DSPs in their duties. Additionally, as noted, the paraprofessionals and school DSPs are assigned to a specific classroom and remain with the same students for the entire school year; their overall tasks are largely defined by the IEP. There is no evidence that the teachers make any isolated reassignments of the paraprofessionals or school DSPs. The Employer has likewise not shown that teachers perform a detailed analysis of the paraprofessionals’ and school DSPs’ abilities in relation to the students’ needs. The record overall demonstrates that the paraprofessionals’ and DSPs’ assignments are routine in nature and based on their title, rather than any particular expertise, and the evidence is insufficient that the direction provided to them by the petitioned-for employees requires the use of independent judgment. In the spectrum set out by the Board, any further assignments by the petitioned-for employees of discrete tasks and the isolated temporary switching of tasks falls closer to “completely controlled” actions, rather than “free actions.” They do not involve a “degree of discretion that rises above routine or

clerical.” *Oakwood*, supra at 693. Thus, the assignment of tasks by the petitioned-for employees does not require the use of independent judgment.

2. *Responsible Direction and Discipline*

For direction to be responsible, the person directing must have oversight of another’s work and be accountable for the other’s performance. To establish accountability, it must be shown that the putative supervisor is empowered to take corrective action, *and* that there is a “prospect of adverse consequences” for others’ deficiencies. *Community Education Centers, Inc.* 360 NLRB 85-86 (2014); *Oakwood*, supra at 691-692, 695.

The first question is whether the Employer has established that the petitioned-for employees *direct* other employees within the meaning of Section 2(11). Regarding the petitioned-for employees’ work in the group homes, the RNs direct DSPs largely related to medication administration. In this regard, prescription medications are contained in the residents’ MARs and the RNs rely on the DSPs to chart all medications given to the MARs indicating that they have completed their tasks. While there is scant evidence related to specific direction provided to the group home DSPs by the QIDPs and BCs, the record establishes that the QIDPs and BCs inform DSPs, as well as the HMs, regarding behavioral issues related to resident BIPs. The overall record demonstrates that the HMs, not the QIDPs and BCs, are in charge of the day-to-day direction of the DSPs in the group homes. Likewise, the record demonstrates that the teachers and counselor will direct the paraprofessionals and school DSPs to perform certain tasks in the classroom when the teachers and counselor determine that such tasks are necessary. The evidence is insufficient to establish that the petitioned-for employees “direct” the paraprofessionals and or DSPs within the meaning of the definition set forth in *Oakwood*. *Golden Crest Healthcare Center*, supra at 730.

The next question is whether the Employer has established that any of the petitioned-for employees are *accountable* for their actions in directing the paraprofessionals and/or DSPs. I find that the Employer has not met its burden. The Employer did not offer any evidence that any of the petitioned-for employees have been adversely affected in any way based on the conduct of paraprofessionals or DSPs. There is no evidence of discipline to any of the petitioned-for employees concerning the deficient performance of any employees.

The Employer argues that state and licensing regulations governing the operation of group homes and special education school settings and administration of medications therein expressly require the performance of supervisory duties and obligations by the RNs and QIDPs and take precedence over any potential conflict with the Act’s definition and meaning of supervisory status. In this regard, the Employer specifically argues that it is subject to citation or loss of license by the state to operate its group homes and schools subject to compliance by the RNs and QIDPs relative to their direction to and “supervision” of the DSPs. This argument is misplaced and without merit. Such regulations relate to professional obligations of the RNs and QIDPs and have nothing to do with the purpose of the Section 2(11) supervisory exclusion, with its definitional language, or with the Board’s application of the provision. This does not make the RNs and QIDPs accountable for their actions in directing the DSPs. That such regulations

might reference “supervisory” skills does not make such nurses supervisors within the meaning of the Act, as argued by the Employer. See *Crittenton Hospital*, 328 NLRB 879, 879 (1999). (Finding such laws do not purport to in any way track the Act’s definition of a supervisor and the Board will not substitute the wording of any nurse practice acts for the Congressionally mandated requirements for supervisory status in the Act.)

I find that there is insufficient record evidence to establish accountability as contemplated by *Oakwood*. The record does not demonstrate that the Employer imparted clear and formal notice to any of the petitioned-for employees that they will be held accountable for the job performance of paraprofessionals or DSPs. See *Golden Crest*, supra at 731. The Employer has not met its burden to establish that the petitioned-for employees are accountable for their actions in *directing* the paraprofessionals or DSPs.

Regarding the disciplinary authority of the petitioned-for employees, under Section 2(11) of the Act, individuals are statutory supervisors if they have the authority, in the interest of the employer, to discipline employees 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. *Oakwood*, supra at 687. The Employer acknowledges that none of the petitioned-for employees possess authority to independently discipline other employees. Rather, the Employer argues that they are involved in the discipline procedure and possess authority and use independent judgment to effectively recommend discipline of the DSPs and paraprofessionals.

The RNs’ completion of “clinical administrative supervision training and guidance” forms regarding DSP deficiencies in medication administration is not evidence of disciplinary authority. The Employer acknowledges that such training/counseling forms are non-disciplinary; rather, they are merely recommendations for retraining. The CBA specifically provides that such “documented supervision and training is not considered by the Employer or the Union to be ‘discipline’” for purposes of the progressive discipline procedure in the CBA “but is instead considered to be the provision of additional training toward improvement.” That the RNs’ monitor medication administration and report deficiencies of the DSPs in passing medications which may result in the revocation of a DSP’s medication passing privileges does not confer supervisory status on the RNs. Rather, the record more clearly demonstrates that resident medical care is ultimately and undeniably the direct responsibility of the RNs; the RNs are required under Rule 116 as well as the Employer’s policies and procedures to report all medication errors, and there is no record evidence that any direct care staff employees have been discharged related to medication administration issues. These actions are merely reportorial; the HMs and/or Young, not the RNs, determine all discipline related to DSPs. As noted, the record is devoid of any evidence that any RNs have been disciplined for failures of DSPs related to medication administration issues. Moreover, there is record evidence that management can override an RN’s training recommendation. For example, the record contains an example of a RN who revoked a DSP’s medication passing privileges and recommended retraining for administering medication to the wrong resident. After the RN retrained the DSP and approved her to pass medications again, Young and QA Manager Bismark-Scott revoked the DSP’s medication passing privileges and ordered additional retraining by an RN. Finally, the RNs’

ability to decide *whether* to write a training/counseling form versus recommend discipline to a higher authority is not alone evidence of disciplinary authority using independent judgment, as argued by the Employer, where the record is clear that any and all RN recommendations are subject to further investigation and review by a HM as well as Young.

Like the RNs, the QIDPs and BCs have completed non-disciplinary training and counseling reports, mostly in the form of short-handwritten notes related to DSP job performance. In this regard, the record contains an example of a QIDP reporting a DSP who refused to assist with a resident transport and another example of a BC reporting a DSP who was texting on a cell phone during work. There is one other example in the record of a QIDP completing a “training documentation form” similar to the RN training/counseling form described above recommending training for a DSP for documentation, communication and overall performance duties. The record also contains an example of an unsigned correction notice completed by a QIDP and a BC recommending the suspension of a DSP who cut a resident’s hair while sleeping. Regarding this incident, Young conducted an independent investigation, determined that the DSP should be terminated, and completed and signed a separate correction notice. While the Employer argues that the QIDPs and BCs recommend discipline up to and including discharge as the direct supervisors of the DSPs, the record evidence does support such argument. Rather, the record is clear that any recommendations made by QIDPs and BCs are merely in the nature of reporting of incidents to the HM who decides whether to complete a correction notice and issue discipline.

Teachers also report incidents regarding the deficient performance of paraprofessionals and school DSPs to Principal Genandt and sometimes make verbal recommendations for discipline. This is mostly related to on-call teachers verbally reporting incidents of coverage issues for paraprofessionals and DSPs. In all these cases, Principal Genandt independently decides whether to do nothing, counsel the employee, or issue discipline to the employee. If counseling or discipline is issued, it is Genandt, not the teachers, who completes a write-up or disciplinary correction notice. Discipline is issued to the offending employee by Principal Genandt in the presence of a union steward as well as Young and/or Miller. Sometimes the involved teacher is also present. Importantly, the level of discipline is determined based upon the parties’ collectively bargained progressive discipline procedure. Additionally, all discipline up to and including termination for employees is separately reviewed and approved by Young as well as HR Manager Miller. The record demonstrates that Young and Miller frequently conduct further detailed independent investigations and Young frequently adjusts recommendations for discipline. Employee suspensions and terminations are further reviewed at the Employer’s corporate level by its Vice President of Talent of its parent company, Broadstep Behavioral Health f/k/a Phoenix Care Systems.

There is also some evidence that Principal Genandt has placed paraprofessionals on CAPs based on the recommendation of a teacher working with the paraprofessional in question. While on the CAP, Principal Genandt communicates with the involved teacher regarding the employee’s performance and progress. For all CAPs, Principal Genandt is responsible for writing, issuing and resolving them. There is neither evidence that the teachers make any recommendations resolving CAPs one way or another, nor that any CAPs have actually resulted

in discipline, suspension or discharge of the employee. The teachers' involvement in CAPs is at most reportorial and does not confer supervisory status.

There is no evidence that any of the petitioned-for employees have been trained regarding administration of discipline to employees. None of the petitioned-for employees have access to employee disciplinary records or personnel files, and there is no evidence that they have been trained on any dimension of their disciplinary role. Conclusionary statements without specific explanation are not enough. *Chevron Shipping Co.*, 317 NLRB 379, 381 fn. 6 (1995).

The Employer's reliance on *Mountaineer Park, Inc.*, 343 NLRB 1473 (2004) (a pre-*Oakwood* case) and *Starwood Hotels & Resorts Worldwide, Inc.*, 350 NLRB 1114 (2007) is misplaced. In both cases the Board found employees in question to be statutory supervisors based on their authority to effectively recommend discipline of other employees. Unlike the instant matter, the purported supervisors' write-ups and recommendations for disciplinary action were routinely signed off on by upper management without evidence of any further independent investigation. Here, the overall record shows that the petitioned-for employees' responsibility in the area of discipline is solely to serve as a conduit by reporting misbehavior. Their actions are limited to making factual reports subject to additional scrutiny and often independent investigation by a higher management official. There is no substantive evidence that they recommend that discipline or any consequence result from the deficient performance of the DSPs or paraprofessionals. The authority to "point out and correct deficiencies" in the job performance of other employees does not establish the authority to discipline. *Crittenton Hospital*, supra at 879, citing *Passavant Health Center*, 284 NLRB 887, 889 (1987). Such reporting on incidents of employee misconduct is not supervisory if the reports do not always lead to discipline, and do not contain disciplinary recommendations. Rather, to confer Section 2(11) status, the exercise of disciplinary authority must lead to personnel action, without independent investigation or review of other management personnel. *Lucky Cab Company* 360 NLRB 271, 272 (2014), citing *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002). I conclude that the record fails to establish that any of the petitioned-for employees either make effective recommendations for discipline or are authorized to make disciplinary decisions using independent judgment.

3. *Authority to Effectively Recommend Hiring – Interviewing Prospective Employees*

In October to November 2019, QIDP Imel, as acting hiring manager,¹⁷ conducted three interviews for pre-screened prospective DSPs. In August and October 2019, QIDP Canier conducted two interviews for pre-screened prospective DSPs. Following each interview, the QIDPs completed a two-page interview questionnaire with pre-determined questions and categories (previous work experience, working with a team approach, organization and motivation, problem solving, attendance, timeliness regarding work assignments, assistance in health and personal hygiene care, and crisis management) including scoring of candidates per a pre-determined scale¹⁸ and handwritten comments. Following the interviews, the QIDPs

¹⁷ Hiring manager duties are normally performed by the HR manager. The HR manager position formerly held by Rose Smull was vacant from about October 2019 for a short time until HR Manager Miller was hired.

¹⁸ Only Canier, not Imel, completed the scoring portions.

escorted the candidates to HR for further processing. For one of these interviews, QIDP Imel had the candidate complete a “drug screen protocol” form, a requirement for hire. Besides these five interviews involving Imel and Canier, there is no record evidence that any other QIDPs have similarly been involved with interviews.¹⁹

The Employer does not claim that the QIDPs possess supervisory authority to hire. Rather, the Employer asserts that these QIDPs’ participation in interviews of prospective employees demonstrates their authority to make effective recommendations for hiring. However, the record evidence demonstrates that QIDP Imel’s interviews of three prospective employees were conducted during a time that Imel was acting hiring manager due to the HR manager position being open. QIDP Canier’s interviews of two prospective employees were also completed during this time period. In this regard, I deem their interviewing activities to be infrequent and sporadic.²⁰ Additionally, they provided minimal input on a short pre-determined interview form which does not ask for any recommendation regarding hiring. The record is absent of evidence demonstrating that any of the five candidates interviewed were hired or not hired based on any input from the QIDPs. Even if a hiring recommendation was provided, the record is clear that Young possesses ultimate authority for the hiring of all employees at the Freeport facility. Moreover, there is no evidence of any of the other petitioned-for employees being involved in interviews. I find that the record does not support the Employer’s arguments that the QIDPs or any other petitioned-for employees are statutory supervisors based on their authority to effectively recommend hiring.

4. *Authority to Reward and Effectively Recommend Reward for Employees*

The Employer argues that the petitioned-for employees possess authority to reward, or effectively recommend reward for other employees by recommending the issuance of a gift cards to employees they feel are exemplary. The record demonstrates that Young maintains exclusive custody of \$15.00 Walmart gift cards which are infrequently awarded to employees. Young reviews all recommendations for gift card awards and possesses ultimate authority to grant such awards. The record does not support the Employer’s arguments that the petitioned-for employees are supervisors based on their authority to reward and/or effective recommend reward for other employees.

¹⁹ While the Employer presented some conclusionary evidence that Principal Genandt has included teachers in prospective paraprofessional interviews for their classroom, there is no evidence that any teachers have made recommendations to management regarding the hiring of any other employees.

²⁰ To the extent that the Employer argues that QIDP Imel’s actions as acting hiring manager confer supervisory status, the Board has long held that “[m]erely occasional performance of supervisory duties does not make an employee a supervisor within the meaning of the Act.” *West Texas Utilities Co.*, 94 NLRB 1638, 1642 (1951). See also, *Aladdin Hotel*, 270 NLRB 838, 840 (1984) (“the appropriate test for determining the status of employees who substitute for supervisors is whether [they] spend a *regular and substantial* portion of their working time performing supervisory tasks or whether such substitution is merely sporadic and insignificant.” (emphasis added)) (other citations omitted).

5. *Other Secondary Indicia*

While the Board has held that secondary indicia can be a factor in establishing supervisory status, it is well established that where putative supervisors are not shown to possess any of the primary supervisory indicia, secondary indicia alone are insufficient to establish supervisory status. *Golden Crest*, supra at 730 fn. 10; *Ken-Crest Services*, 335 NLRB 777, 779 (2001).

The Employer argues that the petitioned-for employees possess authority to evaluate the represented DSPs and paraprofessionals. The record demonstrates that only the teachers are involved in the annual evaluations of paraprofessionals and school DSPs. DSPs who work in the group homes are evaluated by the HMs and although the HMs may ask the RNs, QIDPs and/or BCs for input regarding the DSPs' performance, the RNs, QIDPs and/or BCs are not involved in any annual employee evaluations. Additionally, while there is some record evidence that the RNs have completed competency forms for DSPs commenting on their medication passing duties upon completion of training to become authorized medication passers, there is no evidence such competency forms are tied to employee evaluations.

Regarding the teachers' involvement in employee evaluations, the record reveals that they complete performance evaluations for paraprofessionals and DSPs assigned to their classroom. Upon completion, they meet with the employee to discuss the evaluation and they sign the evaluations as "supervisor." The evaluation is transmitted to Principal Genandt and then to Young for further review. If deemed necessary by Young, the evaluation is sent back to Genandt for further discussion with the evaluating teacher regarding areas of concern. Upon final review by the teacher and Genandt, the evaluation is transmitted to Young for final review and signature and then to HR manager Miller for processing. There is no record evidence that these evaluations completed by the teachers affect the future employment of the evaluated employees. The evaluations are not used to determine whether the employee receives a raise, because the CBA between the Employer and Petitioner dictates the wage schedule for unit employees. Moreover, per the CBA, bargaining unit employees' evaluations are not disciplinary; rather, they are considered as teaching tools. The Employer has not established any practice of teacher involvement in the evaluation process that establishes supervisory authority. At any rate, simply evaluating employees is not statutory indicia of supervisory authority. The Board has consistently declined to find supervisory status based on evaluations without evidence that they affect employment term or conditions or constitute effective recommendations to reward, promote, discipline, or otherwise affect the evaluated employee's job status. *Coventry Health Continuum*, 332 NLRB 52, 53-55 (2000); *Ten Broeck Commons*, 320 NLRB 806, 813 (1996).

The petitioned-for employees are also evaluated annually. The RNs, QIDPs and BCs are evaluated by either the Clinical Director and/or Young, and the teachers are evaluated by Principal Genandt. The HMs are also evaluated annually by the Clinical Director and/or Young. The Employer argues that the petitioned-for employees' own evaluations, in which they are evaluated regarding their supervisory authority, impact their future employment conditions. However, all petitioned-for employee evaluation forms are identical to the represented

employees, except for one evaluation form in the record for a BC/QIDP which is identical to an HM evaluation form. The HM evaluation forms is different in that, unlike the petitioned-for employees, the HM is evaluated in the areas of supervision and professionalism. Overall, the record does not support that any of the petitioned-for employees are similarly evaluated in such areas or that their evaluating representatives address such areas when meeting with them to discuss their evaluations. Thus, there is no evidence that any petitioned-for employees suffered any negative consequences as a result of being evaluated in areas of supervision.

The Employer submitted into evidence the petitioned-for employees' job descriptions which purport to designate them as supervisors. The Board has held that job descriptions, without more, do not establish actual supervisory authority. *Training School at Vineland*, 332 NLRB 1412, 1416 (2000) ("Job descriptions or other documents suggesting the presence of supervisory authority are not given controlling weight. The Board insists on evidence supporting a finding of actual as opposed to mere paper authority."). It is well settled that job descriptions without more are not controlling to establish supervisory status. *K.G. Knitting Mills*, 320 NLRB 374 (1995). Similarly, the fact that some employees who perform unit work "receive a salary and do not punch a timeclock, receive different health insurance benefits from unit employees...and require less supervision than other unit employees are inadequate bases for their exclusion from the unit." *Id.* at 374 (1995). That the RNs have provided training to represented employees as "nurse trainers," or that the QIDPs and BCs have provided training regarding behavior-related matters is also not indicative of supervisory status. The Board has frequently found that employees with training or instructional duties are not supervisors within the meaning of the Act. See, *The Washington Post Co.*, 242 NLRB 1079, 1083 fn. 15 (1979) (citing *House of Mosaics*, 215 NLRB 704, 712 (1974) ("having the responsibility of training new employees does not invest employees with supervisory authority within the meaning of the Act.")). That the petitioned-for employees have desks located in the administration building near management employees is also not dispositive. While there is some record evidence that the petitioned-for employees attend clinical administration leadership team meetings, none of them attend any management meetings. Finally, the Employer argues that if the petitioned-for employees are not found to be statutory supervisors then the ratio of supervisors to employees will be too low. I note that the Employer's Freeport operations have been sustainable under the current balance between supervisors and non-supervisors. At any rate, the law is clear that the ratio of supervisors to employees is a secondary indicator of supervisory status and cannot by itself provide a basis for a supervisory finding. *Northcrest Nursing Home*, 313 NLRB 491, 499 (1993). The Board has expressed a disinclination to consider ratio as a useful factor:

"Even if it were possible to conclude that a 1 to 18 ratio is unreasonable and 1 to 3 is reasonable, it would not change our conclusion because such a ratio is not a factor that the Act directs us to consider. It is not the province of the Board to determine the 'proper' number of supervisors. Sec. 2(11) determines the factors that, in conjunction with the exercise of independent judgment, indicate supervisory status for the purpose of this Act, and it is the Employer who determines how its business is operated and what kind of responsibility to give to its various employees." *Phelps Community Medical Center*, 295 NLRB 486, 492 fn. 16 (1999)

VI. CONCLUSION

Based upon the record, it is concluded that the evidence is insufficient to establish that any of the petitioned-for employees are supervisors within the meaning of Section 2(11) of the Act and thus they are eligible to vote in the election.

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

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce²¹ within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.²²
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time registered nurses, qualified intellectual disability professionals, behavior consultants, teachers and counselors employed by the Employer at its Freeport, Illinois facilities; but excluding office clerical employees, confidential employees, managers, guards and supervisors as defined in the Act, and all other employees.

²¹ The parties stipulated at the hearing that in conducting its operations during the 12-month period ending April 29, 2020, the Employer derived gross revenues in excess of one million dollars, and during the same period of time, the Employer purchased and received at its Freeport, Illinois facility goods valued in excess of \$50,000 directly from points outside the State of Illinois.

²² The parties stipulated at the hearing that Petitioner is a labor organization within the meaning of the Act.

VII. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. As all of the petitioned-for employees are stipulated professional employees, as set forth below, I will direct an election allowing them to vote as to whether to be included with the non-professional unit already represented by Petitioner. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by AFSCME (The American Federation of State, County & Municipal employees) Council 31, AFL-CIO as part of the existing unit of employees in the following classifications:

All full-time and regular part-time Authorized Direct Support Providers (ADSP), Direct Support Providers (DSP), Food Handlers, Maintenance, On-Call DSPs, Paraprofessional, Senior DSP (SDSP), and the administrative assistant for Employer's management team, as well as trainers who are neither Qualified Intellectual Disabilities Professionals nor certified teachers, all of the foregoing employed at Employer's facility in Freeport, Illinois, as stipulated in the National Labor Relations Board; BUT EXCLUDING all office clerical employees, confidential employees, professional employees, managerial employees, guards, and supervisors as defined in the National Labor Relations Act.

Two questions shall appear on the ballot:

1. Do you wish to be included with non-professional employees in a unit for purposes of collective bargaining?

The choices on the ballot will be "Yes" or "No"

2. Do you wish to be represented for purposes of collective bargaining by AFSCME (The American Federation of State, County & Municipal employees) Council 31, AFL-CIO?

The choices on the ballot will be "Yes" or "No"

If a majority of professional employees in the petitioned-for unit vote "Yes" to the first question on the ballot, indicating their desire to be included in the existing unit of non-professional employees currently represented by Petitioner, they will be so included if a majority also vote "Yes" to the second question.

If, on the other hand, a majority of professional employees in the petitioned-for unit do not vote for inclusion in the existing non-professional unit, their votes on the second question will determine if they wish to be represented for the purposes of collective bargaining in a separate unit.

If a majority of valid votes is not cast for representation, it will be taken to have indicated the petitioned-for professional employees' desire to remain unrepresented.

A. Election Details

I direct that the election be conducted by mail ballot.²³

The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit by personnel of the National Labor Relations Board, Region 25, on Thursday, June 11, 2020 at 9:00 a.m. EST. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact the Region 25 office by no later than 5:00 p.m. on Thursday, June 18, 2020 in order to arrange for another mail ballot kit to be sent to that employee.

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Subregion 33 office, by close of business on Thursday, July 2, 2020. The mail ballots will be commingled and counted via electronic means at 11:00 a.m. CDT on Monday, July 6, 2020 with party representatives participating remotely.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **June 1, 2020**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Also eligible to vote using the Board's challenged ballot procedure are those individuals employed in the classification whose eligibility remains unresolved as specified above and in the Notice of Election.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3)

²³ The parties are in agreement for a mail ballot election.

employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

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

To be timely filed and served, the list must be *received* by the regional director and the parties by **June 9, 2020**. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

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

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

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

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

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer

customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting, and likewise shall be estopped from objecting to the non-distribution of notices if it is responsible for the non-distribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

VIII. RIGHT TO REQUEST REVIEW

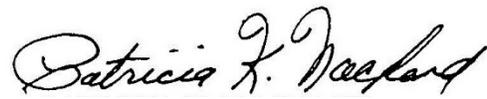
Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a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

A request for review must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions.²⁴ A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

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

²⁴ On October 21, 2019, the General Counsel (GC) issued Memorandum GC 20-01, informing the public that Section 102.5(c) of the Board's Rules and Regulations mandates the use of the E-filing system for the submission of documents by parties in connection with the unfair labor practice or representation cases processed in Regional offices. The E-Filing requirement went into immediate effect on October 21, 2019, and the 90-day grace period that was put into place expired on January 21, 2020. Parties who do not have necessary access to the Agency's E-Filing system may provide a statement explaining the circumstances, or why requiring them to E-File would impose an undue burden.

Dated: June 5, 2020.



PATRICIA K. NACHAND
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 25
SUBREGION 33
575 N Pennsylvania St Ste 238
Indianapolis, IN 46204-1520