

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Talmadge Park, Inc. and New England Health Care Employees Union, District 1199, SEIU

Talmadge Park, Inc. and United Food and Commercial Workers Union, Local 371 and New England Health Care Employees Union, District 1199, SEIU. Cases 34-CA-11295 and 34-RC-2136

December 28, 2007

DECISION, ORDER, AND CERTIFICATION OF REPRESENTATIVE

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

On July 17, 2006, Administrative Law Judge Richard A. Scully issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

On September 30, 2006, the National Labor Relations Board remanded the case to the judge for further consideration in light of the Board's decisions in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006), *Croft Metals, Inc.*, 348 NLRB No. 38 (2006), and *Golden Crest Healthcare Center*, 348 NLRB No. 39 (2006). See *Talmadge Park, Inc.*, 348 NLRB No. 52 (2006).

On January 19, 2007, the judge issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision, the supplemental decision, and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² In affirming the judge's conclusion that the Respondent failed to prove that laundry supervisor Kathleen Proto is a 2(11) supervisor based on her alleged authority to "assign" or "responsibly direct" employees using "independent judgment," we adopt the judge's analysis set forth in the supplemental decision rather than the analysis set forth in the original decision. Because we agree with the judge that the evidence fails to establish that Proto possessed the authority to "responsibly direct" employees with "independent judgment," we find it unne-

Order as modified.³ We also adopt, for the reasons stated by the judge, his overruling of the Respondent's election objections. We, therefore, certify New England Health Care Employees Union, District 1199, SEIU (District 1199) as the exclusive bargaining representative of the employees in the unit.⁴

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Talmadge Park, Inc., East Haven, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Make Kathleen Proto whole for the loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision."

2. Substitute the attached notice for that of the administrative law judge.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for New England Health Care Employees Union, District 1199, SEIU, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time certified nursing assistants (CNAs), lead CNAs, housekeeping employees, laundry employees, cooks, dietary aides, cooks/dietary aides, carpenter, nurse scheduler, receptionists, courier, physical therapy/rehab aide, and maintenance employees employed by the Employer at its East Haven, Connecticut facility; but excluding licensed practical

essary to pass on the judge's finding that Proto had no employees under her.

³ We shall modify par. 2(a) of the judge's recommended Order and substitute a new notice to conform to the Board's standard remedial language.

⁴ Pursuant to a Decision and Direction of Election, a secret ballot election was conducted on September 8, 2005. The tally of ballots showed 44 for District 1199, 0 for United Food and Commercial Workers Union, Local 371, 38 against union representation, and 8 challenged ballots, a sufficient number to affect the results. On January 11, 2006, the Regional Director issued a Supplemental Decision on Challenged Ballots and Objections, and revised tally of ballots in which he sustained 3 of the challenges, leaving only 5 nondeterminative challenged ballots. Thus, District 1199 prevailed in the election.

The judge recommended that the representation case "be severed and remanded to the Regional Director to issue the appropriate certification." However, there is no need for a remand because, under Sec. 102.69 of the Board's Rules, the Board itself has the authority to issue such a certification. Accordingly, we do not adopt the judge's recommendation to remand the representation case, but shall instead issue a certification of representative.

nurses, the RCP/MDS Coordinator, the administrator, director of nurses, assistant director of nurses, dietary service director, business office manager, assistant business office manager, environmental services director, recreation program director, rehabilitation director, social services director, shift supervisors, and guards, other professional employees and other supervisors as defined in the Act.

Dated, Washington, D.C. December 28, 2007

Wilma B. Liebman,	Member
Peter C. Schaumber,	Member
Dennis P. Walsh,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT suspend or otherwise discipline our employees because they engage in activity in support of New England Health Care Employees Union, District 1199, SEIU, or any other labor organization.

WE WILL NOT tell our employees not to wear union insignia or not to discuss the Union while at our facility.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Kathleen Proto whole for the earnings and other benefits she lost as a result of our having unlawfully suspended her, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and probation of Kathleen Proto and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the suspension and probation will not be used against her in any way.

TALMADGE PARK, INC.

Robert M. Cook, Esq. and *Thomas E. Quigley*, for the General Counsel.

Howard M. Bloom, Esq. and *Elan R. Kandel, Esq.*, of Boston, Massachusetts, for the Respondent.

Kevin A. Creane, Esq., of Milford, Connecticut, for the Union.

SUPPLEMENTAL DECISION

In an Order dated September 30, 2006, the Board remanded this matter for further consideration in light of its recent decisions in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006), *Croft Metals, Inc.*, 348 NLRB No. 38 (2006), and *Golden Crest Healthcare, Inc.*, 348 NLRB No. 39 (2006), which addressed the meaning of the terms "assign," "responsibly to direct," and "independent judgment," as used in Section 2(11) of the Act. The Order provided for reopening the record to allow the parties to present additional relevant evidence, if warranted. Thereafter, all parties agreed that the record need not be reopened and filed briefs concerning the issue of whether or not Kathleen Proto is a supervisor within the meaning of Section 2(11), which have been given due consideration.

In those recent decisions, the Board reiterated that each case must be analyzed on its individual facts and that the burden is on the party asserting that supervisory status exists to establish it by a preponderance of the evidence, citing, *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003), and *Bethany Medical Center*, 328 NLRB 1094, 1103 (1999). I find that the Respondent has failed to meet that evidentiary burden in the case of Proto.

The Respondent contends that Proto has the authority to "assign" and "responsibly direct" other employees and that she exercises "independent judgment" in so doing. In *Oakwood Healthcare* and *Croft Metals*, the Board construed the authority "to assign" to involve the act of designating an employee to a specific place in which to perform his or her work, appointing an employee to a particular time during which to perform that work, or giving an employee significant overall duties or tasks to perform. The authority "responsibly to direct" is not limited to department heads but includes persons who have employees under them and who decide what job shall be undertaken next or who shall do it, provided that the direction is both responsible and carried out with independent judgment. In order for direction to be responsible, the person performing the oversight must be accountable for the performance of the task by the other such that some adverse consequences may befall the overseer if the tasks are not performed properly. The putative supervisor must have been given the authority to direct the work and take corrective action, if necessary, and face the prospect of adverse consequences if he or she does not take these steps. To exercise "independent judgment" the person must at a minimum act, or effectively recommend action, free

from the control of others and form an opinion or evaluation by discerning and comparing data. Judgment is not independent if where it is dictated or controlled by detailed instructions whether in company policies or rules or verbal instructions from a higher authority which do not allow for discretionary choices.

The evidence fails to establish that Proto has any employees under her. What it does show is that she has no authority to designate where other employees perform their duties, to designate the time those duties are to be performed, or to determine the tasks employees are to perform. Proto and one other employee work in the laundry department on the day shift according to a schedule prepared by Director of Environmental Services Maria Levatino. Proto has no authority to change the schedule or grant time off. The work in the laundry is routine and repetitive and requires no direction once an employee is trained. On a given day, Proto and her coworker decide among themselves who will perform the various routine tasks. There is no evidence that Proto has ever designated a laundry employee to perform duties other than those involved with the laundry or given a laundry employee an assignment outside that department. Her responsibilities and status are similar to those of the lead persons found not to be supervisors in *Croft Metals*, supra, slip op. at 5–6.

The Respondent contends that Proto can “call employees in and send employees home.” There is no evidence that Proto has ever sent an employee home or has authority to do so. The only times Proto gets involved in calling an employee in is on a weekend or other occasion when Levatino is not present at the facility and the other laundry employee Levatino has assigned to work with Proto calls out. The testimony of Levatino establishes that it is a policy of the facility that the laundry must be fully staffed at all times and there is no evidence that Proto has any discretion to decide otherwise. The evidence shows that in situations where an employee calls out, Proto normally contacts Levatino to obtain her permission to call in a replacement. Even then, since overtime is voluntary Proto has no authority to compel an employee to come in. If Proto is unable to get a laundry employee to come in, she will get an employee on the housekeeping staff who is already working to fill the laundry vacancy. While this appears to involve the authority to designate where the housekeeping employee will perform his or her duties, Proto’s actions are not discretionary but are controlled by the facility’s policy that the laundry must be fully staffed and/or Levatino’s instructions. There is no evidence that Proto is personally accountable for seeing that the laundry is staffed or that she has ever been subjected to “adverse consequences” because it was not.¹ There is no evidence that Proto has any authority “to assign” housekeeping department employees other than when it is necessary to assure that the laundry is fully staffed.

The Respondent’s arguments concerning Proto’s purported supervisory authority are based almost entirely on the generalized testimony of Levatino which is uncorroborated and com-

¹ Since Proto cannot compel a laundry employee to come in on an off-day, she has no means of taking “corrective action” if the employees she calls refuse her request to come in.

pletely lacking in detail and/or is contradicted by the credible testimony of Proto and other laundry employees. The Respondent points to Levatino’s testimony, that Proto can “swing people around and make [the schedule] work,” as an example of her authority to assign employees. However, the only example she cited was when there is a call out and “you have to bring someone from housekeeping to help out because there has to be two people at a time there [the laundry].” Similarly, although Levatino testified that “if the building needs to be cleaned or the building needs a laundry person and you have to shift people around or the job has to get done; she [Proto] can authorize and do what needs to be done—whatever the job is that has to be done” and that “the whole routine on a daily basis can be changed by her [Proto],” she failed to explain what “routine” Proto has changed or to give any examples other than seeing that the laundry is staffed. I do not credit this vague conclusory testimony.

In support of its contention that adverse consequences could befall an employee that ignores Proto’s directions, the Respondent cites only an incident involving Proto and a housekeeping employee named David. The evidence shows that Proto noticed that David was cleaning a room that had already been cleaned and told him that he should do another room, according to a posted schedule, but David ignored her. Although Levatino testified that she told David that he needed “to listen to Kathy,” it is undisputed that no disciplinary was taken against David as a result. Moreover, there is no evidence that Proto has any authority to direct housekeeping employees or that in this instance she was exercising any discretion or giving David an order. In fact, she was simply making a common sense suggestion that he was wasting his time and should be following the posted schedule, which from all that appears she had no involvement in preparing or responsibility for implementing. As noted above, there is no evidence that Proto has ever imposed or effectively recommended disciplinary action against laundry or other facility employees or has suffered adverse consequences herself because of their shortcomings.

The Respondent contends that the fact that Proto works some weekends when Levatino is off creates an inference that “she has the authority to make independent judgments on these weekends free from the control of her superiors.” I do not agree. Once again, there is a complete lack of evidence indicating that Proto has exercised independent judgment in carrying out the routine work of the laundry room - - on weekends or any other time.

The Respondent’s other contentions that Proto exercises independent judgment are also unpersuasive. It cites Proto’s testimony that if there is “an overwhelming heavy day of laundry I will ask one of the housekeepers to help if they have time,” as involving a decision based on the evaluation of data and determining the appropriate action based on that evaluation. While this might involve the exercise of judgment as to the extent of her workload, it does not involve any supervisory action. Its contention that Proto’s opinion, that a new laundry worker needed additional training involved an evaluation of the worker’s competence, is no doubt true but it did not involve supervisory action on her part. Proto’s uncontradicted testimony was that the worker in question was not retained, not

because of Proto's evaluation, but because the worker failed a drug test. It also contends that Proto's telling David that he was cleaning a room that had already been cleaned involved "a decision based on evaluation of data." Perhaps it did, but there was a posted schedule as to what rooms were to be cleaned that day. As the Board stated in *Oakwood Healthcare*, "a judgment is not independent if it is dictated or controlled by detailed instructions." 348 NLRB No. 37, slip op. at 8 (2006). It also contends that Proto makes staffing decisions after evaluating data when there is a call out in the laundry. As has been discussed above, Proto usually contacts Levatino before she acts to replace a laundry call out, but in any event doing so is mandated by the facility's policy that the laundry must always be fully staffed.

Having reviewed the evidence in the light of the Board's recent decisions construing Section 2(11) of the Act, I find that the evidence does not establish that Kathleen Proto is a supervisor within the meaning of that section. Accordingly, based on these findings and the findings of fact and conclusions of law contained in the decision herein issued on July 17, 2006, and the entire record, I issue the following recommended²

ORDER

The Respondent, Talmadge Park, Inc., East Haven, Connecticut, its officers, agents, successors, and assigns, shall comply with the Order issued herein on July 17, 2006.

Dated, Washington, D.C. January 19, 2007

Robert M. Cook, Esq., for the General Counsel.
Howard M. Bloom, Esq., and *Elan R. Kandel, Esq.*, of Boston, Massachusetts, for the Respondent.
Kevin A. Creane, Esq., of Milford, Connecticut, for the Union.

DECISION

STATEMENT OF THE CASE

RICHARD A. SCULLY, Administrative Law Judge. Upon a charge filed by New England Health Care Employees Union, District 1199, SEIU (the Union), on September 28, 2005,¹ the Regional Director for Region 34, National Labor Relations Board (the Board), issued a complaint on December 23, 2005, alleging that Talmadge Park, Inc. (the Respondent), had violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended (the Act). The Respondent filed a timely answer denying that it had committed any violation of the Act.

On September 8, 2005, the Board conducted a secret ballot election among the Respondent's service and maintenance employees to determine whether a majority wanted to be represented by District 1199 or United Food and Commercial Workers Union, Local 371. The Tally of Ballots showed 44 votes in favor of representation by District 1199, 38 votes against union representation, and 8 challenged ballots. Thereafter, the Em-

ployer filed objections to alleged conduct affecting the results of the election. The Regional Director issued his report denying all but two of the objections which were consolidated for hearing with the unfair labor practices case. The Employer filed a request for review with the Board, which issued an Order on March 10, 2006, referring a total of three of the objections for hearing.

A hearing on this consolidated matter was held in Hartford, Connecticut, on April 3, 4, and 5, 2006, at which all parties were given a full opportunity to examine and cross-examine witnesses and to present other evidence and argument. Briefs submitted on behalf of all parties have been given due consideration.² Upon the entire record, and from my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Connecticut corporation with a facility in East Haven, Connecticut, where it has engaged in the operation of a nursing home providing skilled nursing care. During the 12-month period ending November 30, 2005, the Respondent, in the conduct of its business operations, derived gross revenues in excess of \$100,000 and purchased and received goods at its facility valued in excess of \$5,000 directly from points outside the State of Connecticut. The Respondent admits and I find that at all times material it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending employee Kathleen Proto for 3 days, placing her on probation for 90 days, and threatening her with discipline, including termination, because she supported or assisted the Union and by threatening her with disciplinary action for wearing union pins or buttons and for talking about the Union while at work. The Respondent contends that at all times material Proto was a supervisor within the meaning of Section 2(11) of the Act and her union activity was not protected.

The Respondent operates a nursing home providing skilled care to approximately 90 residents. Ted Vinci is the Administrator of the facility and Lorraine Franco, the wife of the owner of the facility, is its Executive Director. For 16 years, Maria Levatino has been the Director of Environmental Services. Levatino directs the work of 16 employees in the housekeeping and laundry departments. The laundry is staffed 24 hours a day with two employees on the day shift and one on each of the other two shifts. Laundry employees pick up soiled clothes and linens, which are taken to the laundry where they are washed, dried, and folded, and then returned. The laundry employees' work is routine and repetitive but essential to the operation of the facility. If a laundry employee fails to report to work, another laundry employee will be called in or a housekeeping

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹ Amended charges were filed on October 6, November 15, and December 22, 2005.

² The Respondent's unopposed motion to correct an error in the transcript is granted.

employee may be pressed into service because the laundry must be fully staffed.

Kathleen Proto is employed by the Respondent as a “laundry supervisor.” In the summer of 2005,³ Local 371 began an attempt to organize the Respondent’s service and maintenance employees and subsequently filed a petition for an election with the Board. Proto had signed a Local 371 authorization card, but later became an active supporter of District 1199 after meeting with a District 1199 representative at her home. Thereafter, she attended a number of union meetings at the library in East Haven, wore union buttons and pins on her uniform every day while at work from July until September 16, handed out union literature outside the facility before and after shifts, and solicited at least one union authorization card from an employee during the organizing campaign. She solicited employees to sign a petition in support of the Union and her picture appeared on a flyer supporting the Union and a petition indicating that she was voting for the Union both of which were mailed to all employees. Despite Proto’s open and active participation in the election campaign, she was never told by any member of management that she should not engage in such activity because she was a supervisor. On the day of the election, the Employer challenged her eligibility to vote on the grounds that she was a supervisor.

On September 7, Proto heard a discussion between April Ford-Dailey, another laundry employee, and Levatino that Ford-Dailey was going to serve as an observer at the election the next day. Ford-Dailey said that Penne Familusi, the consultant hired by the Employer during the election campaign, had told her that she would get to count the votes and she thought that would be fun to do. When Proto learned that Ford-Dailey would be the observer for the Employer, she said that Ford-Dailey could not be an observer because she was “one of us,” a Union supporter. Proto and Levatino got into a heated argument with raised voices about who could be an election observer. Levatino left the area and returned with a copy of a document describing who could serve as an election observer. When she returned to the laundry room, Ford-Dailey was wearing a union button and a lei that some union supporters wore during the campaign. Ford-Dailey told Levatino that she did not want to be an observer and Levatino said that she would tell Familusi of her decision.

Proto was not scheduled to work on the day after the election. When she came to work on the morning of September 10, she was met by Vinci and Lorraine Franco and taken into Vinci’s office. They told her that she had acted inappropriately as a supervisor by coercing an employee and she was suspended pending an investigation. On September 16, Proto was called into the facility to meet with Vinci and Lorraine Franco who denied her request to have another employee present with her as a witness. Proto was given a written warning which stated that she had abused her position as a supervisor by coercing and harassing an employee and that if she did not “sustain an acceptable supervisory performance,” further disciplinary action including discharge could result. The warning also stated that Proto was suspended without pay for 3 days, that she

would be paid for the other 3 days she had been off, and that she was on probation for 90 days.

ANALYSIS AND CONCLUSIONS

The first issue to be resolved is whether Proto is a supervisor within the meaning of Section 2(11) of the Act which defines “supervisor” as

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

Possession of any one of these powers is sufficient to confer supervisory status if the authority is exercised with independent judgment and not in a routine manner. *National Labor Relations Board v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711 (2001); *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981); *Gurabo Lace Mills, Inc.*, 249 NLRB 658 (1980). “[T]he exercise of some ‘supervisory authority’ in a merely routine, clerical, perfunctory, or sporadic manner does not confer supervisory status.” *Masterform Tool Co.*, 327 NLRB 1071 (1999). In making determinations concerning such status, it should not be construed too broadly because an employee who is deemed a supervisor may be denied rights which the Act is intended to protect. *Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970). Those rights include the right to organize. *Masterform Tool Co.*, supra; *Adco Electric*, 307 NLRB 1113, 1120 (1992). The burden of proving supervisory status is on the party alleging that it exists. *Kentucky River*, supra; *Dole Fresh Vegetables*, 339 NLRB 785,793 (2003); *Masterform Tool Co.*, supra. There is no dispute that Proto has no authority to suspend, lay off, recall, promote, discharge, or reward employees or to effectively recommend such actions. She also has no authority to adjust employee’s grievances

Proto has had the title of “laundry supervisor” since May 29, 2000, and the title appears on the name tag she wears at work. A job title is insufficient to confer statutory supervisory status. *Health Resources of Lakeview*, 332 NLRB 878, 879 (2000); *Fleming Cos.*, 330 NLRB 277 (1999). The proper consideration is whether the functions, duties, and authority of an individual, regardless of title, meet any of the criteria for supervisory status defined in the Act. *Masterform Tool Co.*, supra; *Waterbed World*, 286 NLRB 425, 426 (1987).

Proto punches a time clock and is paid on an hourly basis. Her work station is the laundry room. She has a key to Levatino’s office as do laundry employee Eva Giordano and one or two floor care workers because supplies are kept there and may be needed when Levatino is not present. That is the only reason she enters the office when Levatino is not present. Proto and the other laundry employees work according to a schedule posted in the laundry room which is prepared by Levatino. Proto has no authority to alter the schedule or to grant time off. Proto works alongside the other laundry employee on her shift performing the work of the laundry which is routine, repetitious, and requires no direction once an employee is trained.

³ Hereinafter, all dates are in 2005.

Proto's credible and uncontradicted testimony was that she and her coworker usually decide between themselves who will perform the various tasks, such as, picking up the dirty laundry and delivering the clean laundry and she does not assign who will do so. She has trained new laundry employees by working along side them and showing them how the work of the laundry is performed. In one instance she advised Levatino that the new employee needed more training. None of this establishes that Proto has authority to assign or responsibly direct employees or that she exercises independent judgment. It merely indicates that she has more experience in performing the routine work of the laundry.

The Respondent contends that Proto has the authority to assign and transfer employees from one job to another. The evidence shows that, on weekends when Levatino is not present, if a laundry worker calls out Proto will attempt to get another laundry employee to come in to work, but since overtime is voluntary, she has no authority to require a laundry employee to come in. If she fails to get a laundry employee to come in, she will get someone from the housekeeping staff who is already working that shift to fill the position. According to Proto, when an employee calls off, she contacts Levatino to get permission to call someone in. Levatino's testimony implies that Proto has done this on her own. It also suggests that Proto had exceeded whatever authority she had by calling in employees who were paid overtime. Levatino testified that "during the past year she [Proto] was calling in several staff members, then we spoke together and I said to her, at times we need to converse before we do this because of our budget cuts and because it's a nursing home and we're trying to cut down the overtime." I find that it makes little difference whether Proto calls Levatino for permission or acts on her own when she calls in or has a laundry employee stay beyond the end of a shift or transfers a housekeeping employee to the laundry. The evidence fails to establish that assuring that the laundry is fully staffed involves the exercise of independent judgment on Proto's part. To the contrary, it shows that there is no discretion involved. As Levatino testified, if there is a call out in the laundry, "you have to bring someone from housekeeping to help out because there has to be two people at a time there" and "you have to fill the position and you have to run with full staff." Proto's actions involve nothing more than routine responses to predictable, recurring staffing needs and do not establish supervisory authority. *Tree-Free Fiber Co.*, 328 NLRB 389, 393 (1999); *Masterform Tool Co.*, supra. Similarly, Proto's ability to call for repairs if one of the washers or dryers breaks down involves no independent judgment, as Levatino testified, "we only have two machines [of each type] and you cannot run the building with one machine." *Carlisle Engineered Products*, 330 NLRB 1359 (2000).

The Respondent asserts that the fact that from time to time Proto has initialed corrections on the timecards of employees is evidence that she is a supervisor. The timecards in evidence are those of a laundry employee, housekeeping employees who sometimes work in the laundry, and an individual who works at another facility but sometimes did floor care work at Talmadge. Most of the timecards appear to have Levatino's initials on them as well. There is no evidence that Proto did anything more than verify that these employees worked the hours that are

handwritten on the timecards rather than being stamped by the time clock. Such routine clerical functions do not establish supervisory status. *Webco Industries*, 334 NLRB 608, 610 (2001).

The Respondent contends that Proto has the authority to hire or effectively recommend that an individual be hired. There is absolutely no evidence in the record that Proto has ever hired anyone or that she has ever had authority to do so. Proto testified that she is not involved in the hiring process, but in or about 2002, when Levatino was out due to surgery, she did interview three applicants. There is no evidence that any of those interviewed by Proto were hired or that she had any say in whether or not they were hired. Levatino testified that Proto sat in on the pre-employment interview of laundry employee April Ford-Dailey, asked her questions, was comfortable with her, and "we hired her together." Proto testified that she does not sit in on interviews and specifically denied being involved in the interview of Ford-Dailey. I credit Proto over Levatino on this point, particularly, since Ford-Dailey was called as a witness by the Respondent but was not asked about this. Even if Levatino were credited, it shows only that Proto expressed comfort with Ford-Dailey as a co-worker after meeting her and did not involve any evaluation of her skills or ability. Such a compatibility evaluation does not constitute sufficient evidence of supervisory authority. *Tree-Free Fiber Co.*, at 391.

The Respondent asserts that Proto has the authority to reprimand employees. This is apparently based on the testimony of Levatino that if Proto "is walking the floor and someone is not doing their job or she sees something that is out of school, she can approach the individual and let them know that they need to correct the issue immediately." I find such generalized testimony entitled to little weight and insufficient to establish supervisory authority as there is no evidence such oral counseling, if it does occur, has any effect on an employee's job status. *Ken-Crest Services*, 335 NLRB 777, 778 (2001). The one specific incident Levatino cited, where Proto told a housekeeping employee named David that the room he was cleaning had already been done and he should be cleaning another room but he ignored her, did not result in any disciplinary action being taken against David. Nor is there any evidence that Proto recommended such action. According to Levatino, she told David that he had "to listen to Kathy, she's telling you that's the room you need to clean, that's why the purpose of the room cleaning sheet is here on the board." I find that Proto's telling David a room had already been cleaned and he should do another one does not involve the exercise of independent judgment, particularly, when there is posted a room cleaning sheet to be followed. At most, this incident demonstrates Proto's superior experience and commonsense efficiency rather than possession of supervisory authority. *Arlington Electric*, 332 NLRB 845 (2000); *Carlisle Engineered Products*, supra.

Finally, the Respondent contends that the fact that Proto substitutes for Levatino on weekends when Levatino is not present at the facility. While Proto does work on weekends when Levatino is off, there is no evidence that her duties are any different, that she has any more authority, or that she exercises any more independent judgment than during the week. Consequently, this without more does not establish supervisory status.

Dean & Deluca New York, Inc., 338 NLRB 1046, 1047 (2003); *Health Resources of Lakeview*, supra.

The Respondent asserts that the evidence shows that Proto possessed several secondary indicia of supervisory status, such as, the fact that she was paid \$1 an hour more than other laundry employees, that laundry employees perceived her as a supervisor, that her name and home telephone number are on a contact list maintained at the facility under the heading "Department Heads," and that in a letter she sent to a former administrator of the facility, seeking a raise, she referred to herself as a supervisor and listed several supervisory duties she performs. It is well settled that in the absence of any primary indicia of supervisory status, secondary indicia are insufficient by themselves to establish supervisory status. *Ken-Crest Services*, supra, at 779; *Billows Electric Supply*, 311 NLRB 878 fn. 2 (1993). Based on all of the foregoing factors, I find that Proto was not a supervisor within the meaning of Section 2(11) of the Act.

The evidence is clear that Proto was disciplined by the Respondent solely because it believed she had abused her authority as a supervisor by coercing and harassing April Ford-Dailey, a laundry employee it contends was under Proto's supervision. This allegedly occurred on September 7, in the laundry room at the facility where Proto and Levatino engaged in a heated conversation in the presence of Ford-Dailey as to whether or not Ford-Dailey could or should serve as the Employer's observer at the election to be held the following day. As a result of their argument, Ford-Dailey decided not to serve as the observer. The Respondent also believed that Proto had pressured Ford-Dailey into wearing a union button and a lei that was representative of support for the Union that day. In its post-hearing brief, the Respondent relies solely on its contention that Proto is a statutory supervisor in defending the unfair labor practice allegations of the complaint. I have found that Proto was not a statutory supervisor, but an employee entitled to exercise the rights protected by Section 7 of the Act.

Because the conduct for which Proto was disciplined was protected by the Act, a *Wright Line*⁴ analysis is not appropriate. *Felix Industries*, 331 NLRB 144, 146 (2000); *Neff-Perkins Co.*, 315 NLRB 1229 fn. 2 (1994). The only issue is whether Proto's conduct was so egregious as to lose the protection of the Act. I find that it was not.

As discussed above, throughout the election campaign, Proto was a zealous and prominent advocate for representation by District 1099 and was never told by the Respondent that her union activity was inappropriate because she was a supervisor. It is against that background that the events of September 7 took place. Proto's credible and uncontradicted testimony was that she believed that Ford-Dailey was a supporter of the Union as they had discussions about it throughout the election campaign and Ford-Dailey "was very prounion, she thought there needed to be a lot of improvements and she was very open about it." On September 7, Proto first learned that Ford-Dailey had agreed to serve as the Employer's election observer when

Levatino came into the laundry room and Ford-Dailey mentioned it. When Proto asked Ford-Dailey if she realized she would be representing Talmadge Park, Ford-Dailey responded that she did not, that she had been told that she would get to count the votes, and that she thought that would be fun. Proto told Ford-Dailey that she thought it would be confusing to voters if they saw a union supporter "sitting on the Employer's side." Proto and Levatino had a heated conversation about who could serve as an observer with Proto saying, "she [Ford-Dailey] can't be an observer." When Levatino asked "why not?" Proto responded "she's one of us." When Levatino left the area to get a paper describing who could be an observer, Proto gave Ford-Dailey a union button and a lei which Ford-Dailey put on because Proto had asked her. Ford-Dailey credibly testified that Proto also told her that it was her choice whether she served as an observer or not.

The upshot of the argument between Proto and Levatino was that Ford-Dailey decided not to be an observer. I find that, in context, Proto's remarks, which were directed to Levatino not Ford-Dailey, did not purport to imply that Ford-Dailey was ineligible or prohibited from being an observer, rather, that it would be inappropriate for a prounion employee to serve as an observer on behalf of the Employer. I also find nothing coercive in one employee telling another employee whom she believed to be a union supporter that it could be confusing to voters if they saw a prounion employee serving as an observer for the Employer or asking her not to do it. There is no evidence that Proto raised her voice, said anything threatening or intimidating, or offered any inducement when she remonstrated with Ford-Dailey, who testified that she had previously signed a union authorization card at the request of someone other than Proto. Ford-Dailey may well have wanted to please Proto, but there is nothing to indicate that she was any more influenced by Proto, to whom she referred as her "supervisor," than by Levatino, to whom she referred as her "boss." I find that the evidence fails to establish that Proto did or said anything during her interaction with Ford-Dailey and Levatino on September 7 to lose the protection of the Act. Accordingly, I find that the Respondent violated Section 8(a)(3) and (1) of the Act by its disciplinary action against her.

The complaint also alleges that the Respondent violated the Act by telling Proto she could not wear a union button or talk about the Union while at work. Proto testified that during the disciplinary meeting on September 16 with Vinci and Lorraine Franco she was told she could not engage in union activity and that she should just come in and do her job and everything would be fine. She asked if this meant wearing pins or buttons or talking about the Union and the response was "all of it." Both Vinci and Franco denied making such a statement. Franco did recall that during the meeting on September 16, Vinci went over Proto's role as supervisor and that Proto was "upset" and "asked would she not be able to participate in activities outside the building?" I credit Proto who appeared to have a much better recollection of these events than either Vinci or Franco.⁵

⁴ 251 NLRB 1083 (1980) enf'd 662 F.2d 800 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*

⁵ I found Proto to be a credible witness. I do not agree with the Respondent contention that the fact that she may have somewhat inflated her role and responsibilities in a letter, dated January 1, 2002, she sent

Given the nature of the meeting, and the fact that the Respondent had never before discussed with Proto how her alleged supervisory status affected her right to engage in union activity, I find it unlikely that the subject of Proto's union activity did not come up or that Proto did not ask for clarification as to what she could or could not do.

Again, it appears that the Respondent sought to prohibit Proto from discussing the Union and wearing prounion insignia in its facility because of its erroneous belief that she was a supervisor. Since she was not, its attempt to interfere with those protected rights violated Section 8(a)(1) of the Act. *Nicholas County Health Care Center*, 331 NLRB 970, 986 (2000); *DeMuth Electric, Inc.*, 316 NLRB 935 (1995).

III. ELECTION OBJECTIONS IN CASE 34-RC-2136

Following the hearing but before the record was closed, on April 10, 2006, the Employer withdrew its Objection No.1. The balance of its Objections are based solely on its contention that Kathleen Proto was a supervisor and that Proto's prounion activities during the election campaign which included soliciting union authorization cards and signatures of employees on a prounion petition, wearing and distributing prounion insignia to employees, urging employees to wear prounion insignia and to vote for the Union, encouraging an employee she believed to be a union supporter to not serve as an election observer on behalf of the Employer, and having her picture appear on a prounion flyer that was sent to all employees, interfered with employees' freedom of choice. Having found that Proto is not a statutory supervisor, I also find that none of those protected activities she engaged in as an employee and eligible voter in the election can be considered coercive or to have interfered with the employees' freedom of choice. I shall recommend that all of the Employer's remaining Objections be overruled.

CONCLUSIONS OF LAW

1. The Respondent, Talmadge Park, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent failed to prove that Kathleen Proto is a supervisor within the meaning of Section 2(11) of the Act.

4. The Respondent violated Section 8(a)(1) of the Act by telling employee Kathleen Proto that she could not wear union insignia or talk about the Union while at its facility.

5. The Respondent violated Section 8(a)(3), and (1) of the Act by disciplining Kathleen Proto because she engaged in activity in support of the Union.

6. The foregoing unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

to the Talmadge Park administrator after being made laundry supervisor in which she sought a wage increase, casts doubt on the truthfulness of the testimony she gave under oath at the hearing. Given the purpose of the letter, some puffing is to be expected. I find that none of the testimony or other evidence presented at the hearing undermined her credibility.

7. The Respondent has not established that any objectionable conduct occurred during the election campaign or that the prounion conduct of Kathleen Proto coerced or interfered with employee free choice in the election.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily disciplined employee Kathleen Proto by suspending her for 3 days without pay and placing her on probation, it must make her whole for her lost earnings, plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER⁶

The Respondent, Talmadge Park, Inc., East Haven, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending or otherwise disciplining employees because they engage in activity in support of New England Health Care Employees Union, District 1199, SEIU, or any other labor organization.

(b) Telling employees not to wear union insignia or not to discuss the Union while at its facility.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Kathleen Proto whole for the loss of earnings suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful suspension and probation of Kathleen Proto and within 3 days thereafter notify her in writing that this has been done and that the suspension and probation will not be used against her in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in East Haven, Connecticut, copies of the attached notice

⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

marked "Appendix."⁷ Copies of the notice, on form provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 10, 2005.

Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the Respondent's Objections to the election conducted on September 7, 2005, are overruled and that Case 34-RC-2136 be severed and remanded to the Regional Director to issue the appropriate certification.

Dated, Washington, D.C. July 17, 2006

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE

⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO
Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT suspend or otherwise discipline our employees because they engage in activity in support of New England Health Care Employees Union, District 1199, SEIU, or any other labor organization.

WE WILL NOT tell our employees not to wear union insignia or not to discuss the Union while at our facility.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Kathleen Proto whole for the earnings she lost as a result of our having unlawfully suspended her, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful suspension and probation of Kathleen Proto and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the suspension and probation will not be used against her in any way.

TALMADGE PARK, INC.