

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

THE BROOKLYN HOSPITAL CENTER
Employer

and

Case No. 29-RC-335631

THE NEW YORK STATE NURSES ASSOCIATION
Petitioner

DECISION AND DIRECTION OF ELECTION

The Brooklyn Hospital Center (the Employer or the Hospital) is an acute care hospital located in Brooklyn, New York, where the New York State Nurses Association (“NYSNA” or “the Petitioner”) currently represents a unit of registered professional nurses.

NYSNA filed a petition in the instant case under Section 9(c) of the National Labor Relations Act (“the Act”) seeking to add nurse educators employed by the Employer at its 121 DeKalb Avenue, Brooklyn, New York facility, to its existing bargaining unit of employees lawfully entitled to practice as registered professional nurses.¹ More specifically, the Petitioner seeks an *Armour-Globe* self-determination election in which currently unrepresented registered nurse employees in the classification of nurse educator would vote whether or not they wish to be included in the existing unit of registered nurses already represented by the Petitioner.²

The Employer contends that the petitioned-for unit of nurse educators is inappropriate because the nurse educators are supervisors within the meaning of Section 2(11) of the Act and/or managerial employees. Further, the Employer contends that an election is barred by the parties’ collective bargaining agreement. The Petitioner contends that the petitioned-for employees are statutory employees and that the collective bargaining agreement is not a bar to an election in a voting unit of nurse educators.

¹ The petition indicates that the unit sought includes “all full time, part-time and per diem nurse educators residual to the existing unit of registered nurses represented by New York State Nurses Association employed by the Employer at its facility located at 121 DeKalb Avenue, Brooklyn, New York 11201...” In view of the fact that there is an established unit of registered nurses, that such unit is represented by the Petitioner, and no other union seeks in this proceeding to represent the employees involved herein, a separate residual unit would be inappropriate. The Board has long held that it will not entertain an incumbent union's petition for a separate residual unit. *St. Vincent Charity Medical Center*, 357 NLRB 854, 857 (2011); *St. John's Hospital*, 307 NLRB at 768, citing *Budd Co.*, 154 NLRB 421, 428 (1965), and *McKeesport Hospital*, 220 NLRB 1141 (1975). The Petitioner clarified at hearing that it seeks to add the petitioned-for employees to the existing unit represented by the Petitioner at the Hospital by a self-determination election.

² See, *Globe Machine & Stamping*, 3 NLRB 294 (1937); *Armour & Co.*, 40 NLRB 1333 (1942); *Warner-Lambert Co.*, 298 NLRB 993 (1990).

A Hearing Officer of the Board held a hearing in this matter, and the parties orally argued their respective positions prior to the close of the hearing. I have considered the record and relevant law. For the reasons discussed below, based on the record and Board law, I find that the nurse educators are not supervisors within the meaning of Section 2(11) of the Act and are not managerial employees. I also find that the collective bargaining agreement does not bar an election in this case. Further, I find that a self-determination election is appropriate for a voting group of nurse educators wherein they will vote whether they wish to be included in the existing bargaining unit of registered nurses.

Background Facts:

The Employer operates an acute care hospital providing health care and related services at 121 DeKalb Avenue in Brooklyn, New York.

The Employer's Senior Vice President and Chief Nurse Executive, Judy McLaughlin, oversees the entire Nursing Department,³ including practice, training, staff development, and quality initiatives. Staff under McLaughlin's oversight include bargaining unit employees such as floor nurses and non-bargaining unit employees such as nurse educators. McLaughlin testified that the titles of non-bargaining unit managerial employees who report to her include Nurse Manager, Nurse Supervisor, Nurse Director, and Senior Director/Assistant Vice President of Nursing Education, a/k/a Assistant Vice President of Critical Care, Nursing Education and the Emergency Department (Rosemary Fiore). McLaughlin testified that she also considers nurse educators to be "part of that managerial group."⁴

Nurse Educators

The Employer employs about 11 to 13 nurse educators who are part of the Nursing Education branch of the Nursing Department. The nurse educators report to the Director of Nursing Education, Samantha Collins. Collins reports to Assistant Vice President of Critical Care, Nursing Education and the Emergency Department Rosemary Fiore, who reports to Senior Vice President/Chief Nurse Executive McLaughlin.⁵ Nurse educators testified that their office is located on the third floor of the Employer's facility.

The Employer's nurse educators are licensed to practice as registered professional nurses in New York State. The Employer's educational requirements for a nurse educator include a bachelor's degree in nursing, and a master's degree in nursing education is preferred. Nurse educators also hold certifications in Basic Life Support and Advanced Cardiac Life Support.⁶

³ It appears the Nursing Department is referred to as the Department of Patient Care Services in Employer Exhibit 46.

⁴ Transcript p. 19.

⁵ The previous supervisor of the nurse educators was Karen Hanley, Manager of Nursing Education.

⁶ See Employer Exhibit 36. Nurse Educators Michelle Lopez and Rehane Lowtan testified that they have certifications in Basic Life Support and Advanced Cardiac Life Support.

Orientation and In-Service Updates

Nurse educators facilitate new staff orientation for registered nurses, licensed practical nurses, patient care associates (PCAs) and medical assistants. The nurse educators begin the training process for orientees. Orientation for registered nurses includes an in-class component which is followed by an “on the unit” component where the orientee works on the floor with a nurse preceptor.⁷ In-class orientation is two weeks; unit orientation can vary from six to sixteen weeks, depending on the designated unit and the orientee.⁸ Nurse educators assess the abilities/competencies of orientees on Employer competency assessment forms.⁹ For example, during the classroom portion of orientation, the nurse educator uses the competency assessment tool to ensure that the newly hired nurses have been educated on policies, procedures and regulations as required by the Employer. After the orientee has been educated on a specific topic, such as patient risk for falls or suicide risk/homicidal ideation, the orientee must either verbalize or demonstrate what they learned, and the nurse educator signs off on the competency assessment form to indicate that the orientee has or has not verbalized or demonstrated an understanding of the topic. The nurse educators base their assessments on their observations of the orientees. Senior Vice President/Chief Nursing Executive McLaughlin testified that the Employer relies on the signature of the nurse educator on the assessment, and it is not further reviewed by management. Competency assessments filled out by the nurse educators in the classroom stay in the Nursing Education Department in the employee file as regulations require.

⁷ A preceptor is a staff nurse that volunteers to work with an orientee until they are competent to work on their own. Section 3.09 of the collective bargaining agreement covering registered professional nurses (also referred to as floor nurses on the record) states, “Preceptors in conjunction with the Nursing Education Department and the Patient Care Manager shall be responsible for orientation of new employees to the unit and shift.” (Employer Exhibit 50). Preceptors are paid additional compensation per hour while they are designated to precept pursuant to the parties’ collective bargaining agreement, section 10.13, entitled, “Preceptor differential.”

⁸ The parties’ collective bargaining agreement, Section 3.03, “Staff Development Programs,” Section A, states that the Employer will provide each new and/or inexperienced nurse a planned orientation program under responsibility and guidance of Nursing Education Department for a minimum of six (6) weeks. Employer Exhibit 50. Nurse educator Lopez testified that on the unit orientation for the medical surgical unit is from 6 to 12 weeks. Nurse educator Lowtan, who has worked as a nurse educator in critical care, emergency room, interventional radiology and cath lab, testified that the unit orientation varies from eight to sixteen weeks.

⁹ The record contains numerous Employer competency assessment forms filled out by nurse educators during the orientation process or at another time. Employer Exhibits 7 through 17 contain such forms, including 1:1 close observation competency evaluations, performance checklists, and competency assessment tool forms, from seven current nurse educators and four former nurse educators. Specific procedure assessments in the record which are indicated to be initial assessments include Procedure Competency Assessment – Nova Strip Glucometer, Procedure Competency Assessment – Urine Pregnancy, and Nursing Staff Competency tool- Peripheral Intravenous Line Insertion. Assessment forms are also utilized for assessment outside of initial orientation. (See e.g. Employer Exhibit 7, 00136, Restraint & Seclusion Competency Checklist and Employer Exhibit 9 -00001, COVID-19 Nasopharyngeal Specimen Collection, Storage & Transport to Test Site, which are marked as annual assessments.) Although the forms vary according to what is being assessed, as indicated by Senior Vice President and Chief Nursing Executive McLaughlin the checklists/ competency forms generally outline each step of a procedure or list procedure indicators / competencies (for example in a performance checklist assessment for a male urethral catheterization, one such step would be to wash hands and assemble equipment). Next to each step/indicator/competency there is a space to enter a rating (depending on the form, a rating may be standard met /pass/ satisfactory or standard not met/ fail/ unsatisfactory).

During on the unit orientation, the nurse preceptor shadows and guides the practice of a newly hired nurse/orientee while working in a designated unit. The nurse educator also continues to be involved during unit orientation. For example, the nurse educator performs a “medication pass,” essentially observing the orientee give medication to patients.¹⁰ Further, the nurse educator, the nurse preceptor, the nurse manager and the orientee meet on a weekly basis to discuss the progress of the orientee.¹¹ The group considers the progress of the orientee and sets goals for the orientee to meet moving forward based on combined observations of the orientees.

Senior VP/Chief Nurse Executive McLaughlin testified that nurse educators are influential in decisions the Employer makes related to an orientee’s successful completion of orientation, possible reassignment and possible termination. According to McLaughlin, depending on input from the nurse educator, the team including the nurse manager of the unit, the Director of Nursing Education Samantha Collins and Assistant Vice President Rosemary Fiore may consider moving a nurse in the critical care unit to a medical surgical unit which is more generalized if the nurse is having difficulties. Assistant Vice President of Critical Care, Nursing Education and the Emergency Department Rosemary Fiore testified in general terms that nurse educators make suggestions or recommendations, based on their observations and the time they spend with the staff, as to whether orientation should be extended / terminated or that an orientee should be assigned to a different position. Nurse educators’ suggestions are seriously considered by managers; the team discusses the best option for the employee to succeed. Nurse educator testimony indicates that nurse educators have objected to management decisions to take a nurse off orientation early and management did not follow their recommendations.

Record evidence shows that a nurse educator wrote an email to the nurse educator team, indicating that an orientee was having issues. The nurse educator’s email indicated that the nurse educator recommended that the orientee come to the classroom to practice injections but the orientee declined. The record does not establish that any discipline resulted from the nurse educator’s email.¹² Employer Exhibit 11 provides another example of a nurse educator communicating with the Nursing Education department team and director concerning issues with a different orientee but does not indicate any discipline recommended or any further action. Further, Nurse educator Lowtan testified that if a nurse orientee states that they feel like they need more time in a particular unit, nurse educators may advise nurse managers, the director of nursing education and the Assistant Vice President of Nursing Education (Rosemary Fiore) to extend the orientation as requested by the orientee.

Nurse educators also provide in-service education to nursing staff outside of orientation. In-service training includes updates on Employer nursing practice policies and equipment used in the hospital. The record contains examples of annual competency assessments completed by nurse educators. See e.g., Assessment tool related to COVID-19 Nasopharyngeal Specimen Collection,

¹⁰ The nurse educator completes a competency assessment based on observations made, indicating that the necessary steps, set forth on the form, were performed. See e.g., Employer Exhibit 8 -00092 - 00093.

¹¹ Senior Vice President McLaughlin testified that the team, including nurse educator, manager, Director of Nursing Education and Assistant Vice President also meet regularly to discuss each orientee and their progress.

¹² It appears that the employee is no longer employed by the Employer. The evidence does not establish that the nurse educator recommended that the employee’s orientation be terminated.

Storage and Transport, Employer Exhibit 9 – 00001-00002, Employer Exhibit 10 – 00098- 00099. The parties’ collective bargaining agreement covering registered professional nurses, in Section 3.03, “Staff Development Programs,” Section E, states, “[t]he intent of all education, training, refresher training and annual skills review will be to get employees to a clinical level where they can independently function and complete the designated patient care assignment for the unit as assigned by nursing leadership and based on established clinical competencies.”

Remediation

The Employer has established a remediation process to utilize in circumstances where it has determined that an employee was involved in a safety or other issue that requires corrective action. The remediation or reeducation is performed to ensure that the employee is competent in the practice at issue. The Nurse Manager initiates the remediation, entering the justification and the plan for remediation on a remediation form.¹³ Nurse educators participate in the remediation process upon request of the Nurse Manager. The nurse educator’s role is to retrain the nurse/employee to comport with the policies/protocols of the Employer. In this regard, the nurse educator follows the plan set forth in the remediation form, such as reviewing the policy or procedure at issue with the employee, and then asks the employee to answer questions or do a return demonstration of the practice. It is undisputed that employees generally meet the requirements for passing remediation. One example of a remediation completed by a nurse educator concerned the administration of medication wherein the staff member did not include documentation of blood pressure at the time of administration.¹⁴

Remediation is retraining and not considered to be disciplinary action. However, Assistant Vice President of Critical Care, Nursing Education and the Emergency Department Rosemary Fiore testified that if a nurse did not succeed in remediation, some form of discipline could occur; and, that the Nurse Manager would rely on the nurse educator’s decision that the remediation had failed in making a decision on further action.¹⁵ According to Fiore, if the nurse passes remediation but thereafter makes the same mistake again, the Nurse Manager will determine whether discipline, starting with a verbal warning as set forth the collective bargaining agreement, could be started. In such case, the nurse manager would make the determination to start the disciplinary action, taking into consideration the observations of the nurse educators.

¹³Assistant Vice President of Nursing Education Fiore testified that most of the time nurse managers write the plan on the remediation form, but she also indicated that a nurse educator could recommend to the nurse manager that something be added to the remediation plan. The remediation forms do not show whether the nurse educator changed or added to the plan for remediation. No specific examples of a nurse educator adding to the remediation plan were provided.

¹⁴ See e.g., Employer Exhibit# 24 - 0001. This remediation form contains signatures in the areas designated for the staff member being remediated, the nurse educator, and the manager/director, indicating that the staff member successfully completed the remediation in the appropriate timeline and met the standard. The form also contains a signature in the area designated for the Director of Nursing Education. It is noted that the form states that, “Manager/Director will decide on further action plan if staff does not meet standard.”

¹⁵ As noted above in footnote 14, remediation forms state that, “Manager/Director will decide on further action plan if staff does not meet standard.”

Nurse educators decide on their own whether or not to sign off on a remediation. If a nurse educator believes a nurse was not doing well in remediation, she would report her observations to the nurse manager. In this regard, if an employee is not successful on remediation, the nurse educator checks the box indicating that the remediation was not successful and sends the remediation form back to the nurse manager. Thereafter, the manager would make a decision on further action without further discussion. Nurse educator Lopez testified that she did not know of any unsuccessful remediation.

Further, apart from the formal remediation process, the evidence shows that nurse educator Lowtan informed a PCA that she was not properly dressed in PPE when the PCA was in a room where a patient was in isolation; Lowtan told the PCA that in the future she must make sure that she followed standard protocols for infection controls. Lowtan reported this incident to nurse management. There is no evidence of disciplinary action affecting the employee's job status.

Scheduling

Nurse educators do not have any involvement in scheduling staff nurses who have finished their orientation. In the past, it appears nurse educators were involved in scheduling nurse orientees. However, this is no longer the case. Presently, nurse managers issue the nurse orientees' schedules in their unit; the nurse managers provide a copy of the schedules to the nurse educators. Nurse educators set their own schedules; such schedules must be approved by the Director of Nursing Education. Requests to switch days are approved if staffing permits.

Policy Review and Revision

Nurse educators also assist in the development of programs to improve quality of care and to further the nursing knowledge in the hospital. Senior VP/Chief Nurse Executive McLaughlin testified that the entire management team reviews protocols, processes, and safety issues for various reasons; and that nurse educators would be "part of the process" related to changes in Employer educational policies. Regarding proposals on education and editing educational policies, McLaughlin testified in general terms that the nurse educators recommended edits to the Employer's Telesitter and Telemetry Tech Observation policies, and their recommendations were followed.¹⁶ The Senior Vice President/Chief Nursing Executive reviewed and approved the

¹⁶ The recommended edits that were followed were not specified by McLaughlin. However, her testimony and the documentary evidence show that nurse educators pointed to areas where "some detail... needed to be considered." Similarly, Employer witness Fiore also testified that the Employer "accepted" nurse educators' edits; Fiore's further testimony and/or the Telesitter policy revision in evidence indicate the nurse educator essentially commented on items in the draft policy. The seven comments included: 1) that a score should be added next to the words "high risk of fall" (without suggesting a score); 2) asked whether a cisco phone or walkie talkie would be used during the pilot; 3) asked if the trial period is two hours; 4) comment 4 in the draft, next to the words, "[a]ctivation of STAT Cisco alert more than 5 times in 60 minutes," referred the reader to see a competency draft (no specific proposed language was included but Fiore's testimony indicates nurse educators were also involved with the Senior VP/Chief Executive Nurse and other members of management in writing a competency document and that there were issues to be considered such as what to do during a power outage); 5) asked if documentation would be built into Allscripts electronic medical records system or in paper format; 6) suggested that a name for the log referred to in the draft, e.g., "telesitter log," be added to avoid any confusion; 7) asked what the word "carts" referred to. A nurse educator sent the edited draft back to the

documents before finalization. Nurse educators may also review and edit or create practice alerts, which are used to alert nurses on certain nursing practices when the Employer has identified a concern or quality issue; the record generally indicates that nurse educator modifications are followed when the Employer issues the alerts.¹⁷ Further, in connection with annual reviews of key safety policies, the Employer sends certain key safety policy content to the Nursing Education department to make sure the policies are current. Nurse educator testimony indicates that management sends the policy to a nurse educator to review, and the nurse educator makes comments on the document to the extent the educator thinks the document is not clear or does not follow the standard of practice.

Curriculum for Educational Purposes

Record testimony shows that the Employer generally provides curriculum to nurse educators for training staff. However, the record also shows that, upon request of the Employer, nurse educators review curriculum, for example to update power points for training on care for a patient in custody, to align the curriculum with current policy.¹⁸ Similarly, if management has a concern about a safety issue, nurse educators will assist in developing curriculum to reeducate nurses about the safety issue. Nurse educators are guided by policies and procedures of the Employer, regulatory standards, evidence-based practice research and their knowledge in this process. Further, the Nursing Education Department, working with nurse educators, also created nurse preceptor training curriculum upon request of the Employer. In this regard, Senior VP of Nursing McLaughlin asked the nursing education team to create curriculum for nurse preceptor training. The nursing education team put together the nurse preceptor training curriculum; it was reviewed by the Director of Nursing Education Collins, Assistant Vice President Fiore and then Senior Vice President/Chief Executive Nurse McLaughlin for approval. McLaughlin testified that she did not modify anything. The material is used at classes for staff nurses that are hosted by nurse educators.

Leadership Meetings

The Employer holds monthly leadership meetings wherein the Senior VP/Chief Nurse Executive and other managers may discuss current operational issues, budget issues, preparation for regulatory agency visits, negotiations with NYSNA and recruitment and retention. Record evidence shows that nurse educators are invited to monthly leadership meetings, but they do not regularly attend them. The testimony of nurse educators Lowtan and Lopez indicates that they do not attend these meetings regularly; however, they attend if they are told to do so by the Director of Nursing Education. In this regard, nurse educator Lopez attended one leadership meeting

Director of Nursing Education with an email stating that the document had been reviewed and that, “we highlighted and commented on the things that need to be reviewed and/or changed.” Employer Exhibit 20 -0001.

¹⁷ Examples of practice alerts are provided in the record; however specific input of the nurse educators is not indicated. The exhibits in evidence indicate that that the full policy related to the alert is on the intranet. Employer Exhibit 34 – 00001- 00012.

¹⁸ Record evidence shows that a nurse educator updated a power point on the care of a patient in custody to be consistent with the Employer’s updated patient prisoner policy. The Director of Nursing Education reviewed and approved the nurse educator’s suggestions, noting that they were in alignment with the policy. Employer Exhibit 18.

because she was told to attend to learn about a new wound care process that was being introduced. Nurse educator Lowtan recalled attending only one meeting that she was told to attend and that she sat quietly at the meeting.

The testimony of Senior VP McLaughlin indicates that nurse educators have attended value analysis meetings and that their input is solicited concerning whether certain products should be used by the Employer.¹⁹ Employer Exhibit 4 - 00001, entitled “Value Analysis Meeting Minutes,” indicates that a value analysis meeting took place on November 20, 2018, and that nurse educator/wound care specialist Fadya Casseus and nurse educator Leolinda Mangaoang were in attendance.²⁰ Further meeting minutes appear to indicate that Casseus reported on prices of Prevalon boots and that at a meeting on about March 19, 2019, “discussion” was that the price of the product was too high and the matter closed. There is a reference to “Wound RN Manager” being the responsible person next to a topic wherein Casseus’ name was mentioned in Employer Exhibit 4; it is unclear who that title is referring to. See Employer Exhibit 4 – 00004, 00007, 00008.

Appropriateness of the Voting Unit

Whether Nurse Educators are Statutory Supervisors and/or Members of Management

The Employer contends that the nurse educators are supervisors within the meaning of the Act and that they have management authority. I discuss supervisory status first, followed by managerial status.

Analysis - Supervisory Status of Nurse Educators

Regarding supervisory status, the Employer contends that the nurse educators assess the competencies of employees, including floor nurses, during orientation and remediation processes and that their assessments are relied upon by management in making decisions affecting the employees’ future employment and/or departmental assignment with the Employer. The Employer also asserts that nurse educators are treated like supervisors, noting among other things that they are invited to nurse leadership meetings and other management events, that they have the same wages as nurse supervisors and that they self-schedule their work week.

¹⁹ Senior VP McLaughlin who began working in her current position for the Employer in January 2019, is not listed as one of the attendees at the meetings. Neither McLaughlin’s testimony nor the documents entitled, “Value Analysis Meeting Minutes,” in evidence as Employer Exhibit 4 show that McLaughlin attended any of the eight value analysis meetings that took place on dates during the period November 20, 2018 through September 18, 2021.

²⁰ Record evidence indicates that the exact position held by Casseus no longer exists. In this regard, the evidence shows that in the past, there was one RN wound care specialist, Fadya Casseus, who is listed on an organizational chart of the Employer under Wound Care Specialist, a separate branch from Nursing Education. Other evidence indicates that Casseus was a nurse educator. Thus, it appears that Casseus had multiple roles. Indeed, record testimony shows that when Casseus left the Employer, the Employer had difficulty replacing her; currently there is an RN manager, Julio Torres, who oversees two LPN wound care specialists. There is no claim that Torres is a nurse educator.

Board Law- Factors Relevant to Determine Supervisory Status

Section 2(3) of the Act specifically excludes supervisors from the definition of employees. Section 2(11) of the Act defines the term “supervisor” as:

“..any individual having the authority, in the interest of the Employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.”²¹

An individual is a statutory supervisor if (1) they hold the authority to engage in any 1 of the 12 supervisory functions listed in Section 2(11); (2) their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment”; and (3) their authority is held “in the interest of the employer.” *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001). See also, *G4S Government Solutions, Inc., d/b/a WSI Savannah River Site*, 363 NLRB No. 113 (2016); *Oakwood Healthcare*, 348 NLRB 686, 687 (2006); *American River Transportation Co.*, 347 NLRB 925 (2006). Supervisory status may be shown if the putative supervisor has the authority to either perform a supervisory function or to effectively recommend the same. *Croft Metals, Inc.*, 348 NLRB 717 (2006).

In *Kentucky River*, *supra*, the Supreme Court reaffirmed that the burden of proving supervisory status rests on the party asserting it.²² The party seeking to prove supervisory status must establish it by a preponderance of the evidence. *Oakwood Healthcare, Inc.*, *supra* at 694. “Purely conclusionary evidence” does not satisfy that burden. *Lynwood Manor*, 350 NLRB 489, 490 (2007). Where the evidence is in conflict or inconclusive on particular indicia of supervisory authority, the Board will find that supervisory authority has not been established on the basis of those indicia. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989); *The Republican Co.*, 361 NLRB 93 (2014).

Specifically, regarding discipline, the Board in *Veolia Transportation Services, Inc.*, 363 NLRB 9028 (2016) stated:

To confer supervisory status based on the authority to discipline, the exercise of disciplinary authority must lead to personnel action without independent investigation by upper management. See *Sheraton Universal*, *supra*, 350 NLRB at 1116 (“Contrary to the judge’s speculation, nothing in the record suggests that

²¹ 29 U.S.C. Section 152(11) (1982).

²² However, the Court rejected the Board’s interpretation of “independent judgment” in Section 2(11)’s test for supervisory status, i.e., that alleged supervisors do not use “independent judgment” when they exercise ordinary professional or technical judgment, or judgment based on greater experience, in directing less-skilled employees to deliver services in accordance with employer-specified standards. Thus, the Board must seek to interpret the statutory distinction between “routine” and “independent” judgment, without categorically discounting judgment based on professional/technical expertise or greater experience.

upper management conducted an independent investigation before deciding to impose discipline. . . .”); *Beverly Health & Rehabilitation Services, Inc.*, 335 NLRB 635, 669 (2001), enfd. in pertinent part 317 F.3d 316 (D.C. Cir. 2003). Warnings that simply bring substandard performance to the employer’s attention without recommendations for future discipline serve nothing more than a reporting function, and are not evidence of supervisory authority. See *Williamette Industries, Inc.*, 336 NLRB 743, 744 (2001); *Loyalhanna Health Care Associates*, 332 NLRB 933, 934 (2000) (warning merely reportorial where it simply described incident, did not recommend disposition, and higher authority determined what, if any, discipline was warranted); *Ten Broeck Commons*, 320 NLRB 806, 812 (1996) (written warnings that are merely reportorial and not linked to disciplinary action affecting job status are not evidence of supervisory authority). Similarly, authority to issue verbal reprimands is, without more, too minor a disciplinary function to constitute supervisory authority. See *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1139 (1999); *Ohio Masonic Home*, 295 NLRB 390, 394 (1989).

The ability to evaluate is not one of the indicia of supervisory status set out in Section 2(11) of the Act. Thus, when the evaluation does not, by itself, affect job status (or terms and conditions of employment, such as a wage increase, extended probation or termination) of the employee being evaluated, the individual performing the evaluation will not be found to be a statutory supervisor. *Williamette Industries*, 336 NLRB 743 (2001); *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 (1999). Further, the power to “point out and correct deficiencies” in the job performance of other employees does not establish supervisory authority. *Crittenton Hospital*, 328 NLRB 879 (1999), citing *Passavant Health Center*, 284 NLRB 887, 889 (1987).

Regarding orientation work, in their teaching role, nurse educators assess new employees’ competencies and meet on a weekly basis with the orientee, the nurse preceptor and the nurse manager to discuss the orientee’s progress. Employer witnesses McLaughlin and Fiore testified in general terms that the nurse educators’ assessments are influential in the Employer’s decisions as to whether employees successfully complete orientation or whether they should be reassigned to a different area or terminated; and, that the nurse educators make suggestions or recommendations based on their observations and the time they spend with staff. While a nurse educator’s assessments may be considered by the Employer in determining whether to extend the length of /or to terminate an orientation period or transfer the orientee to a different area if the orientee is having difficulties, the assessments, which are based on the nurse educators’ observations of the orientee, are merely reportorial and do not by themselves, lead to personnel action or affect the job status or terms and conditions of employment of the orientee.²³ Indeed, the record indicates that when faced with reports from nurse educators that an orientee is having difficulties, the Employer seeks out the opinions of the entire team, including managers, in making a determination as to any action it will take. Further, the Employer does not point to any specific examples of a recommendation by a nurse educator that an employee should be reassigned/ transferred to a

²³ Nurse educator testimony indicates that the competency assessment form does not have an area to recommend adverse employment action such as discipline discharge or transfer.

different area or terminated where such reassignment /transfer/discharge action was taken by the Employer based solely on the nurse educator's recommendation and without input of the others or investigation by upper management.²⁴ Moreover, although the record indicates that orientees are required to meet established goals during orientation and that the team including upper management have input into how to help the orientee reach required goals, specific details as to how the determination of when orientation is successfully completed is not provided. In this regard, nurse educators indicate that management has taken employees off orientation early against the recommendation of nurse educators in certain circumstances. Thus, the record does not establish that nurse educators assign/transfer, promote or discharge employees or make effective recommendations regarding the job status of new employees. See e.g., *St Mary's Hospital Inc.*, 220 NLRB 496 (1975) (where instructors evaluated new employees, informed their superiors of the new employees' success or lack of success in orientation and had the ability to extend the orientation period of a new employee encountering problems, the Board found insufficient evidence that the instructors promoted or discharged employees or made effective recommendations regarding the job status of new employees or that they were supervisors within the meaning of the Act).

Regarding the nurse educator's role in the remediation process, the Employer contends that nurse educators evaluate the performance and competence of employees and make recommendations that could lead to termination. Here, the record shows that nurse managers make the decision that an employee requires re-education on a procedure/ practice. The nurse manager includes the justification for the remediation and the plan for corrective action on the remediation form and then asks a nurse educator to follow the plan for re-educating the employee. On the remediation form, the nurse educators report whether the employee has met the practice standard based on their observations, signs the form and gives it back to the nurse manager.²⁵ Nurse educators do not include any recommendation for discipline on the form. Indeed, remediation forms in evidence state that, "Manager/Director will decide on further action plan if staff does not meet standard," and also contain signatures of the nurse manager and the Director of Nursing Education. Further, the Employer's evidence indicates that most remediations are successful and do not lead to further action. Remediations are not disciplinary actions and there is no evidence that a particular offense would necessarily lead to any particular form of discipline. The Employer does not point to any specific evidence that a nurse educator's input on remediation automatically led to job affecting discipline.²⁶ Thus, the record does not establish that the nurse educator's role in the remediation constitutes effective recommendations for promotions, wage increases, or discipline. See e.g., *Illinois Veterans Home at Anna L.P.*, 323 NLRB 890 (1997) (where nurses used personnel action forms to describe employee problems which forms were given to director of

²⁴ The record does not establish that an adverse personal action will occur without independent investigation or review by management.

²⁵ The nurse educator indicates whether the employee verbalized or demonstrated an understanding of policies and procedures related to nursing practices at issue.

²⁶ The record does not contain any discipline issued or recommended by nurse educators. The Employer does not point to any specific instance of an employee going through the remediation process with a nurse educator where the employee thereafter made the same mistake again and discipline issued, despite the indication by the Employer that such could occur.

nursing who determined whether disciplinary action would be taken, supervisory status not conferred to the nurses).

Regarding instances, outside of remediation, of nurse educators correcting an employee when the employee fails to perform in accordance with hospital policies or procedures, the record shows that a nurse educator corrected an employee who failed to wear PPE as required by standard protocol for infection controls, advised the employee of established procedures and thereafter advised nurse managers of the incident. An email to the managers described the incident but did not contain any recommendation for disciplinary action.²⁷ The Board has held that to “point out and correct deficiencies” in the job performance of other employees “does not establish the authority to discipline.” *Crittenton Hospital*, 328 NLRB 879 (1999), citing *Passavant Health Center*, 284 NLRB 887, 889 (1987). Further, merely bringing deficient performance to an employer’s attention without recommendations for future discipline serves nothing more than a reporting function and is not evidence of supervisory authority. See *Williamette Industries, Inc.* 336 NLRB 743, 744 (2001). Accordingly, the action of nurse educators in pointing out and correcting a failure to follow established protocol and reporting such to management is not evidence of supervisory authority.

Secondary Indicia

To the extent the Employer relies on the job descriptions for nurse educators to support its claim of supervisory status, it is well-settled that job descriptions, job titles, and similar items that constitute “paper authority” do not, without more, demonstrate actual supervisory authority. *Golden Crest Healthcare Center*, 348 NLRB at 731, citing *Training School at Vineland*, 332 NLRB 1412, 1416 (2000); See also *Chevron Shipping Co.*, 317 NLRB 379, 381 fn. 6 (1995).

The Employer cites several secondary indicia of supervisory status, including nurse educators’ attendance at nurse leadership meetings and value analysis committee meetings, the fact that nurse educators are included on an email distribution list of nurse leaders²⁸ and that they are paid the same salary as nurse supervisors.

Secondary indicia of supervisory authority may lend support to a conclusion regarding supervisory status when at least one of the primary indicia set forth in Section 2(11) is present, but secondary indicia do not independently establish supervisory status. See *DirectTV U.S. DirectTV Holdings LLC*, 357 NLRB 1747, 1750 (2011) (attendance at supervisor meetings, supervisor to employee ratio); *Pacific Coast M.S. Industries*, 355 NLRB 1422 (2010) (training, signing timesheets, pay differential); *Springfield Terrace Ltd.*, 355 NLRB 937 (2010) (evaluating employees, filling out incident reports, highest-ranking employee); *Sam’s Club*, 349 NLRB 1007, 1014 (2007) (pay differential); *Palagonia Bakery Co.*, 339 NLRB 515, 534 (2003) (pay differential, attendance at supervisor meetings, initialing time cards); *House of Mosaics, Inc.*, 215 NLRB 704, 712 (1974) (training). It is well established that where putative supervisors are not

²⁷ The testimony of the nurse educator shows that one of the managers asked the nurse educator to email the manager about the incident.

²⁸ Employer Exhibit 47. This list also includes LPN who are currently represented by another labor organization.

shown to possess any of the primary supervisory indicia, as here, secondary indicia alone are insufficient to establish supervisory status. *Golden Crest Healthcare*, 348 NLRB 727, 730 fn. 10 (2006); *Ken-Crest Services*, 335 NLRB 777, 779 (2001). Because nurse educators do not possess any of the primary indicia of supervisory status, it unnecessary to consider the secondary indicia.

Managerial Status of Nurse Educators

The Employer also asserts that the nurse educators have managerial authority as they promulgate work rules and policies. The Employer also presented evidence in connection with nurse educator involvement in developing curriculum and attending leadership and value analysis meetings.

Board Law- Factors Relevant to Determine Managerial Status

Regarding managerial authority, the Board in *Republican Co.*, supra, stated:

Managerial employees are defined as those who formulate and effectuate high-level employer policies or “who have discretion in the performance of their jobs independent of their employer's established policy.” *General Dynamics Corp.*, 213 NLRB 851, 857 (1974); see generally *NLRB v. Yeshiva University*, 444 U.S. 672, 682 (1980). Although the Board has no firm criteria for determining managerial status, an employee will not ordinarily be excluded as managerial unless he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy. *Allstate Insurance Co.*, 332 NLRB 759, 762 (2000). The party seeking to exclude an individual as managerial bears the burden of proof. *LeMoyné-Owen College*, 345 NLRB 1123, 1128 (2005); *Waste Management de Puerto Rico*, 339 NLRB 262, 279 (2003).

As stated by the Board in *Wolf Creek Nuclear Operating Corp.*, 364 NLRB 1619 (2016), “[t]he fact that employees train or instruct other employees does not, in itself, make them managerial employees. To the contrary, the Board has found that employees who train or instruct other employees are not managerial employees if they do not exercise sufficient independent discretion or judgment in carrying out those duties.”

Here, the nurse educators assist in developing educational policies, practice alerts, safety content and curriculum upon request of the Employer. Related to their policy work, the educators review current policies and point out where more detail may be needed and make comments/suggested edits. Examples of policies worked on by nurse educators include the Telesitter and Telemetry Tech Observation policies, and annual reviews of key safety policy. After the nurse educator works on a policy, it is further reviewed and must be approved by upper management before finalization and issuance. The nurse educators also created curriculum for a nurse preceptor workshop at the request of management. The record shows that the nurse educators’ discretion related to such policies, practice alerts, curriculum and training is curtailed by established Employer policies and regulations. For example, practice alerts, which are edited or newly created by nurse educators, are based on complete Employer policies; the documentary

evidence indicates that that the full policy related to each policy alert is on the Employer’s intranet. Regarding the curriculum for the Preceptor Development Workshop, record evidence indicates that the Employer had established policies in effect for preceptor training. Indeed, the Employer’s Nursing Policy on Preceptor program was consulted by nurse educators as a resource for the workshop curriculum.²⁹ Nurse educator testimony also shows that they base content of educational programs on policies and procedures of the Employer and regulatory standards. Further, the edits and/or comments made to draft policies by nurse educators (such as pointing upper management to areas where “some detail...needed to be considered”) do not indicate that they are making high level management decisions on behalf of the Employer or that they are using discretion to make or implement policies on behalf of the Employer. Accordingly, I find that the record does not establish that the nurse educators exercised any significant degree of discretion independent of the Employer’s established policies and regulatory standards while performing their work. See e.g. *Wolf Creek Nuclear Operating Corp.*, 364 NLRB 1619 (2016) (security training instructors were not found to be managerial employees where any discretion they exercised in developing training programs were severely restricted by Nuclear Regulatory Commission regulations and guide.)

Further, I find that the limited evidence regarding nurse educators’ attendance at leadership and/or Value Analysis Meetings is insufficient to establish managerial authority. In this regard, while the nurse educators were invited to leadership meetings, the evidence does not indicate that they attended such meetings regularly. Rather, on the isolated instances where they were told by their director to attend the meeting and they attended, they sat and listened quietly or were trained on a new procedure. While the Employer’s evidence indicated that during certain leadership meetings, collective bargaining updates were provided, there is no evidence that nurse educators served on collective bargaining negotiation teams, were granted access to the Employer’s bargaining proposals or strategies in advance of the Petitioner, had access to minutes of meetings where bargaining strategy was discussed or assisted the Employer with negotiation strategy. Further, the minimal evidence from agenda minutes of value analysis meetings indicating that one nurse educator, who was also the sole wound care specialist, attended value analysis meetings and may have reported on prices of products does not indicate managerial status of nurse educators.³⁰

Accordingly, I find that there is insufficient evidence to warrant a conclusion that nurse educators should be excluded from the unit as managers.

The Board’s Health Care Rule

The Board’s Health Care Rule (the Rule) 29 C.F.R. Section 103.30 (1990) provides that except in extraordinary circumstances, there are only eight appropriate units in an acute care hospital. Section 103.30 (a) of the Rule provides that a unit of all registered nurses is one of the eight units which may be appropriate for bargaining in acute care hospitals. Assuming the existing unit in this case excludes nurse educators who are statutory employees, it appears that the unit does

²⁹ Employer Exhibit 31 -00101.

³⁰ Neither McLaughlin’s testimony nor the documents entitled, “Value Analysis Meeting Minutes,” in evidence as Employer Exhibit 4 show that McLaughlin attended any of the eight value analysis meetings that took place on dates during the period November 20, 2018, through September 18, 2021.

not conform to paragraph (a) because the registered nurse unit includes some but not all registered nurses, i.e., the nurse educators, and that the issue as to whether the nurse educators should appropriately be included in the existing unit is a matter for adjudication in this case.³¹

Armour-Globe Self-Determination Election

A self-determination election, also referred to as an *Armour-Globe* election, is the proper method by which a union may add unrepresented employees to an existing unit. See, *Globe Machine & Stamping*, 3 NLRB 294 (1937); *Armour & Co.*, 40 NLRB 1333 (1942); *Warner-Lambert Co.*, 298 NLRB 993 (1990). The petitioned-for employees need not constitute a separate appropriate unit by themselves in order to be added to an existing unit. *Warner-Lambert Co.*, *supra*; *St. Vincent Charity Medical Center*, 357 NLRB 854 (2011). Further, a self-determination election may be appropriate regardless of whether the petitioned-for employees may be found to be a separate appropriate unit. *Great Lakes Pipe Line Co.*, 92 NLRB 583, 584 (1950). The appropriateness of a self-determination election depends on the extent to which the employees to be included share a community of interest with the existing unit of employees and whether they constitute an identifiable, distinct segment so as to constitute an appropriate voting group. *St. Vincent Charity Medical Center*, *supra*.

The Board considers the following factors in determining whether employees share a community of interest: “whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the [e]mployer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.” *Walt Disney Parks and Resorts*, 373 NLRB No. 99 (2024) citing *United Operations, Inc.*, 338 NLRB 123 (2002).

Here, I find that the nurse educators constitute a distinct, identifiable segment of the Employer's unrepresented employees so as to constitute an appropriate voting group. The group of 11 to 13 nurse educators, while small, is neither an arbitrary nor a random grouping of employees. The nurse educators perform the same distinct functions, are in the same distinct employee classification, are organizationally included in the same administrative division in the nursing education branch of the Nursing Department, they work in the same location in the Employer's hospital and have the same supervision.

Regarding community of interest, in its closing statement, the Employer contends that the petitioned-for employees lack a sufficient community of interest with the unit employees in the existing unit of registered nurses. The Petitioner contends that the employees share a community of interest with the existing registered nurse unit. As discussed, below I find a community of interest exists between the nurse educators and the existing unit.

³¹ *St. Vincent Charity Medical Center*, 357 NLRB 854, 855 (2011). See also, *Pocono Medical Center*, 305 NLRB 398 (1991) (where the Board included discharge planner and quality review nurses in an existing unit of registered nurses).

Departmental Organization and Supervision

The registered nurses described in the existing bargaining unit are spread throughout various departments in the Employer's facility and directly supervised by different nurse managers/directors.³² The nurse educators are under the direct supervision of the Director of Nursing Education.³³ Both the petitioned-for group of nursing educators and the existing unit of registered nurses are part of the Nursing Department and are both under the supervision of the Senior VP of Nursing/Chief Executive Nurse. I find that these factors support finding a community of interest between the nurse educators and the existing unit.

Skills and Training and Job Functions

Regarding skills and training, the nurse educators and the existing bargaining unit nurses are licensed to practice as registered professional nurses in New York State. Nurse educators also hold certifications in Basic Life Support and Advanced Cardiac Life Support. The job descriptions in evidence indicate that these certifications are also required for unit staff nurse positions. Further, the job description of a staff nurse shows that in addition to their direct patient care, their job duties and responsibilities include participating in performance improvement process such as, "completing occurrence reports according to policy and unit-based audits, as assigned; participating in identifying problems requiring investigation and in developing and implementing corrective action plans for the Unit." And, while the nurse educators do not perform direct patient care, their duties substantially affect patient care.

Functional Integration

Functional integration is present when employees must work together and depend on each other in order to accomplish their overall duties.³⁴ Here, in connection with training, the nurse educators rely on staff nurses and the staff nurses rely on the nurse educators. In this regard, nurse educators rely on staff nurses acting as preceptors to help train orientees. Staff nurses (including preceptors and nurse orientees) rely on the nurse educators for information on new procedures and hospital technology; the proper performance of nurse educator duties is important to the health and safety of patients and to the nursing functions of those nurses assigned to direct patient care. I find this factor favors finding a community of interest.³⁵

³² The parties' collective bargaining agreement indicates that units include Medical/Surgical, Critical Care, Maternal Child, Pediatrics, Perioperative, Ambulatory, Case Management, QA, and Anesthesia.

³³ While not one of the traditional community of interest factors, the diversity of the existing unit may be relevant to consider generally in assessing the unit placement of the nurse educators. See *Disney Parks and Resorts, supra*. Thus, any difference in branch/unit between the nurse educators and the bargaining unit nurses is entitled to less weight than it might receive in other contexts.

³⁴ *Walt Disney Parks and Resorts, supra*.

³⁵ See e.g., *Oak Ridge Hospital*, 220 NLRB 48, 50 (1975) (nurse instructor included in unit of registered nurse).

Interchange and Contact with Other Employees

Nurse educators often begin their employment with the Employer in a staff nurse position as a member of the existing bargaining unit. Of the 11 to 13 nurse educators, there are four instances of permanent interchange, i.e., registered nurses included in the unit transferring to non-unit nurse educator positions, on the record. Indeed, two of the three nurse educators who testified at the hearing had previously worked for the Employer as bargaining unit staff nurses, and one also worked in the bargaining unit position of senior staff nurse, prior to becoming nurse educators. Additionally, there is also evidence of temporary interchange inasmuch as the Employer has called at least one nurse educator to help unit nurses on the floor when they had a shortage of nurses; however, while assistance was provided with pharmacy orders and other unspecified work, the nurse educator did not perform direct patient care. Further, the nurse educators have frequent contact with the existing bargaining unit through orientation, in-service training, hosting preceptor classes, and various assessments that are performed. The educators also have regular contact with nurse preceptors in connection with orientee progress. I find that interchange and contact factors weigh in favor of finding a community of interest.

Terms and Conditions of Employment

While there appear to be certain differences in the employment terms of the petitioned-for and existing unit employees, they do not mandate exclusion and may reasonably be expected in the *Armour-Globe* context, where the unit employees' terms are the result of collective bargaining. See e.g., *Public Service Company of Colorado*, 365 NLRB 1017 fn. 4 (2017).

Therefore, I find that the nurse educators share a sufficient community of interest with the existing bargaining unit employees to warrant inclusion in the existing bargaining unit.

Whether Election Barred in Circumstances of this Case

As noted above, the Employer contends that the parties' collective bargaining agreement bars an election. More specifically, the Employer contends that Section 1 of the collective bargaining agreement, which sets forth the existing unit of registered nurses, expressly excludes nurse educators. Additionally, referring to the contract bar theory, the Employer contends essentially that while the Petitioner has on at least three occasions sought to be recognized as the collective bargaining representative of the nurse educators, its "consistent inaction" in response to the Employer's past refusals to recognize the Petitioner precludes the processing of the petition. As explained below, I find an election is not barred by the collective bargaining agreement.

Facts

The recognition clause of the parties' collective bargaining agreement (Section 2.01) states that the Employer recognizes the Petitioner as the exclusive collective bargaining representative

of every employee covered by the collective bargaining Agreement. Section 1, "Scope of the Agreement," specifically sets forth the employees covered as follows:

This agreement covers each full-time...and part time...employee licensed or otherwise lawfully entitled to practice as a registered professional nurse ... employed by the Employer at its facilities to perform registered professional nursing as a staff nurse, senior staff nurse, assistant patient care coordinator, clinician and clinical nurse specialist. Each person employed by the Employer as a registered professional nurse must be licensed or otherwise lawfully entitled to practice as a registered professional nurse employed in the following classifications: Case Manager, IV Team, Home Care, Nurse Anesthetist, Nurse Practitioner, Quality Assurance Coordinator and Midwives. Excluded from the aforesaid bargaining unit are Patient Care Managers, Assistant Supervisors, Supervisors, Associate Patient Care Managers, Nursing Education Coordinators, IV Team Supervisors, Quality Assurance Research Analysts, Assistant and Associate Directors of Nursing, Directors and Senior Directors of Nursing, Senior Vice President of Nursing, Ambulatory Care Administrator and all professional nurses who are supervisors as defined in the Taft Hartley Act, as amended.

Section 1.01 of the collective bargaining agreement, entitled "Hospital Neutrality," states:

The Hospital agrees to maintain a neutral position at any organizing campaign by NYSNA in any facilities the Employer may operate and/or acquire now and/or in the future. No supervisor, manager, or agents of the Hospital will take position in an organizing campaign in opposition to representation by the Association.

If the Association claims to have authorization cards from a majority of employees in a unit, the Hospital shall agree to a card count conducted by a mutually acceptable neutral person. Upon certification by that person that a majority of the workers in the unit have signed authorization cards, the Hospital agrees that the Association shall be recognized as the bargaining representative of such unit.

Disputes over the scope of the affected unit, voter eligibility or improper conduct by either party, or any other dispute arising under or related to this section shall be decided by the person designated to conduct the card count. He/she shall be empowered to order any appropriate remedy for any breach of neutrality or other misconduct. His/her decision shall be final and binding.

The undisputed evidence shows that the Petitioner sought to be recognized as the nurse educators' collective bargaining representative on at least three separate occasions prior to the filing of the instant petition. More specifically, in about February 2019, the Petitioner formally requested a card check and recognition as the representative of a group including nurse educators and a wound care specialist.³⁶ In response, the Employer refused to recognize the Petitioner as the

³⁶ The record indicates that the sole wound care specialist at issue in 2019 was a registered nurse. Currently, wound care specialists employed by the Employer are LPNs represented by another labor organization and one registered nurse, whose title is unclear, oversees them. The Employer does not contend that this individual overseeing the LPN wound care specialists is a nurse educator.

collective bargaining representative of the group, taking the position that the nurse educators were specifically excluded from the bargaining unit and that they were supervisors within the meaning of the Act. Further, in about October 2022, the Petitioner made a bargaining proposal to include nurse educators in the unit of registered nurses covered by the collective bargaining agreement. The Employer rejected the Petitioner's proposal and again took the position that the nurse educator position was specifically excluded from the agreement and that the nurse educators were statutory supervisors; the Petitioner thereafter withdrew its bargaining proposal. The Employer contends, and it is not disputed, that the Petitioner did not file a grievance alleging that the Employer violated the neutrality agreement nor file a petition with the Board in either of the above instances. Thereafter on about July 18, 2023, the Petitioner presented a new request for a card check for a residual unit of nurse educators;³⁷ the Employer refused the Petitioner's request, asserting its position that the nurse educators were excluded under Section 1 of the collective bargaining agreement.³⁸ On about August 15, 2023, the Petitioner filed a Step 3 grievance regarding the Employer's refusal to do a card check and recognize the Petitioner as the collective bargaining representative of the petitioned for unit.³⁹ The Employer denied the grievance on about September 18, 2023, asserting that the neutrality clause was inapplicable to the "job group;" that it would not agree to a card count by a mutually agreeable neutral person but was "agreeable to select an arbitrator via the American Arbitration Association and submit the issues to that person for resolution."⁴⁰ On October 5, 2023, the Petitioner filed a demand for arbitration regarding "Class Action Grievance ... Violation of the Collective Bargaining Agreement, including but not limited to: Section 1.01 Hospital Neutrality."⁴¹ On about February 5, 2024, the grievance concerning violation of collective bargaining agreement including but not limited to Section 1.01 Hospital Neutrality was "withdrawn with prejudice."⁴² The instant petition was filed on February 12, 2024.

Parties to collective-bargaining agreements may waive certain of their rights, including certain fundamental statutory rights. However, the Board will enforce such waivers only when they are clear, knowing, and unmistakable, whether predicated on a contractual provision or by conduct. *Springfield 355 NLRB 937* (2010), citing *Northern Pacific Sealcoating*, 309 NLRB 759 (1992). In *Briggs Indiana*, 63 NLRB 1270 (1945), the Board held that a union that promises not to represent certain categories of employees during the term of an agreement may not file a petition

³⁷ The Petitioner's July 18, 2023 letter set forth proposed terms for the card count and asked the Employer if the terms were agreeable so that they could formally enter into a card count agreement consistent with Section 1.01 of the parties collective bargaining agreement. (Employer Exhibit 51).

³⁸ Employer Director of Labor Relations Thomas Foley testified that the Employer also argued that the Employer raised that the nurse educators are statutory supervisors; however, the Employer's July 25, 2023 response to the Union's request for a card check and recognition, received in evidence as Employer Exhibit 52, does not include such argument. However, the Employer's September 18, 2023 written response received in evidence as Employer Exhibit 54 argues that the nurse educators are excluded from the unit and that the nurse educators are supervisors.

³⁹ Employer Exhibit 53. NYSNA's August 15, 2023 amended grievance form, refers to an initial August 2, 2023 grievance which is not in the record.

⁴⁰ Employer Exhibit 54.

⁴¹ Employer Exhibit 55.

⁴² Employer Exhibit 56. Tr. 187.

with the Board seeking to represent those employees during that period.⁴³ However, the Board has also held that a promise not to seek to represent a particular group of employees may not be implied by way of an explicit exclusion from a contractual unit or on the basis of an “alleged understanding” between the parties during their negotiations. See *UMass Memorial Medical Center*, 349 NLRB 369 (2007) citing *Cessna Aircraft Co.*, 123 NLRB 855, 856 (1959) (waiver of organizational rights cannot be inferred from a provision in a collective-bargaining agreement that excluded certain employees from the unit covered by the agreement in the absence of an express promise by the union to refrain from seeking representation of the employees in question). Rather, the *Briggs Indiana* principle will be applied only where the union makes an *express* promise to refrain from seeking representation of the employees in question. *Cessna Aircraft Co.*, 123 NLRB 855 (1959); *Lexington Health Care Group, LLC*, 328 NLRB 894, 895 (1999) (the promise not to organize must be “express, and not implied”).

As noted above, the Employer contends that the instant petition is barred because the nurse educators are excluded from the parties’ collective bargaining agreement. Here, Section 1 of the parties’ collective bargaining agreement excludes “Nursing Education Coordinators.” The Employer’s evidence indicates that in the past, the titles “Nursing Education Coordinator” and “Nurse Educator” had been used interchangeably; that the title nursing education coordinator was essentially discontinued in about 2017; and now the nurse educator title is utilized.⁴⁴ While the Union does not contend nurse educators are part of the unit set forth in the collective bargaining agreement, it does not agree that they are explicitly excluded. Even assuming, as the Employer contends, that the nurse educators are expressly excluded from the existing unit of registered nurses set forth in the collective bargaining agreement, a mere explicit exclusion from a contractual unit without more is insufficient to bar the instant petition. *UMass Memorial Medical Center, supra*; *Women & Infants’ Hospital of Rhode Island, supra* (where the Board found that contractual language specifically excluding respiratory therapists from a unit of technical employees did not bar the union from petitioning for an *Armour-Globe* election in a unit of respiratory therapists). Accordingly, I do not find that such an exclusion of nurse educators has the effect of creating an obligation on the part of the Petitioner not to seek their representation during the life of the contract. See e.g., *UMass Memorial Medical Center, supra*; *Women & Infants’ Hospital of Rhode Island, supra*. Compare, *Briggs Indiana, supra*.

Further, the neutrality clause set forth in Section 1.01 of the parties’ collective bargaining agreement, which recognizes the Petitioner’s right to organize unrepresented employees, does not establish an express promise not to organize the nurse educators or not to file a petition with the Board seeking to represent the nurse educators. See *Springfield Terrace, Ltd.*, 355 NLRB 937 (2010) (where the Board held that contractual language creating a card check verification procedure did not satisfy the strict standard for finding a waiver of the union’s right to file the

⁴³ In *Briggs Indiana*, the contracting union agreed that it would not accept for membership certain categories of employees including plant protection employees; however, during the term of the contract, it filed a petition seeking to represent the plant protection employees. In dismissing the petition, the Board held that it is not the proper function of the National Labor Relations Board to expend its energies and public funds to confirm a result which the Union agreed it would refrain, temporarily, from seeking to achieve.

⁴⁴ The Union disputes that nurse educators are specifically excluded from the unit. However, it is undisputed that the nurse educators are not currently covered by the collective bargaining agreement.

petition seeking to represent a group of LPNs as a separate unit; implied promise insufficient). See also, *United States Postal Service*, 348 NLRB 25, 26, fn. 3 (2006) (in the absence of language in an agreement limiting the right of an employer / union to file a petition, the Board will not find that the party has clearly and unmistakably waived its right to file a petition before the Board). Compare *Lexington House*, 328 NLRB 894 (1990) (where the Board found a union waived its right to petition the Board to represent a unit of employees because there was an express promise by the union not to organize the employer's unorganized facility sought in the petition for a period of 12 months; in dismissing the petition, the Board stated, “[t]o do otherwise would permit [the petitioner] to take advantage of the benefits accruing from its valid contract while avoiding its commitment by petitioning to the Board for an election”); *Northern Pacific Sealcoating*, 309 NLRB 759 (1992) (where the Board held that a waiver provision in the parties’ memorandum agreement clearly and unmistakably provided that the employer agreed to waive its right to file a petition, and the waiver provision was executed by the employer). Further, there is no claim or evidence establishing that the Employer agreed to the neutrality clause in exchange for a promise from the Petitioner not to attempt to organize the nurse educators or not to file a petition with the Board during the term of the contract.

The Employer also argues that the Petitioner’s “prior actions regarding potential representation of nurse educators” followed by its “consistent inaction” when the Employer refused to recognize it requires a finding that the parties’ collective bargaining agreement bars an election.⁴⁵ In this regard, the Employer provided evidence that the Petitioner sought to be recognized as the bargaining representative of the nurse educators in February 2019 and in October 2022 but asserts that the Petitioner failed to file a grievance or a petition with the Board when the Employer denied its requests. The Employer also provided evidence of the Petitioner’s July 2023 request for recognition and its related August 2023 grievance/demand for arbitration but notes the Petitioner’s subsequent withdrawal with prejudice as further evidence of the Petitioner’s inaction.⁴⁶ The Employer argues that this background of consistent inaction by the Petitioner shows that it did not file a petition earlier because there was a common understanding between the parties in connection with the exclusion of nurse educators.⁴⁷ However, as noted above, the Board requires more than an alleged understanding between a union and employer to find that a union has waived its right to file a petition with the Board. See *UMass Memorial Medical Center, supra*; *Cessna Aircraft Co., supra*. The evidence here does not establish the required express agreement by the Petitioner that it would not seek to represent the nurse educators or that it would refrain from exercising its right to file a petition with the Board. Accordingly, I do not find merit to the Employer’s argument.

It is noted that in *Verizon Information and Communications Systems*,⁴⁸ the Board narrowly held that a union was estopped from filing a representation petition in circumstances where the

⁴⁵ Board Exhibit 1(c), the Employer’s Statement of Position.

⁴⁶ The record does not contain details related to the withdrawal or the prejudice, i.e., if prejudice is applied to the subsequent filing of a new grievance on the specific instance of the violation alleged, and if so, for what period of time. Nor does the evidence indicate whether the Employer is currently pursuing a grievance against the Petitioner concerning this matter.

⁴⁷ Tr. 339.

⁴⁸ 335 NLRB 558 (2001).

union reaped the benefits of the parties' Neutrality and Card Check Recognition agreement to the employer's detriment (i.e., the union gained significant information from the Employer about the employees it was seeking to organize at various sites and it obtained the Employer's agreement to arbitrate the representation matter) and then filed a petition with the Board, while reserving the right to go back to the agreement to arbitrate.⁴⁹ The Board noted the underlying dispute did not involve a promise by a union to refrain from representing employees; rather, it found that the fundamental policies of the Act were best effectuated by holding the union to its agreement to arbitrate. In the instant case, the Employer does not take the position that the Petitioner failed to live up to or breached the neutrality clause agreed upon by the parties by withdrawing its grievance or by filing the instant petition and there is no evidence that the Employer filed a grievance or charge related thereto. Nor is there a claim that the Petitioner benefitted from its invocation of the neutrality clause or that the Petitioner's withdrawal of its grievance was to the detriment of the Employer. Accordingly, the narrow holding in *Verizon Information and Communications Systems*, is not applicable herein.

Conclusions

Based upon the entire record in this matter and for the reasons set forth above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.⁵⁰
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following group of employees of the Employer constitute an appropriate voting group for purposes of the self-determination election directed herein:

⁴⁹ In *Verizon*, the union and the employer entered into a complete agreement establishing a specific procedure for voluntary recognition outside of the Board's processes which included that if the parties are unable to agree, after negotiating in good faith for a reasonable time, upon the description of an appropriate unit for bargaining, the issue of the description of such unit shall be submitted to arbitration.

⁵⁰ The parties stipulated that the Brooklyn Hospital Center is a New York corporation with its principal office and place of business located at 121 DeKalb Avenue, Brooklyn, New York and it has been engaged in the operation of an acute care hospital providing health care and related services. During the past year, the Employer has derived gross revenues in excess of \$250,000 from its operations and has also purchased and received at its facility medical supplies valued in excess of \$50,000 directly from suppliers located outside New York State.

Voting Group

All full-time and regular part-time and per diem nurse educators employed by the Employer at 121 DeKalb Avenue, Brooklyn, New York, excluding all other employees, guards, and supervisors as defined in Section 2(11) of the Act.

If a majority of the valid ballots in the election are cast for the Petitioner, the employees in the above appropriate voting group will be deemed to have indicated their desire to be included in the existing registered nurse bargaining unit currently represented by the Petitioner, and it shall bargain for those employees as part of that unit. If a majority of the valid ballots are cast against representation, the employees will be deemed to have indicated their desire to remain unrepresented, and I will issue a certification of results of election to that effect.

Direction of Election

The National Labor Relations Board will conduct a secret ballot election among the employees in the voting group found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **The New York State Nurses Association**.

A. Election Details

The election will be held on **February 25, 2025**, from 12:00 p.m. (noon) to 1:00 p.m., in Conference Room A at the Employer's facility located at 121 DeKalb Avenue, Brooklyn, New York.

B. Voting Eligibility

Eligible to vote are those in the voting group who were employed during the payroll period ending **January 19, 2025**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible to vote are all employees in the voting group who have worked an average of four (4) hours or more per week during the 13 weeks immediately preceding the eligibility date for the election.

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

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

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

C. Voter List

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

To be timely filed and served, each of the lists must be *received* by the regional director and the parties by **January 27, 2025**. Each list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

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

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

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

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

D. Posting of Notices of Election

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

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

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

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review. Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: January 23, 2025



TERESA POOR
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 29
One Metrotech Center, 20th Floor
Suite 2000
Brooklyn, NY 11201-3948