

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

**CARE CENTERS MANAGEMENT INC.
d/b/a MYRTLE POINT CARE CENTER¹**

Employer

and

Case 19-RC-271098

**TEAMSTERS LOCAL UNION NO. 206,
affiliated with INTERNATIONAL
BROTHERHOOD OF TEAMSTERS**

Petitioner

DECISION AND DIRECTION OF ELECTION

Petitioner seeks to represent a unit of all full-time and regular part-time Registered Nurses (RNs) and Licensed Practical Nurses (LPNs), collectively referred to as charge nurses, employed by the Employer. The unit sought by the Petitioner includes three RNs and four LPNs. The two issues before me are whether the charge nurses are statutory supervisors as defined by Section 2(11) of the Act and whether to conduct a manual or mail ballot election given the current constraints of the COVID-19² pandemic.

The parties stipulated that the charge nurses do *not* have authority in the interest of the Employer to hire, transfer, layoff, recall, promote, discharge, or reward other employees, or to effectively recommend such actions. The Employer contends that the charge nurses are supervisors given their authority to assign and responsibly direct the work of employees using independent judgment; their involvement in discipline/suspension including effectively recommending the discipline/suspension of other employees; their involvement in adjusting grievances; and other secondary indicia of supervisory status. Petitioner denies that the charge nurses possess any indicia of supervisory authority.

A hearing officer of the Board held a video hearing in this matter. Based on the record³ and relevant Board cases, I find that the Employer has not satisfied its burden of proof regarding the charge nurses and I conclude the charge nurses 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, discipline/suspend, or effectively recommend the discipline/suspension of other employees required for a finding of supervisory status, and the secondary indicia raised by the Employer is not dispositive of their purported supervisory status.

¹ I grant the parties' motion to amend the petition and other formal documents to correctly reflect the names of the parties as set forth herein.

² Throughout this decision, the terms "COVID-19," "COVID," and "coronavirus" are used interchangeably.

³ All parties filed briefs which I have duly considered.

Although election details, including the type of election to be held, are nonlitigable matters at a pre-election hearing and the Board has delegated its discretion in determining such arrangements to Regional Directors,⁴ the positions of the parties were solicited for consideration. I note that while at the time of the hearing the parties were in agreement to a manual election, subsequently the Employer stated in its brief, as further discussed below, that the election should be conducted by mail ballot.⁵ As explained below, after careful consideration and following the Board's recent guidelines set forth in *Aspirus Keweenaw*, 370 NLRB No. 45 (November 9, 2020), and specifically the six factors the Board has ordered me to consider in determining whether or not to order a mail ballot election, I have determined that a mail ballot election is appropriate in view of the circumstances discussed below related to the current state of the COVID-19 pandemic.

I. FACTS

A. The Employer's Operations

The Employer, one of eight care centers managed by Dakavia Management, operates a two-story skilled nursing, long-term and residential care facility in Myrtle Point, Oregon. The first floor is the residential care floor which houses long-term care residents and contains some administrative offices. The second floor is the skilled nursing floor, known as the "SNF," which houses skilled nursing residents and some long-term care patients – there are 23 resident rooms on the SNF which contain 24 residents/patients at full capacity.⁶ Also located on the SNF are the nurses' station, nursing administrative offices, staff break room, medication room, clean linen storage area, dirty utility room, central supply room, and therapy area/gym, also referred to as the "sun room." All of the petitioned-for RNs and LPNs in question work on the second floor/SNF.

The Administrator manages the facility. Reporting directly to the Administrator are the Director of Nursing (DON),⁷ Maintenance Director, Dietary Manager, Social Services Director, Activities Director, and Medical Records Director.⁸ All of these individuals work day shift hours from about 8:00 a.m. until about 5:00 p.m. and when they are not at the facility, the petitioned-for charge nurses are the highest-ranking employees on site. Reporting directly to the DON are the Residential Care Manager (RCM) and the petitioned-for charge nurses. Karen Jaster was the DON from March 2018 until January 8, 2021 when she became the infection preventionist in charge of infection control. Since Jaster's departure as DON, the DON position has been vacant and the charge nurses have been reporting directly to RCM Denise Cook who, like the DON, works day shift hours. The DON and RCM offices are located on the SNF.

⁴ See *Representation-Case Procedures*, 84 Fed. Reg. 69524, 69544 fn. 82 (Dec. 18, 2019) (citing *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366, 1367 (1954)).

⁵ Petitioner did not address the issue of the mechanics of an election and how a manual election should and could be conducted in a safe manner under the Board's guidelines either at the hearing or by brief.

⁶ All rooms are single occupancy except for one which is double occupancy.

⁷ The DON is also known as the Director of Nursing Services, or DNS.

⁸ The cooks and dietary aides, who are included in the same bargaining unit as the CNAs and CMAs, report directly to the Dietary Manager. The Maintenance Director, Social Services Director, Activities Director, and Medical Records Director do not have any direct report employees.

Under the charge nurses are approximately 14 certified nursing assistants (CNAs) and two certified medication aides⁹ (CMAs). They are currently in a bargaining unit¹⁰ represented by Service Employees International Union Local 503, OPEU (SEIU) and are covered by a collective bargaining agreement (CBA) between SEIU and the Employer effective from April 1, 2018 through September 30, 2021. CNAs provide assistance with activities of daily living, including helping residents to dress, eat, toilet, shower, transfer in and out of bed, and transport to scheduled medical, therapy and other appointments. CNAs also take vitals (blood pressure, temperature, pulse, respirations, oxygen saturation level, and weight) of residents but they are not qualified to administer medications or insulin, check blood sugars, provide wound care, or conduct tube feedings. CNAs become certified by attending a six-week CNA course and passing a certification exam. The Employer has also employed non-certified nursing assistants who perform the same functions as CNAs except that they not permitted to care for “skilled” Medicare patients. Currently, there are no non-certified nursing assistants employed by the Employer.¹¹ CMAs primarily administer non-injectable medications¹² during their scheduled shift. When there is no scheduled CMA on a shift, the charge nurse performs such medication administration duties. CMAs possess the same qualifications as CNAs and have additional training and certification in medication administration.

The SNF nursing operations are round-the-clock with three shifts worked by the charge nurses, CNAs and CMAs: the day shift is from 6:00 a.m. to 2:00 p.m.; the afternoon shift¹³ is from 2:00 p.m. to 10:00 p.m.; and the night shift is from 10:00 p.m. to 6:00 a.m. Staffing levels are dictated by Federal and State regulations and budgetary constraints. During the day shift, one charge nurse, four CNAs, and one CMA are assigned to the SNF; during the afternoon shift, one charge nurse, three CNAs, and one CMA are assigned to the SNF; and during the night shift one charge nurse and two CNAs are assigned to the SNF. The Employer recently hired an additional RN to work on the weekends and at times during weekend shifts there are two charge nurses assigned to the same shift.¹⁴

B. Charge Nurse Duties and Responsibilities

1. Overview and Job Description

According to their job description, charge nurses must be graduates of an accredited school of nursing and licensed in the State of Oregon. The charge nurse job description states that the charge nurse "works together with all nursing personnel as a team to provide individual resident care." Specific job duties listed include, but are not limited to: planning and assigning patient care to CNAs; preparing and administering medications including intravenous (IV) medications; collecting blood and other specimens; making resident rounds to observe, assess, and record

⁹ Also referenced in the record as “certified med techs.”

¹⁰ The bargaining unit also includes cooks, dietary aides, housekeeping employees, laundry employees, and caregivers.

¹¹ All certified and non-certified nursing assistants are collectively referred to herein as CNAs.

¹² Intravenous (IV) medications and insulin can only be administered by a charge nurse.

¹³ Also referenced in the record as the swing shift.

¹⁴ According to the record, per guidelines of the Centers for Medicaid and Medicare Services (CMS) (the federal government regulatory agency for care centers), there must be at least one RN scheduled for one eight-hour shift each 24-hour period, and per State guidelines of the Oregon Health Authority (OHA) (incorrectly identified in the record as the “Oregon Health Association”), a charge nurse must be scheduled on all operating shifts at care centers. RNs are typically scheduled on the night shift when management officials are not present at the facility.

residents' needs; assessing and treating residents' skin conditions and wounds; assisting physicians and processing physician orders; charting; providing resident and family support and education; completing incident reports and initiating appropriate interventions; initiating, reviewing, updating and ensuring care regarding resident care plans; participating in nursing meetings; attending and providing educational meetings and in-services; supervising care given by CNAs and CMAs; assisting team members in resident care; assisting in the orientation of new employees; informing nursing personnel regarding changes in resident conditions; willingness to perform all procedures that lower certified or licensed employees are qualified to perform; making resident assignments; overseeing and monitoring staff; assisting with staffing needs; communicating and consulting with physicians and the facility administrator; possessing knowledge of state nursing laws and using such knowledge in supervisory role; and requesting material resources for the unit. The job description further lists specific charge nurse responsibilities as: plans, supervises, assumes and delegates resident care; teaches residents and their families and personnel; appraises resident and staff needs; plans new goals of resident care; and promotes good communication and teamwork.

2. Primary Indicia of Supervisory Status

As noted, the parties stipulated that the charge nurses do not possess the following primary indicia of supervisory status: authority to hire, transfer, layoff, recall, promote, discharge, or reward other employees, or to effectively recommend such actions. The primary supervisory indicia at issue are authority to assign and responsibly direct the work of employees using independent judgment; authority to discipline/suspend, including effectively recommending the discipline/suspension of other employees; and authority to adjust grievances.

a. Assign

The charge nurses are not involved in scheduling the CNAs and CMAs for work. Rather, the RCM or the Administrator is in charge of scheduling the workdays and shifts of charge nurses, CNAs, and CMAs. The charge nurses, CNAs and CMAs typically have set schedules for workdays and shifts. As noted, there is one charge nurse assigned per shift. The charge nurse on duty is stationed at the nursing station on the SNF and starts the shift by receiving the "shift report" from the outgoing charge nurse regarding care required for each resident such as vitals, bowel care, wound care, bathing needs, and any scheduled appointments. The charge nurse also makes sure that all CNAs are present and accounted for at the beginning of the shift and discusses with them which residents the CNAs will be placed with. For the most part, CNAs are consistently assigned to the same residents in consecutive rooms (e.g., residents in rooms one through six, seven through 12, etc.), called "runs," for efficiency and continuity of care purposes. The charge nurse also considers patient census and acuity levels in order to ensure that work is distributed evenly among the CNAs. Patient acuity levels are related to the level of care required for each resident and equate to the amount of time needed for nursing staff to care for the residents' needs.

CNAs receive their assignments from the "Nursing Services Daily Assignment Sheet" which is kept and posted daily at the nurses' station and lists routine CNA tasks and pre-set break and lunch times. The record is silent as to who is responsible for preparing the daily assignment sheet but the record is clear that it is not prepared by the charge nurses. The date, shift, name of nurse and CNAs, and resident names and room numbers assigned to each CNA are written on the assignment sheets. The routine tasks pre-printed on the assignment sheets include vitals (blood

pressure, temperature, pulse, respirations, oxygen saturation level, and weight), bowel movements, appointments, Foley output, colostomy output, and showers. In addition, there are separate daily meal monitor logs and a weekly or monthly shower schedule also kept and posted at the nurses' station. Either the DON, or a charge nurse assisted by a CMA, creates the master shower schedule for all the residents on a weekly or monthly basis and this information is inputted into the shower section of the daily assignment sheet. The CNAs can look at either the shower schedule or the daily assignment sheet to see if an assigned resident is in need of bathing. The meal monitor logs contain columns for the CNAs to track and list all food and fluid intakes for residents.

After the CNAs review the daily assignment sheet and receive other pertinent information from the charge nurse and the shift report pertaining to their assigned residents (e.g. skin issues, special requirements for weighing, or observing for fall and accident prevention),¹⁵ they begin caring for residents/patients as set forth in the daily assignment sheet, shower schedule and meal monitor logs. If a CNA is in need of assistance for things such as lifting, restraints, or showering, they normally will ask another CNA for assistance without involving the charge nurse. On occasion, the CNAs or CMA will ask a charge nurse to assist them in their resident care duties. In this regard, the facility works under a team concept to provide individual resident care. While break and meal times for CNAs and CMAs are authorized and required by their CBA and pre-set on their assignment sheets, the charge nurse on duty is authorized to adjust break times for the CNAs to meet the exigencies of patient care and staffing. Break times are generally adjusted upon discussion between the charge nurse and the CNAs based on workloads.

After the charge nurse and CNAs discuss CNA resident and room assignments and issues related to care as described, the charge nurse begins her resident/patient care duties on the shift consisting mainly of treatments such as IV therapy, tube feeding, wound dressing, diabetic assessments and blood sugar checks, and medication and insulin administration. The charge nurse also conducts regular rounds of residents and inspects the work of the CNAs and makes sure they are appropriately caring for residents, charting, and following care plans. Regarding care plans, upon each resident admission, the charge nurse is responsible for initiating the incoming resident's care plan which is filed in the "24-hour book" maintained at the nurses' station. Care plans are considered to be "working documents" and are continually updated by the DON, RCM, and charge nurses in such areas as 24-hour reports showing any significant shift occurrences in the last 24 hours; medicine changes; physician order changes; pain and behavioral medicine adjustments; behavioral changes in residents; and scheduled appointments. The social services director, activities director, therapists and pharmacists also regularly update care plans in their areas of expertise. The charge nurses also inspects certain specialized medications administered by CMAs such as coumadin and behavioral medications as further explained below. Finally, during the course of the shift, the charge nurse also regularly communicates with physicians¹⁶ about medical orders and resident care issues.

Nursing department staffing on the SNF is dictated by patient census and a certain ratio of nursing personnel to residents is maintained at all times. CNA staff adjustments are sometimes made by charge nurses based on patient census, as a result of someone leaving early or calling off,

¹⁵ The facility is governed by corporate-wide policies and procedures regarding skin and weight assessment and fall and accident prevention.

¹⁶ The charge nurses have telephonic and electronic communications with physicians as well as face-to-face contact with a house physician who regularly visits the facility about once a month.

or sometimes by resident request. Generally, in emergent situations, such as a CNA who does not report to work or requests to leave work early, or a CNA who has been directed to provide one-on-one resident care as further described below, the charge nurse will evenly redistribute a CNA's assignments among the other CNAs on duty with CNA input and discussion. In this regard, for the most part, CNAs work out the redistribution of assignments among themselves. In the event an additional CNA needs to be called in, the charge nurse must consult with the DON or Administrator in-person or by phone. There is no record evidence that a charge nurse has any authority to approve employee absences or time-off requests, or to send employees home due to overstaffing. When a resident requests not to be cared for by a certain CNA, the charge nurse will redistribute assignments as noted above and consult with the DON and/or the Administrator regarding the matter.

b. Discipline/Suspend

Except for a vague reference in the record regarding the existence of a progressive discipline policy that includes verbal, written, and final written discipline preceding termination, no formal discipline policy was addressed or introduced. There is no documentary evidence that any charge nurses have issued any disciplinary write-ups to any employees. There is record evidence that the Employer's general policy is to provide education to employees before resorting to employee discipline. In this regard, when a charge nurse observes a CNA performing a procedure deficiently, the charge nurse will demonstrate the procedure and direct the CNA how to perform the procedure correctly rather than resorting to any corrective action. There is an example in the record of a charge nurse who suspected a CNA was not changing and turning a resident properly so she marked the resident's brief to see whether the resident was thereafter moved by the CNA. While this example appears to be contrary to the stated policy of educating before resorting to corrective action, there is no evidence that the charge nurse involved issued any discipline to the CNA for deficient job performance or was in any way held accountable, such as by being disciplined herself regarding the CNA's deficient performance. There is another vague undated example in the record regarding a CMA who made a medication error. The error was reported to the DON collectively by the CMA and the charge nurse on duty. The DON thereafter provided education to the CMA as well as the charge nurse regarding "medication rights"¹⁷ and the proper rules to follow regarding medication administration. There is no evidence that the CMA was disciplined by anyone regarding the medication error, or that the charge nurse was in any way held accountable regarding the CMA's deficient performance. Finally, there is another undated example in the record and lacking in detail of a charge nurse who issued written discipline to a CMA on the day shift for administering the wrong medication to a resident – the write-up was not introduced in the record.

Charge nurses have authority to remove CNAs from the floor when they are suspected of resident abuse or neglect. For example, in about August 2019, a charge nurse removed an agency CNA¹⁸ from the floor for leaving a resident exposed. The charge nurse immediately contacted the Administrator who suspended the CNA and initiated an investigation per the facility's abuse and neglect policy. Although the record mentions that the charge nurse issued written discipline to the CNA in this matter, no such discipline was introduced into the record. In another example, about

¹⁷ Medication rights are a reference to a number of "rights" set forth by the Employer for those who administer medications to follow, including "right" meds, "right" time, "right" dose, "right" route.

¹⁸ Agency CNAs are temporary employees from staffing agencies who are utilized on an as-needed basis.

two years ago, a member of the public made a complaint to the facility's ombudsman regarding a CNA reportedly borrowing money from a resident. The complaint was directed to the Administrator who advised then-DON Jaster who directed the charge nurse on duty to immediately remove the suspected CNA from the floor, discuss the matter with her, and advise her she was being suspended pending investigation per State guidelines.

c. Responsibly Direct

As the charge nurse is performing rounds and providing resident treatment and care, she informs the CNAs and CMA on the shift of any changes in resident conditions and directs them accordingly. For example, if a resident's medical or medicine orders are changed by a physician, physician assistant, or nurse practitioner, it is the charge nurse's job to advise the CNAs and CMA. During resident crises, the charge nurse also gives directions to the CNAs on duty. For example, when a resident went into respiratory failure and cardiac arrest about six months ago, the charge nurse on duty performed CPR before the paramedics arrived and directed some CNAs to assist with a Ambu bag¹⁹ and secure vitals, and other CNAs to wait for and direct the paramedics to the resident's room. In another undated example, when a resident was found to have low blood sugar, the charge nurse on-duty directed a CNA to get the resident some juice and a protein bar. In another example, when a resident was wandering and attempting to leave the facility about five weeks ago, the charge nurse on duty, along with the RCM, Administrator, and Social Services Director, addressed the matter and collectively determined that one of the CNAs should be reassigned as a one-on-one sitter for the resident. The record does not specifically address who chose the CNA or how the CNA was chosen. Generally, the record indicates that CNAs with greater experience will be assigned to one-on-one care of behaviorally challenged residents rather than inexperienced CNAs or agency CNAs who are less well known by the charge nurses. The record also references similar undated examples of charge nurses who have directed and reassigned CNAs as one-on-one sitters to residents who were acting combative or at high risk of falling. As a result of a CNA being reassigned as a sitter, the charge nurse will evenly redistribute the reassigned CNA's regular assignments to the other CNAs on duty.

All medications are kept under lock and key in the medication room on the SNF. The only employees who have keys to the medication room are the Administrator, the DON, the RCM, the charge nurses and the CMAs. During medication administration, the CMAs will alert the charge nurse to any medication-related issues with residents such as a problem with swallowing or not having a sufficient amount of medicine in the medication room. Charge nurses direct CMAs in the administration of some medications. For example, charge nurses will direct a CMA to hold off on administering coumadin (an anticoagulant medication) to a resident whose INR²⁰ test (lab test to evaluate blood clotting) is pending, or will direct a CMA to administer behavioral medications to residents who take such medications on an as-needed basis.

¹⁹ An Ambu bag is a manual resuscitator.

²⁰ The record incorrectly references INR as standing for "international naturalized ratio." Per the Mayo Clinic website (<https://www.mayoclinic.org/tests-procedures/prothrombin-time/about/pac-20384661>), INR stands for "international normalized ratio."

d. Adjust Grievances

Charge nurses do not adjust grievances within the CBA. CNAs sometimes bring work-related complaints to charge nurses such as a resident who is being difficult, not having enough time to get assignments completed on a shift, dinner not being on time for the residents, or a scheduling complaint. While the charge nurse may offer suggestions or encouragement to CNAs regarding these issues, such issues are generally reported by the charge nurses to nursing management (RCM, DON and/or Administrator) for resolution. CNAs also sometimes approach charge nurses to resolve interpersonal conflicts such as requests to not work together. The charge nurse may adjust room assignments in consultation with the CNAs or may forward these matters to nursing management for resolution.

3. *Secondary Indicia*

The charge nurses earn an average of \$29.00 per hour. Per their CBA, the CNAs earn an average of \$13.14 to \$16.99 per hour, the CMAs earn an average of \$14.64 to \$18.69 per hour, and all non-certified nursing assistants earn \$11.30 per hour. While the record indicates that benefits between the charge nurses and CNAs are similar, it does not specifically state any benefits received by the charge nurses except for a paid lunch which the CNAs do not receive. Per their CBA, the CNAs and CMAs are entitled to a host of benefits including: health insurance (medical, dental, life, and disability), vacation, holidays, paid time off, cost of living allowance, continuing education, education reimbursement, bereavement leave, and jury/witness duty leave. Charge nurses, CNAs and CMAs share the same staff break room on the SNF. As noted, when management is not present at the facility, the charge nurses are the highest-ranking employees on site. A list of management phone numbers is posted at the nurses' station and the charge nurses are instructed to call nursing management for any issues that arise on shift. While the charge nurse job description states that the charge nurses "participate in ALL Nursing Meetings to improve resident care, to listen to problems and complaints, and to help maintain job satisfaction," they do not attend any supervisory meetings.

II. ANALYSIS

A. Board Law on Statutory Supervisors

Section 2(11) of the Act defines a supervisor as:

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

Any one of these enumerated powers is sufficient to establish supervisory status, so long as the authority is not of a merely routine or clerical nature but is exercised with "independent judgment." *Kentucky River*, 532 U.S. 706, 712-713 (2001).

Section 2(11)'s definition is read in the disjunctive, and thus, the Board considers possession of any one of its enumerated powers, if accompanied by independent judgment and exercised in the interest of the employer, sufficient to confer supervisory status. *Kentucky River*, 532 U.S. at 713. Supervisory status may likewise be established if the individual in question has the authority to effectively recommend one of the powers. See, *Children's Farm Home*, 324 NLRB 61, 65 (1997). The Board has held that an effective recommendation requires the absence of an independent investigation by superiors and not simply that the recommendation be followed. *Id.*

The burden of proving supervisory status rests on the party asserting that status by a preponderance of the evidence. *Loyalhanna Health Care Associates*, 352 NLRB 863, 865 (2008) (citing *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006)); *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006); *Kentucky River*, 532 U.S. at 711. Since supervisors are excluded from the Act's protection, the Board has been careful to avoid construing the statutory language too broadly. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1058 (2006) (citing *Oakwood Healthcare, Inc.*, 348 NLRB at 686). Lack of evidence is construed against the party asserting supervisory status and mere inferences or "[p]urely conclusory evidence is not sufficient to establish supervisory status; instead, the Board requires evidence that the employee actually possesses the Section 2(11) authority at issue." *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006); *Dean and DeLuca New York, Inc.*, 338 NLRB 1046, 1048 (2003). See also, *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989) (supervisory status is not established where the record evidence is "in conflict or otherwise inconclusive."); *Dole Fresh Vegetables, Inc.*, 339 NLRB 785, 793 (2003) (where evidence is in conflict or otherwise inconclusive for a particular Section 2(11) indicium, the Board will decline to find supervisory status for that indicium.). Similarly, job titles, job descriptions, or similar documents are not given controlling weight and will be rejected as mere paper, absent independent evidence of the possession of the described authority. *Golden Crest*, 348 NLRB at 731 (citing *Training School at Vineland*, 332 NLRB 1412, 1416 (2000)). Rather "what matters are the authority that an individual actually possesses and the work the individual actually performs." *Loyalhanna*, 352 NLRB at 864.

Indicia other than those enumerated in Section 2(11) of the Act are secondary indicia. Although secondary indicia may be considered in determining supervisory issues, they are not dispositive. In the absence of one of the enumerated primary indicia, secondary indicia, standing alone, are insufficient to establish supervisory status. *St. Francis Medical Center-West*, 323 NLRB 1046 (1997).

B. Application of Board Law to the Charge Nurses

1. Primary Indicia of Supervisory Status

a. Assign

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*, 348 NLRB at 689. Consistent with *Kentucky River*, the *Oakwood* Board 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.” *Id.* at 692. 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).” *Id.* 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.” *Id.* 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.” *Id.* (emphasis added). Further, the judgment must involve a degree of discretion that rises above the “routine or clerical.” *Id.*

Regarding the element of place, 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). *Id.* at 695. Here, the CNAs are assigned to a resident group of consecutive rooms upon discussion between the charge nurse and CNAs. In general, the CNAs consistently stay with the same residents and rooms for continuity of care purposes. Their daily tasks are largely defined by the daily assignment sheet and meal monitor log which are not generated by the charge nurses. The daily assignment sheets are pre-printed and the charge nurse completes them by adding the date, names of the charge nurse and CNAs, and the resident rooms the CNAs are assigned to. The meal monitor logs are also pre-printed with columns to track and list all food and fluid intakes for residents and either the charge nurse or the CNA adds the date and name of resident. The nurses’ assignment of these “discrete task[s]” is closer to “ad hoc assignments” described in *Croft Metals*, 348 NLRB at 721. In that case, 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. *Id.* at 722. Here, the nurses’ assignments of discrete tasks to CNAs are insufficient to confer supervisory status. Thus, the record does not disclose assignments by the charge nurses with respect to place which requires them to use judgment involving a degree of discretion that rises above the “routine or clerical” as contemplated in *Oakwood*.

The charge nurses’ authority to reassign CNAs to additional residents based on staffing and resident needs, such as when a CNA has called off, requested to go home early, or has been assigned as a one-on-one sitter, is also insufficient to confer supervisory status. In these situations, the assignments of the absent CNA are generally equally distributed among the CNAs on duty, either by the charge nurse or among the CNAs themselves. The record does not establish that any charge nurse takes into account the CNAs’ abilities when making such reassignments. Any occasional transfer due to short-staffing is nothing more than switching the tasks among employees, and does not confer supervisory status. *Croft Metals*, 348 NLRB at 722. The Employer has not established that any isolated temporary reassignment of duties of a CNA for the balance of a shift denotes supervisory status. *Id.*

As to the element of time, there is no record evidence or claim that the charge nurses are involved in or have any authority regarding the scheduling or schedule changes of any employees. All CNAs and CMAs are assigned exclusively on the SNF of the facility. All scheduling matters

are handled by the RCM or the Administrator who are in charge of scheduling the workdays and shifts of charge nurses, CNAs, and CMAs. There is no record evidence that the charge nurses possess any authority to call in additional CNAs when a shift is understaffed or to extend their shifts and approve overtime for any reason. CNA breaks and lunch times are according to the facility practices and as designated by their CBA (two 15-minute breaks and one 30-minute meal break). Break times can be adjusted by the charge nurses based on resident and staffing needs. The Employer has not established any exercise of supervisory authority regarding the scheduling of other employees. See, *Golden Crest*, 348 NLRB at 728-730. Thus, the record does not support that the charge nurses appoint employees to a time as contemplated by *Oakwood*.

With respect to the element of duties, the Employer argues that the charge nurses use independent judgment in assigning and directing the duties and tasks of the CNAs and CMAs. In *Oakwood*, the Board found that the term “assign” encompassed a charge nurse’s responsibility to assign nurses and aides to particular patients. *Oakwood* 348 NLRB at 689. The Board found that “if the registered nurse weighs the individualized condition and needs of a patient against the skills or special training of available nursing personnel, the nurse’s assignment involves the exercise of independent judgment.” *Id.* at 693. The Board found that the charge nurses who worked outside of the emergency room used independent judgment in matching patients and nursing staff. For example, nurses who were proficient in administering dialysis were assigned to a kidney patient. The charge nurse assigned staff with skills in chemotherapy, orthopedics or pediatrics to the patients with needs in those areas. Charge nurses also assigned the nursing personnel to the same resident to ensure continuity of care. The nurses who were assisting a patient with a blood transfusion were not assigned to other ill patients. Charge nurses determined whether a mental health nurse or an RN should be assigned a psychiatric patient. *Id.* at 696-697. In contrast, the Board found that the emergency room charge nurses did not “take into account patient acuity or nursing skill in making patient care assignments.” The evidence did not show “discretion to choose between meaningful choices on the part of charge nurses in the emergency room.” *Id.* at 698.

As noted, initial resident/room group assignments to CNAs are made upon discussion between the charge nurse and CNAs on duty and, to a great extent, are consistent over time. Moreover, the overall tasks of the CNAs are largely defined by the daily assignment sheets which are not generated by the charge nurses – the CNAs themselves are able to determine from the assignment sheet which tasks need to be completed based on the residents’ needs.²¹ To the extent the charge nurses make isolated reassignments, such as when advising them of a change in the medical condition or orders for a resident or reassigning a CNA to be a one-on-one sitter, the Employer has not shown that they perform a detailed analysis of CNAs’ abilities and residents’ needs beyond choosing a more experienced employee as a one-on-one sitter. Rather, the record demonstrates that the charge nurses’ assignments for CNAs are routine in nature and not based on any particular expertise possessed by the CNA. In the spectrum set out by the Board, the charge nurses’ assignment of discrete tasks and the isolated temporary switching of tasks by charge nurses falls closer to “completely controlled” actions, rather than “free actions.” They do not involve a “degree of discretion that rises above routine or clerical.” *Id.* at 693. The record overall demonstrates that the assignments of tasks to CNAs are routine in nature and based on their title,

²¹ I note that at the hearing, the Employer solicited an abundance of vague, general and conclusory evidence from its witnesses that nurses use full discretion in making assignments and do not follow any guidelines. As discussed, such evidence is refuted by other evidence such as the daily assignment sheets as well as strict nursing guidelines set by the State.

rather than any particular expertise, and the evidence is insufficient that the direction provided to them by the charge nurses requires the use of independent judgment or involves a “degree of discretion that rises above routine or clerical.” *Id.* at 693.²²

b. Discipline/Suspend

The Employer argues that the charge nurses have authority to discipline CNAs and CMAs for deficient performance. However, in all of the examples presented by the Employer, none were supported with any evidence of discipline issued by a charge nurse to an employee, or even the drafting of any factual or incident reports. Specifically with regard to the example of a CMA who administered the wrong medication to a resident, while the Employer argues in its brief that former DON Jaster testified that the charge nurse “actually wrote up the [CMA],” no such write-up or incident report was introduced. Likewise, regarding the example of another CMA who committed a medication error, not only was no evidence of discipline or an incident report presented, the record demonstrates that the CMA’s error was reported to the DON collectively by the CMA and the charge nurse on duty and thereafter resolved by the DON educating the CMA and the nurse regarding proper medication administration. Finally, regarding the example of a CNA suspected of not properly turning and changing a resident, this example merely shows that a charge nurse inspected a CNA’s work to ensure appropriate care. There is nothing in the record suggesting that the charge nurse took any further action to correct, report or discipline the employee, or that the charge nurse was in any way held accountable, such as by being disciplined herself, regarding the CNA’s purportedly deficient performance. I note again that the Employer’s evidence presented on this subject was largely conclusory, general, and lacking in substance in attempting to show that the charge nurses’ possess authority to discipline or recommend the discipline of CNAs and CMAs for deficient performance, or to show any consequence resulting from their observations of a CNA’s deficient performance. There is no evidence that any of the nurses have been trained regarding administration of discipline to employees. The authority to “point out and correct differences in the job performance of other employees does not establish the authority to discipline.” *Regal Health and Rehab Center, Inc.*, 354 NLRB 466, 473 (2009), citing *Franklin Hospital Medical Center*, 337 NLRB 826, 830 (2002); *Crittenton Hospital*, 320 NLRB 879 (1999), citing *Passavant Health Center*, 284 NLRB 887, 889 (1987).

The Employer also argues that the charge nurses routinely suspend CNAs through removal from the facility when they are suspected of resident abuse or neglect, without independent investigation by management. However, the record evidence does not support the Employer’s argument. Rather, in each example presented of charge nurse removing a CNA from the floor, the record evidence demonstrates that independent investigations were conducted by management. In the August 2019 example of a charge nurse removing an agency CNA from the floor for leaving a resident exposed, the record shows that the charge nurse immediately contacted the Administrator who suspended the CNA and initiated an investigation per the facility’s abuse and neglect policy. Although the record mentions that the charge nurse issued written discipline to the CNA in this matter, no such discipline was introduced into the record. I note that there is also no record

²² I further find that the charge nurses’ authority to purchase supplies on the Employer’s credit does not appear to involve any significant exercise of independent judgment of the type involved in assessing supervisory status, and moreover, this function is not included in the enumerated list of supervisory indicia found in Section 2(11). *Health Care Logistics, Inc.*, 273 NLRB 822, 824 (1984). Nor does their role in occasional product development resulting in routine assignments constitute evidence of supervisory status.

evidence of any incident or factual report. In the 2018 example of a CNA reportedly borrowing money from a resident, the record shows a complaint which came in from a member of the public to the facility ombudsman. The complaint was directed to the Administrator, who advised then-DON Jaster of the complaint, and then-DOM Jaster advised the charge nurse on duty and directed her to immediately remove the suspected CNA from the floor, discuss the matter with the CNA, and advise the CNA she was being suspended pending investigation per State guidelines. The Employer's claim that "neither the DON nor any other management representatives participated in these disciplinary removals" is false and its argument that such examples demonstrate the charge nurses' exercise of independent judgment in removing employees from the facility, thereby suspending them, is not supported by the record evidence. Whatever authority a charge nurse possesses to pull a CNA from the floor for abusive or neglectful behavior, the record is clear that any such incident is subject to independent review and investigation by higher management authority. Moreover, the taking of limited action in response to a flagrant violation has long been held insufficient by itself to establish supervisory status. *Regal Health and Rehab Center, Inc.*, 354 NLRB at 474 (2009); *Vencor Hospital – Los Angeles*, 328 NLRB 1136, 1139 (1999); *Phelps Community Medical Center*, 295 NLRB at 491-492.

Based on the above, I find that the charge nurses do not possess the authority to discipline/suspend or effectively recommend discipline/suspension using independent judgment.

c. Responsibly Direct

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, 85-86 (2014); *Oakwood*, 348 NLRB at 691-692, 695.

Accountability may be shown by either negative or positive consequences to the putative supervisor's terms and conditions of employment as a result of the putative supervisor's performance in the direction of others. *Golden Crest*, 348 NLRB at 731; *Peacock Productions of NBC Universal Media, LLC*, 364 NLRB No. 104, slip op. at 5 (2016).

In *Golden Crest*, the Board found that the employer established that nursing home charge nurses had the authority to direct CNAs, in that they "oversee the CNAs' job performance and act to correct the CNAs when they are not providing adequate care." *Id.* at 731. However, the Board determined that the employer failed to establish that charge nurses were held accountable for their actions in directing the CNAs, as the employer had failed to present "any evidence that any charge nurse has experienced any material consequences to her terms and conditions of employment, either positive or negative, as a result of her performance in directing CNAs." *Id.* "There must be a more-than-merely-paper showing" that the prospect of consequences and accountability exists. *Id.*

Similarly, in *Loyalhanna*, 352 NLRB 863 (2008), the ALJ, upheld by the Board, found that nursing home nurse managers may have suffered adverse personnel actions if, for example, a CNA failed to perform a task, such as raising a bedrail, that resulted in injury to the patient. *Id.* at 869. However, the ALJ concluded that, as the record did not show that the nurse managers at issue

exercised any independent judgment, this failed to establish that they were supervisors within the meaning of the Act. *Id.* (noting that where "nurse managers assign and direct aides to perform tasks that are routinely and necessarily performed in any nursing home," this was insufficient to establish independent judgment for the purposes of Section 2(11)).

Here, the record demonstrates that the charge nurses oversee CNAs' job performance and act to correct the CNAs when they are not providing adequate care by providing training and education. The charge nurse will direct the CNAs and CMAs to perform certain tasks – such as special requirements for weighing, skin care, observing residents for fall and accident prevention, or changes in medication – when the charge nurse determines that such tasks are necessary. The charge nurse will also correct a CNA who she perceives is not performing resident care duties – such as changing, transferring, feeding, or dressing a resident – by discussing and demonstrating the correct procedure for performing such duties. Additionally, in crisis situations such as a critically ill resident in need of emergency medical services or a wandering resident attempting to leave the facility, the charge nurse will direct CNAs in providing medical assistance and assisting in emergency procedures. This might include the charge nurse directing a CNA to assist in resuscitation efforts or direct paramedics coming to the facility, or designating a CNA as a one-on-one sitter. However, there is no evidence that the charge nurses have been informed that there will be any consequences to their terms and conditions of employment as a result of the CNAs deficiencies. Further, the Employer has not demonstrated that the charge nurses direct the CNAs using independent judgment, or that charge nurses' direction of the CNAs is not controlled by the Employer's own policies or procedures or involves a degree of discretion rising above the merely routine. *Community Education Centers*, 360 NLRB at 85-86, citing *Oakwood* 348 NLRB at 692-693.

The Employer contends that the charge nurses responsibly direct employees because they direct CNAs in carrying out residents' care plans and are held responsible and accountable for CNAs and CMAs who do not properly follow and perform the appropriate care plan. The Employer argues that this shows a level of accountability in that charge nurses are responsible for what happens on the floor overall. However, the Employer's conclusory evidence presented at the hearing that charge nurses are held accountable for ensuring CMAs and CNAs appropriately carry out their duties and are "responsible for negligence and other patient failures of residents under CNAs' or CMAs' care" is insufficient to meet its burden. The record contains no evidence the Employer has issued discipline to charge nurses for something that CNAs or CMAs had or had not done. Furthermore, even assuming *arguendo*, as in *Loyalhanna*, that charge nurses may be held responsible for actions of CMAs and CNAs who failed to do something and this resulted in injury to a resident, the record fails to establish the independent judgment warranted to establish supervisory authority under Section 2(11).

I find that there is insufficient record evidence to establish accountability as required under *Oakwood*. The record does not demonstrate that the Employer imparted clear and formal notice to the charge nurses that they will be held accountable for the job performance of CNAs and CMAs. Thus, I find that the Employer has not met its burden to establish that the charge nurses responsibly direct employees utilizing independent judgment.

d. Adjust Grievances

To establish the statutory authority to adjust grievances, a party must show disputed individuals have authority to adjust actual grievances, not merely minor disputes such as disputes regarding workload, lunch and break schedule conflicts, or personality conflicts. *Ken-Crest Services*, 335 NLRB 777, 779 (2001); *Illinois Veterans Home at Anna, L.P.*, 323 NLRB 890, 891 (1997) (noting absence of evidence putative supervisors performed any role in formal grievance procedure); *Riverchase Health Care Center*, 304 NLRB 861, 865 (1991); *Ohio Masonic Home*, 295 NLRB 390, 394 (1989). Being informed of a dispute between subordinates does not, by itself, show that the putative supervisors adjust or handle the problems at issue (nor does it establish independent judgment). *Avante at Wilson, Inc.*, 348 NLRB at 1058. Even if asserted supervisors have some involvement in a grievance resolution procedure, the evidence must specify with clarity what role they play and, of course, the evidence must show independent judgment is exercised. *Training School at Vineland*, 332 NLRB at 1412 fn. 2.

Although not raised in its brief, the Employer presented some evidence at the hearing in support of its argument that charge nurses mediate work-related and interpersonal disputes among employees which warrants a finding of supervisory status. The Employer cites to no case law in support of this argument. The record is clear that charge nurses do not adjust grievances within the CBA. Additional record evidence on this subject is essentially limited to conclusory statements about the charge nurses' ability to resolve employee disputes. To the extent that the record indicates that the charge nurses might have the authority to resolve minor disputes and interpersonal conflicts, the record fails to establish with sufficient specificity actual disputes that have been resolved by any charge nurses, or any independent judgment exercised in their resolution. Moreover, there is no evidence that the charge nurses possess any authority to alter terms and conditions of employment in order to resolve workplace disputes. Finally, as noted, the ability to resolve minor employee complaints or disputes is not enough to establish supervisory authority. Accordingly, the Employer has failed to meet its burden of establishing that the petitioned-for charge nurses adjust grievances within the meaning of Section 2(11).

2. *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*, 348 NLRB at 730, fn. 10; *Ken-Crest Services*, 335 NLRB at 779.

The Employer submitted into evidence the charge nurses' job descriptions and argues they 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 at 1416 ("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). Additionally, that there are times when the charge nurses are the highest-ranking official on site, during evenings and weekends, is also not controlling as "the Board has continued to hold that an employee's service as the highest-ranking employee on duty is a secondary indicium of supervisory status that,

by itself, is insufficient to demonstrate supervisory status." *Loyalhanna*, 352 NLRB at 864-65. At any rate, a list of management phone numbers is posted at the nurses' station and the charge nurses are instructed to call nursing management for any issues that arise on shift. As noted, the charge nurses do not possess any authority to call in additional CNAs when a shift is understaffed or to extend their shifts and approve overtime for any reason. See, *Golden Crest*, 348 NLRB at 730 (finding that service as the highest-ranking employee on duty was "even less probative where management is available after hours").

Other secondary indicia advanced by the Employer is similarly not compelling. There is no record evidence that the charge nurses participate in any evaluation procedures for CNAs or CMAs or that any feedback they might provide about employees is incorporated into any employee performance reviews. The charge nurses' involvement in educating and training employees on-the-job does not support supervisory authority. 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.")). While there is some evidence that the charge nurses attend nursing meetings, there is no evidence that any such meetings are supervisory in nature. Finally, while I acknowledge the disparity in hourly wage rates between the charge nurses and the CNAs and CMAs, the Board has consistently held that "[p]ay differential is a secondary indicia of supervisory status and, in the absence of primary indicia as enumerated in Section 2(11), is insufficient to establish supervisory status." *Masterform Tool Company*, 327 NLRB 1071, 1072 (1999), citing *J. C. Brock Corporation*, 314 NLRB 157, 159 (1994). See also, *Pacific Coast M.S. Industries Co.*, 355 NLRB 1422, 1423, fn. 13 (2010).

III. CONCLUSION ON SUPERVISORY STATUS OF CHARGE NURSES

Based upon the record, I conclude that the evidence is insufficient to establish that the petitioned-for RN and LPN charge nurses are supervisors within the meaning of Section 2(11) of the Act and thus they are eligible to vote in the election.

IV. CONDUCTING THE ELECTION MANUALLY OR BY MAIL BALLOT

A. Applicable Framework When Considering a Mail Ballot Election

On November 9, 2020, the Board reiterated its longstanding preference for manual elections under *San Diego Gas and Elec.*, 325 NLRB 1143 (1998), while also providing more specific and defined parameters under which Regional Directors should exercise their discretion in determining election type against the backdrop of COVID-19. The Board set forth "six situations that suggest the propriety of mail ballots due to the COVID-19 pandemic," noting that "[w]hen one or more of these situations is present, a Regional Director should consider directing a mail-ballot election" under the extraordinary circumstances presented by the COVID-19 pandemic. *Aspirus*, 370 NLRB slip op. at 1. Those six situations are:

1. The Agency office tasked with conducting the election is operating under "mandatory telework" status;

2. Either the 14-day trend in the number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher;
3. The proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size;
4. The employer fails or refuses to commit to abide by the GC Memo 20-10²³ protocols;
5. There is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status; and
6. Other similarly compelling considerations.

Accordingly, I analyze the instant petition using the prevailing circumstances in the state and county where the facility is located and in light of the Board's recent guidance in *Aspirus*.

B. Facts Related to the Six Factors

(1) The telework status of the Region's offices

Neither the Subregional office in Portland, Oregon nor the Regional office in Seattle, Washington is currently in mandatory telework status.

(2) The 14-day trends for increasing cases and the positivity rate

The Board suggests Regional Directors consider the 14-day trend in the number of new cases of COVID-19 and the 14-day testing positivity rate in the area around the Employer's facility.

In *Aspirus*, the Board does not specifically detail how the 14-day trend in the number of new cases should be evaluated. The Board does direct that county-level data for the potential manual polling place for the 14-day trend should be accessed through the "Coronavirus Resource Center" website maintained by Johns Hopkins University. 370 NLRB slip op. at 5, fn. 22. The Employer is located in Coos County. According to the Johns Hopkins "COVID-19 Status Report" for Coos County, the data shows that the 14-day trend in the number of new confirmed cases has fluctuated from eight on February 9, 2021²⁴ to 18 on February 22, with a daily high within that range of 26 on February 19.²⁵

²³ July 6, 2020 General Counsel Memorandum 20-10, "Suggested Manual Election Protocols" (GC 20-10).

²⁴ All dates hereafter are in 2021 unless otherwise noted.

²⁵ <https://bao.arcgis.com/covid-19/jhu/county/41011.html> (accessed February 23).

Number of Cases in Last 14 Days – Coos County	
-14 (2/9/21)	8
-13	15
-12	16
-11	7
-10	20
-9	11
-8	0
-7	11
-6	9
-5	8
-4	26
-3	12
-2	9
-1 (2/22/21)	18

As further noted by the Board in *Aspirus* with regard to the second factor, the 14-day “percent positive” or “testing positivity rate” statistic is “based on the number of positive and total tests in the locality” and is “suggestive of transmission rates in the locality among people who have not been tested.” *Aspirus*, 370 NLRB slip op. at 5. Johns Hopkins University notes that “[b]ecause a high percentage of positive tests suggests high coronavirus infection rates (due to high transmission in the community), a high percent positive can indicate it may be a good time to add restrictions to slow the spread of disease.”²⁶ While Johns Hopkins reports county-level statistics for 14-day trends in the number of new confirmed cases, as noted above, it does not report statistics for 14-day testing positivity rates on a county-by-county basis. However, Coos County reports its 14-day test positivity rates.²⁷ The 14-day positivity rate for Coos County for the period from February 7 to February 20 was 8.4 percent.²⁸ Further, based on current metrics, Coos County will be continuing in “Extreme Risk Guidelines”²⁹ to at least March 11 even as the more populous Portland area is allowed to ease restrictions under the High Risk designation.

(3) Mandatory health orders related to maximum gathering size

On March 8, 2020, Governor Kate Brown issued Executive Order 20-02 declaring a state of emergency in Oregon due to the COVID-19 outbreak – this state of emergency was most recently extended to March 3 by Executive Order 20-67 dated December 20, 2020.³⁰ Following the State’s declaration, on March 27, 2020, the City Manager likewise declared a state of emergency in the City of Myrtle Point based on the finding that “COVID-19 is a public health

²⁶ <https://www.jhsph.edu/covid-19/articles/covid-19-testing-understanding-the-percent-positive.html>

²⁷ <https://cooshealthandwellness.org/psa-county-metrics-update-february-23/> (Please see the attached PSA for more information, PSA: County Metrics Update February 23) (“These levels will be effective to March 11, 2021. The next opportunity for Coos County to change risk categories will be based on the Risk Category determined by Oregon Health Authority on March 8th.”) (accessed February 23).

²⁸ *Id.*

²⁹ See, <https://coronavirus.oregon.gov/Pages/guidance.aspx>, “Sector Risk Level Guidance Chart.” (accessed February 23).

³⁰ <https://coronavirus.oregon.gov/pages/executive-orders.aspx> (accessed February 23).

crisis that threatens the health, safety, and welfare of the City and its citizens and constitutes an imminent threat of injury, illness, human suffering, financial loss, and/or loss of life” (extended on May 1, 2020 and remaining in effect until terminated by the City Manager).³¹ Since January 15, Coos County has remained under “Extreme Risk” guidelines set forth by the State of Oregon and Governor Kate Brown.³² These guidelines provide for the strictest of restrictions including, *inter alia*: indoor and outdoor social and at-home gatherings limited to a maximum of six people and recommended limit of two-households; indoor dining prohibited; restrictions on outdoor dining, indoor and outdoor recreation and fitness and entertainment establishments; remote work, if able; offices closed to public, if possible; and prohibited indoor visits at long-term care facilities with limited outdoor visiting restrictions. Masks are also required state-wide with some exceptions.³³

- (4) *Employer’s position on procedures in GC Memo 20-10 and*
- (5) *COVID-19 in the Employer’s facility*

The Employer notes in its brief that “[i]mmediately prior to the submission of this Brief...the Employer learned an employee tested positive for COVID-19. As a result of that positive test, the Employer now agrees the Region should conduct the election by mail ballot.”

- (6) *Other compelling considerations*

There are no other compelling considerations.

C. Parties’ Positions

At the time of the hearing, the parties were in agreement to a manual election. At the conclusion of the hearing, the positions of the parties were solicited for consideration. As noted, the Employer advised the Region by brief that based on current conditions and specifically its recent knowledge that an employee tested positive for COVID-19, it would no longer request a manual election and agrees to a mail ballot election.

As noted, Petitioner did not address the issue of the mechanics of an election either at the hearing or by brief.

D. Analysis of the Six Factors

As explained above, there is current evidence of widespread COVID-19 infection in Coos County, as evidenced by the 14-day new case rates and especially the 14-day positivity rates. As such, there is sufficient evidence to meet the second factor of the Board’s guidance for when a mail-ballot election should be considered. While I acknowledge that the numbers oscillate in the relevant 14-day new case period above, there is no clear trend in the number of new confirmed COVID-19 cases demonstrating a stable downward trend over the 14-day period. The above statistics showing the 14-day trend in the number of new confirmed cases and the 14-day testing positivity rates above five percent are sufficient to meet the second situation enunciated by the

³¹ <https://www.ci.myrtlepoint.or.us/general/page/state-emergency-extended> (accessed February 23).

³² <https://coronavirus.oregon.gov/Pages/guidance.aspx>. See also, <https://cooshealthandwellness.org/psa-alert-coos-county-metrics-update-january-11th/> (accessed February 23).

³³ <https://govstatus.egov.com/or-oha-face-coverings> (accessed February 23).

Board in *Aspirus* and lead me to conclude there is too much risk to holding a manual election at this time or in the near future.

Regarding the third factor, there are mandatory health orders in the State of Oregon and Coos County related to maximum gathering size as described above. Regarding the fourth and fifth factors in *Aspirus*, concerning GC Memo 20-10 and whether there is a current COVID-19 outbreak at the Myrtle Point facility, I note the Employer's changed position that the election should be conducted by mail ballot based on its recent knowledge of an employee at the facility who tested positive for COVID-19.

Given the above conditions, I find the appropriate and most responsible measure to ensure a safe election is a mail-ballot election. A mail-ballot election will eliminate the risk of further infection and the risk of unnecessarily exposing employees, Board agents, party representatives, and their families to COVID-19, and it will ensure that the unit employees have the opportunity to vote promptly.

V. PROFESSIONAL STATUS OF THE RNs

As noted, the petitioned-for unit includes RNs and LPNs. Although not addressed in the record, I note that Section 9(b)(1) of the Act, which prohibits the Board from including professional employees in a unit with non-professional employees unless a majority of the professional employees vote for inclusion in such a unit, applies to this case because the Board's traditional view is that RNs are presumptively professional employees within the meaning of Section 2(12). *Mercy Hospitals of Sacramento, Inc.*, 217 NLRB 765 (1975). Accordingly, I shall direct separate balloting in Voting Groups A and B pursuant to the Board's decision in *Sonotone Corporation*, 90 NLRB 1236 (1950).³⁴ The RNs will be designated as "Voting Group A" and shall be given a unit choice. Correspondingly, the LPNs are designated as "Voting Group B."

CONCLUSIONS

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Based on 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 commerce within the meaning of the Act, and it would effectuate the purposes of the Act to assert jurisdiction herein.³⁵

³⁴ At the hearing, the parties agreed to a *Sonotone* election.

³⁵ The parties stipulated that the Employer, Care Centers Management, Inc., d/b/a Myrtle Point Care Center, an Oregon corporation with an office and place of business in Myrtle Point, Oregon, is engaged in the business of operating a nursing home facility. During the past twelve months, a representative period, the Employer derived gross revenue in excess of \$100,000 and purchased and received, at its Myrtle Point facility, goods and services valued in excess of \$50,000 directly from points located outside the State of Oregon.

3. The parties stipulated, and I so find, that Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time Registered Nurses (RNs) and Licensed Practical Nurses (LPNs) employed by the Employer at its facility located in Myrtle Point, Oregon; excluding managerial employees, office clerical employees, confidential employees, agency employees, employees represented by other labor organizations, and guards and supervisors as defined by the Act.³⁶

The unit set out above includes professional and non-professional employees. However, the Board is prohibited by Section 9(b)(1) of the Act from including professional employees in a unit with non-professional employees unless a majority of the professional employees vote for inclusion in such a unit. Accordingly, the desires of the professional employees must be ascertained as to inclusion in a unit with non-professional employees.

Therefore, I shall direct separate balloting in the following voting groups:

VOTING GROUP A (PROFESSIONAL UNIT)

All full-time and regular part-time Registered Nurses (RNs) employed by the Employer at its facility located in Myrtle Point, Oregon; excluding all other professional employees, non-professional employees, managerial employees, office clerical employees, confidential employees, agency employees, employees represented by other labor organizations, and guards and supervisors as defined by the Act.

VOTING GROUP B (NON-PROFESSIONAL UNIT)

All full-time and regular part-time Licensed Practical Nurses (LPNs) employed by the Employer at its facility located in Myrtle Point, Oregon; excluding all professional employees, managerial employees, office clerical employees, confidential employees, agency employees, employees represented by other labor organizations, and guards and supervisors as defined by the Act.

³⁶ At the conclusion of the hearing, the parties stipulated to the unit exclusions.

The non-professional employees (Voting Group B) will be polled to determine whether they wish to be represented by the Petitioner. The professional employees (Voting Group A) will be asked the following two questions on their ballot:

1. Do you wish to be included with non-professional employees in a single unit for the purposes of collective bargaining? The choices on the ballot will be “Yes” or “No”
2. Do you wish to be represented for the purposes of collective bargaining by Teamsters Local Union No. 206, affiliated with International Brotherhood of Teamsters? The choices on the ballot will be “Yes” or “No”

If a majority of the professional employees (Voting Group A) vote “Yes” to the first question on the ballot, indicating their desire to be included in a unit with non-professional employees, they will be so included. Their votes on the second question then will be counted together with the votes of the non-professional employees (Voting Group B) to determine whether the employees in the overall unit wish to be represented by the Petitioner. If, on the other hand, a majority of the professional employees vote against inclusion, they will not be included with the non-professional employees. Their votes on the second question will be separately counted to determine whether they wish to be represented by the Petitioner in a separate unit.

Thus, the unit determination is based, in part, upon the results of the election among the professional employees. However, I make the following findings in regard to the appropriate unit:

If a majority of the professional employees vote for inclusion in a unit with non-professional employees, I find the following single unit will constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time Registered Nurses (RNs) and Licensed Practical Nurses (LPNs) employed by the Employer at its facility located in Myrtle Point, Oregon; excluding managerial employees, office clerical employees, confidential employees, agency employees, employees represented by other labor organizations, and guards and supervisors as defined by the Act.

If a majority of the professional employees do not vote for inclusion in a unit with non-professional employees, I find the following two groups of employees will constitute separate units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

UNIT A (PROFESSIONAL UNIT):

All full-time and regular part-time Registered Nurses (RNs) employed by the Employer at its facility located in Myrtle Point, Oregon; excluding all other professional employees, non-professional employees, managerial employees, office clerical employees, confidential employees, agency employees, employees represented by other labor organizations, and guards and supervisors as defined by the Act.

UNIT B (NON-PROFESSIONAL UNIT):

All full-time and regular part-time Licensed Practical Nurses (LPNs) employed by the Employer at its facility located in Myrtle Point, Oregon; excluding all professional employees, managerial employees, office clerical employees, confidential employees, agency employees, employees represented by other labor organizations, and guards and supervisors as defined by the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **Teamsters Local Union No. 206, affiliated with International Brotherhood of Teamsters.**

A. Election Details

The election will be conducted by mail. Petitioner has waived the ten days it is entitled to the voter list described below.

The ballots will be mailed to employees employed in the appropriate collective-bargaining unit by a designated official of the National Labor Relations Board, Subregion 36, 1220 SW 3rd Avenue, Suite 605, Portland, OR 97204, on **Thursday, March 4, 2021 at 4:30 p.m.** 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.

Those employees who believe they are eligible to vote and did not receive a ballot in the mail by Thursday, March 18, 2021, as well as those employees who require a duplicate ballot, should communicate immediately with the National Labor Relations Board by either calling the Subregion 36 office at 503-326-3085 or our national toll-free line at 1-866-762-NLRB (1-866-762-6572).

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Subregion 36 office by **4:30 p.m. on Thursday, April 1, 2021.** In order to be valid and counted, the returned ballots must be received in the Subregion 36 office prior to the counting of the ballots. All ballots will be commingled and counted by an agent of Subregion 36 of the National Labor Relations Board on **Tuesday, April 6, 2021 at 2:00 p.m.** with participants being present via electronic means. No party may make a video or audio recording or save any image of the ballot count.³⁷

³⁷ If, at a later date, it is determined that a ballot count can be safely held at the Subregion 36 office, Region will inform the parties with sufficient notice so that they may attend.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **February 10, 2021**, 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.

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

C. Voter List

As required by Section 102.67(1) 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 **Monday, March 1, 2021**. 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.

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 10 business 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.

A request for review may 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. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden. 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. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

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. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and, therefore, the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated at Seattle, Washington on the 25th day of February, 2021.


Ronald K. Hooks, Regional Director
National Labor Relations Board, Region 19
915 2nd Ave., Ste. 2948
Seattle, Washington 98174