

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

SALT LAKE REGIONAL MEDICAL CENTER, INC.,

Employer,

Case No. 27-RC-8157

and

UNITED AMERICAN NURSES, AFL-CIO

Petitioner.^{1[1]}

SUPPLEMENTAL DECISION ON REMAND

This case is before me following a remand from the Board regarding the asserted supervisory status of registered nurses (“RNs”) who serve as charge nurses at an acute-care hospital. As discussed more fully below, I conclude that the charge nurses who work regularly and substantially in that capacity are statutory supervisors based on their Section 2(11) authority to assign other nurses to patients, through the use of independent judgment.

On February 1, 2002, the Petitioner commenced this proceeding by filing a representation petition under Section 9(c) of the National Labor Relations Act, seeking to represent the full-time and regular part-time RNs employed by the Employer at its acute-care hospital in Salt Lake City, Utah, excluding supervisors,

^{1[1]} The Decision and Direction of Election identified the Petitioner as United American Nurses, AFL-CIO, ANA. The Petitioner no longer is associated with ANA, and the case caption has been so modified to reflect that change.

guards, confidential employees, and all other employees. A hearing officer held a hearing on February 19-21, 2002.

On April 18, 2002, based on that hearing record, the then Regional Director issued a Decision and Direction of Election. He determined that the appropriate unit consisted of all RNs, including charge nurses and other RNs supplied by temporary employment agencies, who were employed by the Employer at its acute-care hospital located at 1050 East South Temple, Salt Lake City, Utah, excluding supervisors as defined in the Act, guards, confidential employees, and all other employees. The Regional Director concluded that the charge nurses were not supervisors within the meaning of Section 2(11) of the Act because the Employer had not met its burden of proving that they exercised independent judgment.

Subsequently, on approximately May 1, 2002, the Employer filed a request for review with the Board, contending that the charge nurses were statutory supervisors and that the Regional Director abused his discretion in ordering a mixed manual-mail ballot election under which supplied RNs could vote by mail ballot.

In late May and early June 2002, the Regional Office conducted the election. The Employer challenged ballots cast by charge nurses, on the grounds that they were statutory supervisors. By the conclusion of the election, the Board had not yet ruled on the Employer's request for review. Pursuant to Section 102.67(b) of the Board's Rules and Regulations, the ballots of the charge nurses were segregated and all ballots were impounded, pending the Board's decision on the request for review.

On approximately June 12, 2002, the Board granted the Employer's request for review.

On September 30, 2006, the Board issued an Order remanding the proceeding to the Regional Director. The remand portion of the Board's Order stated the following:

On September 29, 2006, the Board issued its decisions in Oakwood Healthcare, Inc., 348 NLRB No. 37 (2006), Golden Crest Healthcare Center, 348 NLRB No. 39 (2006), and Croft Metals, Inc., 348 NLRB No. 38 (2006), in light of the Supreme Court's decision in NLRB v. Kentucky River Community Care, 532 U.S. 706 (2001). Oakwood Healthcare, Golden Crest, and Croft Metals specifically address the meaning of "assign," "responsibly to direct," and "independent judgment," as those terms are used in Section 2(11) of the Act. Accordingly, the Board remands this proceeding to the Regional Director for further appropriate action consistent with Oakwood Healthcare, Golden Crest, and Croft Metals, including reopening the record, if necessary.

On October 16, 2006, I issued an Order to Show Cause. I directed the parties to show cause, if any, why the record should be reopened for the purpose of receiving additional evidence regarding the authority of charge nurses to assign, responsibly direct, and exercise independent judgment, including potential changed circumstances bearing on the charge nurses' status.

On approximately November 3, 2006, the Employer submitted a Response to the Order to Show Cause. The Employer contended that changed circumstances required that the April 2002 Decision and Direction of Election be vacated, that the record be reopened, that a supplemental decision be issued, that a new election be ordered, and that the Petitioner be required to submit a new showing of interest.

On November 14, 2006, based on the Employer's contention that there were changed circumstances warranting reopening the record, a Notice of Representation Hearing issued, setting the case for hearing regarding changed circumstances in the petitioned-for unit.

On November 29 and 30 and December 1, 2006, a hearing officer conducted a supplemental hearing. The Employer and the Petitioner were given full opportunity to present evidence.

After the close of the supplemental hearing, both parties submitted timely briefs.^{2[2]} In its brief, the Employer advanced several issues. Those issues include the following: that the Board's recent decisions establish that the charge nurses are supervisors, that a re-run election is warranted because of the passage of time and substantial management and employee turnover since the 2002 election, that the Regional Office should require that the Petitioner submit a recent showing of interest before proceeding with any new election, and that if a new election is not ordered then the Regional Office should count ballots cast by RNs whom temporary employment agencies supplied to the Employer.^{3[3]} In its brief, the Petitioner contended that the RNs who serve as charge nurses are not statutory supervisors because the Employer failed to meet its burden of proving that they serve in that position on a regular and substantial basis, and the charge nurses merely request but do not require other RNs to care for particular patients. The Petitioner also

^{2[2]} On February 2, 2007, the Petitioner submitted a Supplemental Citation of Authority. By Order dated February 8, 2007, I rejected that pleading because the Board's rules do not provide for such supplemental filings.

^{3[3]} In the Decision and Direction of Election, the Regional Director concluded that the Board's rule on bargaining units in acute-care hospitals – which provides that eight specifically defined units will be the only appropriate units in such facilities - required that the supplied RNs be included in the RN unit. In reaching that conclusion, the Regional Director relied on the Board's decision in M.B. Sturgis, Inc., 331 NLRB 1298 (2000), holding that a bargaining unit can combine employees who are solely employed by a particular employer with other employees who are jointly employed by that employer and a supplier employer. The Employer recognizes that, after the Decision and Direction of Election issued, the Board overruled Sturgis and concluded that units combining those two categories of employees are statutorily impermissible without the consent of all parties. See H.S. Care LLC, 343 NLRB 659 (2004). The Employer argues only that the Board should not apply H.S. Care LLC retroactively, but should treat Sturgis as the controlling precedent because it was the law at the time of the election.

contended that the Regional Office should exclude the ballots that the supplied RNs cast.

ISSUE PRESENTED

While the parties advanced several issues in their recent posthearing briefs, the only issue currently before me is whether, in light of the Board's decisions in Oakwood Healthcare, Golden Crest, and Croft Metals, the RN charge nurses are statutory supervisors. Of the many issues identified above, the only one that the Employer presented to the Board in its request for review is the supervisory status issue. Based on the narrow scope of the issues presented to the Board in the request for review and on the express terms of the remand Order itself, it appears that the Board remanded this case to me solely for reexamination of that supervisory status issue, in light of its recent decisions. Additionally, some of the issues that the parties advanced appear to be premature given the current posture of this case. This proceeding still is at the unit-determination stage. To the extent that the parties seek resolution of other issues that do not directly relate to supervisory status unit-determination matters, those issues may be addressed at later stages of the processing of this case, as appropriate.

SUMMARY OF SUPPLEMENTAL DECISION ON REMAND

Upon further consideration of the entire factual record in this case, in conjunction with the Board's recent decisions in the cases cited above, I conclude that the Employer has met its burden of establishing that the charge nurses have the authority to exercise the Section 2(11) function of assigning work by designating particular nurses to care for particular patients, that the charge nurses use

independent judgment in performing that function, and that they have the authority to require the nurses to take those assignments. Additionally, I conclude that the Employer demonstrated that numerous RNs who served as charge nurse worked regularly and substantially in that position as of the February 2002 preelection hearing, but that the Employer did not demonstrate that several other such RNs worked regularly and substantially as charge nurse at that time. Accordingly, I conclude that many, although not all, of the Employer's charge nurses were statutory supervisors.

Below, I set forth evidence from the 2002 preelection hearing and the 2006 postelection hearing. Although I have considered the entire record in this case, I have based my decision primarily on evidence from the 2002 hearing. My reason for focusing on the evidence from that hearing is that the Regional Office conducted an election in this case in May and June 2002, at which voters cast ballots. Given that voters already cast ballots, the supervisory issue herein must be assessed in light of the charge nurses' status before and at the time of the election, which status is best revealed by the evidence presented in the preelection 2002 hearing. While I have considered the evidence from the 2006 hearing, I have done so primarily to determine if any postelection changed circumstances should affect my decision herein.

THE SUPERVISORY STATUS OF THE CHARGE NURSES

1. The Board's Recent Decisions Concerning Supervisory Status

In NLRB v. Kentucky River Community Care, 532 U.S. 706 (2001), the Supreme Court addressed the validity of the Board's views at that time concerning the Section 2(11) term "independent judgment." The Supreme Court rejected the

Board's then-extant view that "a particular kind of judgment, namely, 'ordinary professional or technical judgment in directing less skilled employees to deliver services[,]'" cannot be supervisory independent judgment. Id. at 714. As the Court stated the matter, "the Board's contention that the policy of covering professional employees under the Act justifies the categorical exclusion of professional judgments from a term, 'independent judgment,' that naturally includes them . . . contradict[s] both the text and structure of the statute, and they contradict as well the rule . . . that the test for supervisory status applies no differently to professionals than to other employees." Id. at 721.

More recently, in light of Kentucky River, the Board issued three decisions in which it refined and clarified the analysis to be applied in assessing supervisory status. See 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). In those decisions, the Board analyzed the Section 2(11) terms "assign" and "independent judgment." The Board also discussed the proper analysis for determining whether individuals who rotate periodically into a supervisory position are statutory supervisors who must be excluded from a bargaining unit.^{4[4]}

In Oakwood, the Board construed the Section 2(11) term "assign" to refer to "the act of designating an employee to a place (such as a location, department, or

^{4[4]} The Board also discussed the Section 2(11) term "responsibly to direct." For responsible direction to exist, the putative supervisor must direct and perform oversight of employees and be accountable for the performance of tasks by those employees such that adverse consequences may befall the putative supervisor if the employees do not properly perform the tasks. See Oakwood, 348 NLRB No. 37, slip op. at 7, 10. In this remanded proceeding, the Employer does not argue that the charge nurses responsibly direct employees. In any event, the record does not demonstrate that the charge nurses responsibly direct, as the evidence does not demonstrate that they are accountable for the performance of others' work. In this Supplemental Decision on Remand, I will not further discuss responsible direction.

wing), appointing an individual to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks to an employee.” Id. at 4. “[T]o ‘assign’ for purposes of Section 2(11) refers to the . . . designation of significant overall duties to an employee, not to the . . . ad hoc instruction that the employee perform a discrete task.” Id. The Board observed that some job assignments are more difficult and demanding than others, and that the power to assign an employee’s overall duties is important to the employee and management. Id.

With regard to the health care context, the Board concluded that “the term ‘assign’ encompasses . . . charge nurses’ responsibility to assign nurses and aides to particular patients.” Id. As the Board stated, “the assignment of a nurse’s aide to patients with illnesses requiring more care rather than to patients with less demanding needs will make all the difference in the work day of that employee . . . [and i]t may also have a bearing on the employee’s opportunity to be considered for future promotions or rewards.” Id.

In Oakwood, in accordance with the Supreme Court’s opinion in Kentucky River, the Board also adopted an interpretation of “independent judgment” that focuses on the degree of discretion involved in making a decision, not on the kind of discretion involved (e.g. professional or technical). Id. at 7-8. For an individual’s judgment to be “independent” within the meaning of Section 2(11), the individual must form an opinion or evaluation by discerning and comparing data. Id. at 8. As the Board explained, “actions form a spectrum between the extremes of completely free actions and completely controlled ones, and the degree of independence necessary to constitute a judgment as ‘independent’ under the Act lies somewhere in between

these extremes.” Id. at 8. Extending the Supreme Court’s analysis in Kentucky River, the Board recognized that at one end of the spectrum there are situations where there are detailed instructions for the actor to follow, but that at the other end there are situations where the actor is wholly free from constraints. Id. It found that “a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement[,]” but that a judgment is independent even where there is a guiding policy so long as that policy allows for discretionary choices. Id. Similarly, “if [a] hospital has a policy that details how a charge nurse should respond in an emergency, but the charge nurse has the discretion to determine when an emergency exists or the authority to deviate from that policy based on the charge nurse’s assessment of the particular circumstances, those deviations, if material, would involve the exercise of independent judgment.” Id. at 9.

Additionally, the judgment that the putative supervisor exercises must “rise above the merely routine or clerical” for it to be truly supervisory within the meaning of Section 2(11). Id. at 8. “If there is only one obvious and self-evident choice (for example, assigning the one available nurse fluent in American Sign Language (ASL) to a patient dependent upon ASL for communicating), or if the assignment is made solely on the basis of equalizing workloads, then the assignment is routine or clerical in nature and does not implicate independent judgment, even if it is made free of the control of others and involves forming an opinion or evaluation by discerning and comparing data.” Id. at 8-9. With regard to its statement that assigning work solely

on the basis of equalizing workloads does not involve independent judgment, the Board observed that the process of equalizing workloads does involve independent judgment where it entails assessment of the difficulty of the work and the competence of the staff available to do it, rather than only assessment of the quantity of the work to be assigned. Id. at 12.

In applying its independent judgment test, the Board elucidated its meaning with respect to charge nurses' authority to assign available staff to particular patients.

The Board made clear its view that:

[i]n the health care context, choosing among the available staff frequently requires a meaningful exercise of discretion. Matching a nurse with a patient may have life and death consequences. Nurses are professionals, not widgets, and may possess different levels of training and specialized skills. Similarly, patients are not identical and may require highly particularized care. A charge nurse's analysis of an available nurse's skill set and level of proficiency at performing certain tasks, and her application of that analysis in matching that nurse to the condition and needs of a particular patient, involves a degree of discretion markedly different than the assignment decisions exercised by most leadmen.

Id. at 10-11. The Board also stated that "where [a] charge nurse makes an assignment based upon the skill, experience, and temperament of other nursing personnel and on the acuity of the patients, that charge nurse has exercised the requisite discretion to make the assignment a supervisory function 'requir[ing] the use of independent judgment[.]'" and that "if [a] registered nurse weighs the individualized condition and needs of a patient against the skills or special training of available nursing personnel, the nurse's assignment involves the exercise of independent judgment." Id. at 8, 13.

In Golden Crest Healthcare Center, 348 NLRB No. 39 (2006), the Board reaffirmed existing case law holding that, for supervisory status to exist, the alleged supervisor's authority with regard to Section 2(11) functions must include the power to require employees to undertake certain actions. The Board reiterated that supervisory authority is not established where the putative supervisor has the authority merely to request that an employee take a certain action. Id. at 3.

The Board also made clear in Oakwood that, where an individual is engaged part of the time as a supervisor and the rest of the time as an employee, the legal standard for a supervisory determination is whether the individual spends a "regular" and "substantial" portion of her/his work time performing supervisory functions. Oakwood, 348 NLRB No. 37, slip op. at 9. "Regular" means "according to a pattern or schedule, as opposed to sporadic substitution." Id. Offering an example to distinguish between "regular" and "sporadic," the Board provided case citations (Rhode Island Hospital, 313 NLRB 343, 349 (1993), and St. Francis Medical Center West, 323 NLRB 1046, 1046-1047 (1998)), contrasting regular, recurring rotations into supervisory positions with sporadic service in supervisory positions due to temporary, extraordinary circumstances with little likelihood of recurrence, such as illness or vacation of the supervisors. Id. at 9 n.47. The requirement that a "substantial" portion of time be spent in supervisory functions can be satisfied where the individuals have served in a supervisory role for at least 10 percent of their total work time. Id. (citing Archer Mills, Inc., 115 NLRB 674, 676 (1956) (10 percent is sufficient)).

2. The Employer's Current Contentions Regarding the Charge Nurses' Supervisory Status

As set forth in the Decision and Direction of Election, in the underlying preelection proceedings the Employer contended that its charge nurses were statutory supervisors based on their authority over several functions. The Employer contended that the charge nurses were supervisors because they assigned other employees by designating which staff would care for particular patients; orienting, instructing, and counseling RNs; inspecting RNs' work; scheduling RNs' breaks and lunches; asking RNs to work overtime; calling RNs in to work in short-handed situations; and sending RNs home when the workload was light. The Employer also contended that the charge nurses were supervisors based on their involvement in hiring, evaluating, disciplining, and adjusting grievances.

In the brief that it submitted after the supplemental hearing, the Employer primarily argued that its charge nurses are statutory supervisors based on their role in assigning other staff members. More specifically, the Employer argued that the charge nurses exercise supervisory independent judgment in designating RNs to care for particular patients, and that their performance of that function qualifies them as statutory supervisors under the Oakwood trilogy.

Given that the Employer focused in this remanded proceeding on the charge nurses' role in designating which RNs will care for particular patients, I will deal only with that contention below. More specifically, I will discuss the facts pertinent to whether the charge nurses exercise Section 2(11) assignment authority in designating staff to particular patients, whether any such assignment involves the exercise of independent judgment, whether the charge nurses' assignments constitute job requirements, and whether the charge nurses serve in that capacity on

a regular and substantial basis. I do not give further consideration to the other issues that the Employer previously advanced but does not now advance as part of this remand. I conclude that the Decision and Direction of Election adequately covers those other issues.^{5[5]}

3. The Evidence Relating to Supervisory Status of Charge Nurses

The Decision and Direction of Election sets forth the background facts and other pertinent findings. In this Supplemental Decision on Remand, I will not repeat evidence already covered in the earlier Decision and Direction of Election, except as may be necessary.

A. Evidence Relating to Charge Nurses Designating Staff to Particular Patients

1. Evidence from the 2002 Preelection Hearing

At the time of the February 2002 hearing, the Employer employed charge nurses in various units within its Departments of Inpatient Services, Perinatal Services, and Perioperative Services. Inpatient Services used charge nurses in the Intensive Care Unit (“ICU”), Medical Unit, Surgical Unit, and Inpatient Rehabilitation Unit.^{6[6]} Perinatal Services used charge nurses in the Labor & Delivery Unit, the

^{5[5]} In its brief, the Employer also mentioned the charge nurses’ role in calling in employees to work in short-handed situations and sending them home in overstaffed situations. I find that the evidence is insufficient to establish that the charge nurses are supervisors based on their role in dealing with those staffing needs. The witnesses’ testimony does not clearly explain the actual process that is used in each of the various units. Also, the evidence does not establish that the charge nurses have the independent authority to require employees to come into work on short notice or to send them home. See, e.g., Golden Crest Healthcare Center, 348 NLRB No. 39, slip op. at 3-4 (2006) (employer had not met its burden of proving that charge nurses were supervisors based on calling in employees or sending them home); Avante at Wilson, Inc., 348 NLRB No. 71, slip op. at 1-2 (2006) (employer did not prove the charge nurses were supervisors based on sending employees home).

^{6[6]} The ICU treats patients with severe medical conditions. The Medical Unit is an area for patients who need to be treated for a variety of non-surgical medical conditions, such as pneumonia. The Surgical Unit treats surgical patients. The Inpatient Rehabilitation Unit treats patients who need extended rehabilitation, due to problems such as stroke or orthopedic issues.

Maternal/Infant Unit, and the Neonatal ICU.^{7[7]} Perioperative Services used charge nurses in the Operating Room/Post-Anesthesia Care Unit (“OR/PACU”) and the Same-Day Surgery Unit.^{8[8]}

In the original hearing in February 2002, Employer witnesses Cathy Story, Christina Carter, and Christina Monson and Petitioner witnesses Laurie Gay, Richelle Welling, and Michelle Weeks testified about the charge nurses’ role in the various units.^{9[9]}

Cathy Story testified that she was the Employer’s Interim Chief Nursing Officer and the Regional Director of Clinical Operations for the Employer’s parent company, IASIS Healthcare Corporation. Story had overall responsibility for all nursing services at the facility. Story testified about the authority of charge nurses in all the involved units to designate staff members to care for particular patients. Story testified that the charge nurses “decide” who takes care of whom and they have “complete” and “full” authority in making those assignments. She testified that, in carrying out that function, the charge nurses consider the staff members’ skill sets and the patients’ needs and acuity of their conditions, so that they can “mesh” nurses with patients in order to provide the best possible care. Story offered the example of how a charge nurse typically would handle a situation involving an open-heart surgery patient in the

^{7[7]} The Labor & Delivery Unit is for birthing. The Maternal/Infant Unit is the area where mothers stay after giving birth. The Neonatal ICU is a special-care nursery for babies who are sick and/or premature and who need special care and treatment.

^{8[8]} The OR/PACU includes the operating rooms and the recovery area for patients after surgery. Same-Day Surgery is the pre-operative and recovery area for patients who have surgery and are released on the same day.

^{9[9]} The Employer also called Interim Director of Perioperative Services Lori Jensen as a witness, but her testimony did not cover the subject of charge nurses’ assignment of nurses to patients.

ICU. Story stated that the charge nurse is responsible for recognizing the needs of the patient and then examining the available nurses' skills and work load to ensure that there is a "match" between the patients needs and the assigned nurse's competence level and available time. Story also testified that, in making assignments, the charge nurses can consider patient preferences, such as a patient's desire to receive care by a nurse of a particular gender. Story also explained that the charge nurses can shift workloads based on changes in patients' physical conditions and on how difficult particular patients are, including with regard to personality issues. She emphasized that patients are not "widgets," and that charge nurses are expected to recognize changes in patients' health conditions and to make appropriate staffing decisions to meet the patients' needs.

Christina Carter, the Employer's Interim Director of Inpatient Services and a former ICU clinical coordinator, testified that she had responsibility for overseeing the ICU and the Medical, Surgical, and Inpatient Rehabilitation Units. She testified that the charge nurses in all those units have complete authority to decide which nurses will take care of which patients. She testified that the charge nurses use their "judgment" to evaluate the patients' needs and the skills of the available nurses and then make appropriate staffing decisions based on those factors. She stated that, as part of that matching process, the charge nurses decide how many patients each nurse will have during a shift. Also, Carter testified that the charge nurses have the authority to shift workloads as patients' medical conditions change. Carter also stated that the charge nurses consider patients' preferences in making assignments.

Clinical Coordinator Christine Monson testified that her responsibility covered Perinatal Services, which included the Labor & Delivery Unit, the Maternal/Infant Unit, and the Neonatal ICU. Monson testified that the charge nurses in those units have complete authority to decide which nurses will take care of which patients. She stated that the charge nurses take into account the level of patient acuity and the skill level of the available nurses. She also confirmed that the charge nurses can consider patient preferences for particular nurses, and that the charge nurses can shift assignments depending on workload.

Petitioner witness Lauri Gay, an RN in the ICU, testified that there can be a range of nurses, anywhere from two to eight, assigned to work in the ICU, depending on the number of patients in that unit at a given time. Gay testified the charge nurse on a particular shift makes staff assignments for the next shift, so that when the nurses for that shift arrive to begin work their patient assignments are ready. During a particular shift, the charge nurse can shift nurses around as needed, to account for changes in patients' conditions, new admissions, or discharges. Gay acknowledged that the ICU charge nurse, in assigning nurses to patients, has the authority to assess nurses' skill levels and patients' acuity levels. She stated that the charge nurse decides how many nurses to assign to particular patients based on the patients' acuity, and that there are only "general rules of thumb" that guide that decision-making. Gay acknowledged that the patients in the ICU have a variety of conditions, and that the charge nurses have the authority to assess nurses' skills and patients' acuity levels in assigning nurses to those patients. She stated that, as charge nurse, she would tend to assign a nurse with much experience in treating open-heart

surgery patients to a patient who was brought into the ICU after having such surgery. She also stated that she would tend to assign a nurse with longer tenure in the ICU rather than a new nurse to treat a critically ill patient. Gay also testified that the charge nurse can take patient preferences into account, and that the charge nurse also has the authority to take nurses' and patients' personalities into account. Gay testified that it is the "rare occasion" when a nurse questions a charge nurse's patient assignment. Gay also testified that the RNs can be subject to discipline by higher-level authorities for not obeying the assignments of a charge nurse.

Richelle Welling testified that she serves as a charge nurse in the Labor & Delivery Unit. She stated that there usually are three RNs on a shift, and that at the beginning of the shift the charge nurse talks to the other RNs about who will care for which patients. Welling acknowledged that the charge nurse has the ultimate authority and responsibility to make sure that nurses are assigned to patients, particularly when things get hectic. Welling stated that the charge nurse and the RNs usually divvy the work among themselves in a cooperative fashion after each RN has expressed a preference for patients. She also testified that, although all the nurses try to cooperate, the decision about assignment ultimately rests with the charge nurse, subject to possible appeal to higher management.

Michelle Weeks testified that she is a charge nurse who alternates between the ICU and the Newborn ICU. Weeks testified primarily about the charge role in the Newborn ICU. Weeks testified that the charge nurse in the Newborn ICU has the ultimate responsibility to assign nurses to patients based on the nurses' skill levels and the patients' acuity levels, as does the charge nurse in the ICU. Weeks testified,

for example, that if there is a situation where a temporary staff nurse is assigned to work with her she determines that nurse's skill level and then makes sure not to assign that person to patients whose needs are too great for the nurse's skill level. She stated that in the Newborn ICU the charge nurse and the other RNs participate in a mutual decision-making process to divvy up the work. Weeks testified that the nurses all try to cooperate, but that ultimately the decision about assignment rests with the charge nurse, subject to possible appeal to higher management.

2. Evidence from the 2006 Postelection Hearing

By the time of the 2006 hearing, the Employer had modified its department structures somewhat, but continued to employ charge nurses in various units.^{10[10]} Currently, the Employer uses charge nurses in the ICU, the Medical/Surgical Unit, Women's Services (including Labor & Delivery, Neonatal ICU, OB/GYN-Newborn Nursery), Rehabilitation, and Same-Day Surgery.

The Employer and the Petitioner each called witnesses to testify about the current role of the charge nurses. The Employer called Chief Nursing Officer John Kass, Director of Critical Care Services Daniel Davis, and Director of Women's Services Carol Lindsay. The Petitioner called RNs Shauna Mann, Clare Valles, Judee Brasher, and Georgianna Wallace.

Chief Nursing Officer Kass testified that he started to work for the Employer in December 2003 as the Director of Critical Care Services and that, since September 2004, he has served as the Chief Nursing Officer, initially on an interim basis and then in April 2005 becoming permanent. As Director of Critical Care Services, Kass

^{10[10]} For example, since the 2002 hearing the Employer combined its Medical and Surgical Units into one unit.

oversaw the ICU's operations. As Chief Nursing Officer, he is responsible for oversight of all nursing units. Kass testified primarily about the ICU charge nurses, although he provided some information about the charge nurses in other units. According to Kass, the ICU charge nurses all have a high skill level, but there is still a wide range in skill level of the nurses in the ICU. Kass also stated that there is a wide range in patients' medical conditions in the ICU. Kass testified that one of the charge nurses' duties and responsibilities is to assign other staff to care for particular patients. Generally, near the end of a work shift, the charge nurse for that shift gets a detailed report from each primary care nurse about the patients' conditions, and then uses that information to assign particular patients to nurses and other staff who are scheduled for the incoming shift. The incoming charge nurse can change those assignments if she disagrees with them. In making those assignments, the charge nurse uses her judgment to make sure that the patients' needs are matched by the assigned nurses' skills. The charge nurse also considers other factors, such as maintaining continuity of care, language and other communication issues between patient and staff, and doctors' preferences. Kass also testified that once a charge nurse assigns a nurse to a patient the nurse is required to take the patient, although he acknowledged that the nurse's input about the assignment usually is welcome and that if the nurse disagrees with the assignment she/he can go to higher management.

Daniel Davis, the Director of Critical Care Services, has had overall responsibility for the ICU and the Intermediate Care Unit since April 2003, when he first started to work for the Employer. Consistent with Chief Nursing Officer Kass' testimony, Davis testified that the ICU patients have a very high level of acuity and

that there is wide variation in their conditions. He testified about Employer's Exhibit 49, which set forth a summary of some of the various medical conditions of numerous ICU patients.

Shauna Mann, one of the Petitioner's witnesses, has been an ICU nurse for over 20 years. Mann testified that the ICU charge nurse position was basically the same in 2006 as it was in 2002, with the possible exception of reporting to the scheduling coordinator or nursing supervisor. She testified that the charge nurse on the outgoing shift assigns nurses to patients for the next shift, and that when a new patient arrives in the ICU during a shift the charge nurse designates a nurse to care for that patient. Mann acknowledged that charge nurses consider nurses' skills and patients' acuity in designating the nurses to care for particular patients. She also testified that the charge nurse takes into account how much time the various nurses have available. For example, if a nurse were caring for an extremely ill patient and another extremely ill patient came into the ICU, the charge nurse probably would not have that nurse care for the new patient because the nurse probably would not have adequate time to care for both patients. Mann also testified that, as charge nurse, she takes nurses' preferences into account in designating nurses to patients. She stated that charge nurses discuss patient assignments with staff and that nurse preferences often are followed, but that if a charge nurse insisted that a particular nurse take a particular patient then the nurse would do so. Mann testified that a nurse can disagree with an assignment and that there can be a give-and-take discussion about it, but she also acknowledged that if she determined that a particular nurse had enough time available to take a patient, then she would not just accept the

nurse's claim that she was too busy and would become more forceful to get the nurse to take the patient.

Judee Brasher, one of the RNs who serves as a Medical/Surgical charge nurse, testified that the charge nurse assigns patients to rooms and nurses to care for those patients. Brasher stated that, in assigning nurses to patients, the charge nurse considers the nurses' skill level and the patients' acuity levels. She testified that the charge nurse also considers which nurses are on shift, how busy each nurse is, and who has a patient load that could accommodate another patient. Brasher testified that she consults with the nurses before making assignments, and that she typically asks a nurse who is less busy if she can take more patients before assigning that nurse to another patient.

Carol Lindsay, the Director of Women's Services since April 2004, testified about the charge nurse role in Labor & Delivery, Neonatal ICU, and OB/GYN-Newborn Nursery. She testified that the charge nurses in those units are responsible for assigning nurses to patients. Lindsay testified that the health conditions of the mothers and babies varies throughout Women's Services. She also testified that the nurses have a range of backgrounds and experience, and that some nurses are better than others at handling certain situations and issues. For example, Lindsay testified that some nurses are very good at dealing with breast-feeding issues while other nurses are very good with handling postpartum depression issues. In assigning nurses to patients, the charge nurses consider factors such as nurses' skills and patients' conditions to make sure that a nurse with appropriate skills is assigned. Lindsay stated that the charge nurse also will consider other factors, such as the

nurses' preferences, the patients' preferences, doctors' preferences, and workflow within the units. Lindsay explained that the various charge nurses have different styles in exercising their authority, so that some charge nurses are "bossy" while others are friendlier. Lindsay testified that, regardless of the particular style that a charge nurse uses, the charge nurse is responsible for making sure that appropriate staffing assignments are made.

Clare Valles, a Women's Services staff nurse who works primarily in Labor & Delivery, testified that there is a wide range of patients in the various Women's Services units. In the Labor & Delivery Unit, some women go through childbirth with no complications while others need to have labor induced or possibly even have a scheduled or emergency Caesarian section. In the Neonatal ICU, some babies need only to add some bodyweight while other babies are on respirators or are being treated with antibiotics. Valles also stated that all the nurses in Labor & Delivery are certified to care for all patients in the unit, but that some nurses are stronger in some areas than in others. As an example, she stated that some nurses are better than others at dealing with a mother whose baby died. Valles acknowledged that the charge nurses have the authority to assign nurses to patients in accordance with the acuity of the patient, and that some of the charge nurses exercise that authority without consulting the nurses while others choose to work in a more collaborative fashion. Valles stated that, when she serves as charge nurse, she and the other nurses work out patient assignments in a collaborative manner. She often asks the other nurses which patients they want, and the nurses express their wishes.

Frequently, to maintain continuity of care, the nurses stay with patients that they previously treated.

B. Evidence Relating to RNs' Time Spent as Charge Nurse

As set forth above, in Oakwood the Board decided that where an individual is engaged part of the time as a supervisor and the rest of the time as an employee, the legal standard for a supervisory determination is whether the individual spends a regular and substantial portion of her/his work time performing supervisory functions. Below, I set forth evidence from the 2002 and 2006 hearings relating to the regular/substantial analysis. Because the main issue is whether the charge nurses were supervisors before and at the time of the election, in analyzing the regular/substantial issue I will focus on the evidence from the 2002 hearing. The evidence from the 2006 hearing concerning issues of regularity and substantiality at the time of that hearing does not illuminate whether charge nurses worked regularly and substantially in that position before the 2002 election. Accordingly, below I will discuss the evidence from 2006 in a much more summary fashion.

1. Evidence from the 2002 Preelection Hearing

In the February 2002 hearing, the Employer presented documentary evidence showing which RNs worked as charge nurse, the units in which they worked, and how often they worked in that position. The evidence was in the form of two exhibits, Employers Exhibits 21 and 22, which covered payroll periods for different, but substantially overlapping, time periods. Employer Exhibit 21 covered payroll periods from May 27, 2001, through February 2, 2002 (payroll period 12 in 2001 through

payroll period 3 in 2002). Employer Exhibit 22 covered payroll periods from April 15, 2001, through December 22, 2001 (payroll period 9 in 2001 through payroll period 26 in 2001). Thus, the information included in the two exhibits, when combined, covered the time period from April 15, 2001, through February 2, 2002.

Below, I have listed in summary form the names of all the RNs identified in Employer Exhibits 21 and 22 as RNs who worked as charge nurse in the various units, along with the number of each payroll period in which the RN worked as charge nurse. A payroll period number in regular font signifies that the RN spent at least 10 percent of her/his time as charge nurse in that payroll period. A payroll period number in bold font signifies that the RN spent less than 10 percent of her/his time as charge nurse in that payroll period.^{11[11]} Additionally, for each listed RN, I have set forth, in parentheses after the payroll period numbers, the percentages of total time spent working as charge nurse.^{12[12]}

ICU

Name

Payroll Period Nos.

^{11[11]} A few of the entries on Employer Exhibits 21 and 22 included obvious mathematical mistakes, such as reflecting that a charge nurse spent more than 100 percent of her/his total work time working as a charge nurse. Those obviously incorrect entries are denoted with an underline beneath the affected payroll period number. The parties were aware of those errors during the February 2002 hearing. The Employer proffered that those inaccuracies were due to accounting corrections to handle RN mistakes in clocking their time spent as charge nurse. The Petitioner indicated that it was satisfied with that explanation. No party claims that the data included in the Employer Exhibits 21 and 22 generally is inaccurate.

^{12[12]} For most of the listed RNs, the percentages differ because the two exhibits cover slightly different payroll periods. For some RNs, only one percentage is set forth because those RNs are listed on only one of the two exhibits.

Cynthia Aagard ^{13[13]}	12, 13, 15, 16, 17, 18, 20, 21, 22, 24, 26, 1, 2, 3 (48.95, 48.35)
Angie Adams	12, 13 (47.74, 47.74)
Christine Anderson	9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 26, 1 (58.43, 62.39)
Laura Beck	9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 26, 1, 2, 3 (41.01, 42.16)
Virginia Clark	15 (100.00, 100.00)
2, 3 Susan Earl	9, 10, 11, 13, 14, 16, 17, 18, 19, 20, 21, 23, 26, 1, (25.13, 27.40)
Maria Esquibel	9, 10, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 1, 3 (31.02, 31.54)
Lauri Gay	9, 10, 13, 14, 16, 17, 18, 19, 21, 22, 24, 25, 26, 2 (39.81, 37.30)
Lee Ann Gillund	9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 1, 2, 3 (31.27, 37.88)
Jeffrey Gorzitze ^{14[14]}	10, 16, 24, 25, 26, 1, 2, 3 (40.15, 37.63)
Ann Lapolla	18, 24 (9.65, 9.65)
Shauna Mann	9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 1, 2, 3 (34.50, 30.21)
Catherine Mason	9, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 1, 3 (30.71, 35.28)
Sheila Moomaw	9, 10, 11, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 26, 1, 2, 3 (23.59, 20.24)
Dianne Player	10, 11, 12, 19, 20, 21, 22, 23, 24, 25, 26, 1, 2, 3

^{13[13]} Cynthia Aagard worked as a charge nurse primarily in the ICU, but she worked as a charge nurse in the Neonatal ICU in pay period numbers 16, 21, 2, and 3, and as a charge nurse in the Surgical Unit in pay period number 24.

^{14[14]} Jeff Gorzitze worked as a charge nurse primarily in the ICU, but he worked as a charge nurse in the Medical Unit in pay period numbers 10 and 16.

	(32.54, 28.89)
Louise Shryers	9, 13, 14, 15, 18, 21, 2, 3 (33.65, 35.86)
Leland Smith	10, 11, 12, 13, 14, 15, 16, 17, 18, 25, 26, 1 (27.94, 30.13)
Sheri Tesseyman	19, 20, 21, 22, 23, 24, 25, <u>26</u> , 2, 3 (33.53, 33.83)
Donald Tetzloff	9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, <u>26</u> , 1, 2, 3 (39.84, 44.54)
Georgianna Wallace	9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 1, 2 (31.18, 35.82)

Surgical Unit

<u>Name</u>	<u>Payroll Period Nos.</u>
Judee Brasher	9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 12, 3 (60.41, (62.89)
Marilyn Castagno ^{15[15]}	22, 23, 25, 26, 3 (28.36, 24.45)
Sandy Garrand	13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 1, 2, 3 (51.62, 51.32)
Keri Holzworth	25, 26, 1, 2, 3 (51.87, 50.92)
Janae Paulson	2 (61.82)
Andrea Veniegas	24, 25, 26, 1, 2, 3 (94.83, 93.87)

Medical Unit

<u>Name</u>	<u>Payroll Period Nos.</u>
Aaron Friel ^{16[16]}	18, 19, 20, 21, 22, 23, 24, 25, 26, 1, 2, 3 (67.24, 67.58)

^{15[15]} Marilyn Castagno worked as a charge nurse primarily in the Surgical Unit, but she worked as a charge nurse in the Medical Unit in pay period number 3.

^{16[16]} Aaron Friel worked as a charge nurse primarily in the Medical Unit, but he worked as a charge nurse in the Surgical Unit in pay period numbers 22 and 3.

Rebecca Jenkins	9, 10, 11, 12, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 1, 2, 3 (72.24, 68.09)
Edita Lucero ^{17[17]}	9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, <u>25</u> , 26, 1, 2, 3 (63.79, 68.28)
Tonia Martinez	9, 10, 11 (38.78)
Rachel Tanner	9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 1, 2, 3 (49.31, 47.47)
Karen Valdez ^{18[18]}	9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 1, 2, 3 (67.51, 71.81)
Bradley Wardle	9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 1, 2, 3 (77.40, 77.19)

Inpatient Rehabilitation Unit

<u>Name</u>	<u>Payroll Period Nos.</u>
26, Susan Brown	11, 14, <u>15</u> , 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 1, 2, 3 (<u>117.48</u> , <u>121.99</u>)
Debbie Gibson ^{19[19]}	24, 25, 26, 2, 3 (81.02, 85.22)
Susan Griffin ^{20[20]}	9, 10, 11, 12, 13, 14, 15, 16, 17, 21, 22, 23, 24, 25, 26, 1, 2, 3 (83.70, 79.16)
Kari Goris	9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 24, 25, 26, 2, 3 (65.93, 79.47)
Corina Jachmann	9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 1, 2, 3 (96.99, 96.35)

^{17[17]} Edita Lucero worked as a charge nurse primarily in the Medical Unit, but she worked as a charge nurse in the Inpatient Rehabilitation Unit in pay period number 25.

^{18[18]} Karen Valdez worked as a charge nurse primarily in the Medical Unit, but she worked as a charge nurse in the Surgical Unit in pay period number 25.

^{19[19]} Debbie Gibson worked as a charge nurse primarily in the Inpatient Rehabilitation Unit, but she worked as a charge in the Surgical Unit in pay period number 24.

^{20[20]} Susan Griffin worked as a charge nurse in the Surgical Unit from pay period numbers 9 through 17, and then became a charge nurse in the Inpatient Rehabilitation Unit from pay period numbers 21 through 3.

Vilate Klein 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23,
24, 25, 26, 1, 2, 3 (95.12, 92.31)

Sandra Ogzewalla^{21[21]} 17, 18, 19, 20, 23, 24, 25, 26, 1, 2 (86.36,
83.51)

Labor & Delivery Unit

<u>Name</u>	<u>Payroll Period Nos.</u>
Sharon Coons ^{22[22]}	9, 10, 11, 12, 13, 14, 15, 16, <u>17</u> , 18, 19, 20, 21, 22, 23, 24, 25, 26, 1, 2, 3 (85.81, 84.32)
Heather Erickson	9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 1, 2, 3 (61.51, 54.42)
Maureen Feighan-Perkins	10, 12, 13, 15, 16, 18, 19, 20, 22, 23, 24, 25, 26, 1, 2, 3 (35.24, 30.53)
Virginia Fields	9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 1, 2, 3 (66.24, 63.04)
Margaret Frye-Maack	9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 25, 26, 1, 2, 3 (39.78, 42.29)
Glenda Green	19 (4.36, 4.36)
Sandy Hampton Jones	9, 10, 12, 20, 21, 22, 23, 24, 25, 26, 1, 2, 3 (40.25, 49.65)
Rebecca Huggins	22, 23 , 24, 25, 26 (23.10, 23.10)
Heather Johnson	2 (36.92)
Lorraine Lysaght	26 (33.33, 33.33)
Stephanie Parks	9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 1, 2, 3 (50.38, 49.56)

^{21[21]} Sandra Ogzewalla worked as a charge nurse primarily in the Inpatient Rehabilitation Unit, but worked as a charge nurse in the Surgical Unit in pay period numbers 18, 19, and 23.

^{22[22]} Sharon Coons worked as a charge nurse primarily in the Labor & Delivery Unit, but she worked as a charge nurse in the Maternal/Infant Unit in pay period number 9.

Ellen Shafer	9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 1, 2, 3 (73.74, 79.39)
Jennifer Slingerland 15.90)	12, 15, 17, 19, 20, 21, 22, 25, 26, 2, 3 (16.88,
Barbara Tewell	10, 11, 12, 14, 15, 17, 21, 22 (90.55, 73.13)
Clare Valles	24, 26, 1 (30.34, 23.33)
Cynthia Watson ^{23[23]}	9, 17, 19, 2, 3 (17.27, 21.22)
Richelle Welling	9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 1, 2, 3 (84.37, 86.98)

Maternal/Infant Unit

<u>Name</u>	<u>Payroll Period Nos.</u>
Amber Baker	23 (40.00, 40.00)
Marilyn Buman	9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 25, 26, 1 (75.52, 78.00)
Mary Burch	9, 11, 12, 13, 14, 15, 16, 18, 19, 24, 1, 2, 3 (59.81, 58.98)
Nemia German	9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 1, 2, 3 (63.77, 60.18)
Chun-Hee Han	9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 1, 2, 3 (84.37, 84.75)
Mary Hargett	9, 10, 11, 12 (70.37, 37.84)
Sharon Hermanson	25, 26, 2 (18.76, 16.58)
Stephanie Loosle	12, 17, 20 (25.62, 25.62)
Lori Minnick	9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 1, 2, 3 (62.02, 58.35)
Heather Nielson	13 (15.95, 15.95)

^{23[23]} Cynthia Watson worked as a charge nurse primarily in the Labor & Delivery Unit, but she worked as a charge nurse in the Maternal/Infant Unit in pay period number 9.

Charity Rast	9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 1, 2, 3 (63.33, 58.01)
Nichole Slatter	17 (100.00, 100.00)
Joan Wake 29.85)	9, 10, 11, 13, 14, 15, 18, 23, 25, 26, 3 (31.26,

Neonatal ICU

<u>Name</u>	<u>Payroll Period Nos.</u>
Shauna Fairbanks 46.18)	14, 15, 16, 17, 18, 19, 23, 24, 26, 1, 2 (43.88,
Nancy Faldmo	11, 13, 14, 18, 21, 22 (67.12, 71.15)
Sandra Fendt	9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 1, 2, 3 (79.02, 85.08)
Katherine French 3	9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, (93.83, 97.32)
Lynda Lawrence	9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 1, 2, 3 (96.17, 96.32)
Susan May	23, 24, 25, 26, 1, 2, 3 (59.16, 53.52)
Paula McCarty	9, 10, 11, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 1, 3 (43.89, 48.27)
Wendy Morris	15, 18, 20, 21, 22, 23, 24, 25, 3 (77.44, 82.09)
Leila Navales	9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 1, 2, 3 (76.04, 75.26)
Michelle Nebeker	10, 12, 14, 15, 16, 21, 23, 24, 25, 26, 1, 2, 3 (46.50, 40.67)
Janice Sloan	15, 16, 20, 21, 22, 25 (47.57, 47.57)

ICU & Neonatal NICU

<u>Name</u>	<u>Payroll Period Nos.</u>
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Michelle Weeks	9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 22, 23, 24, 25, 26, 1, 2, 3 (52.52, 49.71)
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OR/PACU

<u>Name</u>	<u>Payroll Period Nos.</u>
Suzanne Cole	13, 18 (10.77, 10.77)
Kayleen Evans	18 , 1 (8.99, 7.91)
Denise Harja	9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 2, 3 (6.59, 7.08)
Jacqueline McAmis	13, 18 (5.77, 5.77)

Same-Day Surgery

<u>Name</u>	<u>Payroll Period Nos.</u>
Sheila Larsen	11, 12, 16, 20, 22, 23, 24, 25, 2 (13.67, 13.52)
Jewelle Roberts	9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 1, 2, 3 (25.10, 26.51).

2. Evidence from the 2006 Postelection Hearing

In the 2006 hearing, the Employer presented documentary evidence and testimony showing which RNs worked as charge nurse, the units in which they worked, and how often they worked in that position.

Employer Exhibits 34 and 36 identify the RNs who worked as charge nurses in the ICU, the Medical/Surgical Unit, Labor & Delivery, Neonatal ICU, OB/GYN-Newborn Nursery, Rehabilitation, and Same-Day Surgery. Those exhibits show that, for the period April 1, 2006, though November 17, 2006, many RN charge nurses in each of those units spent more than 10 percent of their total working time in the charge role in their respective units. Also, those exhibits shows that, during that same period, some of the charge nurses worked substantially higher proportions of

their time as charge nurse, with several working over 75 percent of their time as charge nurse.

The hearing record also includes Employer Exhibits 40, 41, 42, and 43, which are four monthly schedules for the ICU for the latter part of 2006, covering the following time periods: August 13 through September 9, September 10 through October 7, October 8 through November 4, and November 5 through December 2. Georgianna Wallace testified about the process for scheduling charge nurses in the ICU. Wallace herself is a long-term ICU RN who frequently serves as charge nurse. According to Wallace, after the work schedule is completed, she takes the schedule and selects someone from each scheduled shift to be charge nurse for that shift. Wallace testified that she tries to distribute the charge role fairly and evenly among those RNs who want to serve as charge nurse, to spread out that responsibility. She writes a "C" on the schedule, designating which RN will charge on each shift. The schedule then is posted, so that the staff is notified in advance of their hours and who will be the charge nurse on each shift. Exhibits 40, 41, 42, and 43 demonstrate that several of the ICU charge nurses who spent more than 10 percent of their working time as charge nurse were scheduled to work in the charge role several times in each month covered by the schedules.

With regard to Labor & Delivery, Employer Exhibit 47 consists of four monthly schedules for that unit for the following periods: July 16 through August 12, 2006; August 13 through September 9, 2006; October 8 through November 4, 2006; and December 3, 2006, through January 1, 2007. The schedules designate the RNs who will serve as charge nurse on particular shifts. Ellen Schafer, a clinical coordinator,

decides who will charge. She notifies the RNs who will charge by placing a "C" on the schedule next to the RN's name, similar to how RN Georgianna Wallace does it in the ICU, and posts the schedule several weeks in advance. Employer Exhibit 47 shows that some of the RNs charge frequently, at least on a weekly basis. RN Clare Valles testified that she usually works as charge nurse on Sundays.

In the Neonatal ICU, RN Chris Lawrence designates the charge nurses for that unit, approximately four to six weeks in advance. Employer Exhibit 48 consists of three work schedules for the Neonatal ICU for the months of October 2005, November 2005, and April 2006. Those schedules show that some of the charge nurses work every week, sometimes multiple times in a week, as charge nurse. Also, Employer Exhibit 34 and 36 show that there are RNs in that unit who work as charge nurse 99.7, 90.6, and 86.5 percent of their total working time. Charge Nurse Clare Valles testified that the charge nurses in the Neonatal ICU are selected based on who is the most senior RN on a particular shift.

In OB/GYN-Newborn Nursery, RN charge nurses Nemia German or Charity Rast decide which of the scheduled RNs will serve as charge nurse on each shift. They make that decision approximately 10 days in advance. They communicate the decision by filling out a form and placing it in the "blue book." While the record from the 2006 hearing does not include completed examples of those blue book forms, Employer Exhibits 34 and 36 show that several of the charge nurses in that unit work well over half of their time as charge nurse.

Same-Day Surgery has only one RN, Jewelle Roberts, who serves as charge nurse. Roberts serves as charge nurse every Friday, when she substitutes for Clinical Coordinator Mary Daigle.

In the Medical/Surgical Unit, the RNs themselves decide which of them will act as charge nurse. They make the decision on each shift. The RNs for that shift gather at the beginning of the shift and discuss who will be the charge nurse. Chief Nursing Officer John Kass testified that the most senior RN on the shift normally ends up being the charge nurse. One of the RNs in that unit, Judee Brasher, testified that the RNs on the shift discuss whose turn it is to charge and who wants to charge. She stated that there is “no set way” of deciding who is going to charge and that “it varies maybe from day to day” how they decide who will charge. According to Brasher, she works as charge nurse two out of three scheduled work days on average, with some weeks including only one out three work days as charge and other weeks including three out of three work days as charge. Employer Exhibits 34 and 36 show that one of the charge nurses in that unit works 76.2 percent of her time as charge nurse, and another one works 57.7 percent of her time in that capacity.

The record from the 2006 hearing does not reflect how the charge nurses are designated in the Rehabilitation Unit. Employer Exhibits 34 and 36 show that several of the RNs work over half of their time as charge nurse, with two of them working almost 100 percent of their time as charge nurse (98.7 and 95.5 percent), another one of them working 75.3 of her time as charge nurse, and three others working over 50 percent of their time as charge nurse (59.5, 58.8, and 51.0 percent).

4. Analysis of Charge Nurses' Supervisory Status

A. Charge Nurses' Authority to Assign

Based on the evidence summarized above, I find that the Employer's charge nurses "assign" employees within the meaning of Section 2(11). In Oakwood, the Board concluded that the term "assign" encompasses charge nurses' responsibility to assign nurses and aides to particular patients. The testimony demonstrates that the charge nurses have authority to decide which staff members will care for which patients.

B. Charge Nurses' Exercise of Independent Judgment

Additionally, I find the charge nurses exercise independent judgment in performing their function of assigning personnel to patients. The testimony of most of the witnesses demonstrates that the charge nurses, in assigning personnel to patients, consider the skills set of the available staff members and the various conditions and needs of the patients, and that they try to match staff members with patients based on those factors. The testimony also shows that the charge nurses can take into account the personalities of the staff and the patients and patients' preferences from whom they want to receive care. Moreover, the evidence shows that the Employer has not controlled the range of choices available to the charge nurses – for example, through promulgation of detailed policies, rules, or instructions – such that the level of discretion they can exercise falls below the level necessary for supervisory status to exist. The Board made clear in Oakwood that, in such circumstances, the charge nurses' process of matching nurses and patients involves

a meaningful exercise of discretion that amounts to “independent judgment” within the meaning of Section 2(11). Oakwood, 348 NLRB No. 37, slip op. at 10-11.

In the underlying Decision and Direction of Election, the then Regional Director addressed the degree of judgment that the charge nurses exercised in assigning staff to patients. The Regional Director determined that the evidence concerning the degree of judgment was general and conclusionary, and that it therefore was insufficient to meet the Employer’s burden of proving that the charge nurses exercised independent judgment. However, as explained more fully immediately below, in light of the Board’s decision in Oakwood I find that the evidence relating to the degree of judgment that the charge nurses exercise in assigning staff to patients should not be deemed insufficient on the grounds that it is general and conclusionary.

In Oakwood, in finding that the employer met its burden of proving that the charge nurses exercised independent judgment in assigning employees to patients, the Board relied on evidence similar to that described above. For example, the Board determined that the following testimony supported its conclusion that the charge nurses in that case used independent judgment in assigning staff to patients:

“Theisen testified that the charge nurses can choose personnel for assignments based on judgments as to the particular condition and medical needs of a given patient and the skill sets or specialized training of the available staff. Theisen testified, for example, that a charge nurse would select a nurse ‘who is particularly good [at peritoneal dialysis] to take care of [a] patient who requires [such treatment]’ or assign a nurse with a proficiency in ‘vasoactive drug monitoring’ to take care of a patient requiring such attention. Theisen also testified that charge nurses take into account a host of other factors in making assignments, including the amount of time required to perform specific patient care functions (which, in turn, would limit a nurse’s availability to attend to other patients), competence levels, licensing, personalities, and compatibility of staff members.”

“. . . [Carolyn] Carney testified that charge nurses are required to make informed judgments about their patients and staff in order to make patient care assignments. As an example, she testified that if a patient in the behavioral health unit had medical as well as psychiatric problems, the charge nurse could exercise her discretion to assign an RN rather than a mental health worker to that patient. Similarly, Carney testified that charge nurses would take into account a myriad of factors, such as the aggressiveness of the patient and a care giver’s ability to respond to the same, in making assignment decisions.”

“[Sue Caines] . . . testified that charge nurses consider specific patient conditions and needs, staff’s special training or certifications, the continuity of care, and geographic location of the patient’s room in making assignments. She testified, for example, that if a chemotherapy, orthopedic, or pediatric patient is involved, the charge nurse considers whether the staff to be assigned has the special training and can perform the necessary care for that type of patient before making the assignments.”

“Nicholas Paul Makaelian . . . testified that the charge nurse takes several factors – such as the nature and severity of the patient’s condition, patients’ gender-based sensitivities, patient population number and length of stay, and staff licensing – into consideration when making assignment decisions.”

“Nancy Coffee . . . testified that the charge nurse in her unit makes staff assignments based on several factors. She explained that the charge nurse considers such factors as the patient’s condition, continuity of care, gender and personality of the staff and patients, and specific skills and abilities (especially if flex nurses are temporarily assigned to her unit). She testified that as charge nurse she reassessed patient care assignments during a shift because of personality clashes between a patient and a nurse.”

Id. at 11-12. Given that the Board did not view the evidence in Oakwood as being too general and conclusionary, I find that the Board would view the comparable evidence in this case as being sufficient to satisfy the Employer’s burden of proof.^{24[24]}

^{24[24]} In the Decision and Direction of Election, the then Regional Director pointed out that the record from the February 2002 hearing does not include specific, detailed evidence demonstrating differences in nurses’ skills and variations in patients’ conditions. While the Regional Director’s observation is accurate, I conclude that the testimony that the charge nurses examine nurses’ skills and patients’ needs in making assignments necessarily implies the existence of such differences and variations.

C. Charge Nurses' Authority to Require Action

With regard to the charge nurses' authority to require RNs to take particular patients, the testimony indicates that it involves more than the authority merely to request nurses to take certain patients. Chief Nursing Officer Cathy Story, Interim Director of Inpatient Services Christina Carter, and Clinical Coordinator Christine Monson all testified that the charge nurses "decide" who takes care of whom and that they have "complete" or "full" authority in making those assignments. Chief Nursing Officer Kass testified that once a charge nurse assigns a nurse to a patient the nurse is required to take the patient, although he acknowledged that the nurse's input is welcome and that the nurse can go to higher management if she/he disagrees with the assignment. Director of Women's Services Carol Lindsay stated that the nurses are expected to abide by the charge nurses' assignments. Laurie Gay, an ICU RN who served as charge nurse, testified that it is "rare" for a nurse to question a charge nurse's assignment and that RNs can be subject to discipline by higher-level authorities for not obeying. ICU Charge Nurse Shauna Mann similarly testified that she has the authority to use her authority to force a nurse to accept an assignment if she were to conclude that the nurse lacked legitimate grounds for not wanting it. Charge Nurses Richelle Welling and Michelle Weeks also testified that ultimately the decision about assignment rests with the charge nurses, subject to possible appeal. While Charge Nurse Clare Valles testified that most charge nurses in Labor &

Moreover, the record from the 2006 hearing includes additional evidence showing that there are such differences and variations.

Delivery have a collaborative style, she also testified that some have an “authoritative” style, thereby confirming that charge nurses can dictate assignments, even if some of them choose not to wield that authority in a “bossy” fashion. Valles also testified about one particular charge nurse with an “authoritative” style. Valles confirmed that when that charge nurse makes assignments, the nurses accept them.

In contending that the charge nurses only have the authority to request that nurses take particular patients, the Petitioner relies on testimony that some charge nurses include the RNs in the assignment process. Although I find that the record includes evidence that some charge nurses do solicit RNs’ opinions about assignments, I conclude that charge nurses’ inclusion of RNs in the assignment process does not relegate their ultimate assignment decisions to the category of mere requests. In those situations where the charge nurses seek the nurses’ views about particular assignments, the discussion seems to facilitate the charge nurses’ process of deciding whether a particular assignment should be made. The fact that a charge nurse may involve a nurse in discussion about whether an assignment is appropriate does not make the assignment, if given, one that the nurse would be free to ignore. Moreover, as the previous Regional Director found in the Decision and Direction of Election, the charge nurses here do not have independent authority to discipline. Given the charge nurses’ lack of such disciplinary authority, it may be an effective supervisory technique for them to gain the support of the nurses by seeking their input, without actually giving up their discretion to make appropriate judgments about assignments.

The Petitioner also relies on evidence showing that charge nurses sometimes acquiesce to RNs' resistance to particular assignments. For example, Labor & Delivery Charge Nurse Clare Valles described how nurses occasionally had problems with assignments from a particular charge nurse, Nemia German, because of their belief that German distributed work to them to make her own workload lighter. Valles testified that, on those few occasions, the nurses complained and thereafter either German or another nurse took the assignments. In my view, such acquiescence does not demonstrate that the charge nurses have the authority only to request, but not require, that nurses take particular assignments. Rather, such acquiescence is consistent with the conclusion that, in such situations, the charge nurse exercised discretion and decided not to adhere to the initial assignments. There is no indication that any of those situations escalated to a point where Charge Nurse German insisted that the staff nurses take the assignments and the staff nurses refused. Charge nurses' willingness to take into account nurses' objections to particular assignments does not demonstrate that the charge nurses lack the authority to require nurses to take assignments that the charge nurses deem to be appropriate and necessary.

The Petitioner also contends that the charge nurses' assignments are not genuine requirements because there is no consequence for nurses who disregard them. In advancing that contention, the Petitioner relies on the Board's decision in Golden Crest Healthcare Center, 348 NLRB No. 39, slip op. at 3 (2006), in which it found that a "mandate" that employees report to work on a call-in basis was a mandate in name only and not a genuine job requirement, because refusing to

comply with the mandate resulted only in a de minimis consequence.^{25[25]} I do not find the analogy to Golden Crest Healthcare Center to be persuasive, as the record here indicates that it is a genuine job requirement for the nurses to follow charge nurses' orders concerning job assignments. The record here does not show that there has been any situation in which a charge nurse insisted that a particular nurse care for a particular patient, only to have the nurse refuse. The record shows only that some nurses have questioned particular assignments that they thought were inappropriate, and sometimes were successful in getting the assignments changed. I do not conclude from such evidence that the Employer would ignore a nurse's refusal to abide by a charge nurses' insistence that a nurse take appropriate and unobjectionable assignments. Indeed, I observe that the record reflects that the Employer has taken action against at least one employee concerning his not wanting to accept an assignment from a charge nurse. Chief Nursing Officer Kass testified about a situation in which an ICU charge nurse talked to him about a nurse's claim that a particular patient assignment was too much for him. Kass testified that his recollection was that he supported the charge nurse's assignment and that he and the Director of Critical Care Services later counseled the nurse.

Finally, the Petitioner contends that the charge nurses do not exercise independent judgment in assigning nurses to patients because the charge nurses' ability to get the nurses to accept assignments ultimately depends on the power of higher-level authority to compel compliance. The record indicates, however, that the nurses accept almost all of the charge nurses' assignments without higher

^{25[25]} The penalty for refusing the mandate was assessment of one-third of an absenteeism point.

management having to intervene to back up the charge nurse. In any event, it does not seem that the authority of higher management to support a charge nurse's assignment with the threat of discipline, or with actual discipline, negates the existence of the charge nurses' supervisory authority based on their role in assigning.

D. RNs' Time Spent as Charge Nurses

Based on my review of Employer Exhibits 21 and 22, I conclude that, as of the February 2002 hearing, a substantial number of the Employer's charge nurses worked regularly and substantially in the charge nurse position, but that several of the charge nurses did not regularly and substantially as charge nurse.^{26[26]}

The following list identifies the RN charge nurses who I conclude worked regularly and substantially as charge nurse as of February 2002. The evidence shows that these individuals worked at least 10 percent of their time in the charge nurse position, that the great majority of them worked considerably more than 10 percent of their time in the charge nurse position, and that they worked as charge nurse on a regular and recurring basis over numerous pay periods throughout the lengthy time period covered by the documentary evidence. Based on their recurring service in that position for substantial amounts of time, I conclude that their service as

^{26[26]} I recognize that in Oakwood, 348 NLRB No. 37, slip op. at 14, the Board determined that the "rotating" charge nurses were not statutory supervisors because the evidence failed to demonstrate regularity. The Board found that there was no evidence of an established or predictable pattern, schedule, or system demonstrating the frequency with which the RNs served as charge nurse. However, I find that this case is distinguishable with regard to regularity as of the February 2002 hearing, in light of the fairly detailed evidence on that issue as reflected in the Employer's Exhibits 21 and 22.

charge nurse cannot be considered to be mere sporadic substitution. The charge nurses who worked regularly and substantially are the following:

ICU

Cynthia Aagard
Christine Anderson
Laura Beck
Susan Earl
Maria Esquibel
Lauri Gay
Lee Ann Gillund
Jeffrey Gorzitze
Shauna Mann
Catherine Mason
Sheila Moomaw
Dianne Player
Louise Shryers
Leland Smith
Sheri Tesseyman
Donald Tetzloff
Georgianna Wallace

Surgical Unit

Judee Brasher
Sandy Garrand
Keri Holzworth
Andrea Veniegas

Medical Unit

Aaron Friel
Rebecca Jenkins
Edita Lucero
Rachel Tanner
Karen Valdez
Bradley Wardle

Inpatient Rehabilitation Unit

Susan Brown
Debbie Gibson
Susan Griffin
Kari Goris

Corina Jachmann
Vilate Klein
Sandra Ogzewalla

Labor & Delivery Unit

Sharon Coons
Heather Erickson
Maureen Feighan-Perkins
Virginia Fields
Margaret Frye-Maack
Sandy Hampton Jones
Stephanie Parks
Ellen Shafer
Jennifer Slingerland
Barbara Tewell
Richelle Welling

Maternal/Infant Unit

Marilyn Buman
Mary Burch
Nemia German
Chun-Hee Han
Lori Minnick
Charity Rast
Joan Wake

Neonatal ICU

Shauna Fairbanks
Sandra Fendt
Katherine French
Lynda Lawrence
Susan May
Paula McCarty
Wendy Morris
Leila Navales
Michelle Nebeker

ICU & Neonatal NICU

Michelle Weeks

Same-Day Surgery

Sheila Larsen
Jewelle Roberts.

In contrast, I conclude that several of the RNs who worked as charge nurse as of February 2002 did not work regularly and substantially in that position. Several of the RNs worked very few pay periods in the charge nurse position, some worked on a sporadic and intermittent basis, and some of the charge nurse time in particular pay periods amounted to less than 10 percent of their working time for that period. The RNs who I conclude did not work regularly and substantially as charge nurse as of February 2002 are the following:

ICU

Angie Adams
Virginia Clark
Ann Lapolla

Surgical Unit

Marilyn Castagno
Janae Paulson

Medical Unit

Tonia Martinez

Labor & Delivery Unit

Glenda Green
Rebecca Huggins
Heather Johnson
Lorraine Lysaght
Clare Valles
Cynthia Watson

Maternal/Infant Unit

Amber Baker
Mary Hargett
Sharon Hermanson

Stephanie Loosle
Heather Nielson
Nichole Slatter

Neonatal ICU

Nancy Faldmo
Janice Sloan

OR/PACU^{27[27]}

Suzanne Cole
Kayleen Evans
Denise Harja
Jacqueline McAmis.

With regard to the evidence from the 2006 hearing concerning the regular/substantial issue, as explained above I have found that it is not necessary to examine that evidence in detail for each individual charge nurse, as I did for the charge nurses in 2002. For purposes of this Supplemental Decision on Remand, I find only that the record from the 2006 hearing shows that, as of the time of that hearing, the Employer continues to employ some RNs who serve regularly and substantially in the charge nurse position.

CONCLUSION

Based upon the above analysis, I conclude that the registered nurses who serve as charge nurse on a regular and substantial basis are excluded from the

^{27[27]} Lori Jensen, the Interim Director of Perioperative Services, testified that in the OR/PACU the clinical coordinators usually assign staff to patients and that it is rare for the OR/PACU to use charge nurses.

appropriate unit, but that registered nurses who do not serve as charge nurse on a regular and substantial basis are included.

BALLOT COUNT

In light of the above findings and conclusions, I hereby direct that, at a time and place to be determined by me after consulting with the Employer and the Petitioner, the impounded ballots of all eligible voters from the election in May and June 2002 be opened and counted and thereafter that other appropriate action be taken.^{28[28]}

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Supplemental Decision on Remand may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, DC 20570. This request must be received by the Board in Washington by **March 6, 2007**.^{29[29]}

Dated at Denver, Colorado this 20th day of February, 2007.

/s/ Michael W. Josserand

Michael W. Josserand, Regional Director
National Labor Relations Board

^{28[28]} As explained above, the only issue in this remanded proceeding is the supervisory status of RN charge nurses. Accordingly, in this Supplemental Decision on Remand I have not decided what impact, if any, the Board's decision in H.S. Care LLC may have on the Regional Director's earlier decision, made at a time when Sturgis still was valid case law, to include the Employer's supplied RNs in the appropriate unit and to allow them to vote. The supplied RNs could have voted by mail ballot. The issue of the supplied RNs' voting eligibility may be determined in future proceedings, such as challenged ballot proceedings.

^{29[29]} The Board has expanded the list of permissible documents that may be filed electronically with the Board's office in Washington. If a party wishes to file the above-described document electronically, please refer to the enclosed policies and procedures for guidance in doing so. The guidance can also be found under "E-Gov" on the Board's website: www.nlrb.gov.

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