DECISION AND DIRECTION OF ELECTION

This case presents the single issue of whether the petitioned-for unit is an appropriate unit in a senior living facility offering various levels of care. Petitioner seeks to represent a unit consisting of Resident Assistants, non-certified Resident Assistants, Lead Resident Assistants, Trained Medication Assistants (TMAs), and Licensed Practical Nurses (LPNs). The Employer claims that this unit is inappropriate and must be expanded to include all non-professional employees employed at the Employer’s facility located at 100 Promenade Avenue in Wayzata, Minnesota.

A hearing officer of the Board held a video hearing in this matter and the parties subsequently filed briefs with me. As described below, based on the record and relevant Board cases, I find the petitioned-for unit is an appropriate unit.

I. FACTS

A. THE EMPLOYER’S STRUCTURE AND OPERATIONS

The Employer in this case operates a senior living facility called Folkestone in Wayzata, Minnesota. It is part of a larger organization, Presbyterian Homes and Services, which is headquartered in Roseville, Minnesota. Although the record is somewhat unclear, Presbyterian Homes provides certain support services, such as human resources and engineering expertise, to the Folkestone facility. Additionally, the chief management official at Folkestone reports directly to the Regional Director of Operations at Presbyterian Homes.

1 The Employer’s name appears as amended by stipulation of the parties.
At its Wayzata facility, the Employer operates three buildings: the main North Building, West Building, and South Building. The North Building houses most residents and provides various levels of care, including independent living, assisted living, memory care, and skilled nursing services (described in more detail below). The West and South Buildings, by contrast, only contain independent living apartments and resident amenities. All buildings are located within the same campus and are connected by skyways.

The services offered at Folkestone are divided into increasing levels of care. At the lowest level, seniors live in independent living apartments. For individuals living in these apartments, Folkestone essentially operates as a landlord. In addition to traditional landlord duties, Folkestone offers housekeeping services for these residents and a pre-loaded credit card that can be utilized for amenities at the facilities. The Employer operates 221 independent living apartments.

The next tier of care is assisted living. The main assisted living area at Folkestone is referred to as the Commons, and it is located on the second and third floors of the North Building. There are 39 apartments in the Commons. Residents who require assisted living develop a care plan with the Employer, which lays out the services that will be provided to them. These services can vary from minimal assistance to higher levels of care, such as dressing, grooming, and medication assistance.

The Employer also provides a higher tier of assisted living care, in an area called the Hearth. The Hearth is located on the fifth floor of the North Building. Residents at the Hearth require the supervision of a nurse 24 hours a day. In this area, residents also have dedicated care packages, as in the Commons. The Employer operates 18 apartments in the Hearth.

Next, the Employer also offers memory care assisted living. These facilities are located on the first floor of the North Building and are referred to as the Arbor. There are 17 apartments in the memory care unit. Residents are placed in this area solely through the orders of their doctor. The Arbor is a secured portion of the building, and residents who live there are provided comprehensive housekeeping, laundry, and activity services.

Finally, the Employer offers a skilled nursing facility, called the Gables (and also referred to as the Care Center). The Gables is located on the fourth floor of the North Building. This area is licensed for 30 patients. Residents will be placed in the Gables when they have acute clinical needs, such as a stroke or broken limb, or have longer term medical issues. At the Gables, the Employer provides the highest level of clinical care.

The Folkestone operations are overseen by Jodi Devick-Neal, Campus Administrator. She is the highest manager at the facility. The operations are then divided into following departments:

Folkestone also owns a fourth property on this campus—the Keyside Building—which is not age restricted and is managed by a third-party contractor.
• Housing Administrator: Sharon Millet
• Care Center Administrator: Angie Nyamburi
• Culinary Director: Justin Spano
• Environmental Services Director: Larry Jonson
• Life Enrichment Director: Danessa Weiss
• Wellness Director: Kathy Kmentz
• Chaplain: Ian Hewittson
• Office Manager: Lori Peterson
• Human Resources Manager: Katelynn Pollack

These directors and administrators all report directly to Campus Administrator Devick-Neal.

As emphasized by Devick-Neal and other managers who testified, the Employer utilizes a holistic care model to provide services to its residents, in which all staff are expected to support the Employer’s mission of providing a safe, comfortable, and stimulating environment for residents. One method that the Employer utilizes to further this mission is the “My Best Day” book. Each resident is interviewed about their preferences (such as when they like to wake up and go to bed) and any concerns (for example, if they get scared or disoriented being alone) when they arrive at the facility. These notes are then incorporated in an individualized “Best Day” sheet, which is then kept in a book for each floor at the Employer’s facility. As testified to by employees and managers, these books are utilized by employees in various departments (such as Resident Assistants) to ensure that residents are receiving optimum care.

The Employer also utilizes regular resident care conferences to further this mission. Employees meet with residents and, at times, their families to review care plans. Employees from various departments, including Resident Assistants, Life Enrichment Coordinators, culinary staff, and Housekeeping Service Assistants, are allowed to attend these meetings. If staff from certain departments are unable to attend, then they are encouraged to complete forms that are used at the meeting; the record, however, contains only blank examples of these forms.

Another way in which the Employer seeks to further the holistic care model is through its scheduling practices. Specifically, employees are scheduled in specific departments and times (for example, the morning shift in the Commons or the afternoon shift in the Gables) to ensure that residents are regularly and predictably interacting with the same employees. According to both managers and employees, this regular contact facilitates the Employer’s mission by making residents feel more comfortable and allows for employees in all departments to notice changes in residents’ behavior.

Concerns that are raised from various departments, such as the culinary department, will be routed through interdisciplinary team meetings (IDTs). These meetings occur on a daily basis shortly before lunch and are open to all departments, including activities, culinary, nursing, and social work. Campus Administrator Devick-Neal also attends these meetings. Although the record is slightly unclear, it appears that only managers and supervisors attend these meetings. At IDT meetings, the individuals involved discuss needs and issues of residents—for example, if a resident is seeking a dietary change or they are experiencing changes in behavior.
**B. GENERAL TERMS AND CONDITIONS OF EMPLOYMENT**

The Employer utilizes an employee handbook that applies to all employees at the Folkestone facility (and appears to be standardized across the Presbyterian Homes and Services organization). This handbook lays out various Employer policies, including pay and leave practices, personal conduct policies, and health and safety practices. The Employer also maintains a shared employee benefits guide. The benefits contained in this book include health, dental, and vision insurance, along with the ability to access other voluntary benefits such as short-term disability insurance.

There is also a standardized wage scale that applies to all employees. The base pay scale ranges from $14.00 an hour for Servers and Drivers, up to $24.66 an hour for LPNs. All employees receive wage increases based on time of service, with the first increase occurring after 1000 hours and the final increase occurring after 18,000 hours of work.

All employees report to the North Building at the start and conclusion of their shifts, where they complete a COVID check-in, clock in, and clock out.

Authority to hire for the Employer, including terms and conditions of employment, is set by the Employer’s corporate office. The actual hiring process for the Employer, however, is handled by the various department managers for each department, along with the local Human Resources Manager Katelynn Pollack. Interviews are conducted by these same individuals. After the interview process is complete, and a candidate is selected, the offer is made by the Employer’s corporate office, not the Wayzata facility.

Although the record does not contain any specific disciplines, the Employer’s disciplinary process evidently always involves the employees’ department supervisor and facility Human Resources Manager Katelynn Pollack. For lower-level disciplines, only the supervisor and Human Resources Manager will be involved. In the case of suspensions or terminations, Campus Administrator Devick-Neal also will be involved in the disciplinary decision. Finally, in the case of terminations, the Employer will involve Lydia Sokoto, who is a human resources representative at the corporate office.

**C. CLASSIFICATIONS IN THE PETITIONED-FOR UNIT**

1. **Resident Assistants, non-certified Resident Assistants, and Lead Resident Assistants**

   The proposed bargaining unit contains 52 Resident Assistants and three Lead Resident Assistants.\(^3\) As the duties of Resident Assistants and Lead Resident Assistants largely overlap, I will combine the discussion of their positions, noting the differences where necessary.

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\(^3\) The record also contains a job description for a position entitled non-certified Resident Assistants. Individuals in this position are hired without certification, but are required as part of their job duties to obtain certification with four months of being hired. Although no employees currently are in this classification, the parties stipulated that this position should be included in any appropriate bargaining unit.
Resident Assistants work under two different departments for the Employer. One group of Resident Assistants work under the purview of Housing Administrator Sharon Millet. In turn, the Resident Assistants in this group report to Clinical Administrator of Housing Annette Sundem. Resident Assistants (also referred to at times as Home Health Aides in the record) in this department provide services for assisted living residents (Commons), enhanced assisted living residents (Hearth), and memory care residents (Arbor). The second group of Resident Assistants work under the management of Care Center Administrator Angie Nyamburi and are supervised by Clinical Coordinator Timon Salhstrom. Resident Assistants in this classification work solely in the skilled nursing area (Gables).

Resident Assistants work on a three-shift schedule: the AM shift, which extends from approximately 6:00 am to 4:30 pm; the PM shift, which is from approximately 2:00 pm to 10:00 pm; or the NOC (Overnight) shift, which is from 10:00 pm to 6:30 am. The vast majority of Resident Assistants work regularly scheduled shifts; however, in addition to these regularly scheduled employees, the Employer employs six Resident Assistants on an on-call/temporary basis.

The Employer’s Resident Assistants are formally certified by the state as certified nursing assistants as a requirement of their job. In order to become a certified nursing assistant, an individual must take a three-month course and then pass a state test consisting of both a written and skills-based portion. All Resident Assistants are also trained on how to utilize various lifts by the Employer; this lift training takes place on an annual basis. The Employer additionally provides annual nurse assistant training courses. Only Resident Assistants attend these trainings.

Regardless of department or shift, the duties of the Resident Assistants appear from the record evidence to be relatively consistent across the two departments. As described by employee testimony, Resident Assistants are intimately involved with ensuring that residents in assisted living and the skilled care center have their personal needs met. Among other tasks, this involves assisting residents with using the restroom, dressing residents, showering residents, assisting them with feeding, and helping them brush their teeth. Resident Assistants also keep track of residents’ vital signs. Resident Assistants also are primarily responsible for answering call lights and pendant calls from residents during their shifts. They are also primarily responsible for transporting residents from their rooms to other areas, such as dinner or activities. Finally, if no maintenance personnel are available (such as during overnight shifts), Resident Assistants will assist with basic maintenance such as unclogging toilets or adjusting temperature controls.

There are, however, two notable exceptions in job duties between Resident Assistants in the Gables/Care Center and Resident Assistants in the housing department. First, Resident Assistants in the Gables/Care Center are prohibited, by regulation, from passing out medication to

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4 An employee Resident Assistant testified that employees in the Gables (skilled nursing area) have different certifications than those who work in other assisted living care areas, and that an employee must have this additional qualification to work in the Gables. The record, however, is unclear as to what this certification entails.
residents; in other areas, Resident Assistants are tasked with passing out medication. Second, in general assisted living areas, Resident Assistants are responsible for personal laundry for residents; in the Gables care center, by contrast, these personal laundry duties are handled by Housekeeping Service Assistants.

Lead Resident Assistants have the same job duties and qualifications described above, but are also characterized by the Employer as the “go to” persons regarding staffing—particularly on nights and weekends, when other managers and supervisors may be off duty. They are also charged with taking the lead in handling any emergency situations. Lead Resident Assistants, however, do not possess any disciplinary authority and are not supervisors under Section 2(11) of the Act.

The record evidence indicates that Resident Assistants have varying levels of interaction with employees in other departments. According to employee testimony, Resident Assistants in the Gables work regularly alongside both TMAs and LPNs, performing largely the same job duties (as will be described in more detail below), throughout most of their shifts. During meal times, which last approximately one hour, Resident Assistants will feed residents, while Servers deliver food to residents. Resident Assistants spend less time interacting with other positions in the unit; an employee Resident Assistant testified that he spends approximately 15 minutes of each shift interacting with Cooks, Engineers and Maintenance Technicians, and Housekeeping Service Assistants. The record is somewhat unclear as to what, if any, level of interaction the Resident Assistants have with activity coordinators. Finally, it appears that Resident Assistants have little, if any, contact with the Driver and Gift Shop Concierge.

With one exception, discussed immediately below, there is no evidence of functional interchange between Resident Assistants and the other positions described above. The training and job duties of the Resident Assistants vary widely from other classifications besides LPNs and TMAs. The training requirements of TMAs and LPNs, however, prevent Resident Assistants from being able to fill those positions.

The record does indicate that there is one Life Enrichment Coordinator who is also qualified to work as a Resident Assistant. This employee works in the Gables, and her job duties generally involve setting up and administering activities with the residents in that area. When residents have needs that are traditionally served by a Resident Assistant (such as using the rest room), this particular employee will also fill in these functions.

2. Trained Medication Assistants

There are three TMAs at the Employer. In contrast to the Resident Assistants, all the TMAs work in the skilled nursing care center (Gables), under the purview of Care Center Administrator Nyamubri. Two of the TMAs work in the AM shift, while the third is employed on an on-call basis.

5 This position is also referred to at times as a “CMA” or Certified Medication Assistant. The record reflects that these positions are the same.
The record contains much less direct evidence regarding the training, job duties, and responsibilities of TMAs. According to the testimony of a Resident Assistant who works in the Gables, the duties of the TMAs are essentially the same as those of Resident Assistants—with the exception that they are allowed to give medication to residents in the Gables. As indicated by the job description for this position, being allowed to provide medications in the Gables involves additional training, although the record is unclear as to what is required for this training. There is no other record evidence of functional interchange between the TMAs and other classifications that the Employer is seeking to add to the unit.

3. Licensed Practical Nurses

The Petitioner also seeks to include the five LPNs who work at the Employer. Although somewhat unclear from the record, it appears that most LPNs work in the skilled nursing care center (Gables), and one LPN works in the heightened assisted living (Hearth). There are three LPNs who are scheduled to work on the afternoon shift, one LPN who works overnight, and one on-call LPN.

As with TMAs, the record is devoid of detailed evidence regarding the job duties and qualifications of LPNs. The job description for this position states (perhaps obviously) that employees in this position must have a current license as an LPN in the state that they practice in. The job description also provides that LPNs monitor the work of TMAs and Resident Assistants. According to the testimony of Resident Assistants who regularly work with LPNs, their job duties are roughly the same as those of the Resident Assistant, in that they are regularly in residents’ rooms throughout their shift, in a caregiving capacity. They are, however, charged with other responsibilities that fall outside the scope of Resident Assistant job duties, such as wound care, signing for medications, and directly taking doctors’ orders. LPNs, when needed, are qualified to fill in for TMAs if none are available.

D. CLASSIFICATIONS SOUGHT TO BE ADDED BY EMPLOYER

1. Servers and Cooks

The Employer seeks to add both Servers and Cooks (including leads in both categories) to the bargaining unit. The record indicates that there are 30 Servers (including two leads) and eight Cooks (including two leads). Both the Servers and Cooks work either AM, PM, or on-call shifts; there is no overnight shift for either position. Both Servers and Cooks ultimately report to Culinary Director Justin Spano, as part of the nutrition and culinary department.

Starting with the Servers, the Employer requires no specific training or qualifications (beyond an ability to read and write in English and understand the Employer’s policies) to work as a Server; to work as a Lead Server, the qualifications are apparently the same, with the exception that an individual must have six months of service experience in a health care or restaurant setting. The record is unclear as to what, if any, additional on-the-job training is provided to Servers.

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6 This position is also referred to at times as a Chef or a Cook/Chef. The record reflects that these positions are the same.
Servers are assigned to work in various dining rooms throughout the facility. As with other positions, Servers are generally scheduled in the same areas consistently to develop a rapport with residents and to be in a better position to observe any changes in resident behavior. Based on my review of the Employer’s floorplans, there are dining rooms located in the North Building on the first floor (in the Arbor memory care area); second floor (in the Commons assisted living area); fourth floor (in the Gables care center); and fifth floor (in the Hearth enhanced assisted living area).

The Servers’ job duties involve assisting the Cooks with meal preparation and serving meals to the residents during breakfast, lunch, and dinner. In addition to serving food, they are charged with completing a roster of who attended each meal and providing that roster to Clinical Coordinator Debbie Coffman. If a resident does not attend a meal during a given day, the serving team will communicate with them via telephone and then provide information regarding this contact to the home care team. This is required by regulation and is dictated by the Employer’s Assisted Living Resident Daily Check.

As part of their duties, Servers also ensure that the food service is consistent with the resident’s dietary plan (which is set up by their primary care doctor and then routed through the nursing team to the culinary department). Dietary plans are maintained in a system called Full Count, which is utilized only by the culinary department (but is completed using information from the nursing department). Where residents seek to have food that is outside their dietary plan (for example, receiving an extra cookie), the culinary department will also coordinate with the nursing department to see if these requests can be granted consistent with the care plan. If Servers notice behavioral concerns, they will bring them up with Culinary Director Spano, who will then relay these concerns via email to the clinical departments.

Additionally, although there is little testimony regarding their duties, the Lead Servers, based on their job description, have the additional responsibility of “serv[ing] as a resource for our staff and customers during your assigned shift according to regulations and established procedures.”

The Cooks, in turn, work primarily in the main kitchen, which is located on the second floor of the North Building in the Commons area. This is where most of the meal preparation for the Employer occurs. The menus utilized are initially created at the Employer’s home office, by a dietician, and then distributed to the Cooks at Folkestone kitchens. After being prepared, meals are then transported by Cooks, Servers, and at times other personnel to satellite kitchens on other floors of the North Building. In preparing meals for residents, the Cooks rely on the same dietary plans discussed above. The Employer also provides general dietary instructions to Cooks that, among other expectations, instruct them to speak with nurses, dieticians, or their supervisor if they have questions regarding a certain diet or if a resident seeks to have food items outside their prescribed diet. Finally, there is no record evidence (including job descriptions) regarding what, if any, additional duties the Lead Cooks are required to perform.

There is no evidence of any interchange between Cooks and Servers, nor of any interchange between these positions and others in the proposed unit.
2. Life Enrichment Coordinators and Drivers

The Employer also seeks to add the classifications of Life Enrichment Coordinator and Driver to the unit. There are three Life Enrichment Coordinators in the proposed expanded unit, and one Driver; all individuals work in the AM shift. Additionally, as discussed above, there is one employee who works both as a Life Enrichment Coordinator and a Resident Assistant; this employee works in the PM as an activity coordinator. The Life Enrichment Coordinators and Driver work directly under Life Enrichment Director Danessa Williams.

Among other more general qualifications, Life Enrichment Coordinators are required to possess a high school diploma (or its equivalent), a Class B driver’s license or ability to obtain one within six months of hire, and a demonstrated ability to plan programming for seniors. As with other positions, the Life Enrichment Coordinators are assigned to specific areas (such as Gables or Arbor) for specific periods of time. Life Enrichment Coordinators are primarily responsible for planning activities for residents. These activities are tailored to the level of each area; for example, coordinators in the Arbor area will schedule simpler activities for residents than in the general assisted living areas.

In addition to activities that take place at the facility, Life Enrichment Coordinators will also schedule outings, such as visiting flower shops or art galleries. During these outings, the coordinators are responsible for keeping track of residents and ensuring their safety and well-being. The coordinators will help to move residents in wheelchairs; they are not, however, qualified to transfer residents into or out of their wheelchairs (these duties are handled by Resident Assistants). Finally, if a resident needs a certain medication during an outing, the coordinators will provide the medication to the resident, in a sealed envelope. Life Enrichment Coordinators are also primarily responsible for assembling the information in the My Best Day forms, described above.

The Driver also falls under the purview of Life Enrichment Director Williams. The Driver works the AM shift. In terms of qualifications, the Driver is required to have at least a Class A or Class B license with passenger endorsement; previous work experience as a driver; basic knowledge of vehicle maintenance; and an excellent driving record, among other more general requirements. The Driver is primarily responsible for driving residents in the facility’s bus; in addition, the Driver spends one day a week working at a different facility run by Presbyterian Homes. During outings, the Driver will help to assist residents with entering and leaving the bus, if necessary, and then will join the residents to assist during the outing. Additionally, if there are no driving tasks, he will assist Life Enrichment Coordinators with their activities at the facility.

With one notable exception, there is no evidence of interchange between Drivers, Coordinators, and other classifications. As discussed above regarding Resident Assistants, there is one Life Enrichment Coordinator who is also a certified nursing assistant. This individual works some shifts as a Life Enrichment Coordinator, and other shifts as a Resident Assistant. Additionally, according to the Employer, this individual will (while working as a Life

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7 The employee list submitted with the Employer’s position statement, however, solely lists this individual as a Resident Assistant.
Enrichment Coordinator) perform traditional Resident Assistant duties, such as toileting and dressing residents. This particular employee, however, is the only individual in the Life Enrichment Coordinator classification that is licensed to perform such tasks.

3. Housekeeping Service Assistants

The Employer also seeks to include eight Housekeeping Service Assistants within the bargaining unit. Seven of the Housekeeping Service Assistants work the AM shift, while one works solely on an on-call basis. The Housekeeping Service Assistants are directly managed by Housekeeping Services Manager Stefanie Hanson, who in turn reports to Environmental Services Director Larry Johnson (who also directly supervises the maintenance employees, discussed below).

The Housekeeping Service Assistant position requires no specialized training or licensure; the Employer generally requires employees in these positions to be able to complete the work, consistent with its mission, and to read and write in English. There is no evidence of any specific on-the-job training being provided to individuals in the Housekeeping Assistant role.

As with other positions, the Housekeeping Service Assistants are assigned to specific floors at the Employer, in order to facilitate the Employer’s mission of providing optimum care to residents. Employees in this classification work in both the assisted living areas and the independent living areas at all facilities, including the West and South Buildings. Housekeeping Service Assistants who work in the main North Building are generally assigned to a floor, while the West and South Buildings are each handled by a single Housekeeping Service Assistant.

The duties of Housekeeping Service Assistants differ depending on whether they work in an assisted or independent living space. For employees who work in assisted living areas, the bulk of their day is spent cleaning residents’ rooms, while less time is spent cleaning common areas. Housekeeping Service Assistants who work in independent living, in turn, spend more of their time cleaning common areas, as residents’ rooms are cleaned less frequently. Specifically, residences in assisted living are cleaned at least once a week (and more frequently in the Care Center), while those in independent living are cleaned every other week. Housekeeping Service Assistants are expected to clean the residences in all areas in about 30 minutes. Finally, Housekeeping Service Assistants in the Gables/Care Center are also expected to do residents’ personal laundry.

Regardless of which area they work in, while Housekeeping Service Assistants are cleaning rooms, they are expected to monitor and interact with residents, both for the comfort and enjoyment of residents and also to monitor any changes in behavior. If a Housekeeping Service Assistant notices any changes in behavior, they are expected to bring it to their supervisor (in cases of less acute issues); in the case of more acute issues, they are expected to raise them with either a nurse or a Resident Assistant. The Employer presented evidence that Housekeeping Manager Hanson will, in turn, raise these concerns with other supervisors and managers in different departments, via email.
These is no evidence of interchange between the Housekeeping Service Assistants and other positions in the petitioned-for unit, or the other classifications sought to be added to the unit by the Employer.

4. Maintenance Technicians, Engineering Technicians, and Engineers

The Employer next seeks to add three related classifications of employees into the unit: Maintenance Technicians (I), Engineering Technicians (II), and Engineers (III). There are three Maintenance Technicians, one Engineering Technician, and one Engineer. These employees all work the AM shift, although there is apparently a call system in place for these maintenance personnel in the case of emergencies. They fall under the direct supervision of Environmental Services Director Larry Johnson.

The job descriptions for these positions refer to Level I, II, and III core competencies. These competencies are not included in the record, but the record testimony indicates that these positions increase in qualification and responsibilities in increasing order. Based on testimony, Level III Engineers have the capabilities to work in more technical areas such as HVAC and electrical work; Level I Maintenance Technicians have very few qualifications before working; and Level II Engineering Technicians are somewhere in between Level I and III maintenance personnel.

As with other positions, the Employer strives to schedule maintenance personnel to regular work areas during regular periods of time. The maintenance personnel are responsible for maintaining both residents’ rooms and common areas. They are also responsible for installing certain permanent improvements, such as grab bars for residents. In deciding which items to install, they will work alongside nursing and occupational therapy. They are further expected to report any irregularities that they notice in residents’ rooms (such as, for example, a bloodstain) to other departments such as housekeeping.

Maintenance personnel can receive work orders either verbally or through a system for such requests called TELS. Requests in TELS can be completed either through the receptionist department, or by other employees directly. The Employer presented evidence of numerous TELS requests from the housekeeping department, requesting maintenance for various items in residents’ rooms. The Employer also produced another series of work orders, indicating that maintenance workers will also repair wheelchairs for residents and adjust rooms to make them more wheelchair accessible. Finally, maintenance orders (at least with regard to the Gables skilled nursing area) are tracked through a communication whiteboard. This board is maintained by the Care Center Administrator and can include both requests for maintenance and for housekeeping.

There is no evidence of interchange between the maintenance positions and the other classifications proposed by the parties.
5. Gift Shop Concierge

Finally, the Employer seeks to include the Gift Shop Concierge in the bargaining unit. The Gift Shop Concierge falls under the scope of the Office Manager Lori Peterson. The Gift Shop Concierge works only during the AM shift, in the gift shop, which is located near the main entrance of the North Building.

According to the position description, Gift Shop Concierges are required to have a high school education or equivalent, proficiency with computer programs including Microsoft Outlook, Word, and Excel; and are preferred to have prior retail managerial experience. Although record testimony regarding the Gift Shop Concierge is limited, the duties of this individual appear to involve running and maintaining the Employer’s gift shop. Along with running the shop, this individual is expected (as with other positions) to observe residents and note and report any changes in behavior, and to report those changes to the nursing department. There is no other evidence of any integration of duties, nor interchange with any other positions discussed above.

II. ANALYSIS

The Act does not require that a unit for bargaining be the only appropriate unit or even the most appropriate unit. Rather, the Act requires only that the unit be an appropriate one. Wheeling Island Gaming, Inc. 355 NLRB 637, 637 n.2 (2010) (citing Overnite Transportation Co., 322 NLRB 723, 723 (1996)). “The Board’s inquiry necessarily begins with the petitioned-for unit. If that unit is appropriate, then the inquiry into the appropriate unit ends.” Boeing Co., 368 NLRB No. 67, slip op. at 3 (Sept. 9, 2019). If the petitioned-for unit is not appropriate, the Board may examine alternative units suggested by the parties, or it may select a unit different from the proposed alternative units. See, e.g., Bartlett Collins Co., 334 NLRB 484, 484 (2001); Overnite Transportation Co., 322 NLRB at 723.

Typically, to determine whether a unit is appropriate, the Board looks at whether the petitioned-for employees have shared interests. See, Wheeling Island Gaming, 355 NLRB at 637 n.2. Additionally, the Board analyzes “whether employees in the proposed unit share a community of interest sufficiently distinct from the interests of employees excluded from the unit to warrant a separate bargaining unit.” PCC Structural, Inc., 365 NLRB No. 160 (Dec. 15, 2017), slip op. at 11 (emphasis in original). In making these determinations, the Board considers whether the employees: (1) are organized into a separate department; (2) have distinct skills and training; (3) have distinct job functions and perform distinct work; (4) are functionally integrated with other employees; (5) have frequent contact with other employees; (6) interchange with other employees; (7) have distinct terms and conditions of employment; and (8) are separately supervised. PCC Structural, 365 NLRB at 11, citing United Operations, Inc., 338 NLRB 123, 123 (2002). The Board considers all the factors together, as no single factor is controlling. Airco, Inc., 274 NLRB 348, 348 (1984). The Board has also made clear that it will not approve

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8 The parties stipulated that two additional positions, fitness instructor and receptionist, should be excluded from the unit.
of fractured units—that is, combinations of employees that are too narrow in scope or that have no rational basis. *Seaboard Marine, Ltd.*, 327 NLRB 556, 556 (1999).

Where, as here, a party asserts that the smallest appropriate unit must include employees excluded from the petitioned-for unit, it is necessary to apply the three-step analysis set forth in *Boeing Co.*, 368 NLRB No. 67, slip op. at 2: (1) whether the petitioned-for employees share an internal community of interest; (2) whether the petitioned-for employees are “sufficiently distinct” from the excluded employees; and (3) consideration of any industry-specific guidelines. Steps one and three of *Boeing* reference broad principles that are generally applicable to unit determinations. Step two considers “whether the petitioned-for employees share a community of interest sufficiently distinct from employees excluded from the proposed unit to warrant a separate appropriate unit.” *Id.* at 4.

Further, while *PCC Structurals* involved a non-healthcare employer, in that case the Board explicitly reinstated the standard for non-acute healthcare facilities established in *Park Manor Care Center*, 305 NLRB 872 (1991). *PCC Structurals, supra*, slip op. at 1 n.3; see also *Manor Care of Yeadon PA, LLC*, 368 NLRB No. 28, slip op. at 1 n.3 (July 25, 2019) (applying *Park Manor* based on *PCC Structurals*). Under *Park Manor*, unit appropriateness is determined under the “pragmatic” or “empirical community of interest test” by examining traditional community of interest factors, noted above in *PCC Structurals*, plus background information gathered during the healthcare rulemaking and prior cases involving either the type of unit sought or the particular type of healthcare facility at issue. *Park Manor*, 305 NLRB at 875.

Applying the *Boeing* three-step analysis, along with the traditional community of interest factors in *PCC Structurals* and the empirical community of interest test in *Park Manor*, I find that the petitioned-for unit of Resident Assistants, non-certified Resident Assistants, Lead Resident Assistants, TMAs, and LPNs is appropriate.

A. SHARED INTERESTS WITHIN THE PETITIONED-FOR UNIT

The parties have stipulated that the petitioned-for unit shares a requisite internal community of interest. The record evidence fully supports this stipulation. The petitioned-for classifications work closely together to ensure that the medical needs of residents are met throughout the Employer’s assisted living and clinical facilities. The record also discloses that these classifications otherwise share similar terms and conditions of employment. Based on this stipulation and the record evidence, I find that the petitioned-for unit employees share an internal community of interest and therefore satisfy step one of the *Boeing* analysis.

B. SHARED INTERESTS BETWEEN THE PETITIONED-FOR AND DISPUTED CLASSIFICATIONS

A review of the traditional community of interest factors in the petitioned-for unit, compared with the remaining classifications, reveals that the classifications sought by Petitioner are “sufficiently distinct” from those sought to be added by the Employer under step two of the *Boeing* analysis.
1. Departmental Organization

The Board has held that an employer’s departmental organization is an important consideration in determining the appropriateness of a bargaining unit. *Buckhorn, Inc.*, 343 NLRB 201, 202-03 (2004). Thus, for example, in the context of a power plant, where the employer chose to separate its nuclear operations from its general operations, the Board found it appropriate to have two petitioned-for units (as opposed to a system-wide unit) based in part on this administrative grouping. *PECO Energy Co.*, 322 NLRB 1074, 1079-81 (1997). An employer’s administrative groupings, however, are not dispositive; in some cases, the Board will approve units that include some, but not all, employees within an administrative grouping. *Home Depot USA*, 331 NLRB 1289, 1289-91 (2000).

Here, the Employer’s administrative groupings generally support the appropriateness of the proposed unit and the exclusion of the disputed classifications. In this regard, employees in the proposed unit work under the purview of the Housing Administrator or the Care Center Administrator. Although the petitioned-for unit admittedly extends across two administrative groupings, Resident Assistants, TMAs, and LPNs are the only employees who work in these groupings. By contrast, the remaining positions that the Employer seeks to add to the unit all work in different administrative groupings—specifically, culinary, environmental services, life enrichment, and office management/billing, with separate and distinct supervision. Although the Employer argues that its operations are part of a single integrated workforce, its own organization chart demonstrates that there are rational and distinct divisions between the petitioned-for unit and those positions that the Employer seeks to add to the unit. Accordingly, the Employer’s administrative structure supports the petitioned-for unit.

2. Common Supervision

A second factor that the Board considers in conducting its community of interest analysis is whether the employees in dispute share common supervision. In examining supervision, the most important factor is the identity of employees’ supervisors who have the authority to hire, fire, or discipline employees (or effectively recommend those actions) or supervise the day-to-day work of employees, including rating performance, directing and assigning work, scheduling work, and providing guidance on a day-to-day basis. *Executive Resource Associates*, 301 NLRB 400, 402 (1991). Common supervision weighs in favor of placing the employees in dispute in one unit but separate supervision does not mandate separate units. *Casino Aztar*, 349 NLRB 603, 607 n.11 (2007). Conversely, shared supervision does not mandate inclusion in the same unit, particularly where there is no evidence of interchange, contact, or functional integration. *United Operations*, 338 NLRB 123, 125 (2002).

Here, while the Employer’s Campus Administrator Jodi Devick-Neal is ultimately responsible for overseeing operations at the facility and ensuring regulatory compliance, the record evidence generally demonstrates that there is separate supervision across the relevant departments. In this regard, the Employer’s organizational chart shows that employees in the petitioned-for unit report to the clinical administrator in housing and the clinical administrator in the Care Center (depending on whether they work in the skilled nursing facility or other areas of assisted living). The evidence further supports that, in terms of direction, assignment, and
day-to-day supervision, these employees (or at least Resident Assistants) report to these administrators, and not other supervisors (including the campus administrator). Conversely, there is no record evidence suggesting that administrators from other areas (such as culinary or environmental services) provide any supervision to the petitioned-for employees.

There are certain factors—such as the use of a shared human resource professional for hiring and disciplinary decisions—which provides some limited evidence of shared supervision. This evidence, however, is outweighed by the factors discussed above, and it is clear from the record that the common supervision factor weighs in favor of the proposed unit consisting solely of the petitioned-for employees.

3. The Nature of Employee Skills and Functions

This factor examines whether disputed employees can be distinguished from one another on the basis of job functions, duties, or skills. If they cannot be distinguished, this factor weighs in favor of including the disputed employees in one unit. Evidence that employees perform the same basic functions or have the same duties, that there is a high degree of overlap in job functions or of performing one another’s work, or that disputed employees work together as a crew, supports a finding of similarity of functions. Evidence that disputed employees have similar requirements to obtain employment, that they have similar job descriptions or licensure requirements, participate in the same employer training programs, or use similar equipment, supports a finding of similarity of skills. Casino Aztar, 349 NLRB at 603 (petitioned-for beverage employees have no separate community of interest from restaurant and catering with regard to job function, duties, or skills); J.C. Penney Company, Inc., 328 NLRB 766, 766-67 (1999) (petitioned-for employees in catalog fulfillment department and telemarketing employees “have similar skills and perform similar functions”); Brand Precision Services, 313 NLRB 657, 657-58 (1994) (a unit of operators, apart from other production employees, is not appropriate where “the operators’ training, skills, and functions are not distinct from those of the laborers or leadmen”); Phoenician, 308 NLRB 826, 827-28 (1992) (petitioned-for unit of golf course maintenance employees is too limited in scope and must include the landscape employees where “high degree of overlap in job functions” exists).

Here, the record evidence establishes that, outside some marginal overlap, employees in the petitioned-for unit perform fundamentally different work than those of the disputed employees. In this regard, the petitioned-for unit is responsible for the medical and personal care of residents. They bathe, dress, toilet, transport, and provide medication to residents—all of which are tasks that are (with a few narrow exceptions) handled solely by employees in the proposed unit. By contrast, employees in the disputed classifications perform discrete tasks that are separate and apart from those performed by the petitioned-for employees. The maintenance employees (including the Maintenance Technicians and Engineers) are responsible for maintaining the physical facilities of the Employer (including both in assisted and independent living areas). Similarly, the housekeeping employees are responsible for ensuring that residents’ rooms and common areas throughout the facility (including assisted and independent living) are kept clean and sanitary. The culinary department employees (Servers and Cooks) are tasked with ensuring that residents receive food, consistent with their clinical diet plan (which is developed by a physician and dietician). The Life Enrichment Coordinators and Driver, in turn,
are responsible for providing activities to mentally stimulate residents both inside and outside the Employer’s facility. Finally, the Gift Shop Concierge (to the extent that there is record evidence regarding this position) is involved in retail, not care, duties.

The qualifications, licensure, and training requirements also support drawing a distinction between the petitioned-for and disputed employees. Resident Assistants, TMAs, and LPNs are all required to have state-certified medical licenses—which are not required for any other positions. Many positions require only generalized qualifications, with no specific licensing requirements; to the extent that specific skills are required (such as for certain engineer positions), these skills appear to be far afield from those in the petitioned-for unit. Finally, the Employer itself provides annual training that is limited to those employees in the proposed unit—further illustrating its appropriateness.

In the face of this evidence, the Employer claims that the two groups of employees all share the task of monitoring, interacting with, and reporting issues with residents, as part of Respondent’s integrated care model. This monitoring, however, appears to be merely a baseline expectation, at least for many classifications in the disputed positions, and does not form the basis of their actual job duties. In other words, maintenance workers spend their days maintaining and repairing facilities; Housekeeping Service Assistants cleaning these same facilities; Life Enrichment Coordinators and the Driver running activities; Cooks and Servers providing food; and the Gift Shop Concierge operating that retail space. To the extent that these employees engage in passive observation of residents, any documentary evidence of reporting of resident issues between the various departments appear to be sent mainly from supervisors to other supervisors—not by employees in the proposed or disputed bargaining units.

In sum, I find that the nature of work performed by the petitioned-for unit, as opposed to the disputed employees, strongly supports a finding that this unit is appropriate.

4. Contact and Interchange Among Employees

Interchangeability refers to temporary work assignments or transfers between two groups of employees. Frequent interchange “may suggest blurred departmental lines and a truly fluid work force with roughly comparable skills.” Hilton Hotel Corp., 287 NLRB 359, 360 (1987). As a result, the Board has held that the frequency of employee interchange is a critical factor in determining whether employees who work in different groups share a community of interest sufficient to justify their inclusion in a single bargaining unit. Executive Resource Associates, 301 NLRB at 401 (citing Spring City Knitting Co: v. NLRB, 647 F.2d 1011, 1015 (9th Cir. 1981)). Lack of significant employee interchange between groups of employees is a “strong indicator” that employees enjoy a separate community of interest. Id. at 401. Also relevant for consideration regarding interchangeability is whether there are permanent transfers among employees in the unit sought by a union. However, the existence of permanent transfers is not as important as evidence of temporary interchange. Hilton Hotel Corp., 287 NLRB at 359.

The record in this case reveals that while the petitioned-for and disputed employees work at certain times in the same areas, there is little evidence of meaningful interchange between the employees in terms of temporary work assignments or transfers. Indeed, such transfers of work
appear to be largely precluded by the special licensing and training that Resident Assistants, TMAs, and LPNs possess. For example, they are the only employees who have the training necessary to physically transfer and bathe residents. The disputed classifications (with the exception of one employee) do not perform this work, nor could they, given their disparate training and qualifications.

To rebut this argument, the Employer points to evidence that the Resident Assistants (but not other positions in the petitioned-for unit) regularly interact with other employees in the disputed classifications. As an initial matter, however, these interactions do not include all positions in the disputed classifications; for example, there is no evidence of interaction or contact at all between the Gift Shop Concierge and the petitioned-for unit. And even in situations where there is record evidence of contact between positions, it still involves the performance of different duties. For example, while residents are in the dining room, both the Servers and Resident Assistants are present (for up to an hour) with residents; during this time, however, the Servers are providing food service while the Resident Assistants are often feeding residents. Similarly, while there was some testimony that Resident Assistants may need to accompany residents during outings organized by Life Enrichment Coordinators, the Coordinators are focused on coordinating and directing the activity, not the care of the residents. These types of interactions, where employees are working in the same area but performing distinct tasks, do not amount to interchange. *Lawson Mardon USA, Inc.*, 332 NLRB 1282, 1282, 1287 (2000) (separating production from maintenance employees appropriate, despite fact that employees work side-by-side, based on discrete division between work tasks). Similarly, to the extent that Resident Assistants may perform certain basic, unskilled maintenance tasks such as unclogging a toilet or adjusting the temperature in a room, this does not establish interchange in job duties. *E.g.*, *id.*, *Phoenician*, 308 NLRB at 827.9

The Employer also contends that the unit should be expanded based on a single dual-function employee, who spends half of her full-time job working for the Employer as a Life Enrichment Coordinator, and the other as a Resident Assistant. As an initial matter, however, this employee is separately scheduled to work at certain times as a Resident Assistant, and at other times as a Life Enrichment Coordinator—in other words, she does not perform both

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9 The caselaw relied on by the Employer to argue that mere contact between employees supports expansion of the unit is inapposite. In *Brattleboro Retreat*, 310 NLRB 615, 615 (1993), the finding of regular contact cited by the Employer was buttressed by evidence of shared supervision, transfers between the disputed classifications, and performance of similar duties (all of which are largely absent here). In *Los Angeles Daily News*, Case 21-RC-273230, unpublished Board Order dated Dec. 22, 2021, the Board specifically rejected the use of the *Boeing* analysis that all parties agree is applicable here because the Employer was seeking to remove employees from the petitioned-for unit; moreover, in analyzing the community of interest factors, the Board emphasized that the petitioned-for and disputed units were all part of the same department and had overlapping skills and qualifications (which again are not present here). *Id.*, slip op. at 1, n.1. And *GHR Energy Corp.*, 294 NLRB 1011, 1052 (1989), involved a unit accretion analysis (not a community of interest question) in a ULP proceeding where the ALJ found (and the Board agreed) that the General Counsel’s theory of accretion did not have merit.
functions simultaneously. Additionally, while there was testimony suggesting that she performs certain Resident Assistant job duties while serving as a Life Enrichment Coordinator, she possesses the ability to do so only because she is licensed and trained as a Resident Assistant—something that no other coordinators possess and is not a requirement for that position. Finally, to the extent that this does establish a greater level of interchange between these two specific positions, I would find that this does not overcome the factors discussed above, as it involves a single Resident Assistant out of a proposed unit of 52 Resident Assistants and is not probative as to any other classifications in the petitioned-for and disputed units.\(^\text{10}\)

In sum, regarding this factor, I find that the record does not demonstrate sufficient evidence of significant contact or interchange between the petitioned-for and disputed employees to justify their inclusion in a single bargaining unit.

5. Functional Integration

Functional integration refers to when employees’ work constitutes integral elements of an employer’s production process or business. For example, functional integration exists when employees in a unit sought by a union work on different phases of the same product or as a group provides a service. Evidence that employees work together on the same matters, have frequent contact with one another, and perform similar functions is relevant when examining whether functional integration exists for community of interest purposes. *Transerv Systems*, 311 NLRB 766, 766 (1993). On the other hand, if functional integration does not result in contact among employees in the unit sought by a union, the existence of functional integration has less weight.

Here, there is some evidence of functional integration between the petitioned-for and disputed classifications. At an abstract level, all employees at the Employer’s facility are dedicated towards the Employer’s mission of providing a safe, comfortable, and stimulating environment for its residents. This goal can only be accomplished through the integrated efforts of employees performing jobs in the petitioned-for and disputed classifications.

The level of functional integration, however, varies widely between the petitioned-for and disputed classifications. For example, there is virtually no evidence that the Gift Shop

\(^{10}\) The caselaw cited by the Employer for evidence of interchange, based on overlapping work duties, can be easily distinguished. In *Ikea Distribution Services*, the Board found that there was overlap in job functions and work between the petitioned-for and disputed units based on a finding that “both classifications perform the same basic function.” 370 NLRB No. 109, slip op. at 15 (Apr. 19, 2021). In *Casino Aztar*, another case relied on by the Employer, the Board found that a standalone unit of beverage employees needed to be included in a larger unit containing all food and beverage employees, as employees in both positions served the same basic function of providing food and beverage service and there was evidence that the beverage employees would regularly transfer to other departments (such as catering) to help with large events. 349 NLRB 603, 604-05 (2007). Here, by contrast, the petitioned-for classifications perform distinct duties from those in the disputed classifications and, more importantly, there is no evidence of the type of temporary transfers relied on in *Casino Aztar*.  

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Concierge and the petitioned-for employees interact or work together in any meaningful sense. Similarly, there is little evidence that the maintenance classifications and the petitioned-for unit are regularly collaborating in their work. The same holds true for Cooks and the employees in the petitioned-for unit. And while certain other classifications, such as Servers, Housekeeping Service Assistants, and Life Enrichment Coordinators appear to have a greater level of integration with the petitioned-for unit, this integration is not enough to overcome the disparate departmental organization, separate supervision, distinct skills and qualifications, and lack of interchange. Additionally, while the petitioned-for unit employees work almost exclusively in the assisted living areas, employees in the disputed classifications work throughout the campus and, in some cases, even outside the facility.

Weighing these countervailing factors, I find the functional integration between the units is neutral in determining their community of interest.

6. Terms and Conditions of Employment

Terms and conditions of employment include whether employees receive similar wages and are paid in a similar fashion (for example hourly); whether employees have the same fringe benefits; and whether employees are subject to the same work rules, disciplinary policies, and other terms of employment that might be described in an employee handbook. However, the facts that employees share common wage ranges and benefits or are subject to common work rules does not warrant a conclusion that a community of interest exists where employees are separately supervised, do not have sufficient interchange, or work in a physically separate areas. Bradley Steel, Inc., 342 NLRB 215, 215-216 (2004); Overnite Transportation Co. 322 NLRB at 350. Similarly, sharing a common personnel system for hiring, background checks, and training, as well as the same package of benefits, does not warrant a conclusion that a community of interest exists where two classifications of employees have little else in common. American Security Corp., 321 NLRB 1145, 1146 (1996).

The evidence regarding this factor is mixed. On the one hand, it is undisputed that employees in both the petitioned-for and disputed classifications share the same employee handbook and employee benefits. All employees are paid hourly, on a similar pay scale with a

11 The caselaw cited by the Employer in support of its functional integration argument is readily distinguishable. For example, in Transerv Systems, 311 NLRB 766, 766 (1993), cited by the Employer, the Board found that a petitioned-for unit of bicycle messengers needed to be expanded to include driver messengers because they “essentially perform the same functions . . . [they] pick up and deliver documents and small packages.” And In Levitz Furniture Co., 192 NLRB 61, 62 (1971), there was significant evidence of employee transfers between the petitioned-for and disputed classifications (with no evidence of any qualification requirements that would exclude transfers between the classifications). Finally, Boeing Co., 368 NLRB No. 67, which establishes the legal framework here, turned on the facts that the petitioned-for unit performed only about one percent of the overall work on the integrated product, that they shared supervision with disputed employees, and that a significant portion of their work overlapped completely with the work of other non-unit employees. Id., slip op. at 5.
uniform raise structure based on seniority. They also all clock in and out at the same location, utilize the same employee entrance, and share the same parking lot. On the other hand, there are some significant differences in their terms and conditions of employment. The employees in the petitioned-for unit are the only employees who work overnight shifts. Further, in contrast to employees in the disputed unit who work throughout the whole campus and in certain cases outside the campus, they work almost exclusively in the assisted living and skilled care areas of the Employer’s facility.\textsuperscript{12}

Although the employees in both groups share certain terms and conditions of employment, there are important distinctions in terms of hours and locations of work. Further, given that the rest of the factors considered in the community of interest analysis weigh in favor—in many cases strongly—of excluding the disputed classifications from the petitioned-for unit, these shared terms and conditions of employment are insufficient to justify expansion of the proposed unit.

\textbf{C. INDUSTRY STANDARD FOR APPROPRIATE UNITS}

Finally, the Board’s Boeing analysis requires an examination of whether any specific industry standards apply to a given unit. Here, the analysis is guided by the Board’s decision in Park Manor, which, as discussed above, in addition to an evaluation of traditional community of interest factors, directs the analysis towards the Board’s healthcare rulemaking and case precedent in existence at that time.

The Board’s healthcare rulemaking, in turn, specifically excluded nursing homes.\textsuperscript{13} Collective-Bargaining Units in the Healthcare Industry, 53 Fed. Reg. 33,900, 33,928 (1988). Although excluded, in its rulemaking, the Board nonetheless believed that “comparing and contrasting individual nursing home work forces with those in acute care hospitals would aid in determining appropriate units.” Park Manor, 305 NLRB at 875. The Board specifically observed and noted that “in nursing homes, there is generally less diversity among technical employees and service employees, and the staff as a whole is more integrated than in acute care hospitals, because there is a greater overlap of functions and greater work contact in the nursing home environment. The Board [further] noted that, generally, nurses provide a less intensive, lower level of care to patients in skilled and extended care facilities than that provided in acute care hospitals, and thus receive lower wages.” Hillhaven Convalescent Center of Delray Beach, 318 NLRB 1017, 1018 (1995) (citing 53 Fed. Reg. at 33,927-28). Finally, the Board concluded

\textsuperscript{12} The single case cited by the Employer to the contrary, St. Francis Hospital, 271 NLRB 948 (1984), involving an expansion of a unit based on shared terms and conditions of employment, is easily distinguishable. There, the disputed employees shared supervision, had the same qualifications, and transferred positions with the employees in the petitioned-for unit—factors that are not present here.

\textsuperscript{13} While the Board does not specifically reference “assisted living facilities” as falling within the definition of a nursing home, it does reference that there are “three basic types of nursing home facilities: skilled nursing, intermediate care, and residential care.” 53 Fed. Reg. 33928.
that “it is best to continue a case-by-case approach with respect to nursing homes.” 53 Fed. Reg. at 33,928.

I note that there are no controlling Board cases following Park Manor which address the issue presented in this case, i.e., whether additional classifications must be included in a petitioned-for unit with a stipulated internal community of interest. Rather, the Board cases following Park Manor involving nursing homes largely address the issue of whether technical employees working at a nursing home facility may be included in or excluded from an otherwise appropriate all-nonprofessional service/maintenance unit. See Hillhaven Convalescent Center, 318 NLRB at 1017-20; Lincoln Park Nursing and Convalescent Home, Inc., 318 NLRB 1160, 1160-62 (1995). Notably, the Board found in both Hillhaven and Lincoln Park that in applying the “empirical community of interest test . . . [established in Park Manor] . . . if the employees excluded by the Regional Director could not themselves constitute a separate unit, they must perforce be included in the broader unit.” Hillhaven, 318 NLRB at 1017; Lincoln Park, 318 NLRB at 1161 (both citing Park Manor, 305 NLRB at 875 n.18).

The Employer asserts two primary arguments, specific to the nursing home industry under this prong of the Boeing analysis, for why the petitioned-for unit is inappropriate. First, the Employer argues that allowing a segmented unit, as opposed to a wall-to-wall unit of non-professional employees, would lead to the undue proliferation of bargaining units in the health care industry, in contravention of both congressional policies14 and findings made in the healthcare rulemaking. With regard to the latter point, the Employer points to passages from the rulemaking record (referenced above) where the Board noted that nursing homes are generally more functionally integrated and have a greater overlap of functions and work contact than in acute care hospitals.

While the Employer correctly cites these general principles, other policies announced in the rulemaking and in Park Manor weigh in favor of the petitioned-for unit. For example, in its rulemaking, the Board repeatedly emphasized that nursing homes vary widely in terms of staffing and services offered—noting that some nursing homes could be as small as 10 patients, while others could service up to 500 patients. 53 Fed. Reg. at 33,927-28. In the case of these larger facilities (such as the facility at issue here), the Board stated that more than one unit could be appropriate, particularly if organized into discrete departments under separate supervision.15 The Board further noted that at the time of the rulemaking in 1988, the nursing home industry

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14 I would note that the congressional policy cited by the Employer comes from committee reports in the House and Senate at the time of the 1974 amendments to the National Labor Relations Act extending its jurisdiction to non-profit hospitals. The Supreme Court, however, has cautioned that such reports do not have the “force of law,” and where (as here) reports “cannot be tied to the enactment of specific statutory language [they] carry little weight in the judicial interpretation of the statute.” American Hospital Association v. NLRB, 499 U.S. 606, 616-17 (1991).

15 The Board specifically noted: “In a small, 10-resident facility, the staff will have overlapping responsibilities, and thus an overall unit would be appropriate. In a large, skilled care facility with specialized units, more than one unit might be appropriate.” Id. at 33,928.
was “in a period of rapid transition,” and that the provision of increasingly specialized services such as designated memory care and nutrition services could warrant different staffing needs (and thus potentially different units). Id. at 33,928. The Board’s observations from 1988 on this front were prophetic and appropriate, given the specialized and departmentalized nature of the Employer’s operations here. Finally, in Park Manor, the Board reiterated the need to balance two competing interests with regard to unit determinations: first, to ensure that a unit is not too large because “it may be difficult to organize and when organized, will contain too diversified a constituency which may generate conflicts of interest and dissatisfaction among constituent groups, making it difficult to represent,” and second, to ensure that units are not so small as to make it “costly for the employer to deal with because of repetitious bargaining and/or frequent strikes, jurisdictional disputes and wage whipsawing, and [ ] deleterious for the union by too severely limiting its constituency and hence its bargaining strength.” 305 NLRB at 867. The petitioned-for unit here, in my view, properly balances these competing considerations. The number of employees in the petitioned-for classifications (63) is roughly equal to those in the disputed classifications (57). And the community of interest analysis discussed above demonstrates that employees in the petitioned-for group have closely aligned interests, while those in the disputed classifications have different working conditions, qualifications, and training that may cause dissension in the Employer’s proposed larger unit.

Second, the Employer contends that separating the proposed unit from the disputed classifications utilizes a rejected direct versus indirect care standard, citing to Mount Airy Psychiatric Center, 217 NLRB 802 (1975) and Bay St. Joseph Care Center, 275 NLRB 1411 (1985). The Employer is correct in noting that the Board has historically rejected utilizing a direct/indirect care paradigm as a test for defining the appropriateness of healthcare bargaining units. Mount Airy Psychiatric Center, 217 NLRB at 802; Bay St. Joseph Care Center, 275 NLRB at 1412. My unit determination here, however, does not rest on the fact that positions in the proposed unit could arguably be construed as providing more direct care to residents, as opposed to certain other excluded classifications having a less immediate connection to patient care. Rather, my determination of the appropriateness of the petitioned-for unit rests on the application of traditional community of interest principles, within the paradigm of the three-part Boeing analysis.

Here, for the reasons stated above regarding the disparate interests between the petitioned-for and disputed units, and in applying the Park Manor “empirical” community of interest test (including post-Park Manor case precedent), I find that, despite some community of interest factors favoring inclusion of the disputed employees in the petitioned-for unit (e.g., generally similar employment terms and conditions; some functional integration between certain positions; and a very limited example of interchange) the record supports a conclusion that the petitioned-for unit of Resident Assistants, non-certified Resident Assistants, Lead Resident Assistants, TMAs, and LPNs constitutes a readily identifiable group, excluding the disputed classifications. 16

16 In making this finding, I note that the disputed classifications at the facility could constitute an appropriate separate unit. See Hillhaven Convalescent Center, 318 NLRB 1017, 1017 (1995) (noting that “if employees excluded by the Regional Director could not themselves constitute a separate unit, they must perforce be included in the broader unit.”)
D. CONCLUSION REGARDING UNIT COMPOSITION AND COMMUNITY OF INTEREST

In determining the appropriateness of the proposed unit, I have carefully weighed the community of interest factors cited in *PCC Structurals, supra*, and *Boeing Co., supra*. I note first that the parties have stipulated to the appropriateness of the proposed unit under step one of the *Boeing* analysis. Under step two, I have found that the petitioned-for classifications share a sufficiently distinct community of interest from those positions that the Employer seeks to add. More specifically, I have found that the petitioned-for employees share a distinct administrative and supervisory structure from those in other classifications; that they have discrete qualifications, training, and duties; that they do not interchange with those other disputed employees and are (for the most part) not functionally integrated with their duties. Finally, under step 3 of the *Boeing* analysis, I find that a careful examination of the policies underlying unit determinations in the nursing home industry (including *Park Manor’s “empirical community of interest” test*) supports the appropriateness of the petitioned-for unit of Resident Assistants, non-certified Resident Assistants, Lead Resident Assistants, TMAs, and LPNs.

CONCLUSION

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 commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.17

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.

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:

17 The parties stipulated that the Employer is a Minnesota corporation engaged in the operation of an assisted living facility in Wayzata, Minnesota, and that during the past calendar year (a representative period) the Employer received revenue from the sale or performance of services in excess of $50,000 directly from customers located outside the state of Minnesota and earned gross revenue in excess of $100,000.
**Included:** All full time and regular part time Resident Assistants, non-certified Resident Assistants, Lead Resident Assistants, Licensed Practical Nurses (LPNs), and Trained Medication Assistants (TMAs).

**Excluded:** All office clerical employees, professional employees, managers, guards and supervisors as defined by the Act, as amended, and all other employees.

Those eligible shall vote whether they wish to be represented for the purposes of collective bargaining by Service Employees International Union Healthcare Minnesota and Iowa.

Those eligible shall vote as set forth in the Direction of Election below.

**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 Service Employees International Union Healthcare Minnesota and Iowa.

**I. METHOD OF ELECTION**

**A. Election Details**

The election will be held on Tuesday, June 28, 2022, from 5:30 a.m. to 7:15 a.m. and 1:30 p.m. to 3:30 p.m. in the Movie Theater at the Employer’s Wayzata, Minnesota facility located at 100 Promenade Avenue, Wayzata, Minnesota.\(^{18}\)

If the election is postponed or canceled, the Regional Director, in his or her discretion, may reschedule the date, time, and place of the election. Prior to the date of the manual ballot election in this case, the Regional Director may reassess the COVID conditions in Hennepin County. The Regional Director may, in accordance with guidance set forth in *Aspirus Keweenaw*, 370 NLRB No. 45 (2020), determine that the scheduled manual ballot election cannot be safely conducted, and the Regional Director may cancel, postpone, or order a mail ballot election. If the election is postponed or canceled, the Regional Director, in his or her discretion, may reschedule the date, time, and place of the election, or the method of the election.

\(^{18}\) The Petitioner and Employer submitted a stipulated request for a manual election and further agreed to follow the terms and conditions for manual elections set forth in General Counsel Memo 20-10. Based on my view of the current COVID-related conditions in Hennepin County, and the stipulated request of the parties for a manual election, I have approved that request and determined that a manual election is appropriate.
In addition, the election will be conducted consistent with the following safety protocols:

- Each party will be allowed one representative and one observer to attend the pre-election conference and the ballot count. Beyond the one observer and one representative per party at the count, the Board Agent may limit attendance at the counting of the ballots.

- Individuals present in the polling area must maintain six feet of distance from any other person, and individuals who are not a party, party representative, or an observer, must stay at least 15 feet away from the Board agent at the pre-election conference and the ballot count.

- Each party will be permitted to have one observer present during each polling period, and observers cannot be switched, replaced, or substituted in the middle of a polling period.

- **Voter Lists.** A total of three (3) voter lists will be provided by the Board Agent in order to allow for social distancing between observers and Board Agent. Each party’s observer will verbally notify the Board Agent whether they are checking or challenging a voter and the Board Agent will reflect the same on the voting list used by the Board Agent. Copies of the Board Agent’s list will be provided to the parties following the election.

- **Masks Required.** The Employer will provide CDC-conforming masks to voters and all other participants in the election. All voters, observers, party representatives, and other participants must wear CDC-conforming masks in all phases of the election, including the pre-election conference, in the polling area or while observing the count. The Employer will post signs immediately adjacent to the Notice of Election to notify voters, observers, party representatives, and other participants of the mask requirement. In accordance with the “Voting Place Notice”, Form NLRB-5017, the Board Agent has the discretion to advise a voter who is not properly masked in full conformance with CDC guidelines to leave the voting area and return when properly masked. Likewise, the Board agent has the discretion to advise a pre-election conference or count attendee who is not properly masked to leave the conference/count and return when properly masked.

- **Polling Area Supplies to be Provided by the Employer.** The Employer will provide the following for use in the polling area, at the pre-election conference and during the count:
  
  o Plexiglass barriers. Plexiglass barriers should be sufficient in size and number to protect the observers and Board Agent from one another and protect the Board Agent and observers from other participants in the election (i.e., voters and representatives).
  o Hand sanitizer
  o Gloves and disinfecting wipes (for use by Board Agent and observers)
- Glue stick or tape (for sealing challenge ballot envelopes)
- Disposable pencils without erasers (sufficient in number so that each voter may mark their ballot using a pencil)
- CDC-Conforming face masks for all participants (see section above entitled “Masks Required”)
- Doorstops. The Employer will provide doorstops or similar items to allow the doors to be propped open during the pre-election meeting, election, and the ballot count, to facilitate air flow in the polling area.

- **Voter Lists.** The Employer will sanitize the polling area the day of the election, prior to the start of the pre-election conference.

- **Election Area Layout and Social Distancing Requirements.** Polling area must include a separate entrance and exit for voters, with markings to depict safe traffic flow throughout the polling area.

  The Employer must provide four separate tables spaced six feet apart for: (1) Board Agent; (2) Employer observer; (3) Petitioner observer; and (4) voting booth and ballot box. Additionally, six-foot of distance must be marked on the floor to insure separation of observers, Board Agent, voters and other participants (such as during count or during pre-election conference). The Employer will provide markings on the floor to remind and enforce social distancing requirements.

  During the election, only one voter will be permitted to approach the observers’ tables and election booth at a time to ensure social distancing. After clearance by the observers, the Board Agent will place an individual ballot on table for the voter and then step back to maintain social distance.

- **Pre-Election Inspection.** An inspection of the polling area will be conducted by video conference at least 24 hours prior to the election so that the Board Agent and parties can view the polling area. The Board Agent assigned to conduct this election will make arrangements with the parties for this conference.

**B. Voting Eligibility**

Eligible to vote are those in the unit who were employed during the bi-weekly payroll period ending June 4, 2022, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. In the event the Regional Director later orders a mail ballot election, employees will be eligible to vote if they are in the Unit on both the payroll period ending date and on the date they mail in their ballots to the Board’s designated office.

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, and, in a mail ballot election, before they mail in their ballots to the Board’s designated office; (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. Certifications Required

1. Certification Form A—Employer. No earlier than 48 hours before the election but no later than 24 hours before the election, the Employer must:

   o The Employer will complete and submit GC 20-10 COVID-19 Certification Form A to the Region. Form A will be considered by the Regional Director in determining whether conducting the election manually will jeopardize public health. Failure to provide accurate or timely forms may result in the election being cancelled, rescheduled, or converted to a mail ballot election.

2. Certification Form B—for each Party, Party Representative, and Observer. Each party, party representative, and observer participating at the pre-election conference, serving as an election observer, or participating in the ballot count, must complete and submit GC 20-10 COVID-19 Certification Attachment B. Individuals for which Form B was not submitted will not be permitted to be physically present at the pre-election conference, to serve as an observer during the election or at the ballot count.

3. Post-Election Certifications—Petitioner, Union, and Employer. All parties must notify the Regional Director in writing, within 14 days after the day of the election, if any individuals who were present in the facility on the day of the election: (a) have tested positive for COVID-19 (or has been directed by a medical professional to proceed as if they have tested positive for COVID-19, despite not being tested) within the prior 14 days; (b) are awaiting results of a COVID-19 test; (c) are exhibiting symptoms of COVID-19, including a fever of 100.4 or higher; cough, shortness of breath; or (d) have had direct contact with anyone in the previous 14 days who has tested positive for COVID-19 (or who are awaiting test results for COVID-19 or have been directed by a medical professional to proceed as if they have tested positive for COVID-19, despite not being tested).

D. 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 **Friday, June 10, 2022.** 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.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015](http://www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015).

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency’s website at [www.nlrb.gov](http://www.nlrb.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.

**E. 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 nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. 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. 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.nlrb.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.

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: June 8, 2022

/s/ Jennifer A. Hadsall

Jennifer A. Hadsall, Regional Director
National Labor Relations Board, Region 18
Federal Office Building
212 Third Avenue South, Suite 200
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Attachment