

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

**In the Matter of:**

**SUTTER WEST BAY HOSPITALS d/b/a Case No. 20-UC-076774**  
**CALIFORNIA PACIFIC MEDICAL**  
**CENTER,**

**Employer/Petitioner,**

**and**

**INTERNATIONAL UNION OF**  
**OPERATING ENGINEERS,**  
**STATIONARY ENGINEERS, LOCAL**  
**NO. 39,**

**Union.**

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**REQUEST FOR REVIEW OF REGIONAL DIRECTOR**  
**DECISION AND ORDER DATED MAY 29, 2012**

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## **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

Employer and Petitioner Sutter West Bay Hospital d/b/a California Pacific Medical Center (“CPMC”), pursuant to Section 102.67 of the National Labor Relations Board (“Board” or “NLRB”) Rules and Regulations, submits this request for review of the Region 20 Regional Director’s Decision and Order issued May 29, 2012 (“Decision and Order”), inasmuch as his Decision and Order found that the Employer’s Assistant Chief Engineers are not Section 2(11) supervisors under the National Labor Relations Act (“NLRA” or the “Act”).

This finding was error. As the Decision and Order correctly determined, the Employer’s Chief Engineers are statutory supervisors within the meaning of Section 2(11) of the Act and are properly excluded from the existing bargaining unit. The weight of the evidence indicates that Assistant Chief Engineers are similarly situated as statutory supervisors because their job responsibilities require them to perform functions similar and equal to those of the Chief Engineers and distinct from the rank-and-file members of the bargaining unit.

Assistant Chief Engineers, along with Chief Engineers, are the top officials in the engineering department at each of the four hospital campuses in which they are employed. Their job responsibilities require them to perform 2(11) functions such as hiring, disciplining, and assigning and directing work of the rank-and-file members of their own bargaining unit. The Act explicitly excludes individuals who perform such tasks from the statutory definition of an “employee.”

Further, “secondary indicia” overwhelmingly support a finding of supervisor status. Individuals in these job classifications sit in their own private offices, attend management training classes, and receive management incentive bonuses. Based on these secondary factors, the rank-and-file bargaining unit members view Assistant Chief Engineers as supervisors. For all these reasons, we respectfully request that review of the

Regional Director's Decision and Order be granted and that the bargaining unit at issue be clarified to exclude as statutory supervisors Assistant Chief Engineers, as encompassed in CPMC's amended Unit Clarification Petition.

## **II. RULE CONCERNING REQUEST FOR REVIEW**

Section 102.67 of the Board's Rules and Regulations provides that the grounds for granting a Request for Review include:

- (1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.
- (2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
- (3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
- (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

The Regional Director's decision that Assistant Chief Engineers are not statutory supervisors and thus should not be excluded from the unit based on their supervisory status is clearly erroneous based on the weight of the evidence and such error was prejudicial, inasmuch as it results in statutory supervisors owing divided loyalty to both the Employer and a labor organization.

## **III. PROCEDURAL BACKGROUND**

CPMC filed an amended Unit Clarification Petition on March 21, 2012, to exclude four job classifications from the bargaining unit represented by Stationary Engineers Local 39, International Union of Operating Engineers, AFL-CIO ("Local 39" or "Union"): 1) Chief Engineers; 2) Assistant Chief Engineers; 3) Supervising Chief

Engineers; and 4) Director of Technical Services.<sup>1</sup> During the hearing, the Union and CPMC stipulated to exclude the Supervising Chief Engineer and the Director of Technical Services from the unit. As a result, the only job classifications in dispute are the Chief Engineers and Assistant Chief Engineers.

In a decision dated May 29, 2012, the Regional Director determined that individuals in the Chief Engineer position are statutory supervisors excluded from the bargaining unit while individuals in the position of Assistant Chief Engineer are not statutory supervisors and are not excluded from the bargaining unit represented by Local 39.

#### **IV. STATEMENT OF THE FACTS**

##### **A. California Pacific Medical Center.**

California Pacific Medical Center (“CPMC”) is made up of four, separate hospital campuses, all located in San Francisco, California. Tr. 11:6-8. The St. Luke’s Campus is located in the Mission District at Cesar Chavez and Valencia streets; the Davies Campus is located on Castro and Duboce streets; the California Campus is on California and Maple streets; and the Pacific Campus is located on Buchanan and Clay. Tr. 11:11-17.

CPMC employs approximately 6,800 employees at these four campuses, some of whom are represented by unions. One of these unions is the International Union of Operating Engineers, Stationary Engineers, Local 39. Tr. 12:3-7, 13-14.

##### **B. The Union.**

Local 39 represents the Stationary Engineers, Biomedical Engineers, Assistant

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<sup>1</sup> CPMC reserved the right at a later time to seek exclusion of an additional, currently vacant position, the Chief Biomedical Electronics Technician, if and when that vacancy is filled. Tr. 110:20-111:13.

References to “Tr. \_\_\_” are to the official transcript of the hearing that took place before Hearing Officer Lucile L. Rosen, Esq., on April 26 and 27, 2012. The Employer’s, the Union’s, and the Regional Director’s exhibits are referred to as “Er. Exh. \_\_\_,” “U. Exh. \_\_\_,” and “Bd. Exh. \_\_\_,” respectively.

Chief Engineers, Chief Engineers, Supervising Chief Engineer, the Chief Biomedical Electronics Technician,<sup>2</sup> the Director of Technical Services, Painters, and Carpenters at CPMC. Tr. 13:6-13; Tr. 110:20-111:13; Er. Exh. 2. At the hearing, the Union stipulated that the Supervising Chief Engineer (currently Jim Cronin) and the Director of Technical Services (currently John Dennis Layden) do not belong in the bargaining unit, because they are managers. Tr. 154:5-16; U. Exh. 1.

The employees represented by Local 39 are responsible for maintaining and operating the mechanical and electrical equipment within the four CPMC campuses. Among other tasks, they are responsible for maintaining and operating the heating, ventilation, cooling, electrical, plumbing, generator, and boiler systems. Tr. 117:18-118:1.

The parties stipulated that there was no contract bar to the instant proceedings. Tr. 7:7-13; Bd. Exh. 2.

**C. Assistant Chief Engineers.**

Each of the four hospital campuses employs one Chief Engineer (“Chief”) and one Assistant Chief Engineer (“Assistant Chief”), with the exception of the Davies Campus, which has a “Supervising” Chief Engineer (an undisputed supervisor) and one Assistant Chief. Tr. 116:9-14.

Assistant Chiefs help to direct the engineering crews at their hospital campus and help with scheduling engineers’ shifts. Tr. 314:16-20. They report directly to the Chiefs at their campus (with the exception of the Assistant Chief at the Davies campus, who reports to the Supervising Chief Engineer). Tr. 116:9-14. The written job description for Assistant Chiefs also articulates numerous supervisory responsibilities, including requirements that the Assistant Chief:

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<sup>2</sup> As mentioned above, CPMC reserves the right to seek clarification of the appropriate bargaining unit status of this currently-vacant position, if and when the position is filled. Tr. 110:20-111:13.

- “supervises and directs Engineering Department personnel in the use of policies, procedures and standard of work performance,”
- “instructs other [engineers] in the performance of tasks,”
- “schedules and supervises maintenance repair work, alterations, remodeling, minor construction, and the checkout, installation and servicing of mechanical and electrical equipment and building systems,”
- “monitors departmental personnel matters and makes recommendations, such as selection, training, promotion, discipline, and termination,”
- and “supervises scheduling of department personnel.” Er. Exh. 5.

Overall, the Assistant Chief at each hospital campus “organizes duties and supervises assigned activities of” Engineering Department personnel. *Id.* They are accountable to the Chief Engineer for “maintaining an effective organization, administering labor and materials controls, [and] training maintenance personnel on safety and effective management practices.” *Id.* The Union did not dispute the accuracy of the job description for Assistant Chiefs at the hearing.

## V. ARGUMENT

It is well established that employees classified as Section 2(11) statutory supervisors are excluded from bargaining units. Section 2(11) of the National Labor Relations Act defines a “supervisor” as:

[A]ny 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. 29 U.S.C. § 152(11) (emphasis added).

In order to classify an employee as a supervisor under the Act, the putative supervisor must have “the authority to exercise *at least one* of the powers enumerated in

Section 2(11) of the Act,” using a “degree of discretion that rises to the level of supervisory independent judgment.” *Dean & Deluca*, 338 NLRB 1046, 1047 (2003) (citing *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 n.8 (1999)). Indeed, having the ability to exercise “any one of the 12 supervisory functions listed in Section 2(11)” is sufficient to establish supervisory status. *Oakwood Healthcare*, 348 NLRB 686, 688 (2006) (emphasis added).

The evidence demonstrates that CPMC has conferred to the Assistant Chiefs the authority to exercise, or effectively recommend, many of the 2(11) powers using their own discretion, including but not limited to: hiring, suspension, discipline, assignment of work, and responsible direction of work. While the Assistant Chiefs may in some cases confer with higher-ups about their decision, CPMC has still conferred them with the requisite authority to make supervisory decisions, or to effectively recommend the same.

**A. Assistant Chief Engineers Are Statutory Supervisors Because They Exercise Section 2(11) Functions.**

**1. Assistant Chiefs Are Responsible For Hiring Bargaining Unit Members.**

When a vacancy exists within the engineering department at one of the hospital campuses, resumes are sent directly to the Chief in charge of that campus. Tr. 165:20-24. The Chief and the Assistant Chief jointly review the resumes and determine whom to interview. Tr. 290:10-19; 316:19-24. Together, the Assistant Chiefs and Chiefs schedule appointments with and interview their preferred candidates, without the input of Hern. Tr. 211:5-12; 290:20-24; 316:23-24. Subsequently, the Assistant Chief and the Chief decide who should be hired. Tr. 290:25-291:9; 317:3-5. The Chief and Assistant Chief inform the Human Resources Department and Hern about their selection. Tr. 210:14-211:17. Hern testified that in the four years since he became the Director of Facilities, he has never had to give approval for hiring someone into the bargaining unit: “I think what has happened . . . the chief has come back to me and said they’d like to hire this

individual and that was it. *They didn't ask my approval, they just let me know and informed me, that's the individual they selected.*" Tr. 166:15-21 (emphasis added).

Further, the job descriptions for Assistant Chiefs support the witnesses' unequivocal testimony and the hearing officer's stated conclusion that Assistant Chiefs have the authority to hire bargaining unit members. Assistant Chiefs are required to "monitor[] departmental personnel matters and make[] recommendations, such as selection" of engineers. Er. Exh. 5.

Indeed, the performance of Chiefs and Assistant Chiefs is evaluated, in part, based on their ability to successfully exercise their hiring authority. The performance review guidelines for Assistant Chiefs assign scores for "Leading People/Teams," a criteria described in part as the ability to "*recruit*[], *select*[], and *manage*[]" individuals to create a high performing team." Er. Exh. 9 (2011 performance review for an Assistant Chief Engineer, under "General Management" scores).

Despite the evidence on the record that Assistant Chiefs possess the Section 2(11) ability to hire bargaining unit members, or to effectively recommend their hire, the Regional Director found that the record evidence does not support the conclusion that the Assistant Chiefs possess authority to hire or to effectively recommend the hiring of employees. The Regional Director's decision rests on his determination that "there is no evidence to establish that [Assistant Chief's] opinions have amounted to effective recommendations to hire" though he acknowledges that Assistant Chiefs "have participated ... in selecting candidates to interview, in interviewing candidates, and in giving their opinions of candidates." Decision and Order at 19. As discussed above, Assistant Chiefs are integral to hiring. Assistant Chiefs and Chiefs *jointly* review resumes and determine whom to interview, *jointly* schedule appointments with and interview their preferred candidates, and *together* decide who should be hired before informing the Human Resources Department and Hern about their selection. The totality of the evidence shows that the Assistant Chiefs' opinions did amount to effective

recommendations to hire, including Hern's testimony that he has never had to give approval for hiring someone into the bargaining unit because the Chief and Assistant Chief made the hiring recommendations. Tr. 166:15-21.

In addition to hiring employees, the record demonstrates additional 2(11) powers that are exercised by Assistant Chiefs.

**2. Assistant Chief Engineers Have The Authority To Suspend And Discipline Bargaining Unit Members.**

**a. Assistant Chief Engineers Issue Disciplinary Actions, Including Unpaid Suspensions.**

The Regional Director found that the record evidence does not support the conclusion that Assistant Chiefs possess disciplinary authority. One basis for the Regional Director's finding is that the evidence does not support that Assistant Chiefs have independently made disciplinary decisions or effectively recommended them because "any documented discipline requires approval of the chief engineer and/or other higher level manager..." Decision and Order at 19.

To the contrary, the record reflects that Assistant Chiefs can, and have, independently issued a variety of disciplinary actions, and that they have the discretion to determine the level of disciplinary action to issue. At the hearing, the Employer introduced *twelve* independent examples of "Corrective Disciplinary Action Notices" that Chiefs and Assistant Chiefs issued to bargaining unit members, *nine* of which were issued by Assistant Chiefs. Er. Exhs. 13 through 19, 21-22. The disciplinary actions issued by Assistant Chiefs vary in terms of infraction type and severity of discipline:

- Verbal Warning for unauthorized absences and improper lifting techniques, issued by an Assistant Chief Engineer. Er. Exh. 13.
- Verbal Warning for failure to provide 4 hour notification prior to calling in sick, issued by an Assistant Chief Engineer. Er. Exh. 16.
- Verbal Warning for tardiness, issued by an Assistant Chief Engineer. Er.

Exh. 22.

- Written Warning for aggressive behavior and profanity, issued by an Assistant Chief Engineer. Er. Exh. 14.
- Written Warning for excessive tardiness, issued by an Assistant Chief Engineer. Er. Exh. 18.
- Final Written Warning and Unpaid Suspension for sleeping on the job and for disobeying instruction of an Assistant Chief to go home, issued by an Assistant Chief Engineer. Er. Exh. 15.
- Unpaid Suspension for performing personal and unauthorized work on hospital grounds, issued by an Assistant Chief Engineer. Er. Exh. 17.
- Unpaid Suspension for sleeping on the job, issued by an Assistant Chief Engineer. Er. Exh. 19.
- Unpaid Suspension for improperly shutting down a boiler, jointly issued by Chief and Assistant Chief Engineer. Er. Exh. 21.

**b. Assistant Chief Engineers Have Discretion To Determine The Appropriate Level Of Discipline Without Consulting The Next-Level Supervisor.**

Assistant Chiefs have the discretion to determine the level of discipline: they can choose to informally counsel employees or recommend immediate termination, depending on their own independent judgment. Tr. 204:20-205:25. For example, in a letter to a subordinate engineer who had been sleeping on duty, then-Assistant Chief Engineer Don Haynes explained to the employee that he had the authority to determine the degree of discipline that would be taken, and that in his judgment, the employee's infraction warranted, at a minimum, a final written warning:

Chief Engineer Jim Cronin reported to me that upon his arrival . . . he found you on the floor on top of a mattress asleep . . . This has been discussed at length for as long as I can remember and is *grounds for immediate dismissal. I will wait for Chief Cronin's written account before deciding on disciplinary action to be taken.* This notice is to be considered a precursor

to the final and written warning *at the very least*. Er. Exh. 32 (emphasis added).

This discipline infraction, led and decided by the Assistant Chief, resulted in an unpaid suspension for the employee. Er. Exh. 19.

In other situations, despite violations of company policy, Assistant Chiefs may decide not to issue any discipline at all. For example, as an Assistant Chief Engineer, current Chief Engineer Don Haynes sometimes made exceptions for employees who failed to submit timely PTO requests, even though the stated policy required employees to submit them “at least seven days in advance.” *See* Er. Exh. 33 (“This is a reminder to you that this will be the last exception that we can make for you in this regard”).

Assistant Chiefs also understand that they have the power to discipline subordinate employees without consulting their next level supervisor. Chiefs, with the assistance and recommendations of their Assistant Chiefs, are ultimately responsible for disciplining their subordinates. Tr. 143:11-12. (As with any managerial decisions at CPMC to implement disciplinary actions that affect pay (such as terminations), Chiefs are required to inform the Human Resources Department about their decisions to suspend employees. Tr. 253:3-14.)

The authority of Assistant Chiefs to issue disciplinary actions is supported by their job descriptions and performance reviews. The job descriptions for Assistant Chiefs require them to “monitor[] departmental personnel matters and make[] recommendations, such as . . . *discipline* . . .” Er. Exh. 5. For this reason, the performance review guidelines for Assistant Chiefs score them on their ability to “hold[] individuals accountable” and to “take[] *appropriate corrective/complimentary action*.” Er. Exhs. 8, 9.

**c. Even Though Assistant Chief Engineers Are Expected To Consult With Human Resources Prior To Issuing Suspensions And Termination, They Are Considered 2(11) Supervisors.**

Further, despite the evidence on the record that Assistant Chiefs possess the

Section 2(11) ability to discipline or terminate bargaining unit members or effectively recommend such actions, the Regional Director found that the record evidence does not support the conclusion that the Assistant Chiefs possess disciplinary authority because in the case of suspensions and terminations, Assistant Chiefs consult with the Human Resources Department. Decision and Order at 19. The Regional Director additionally claimed that the record could not establish whether and/or how frequently disciplinary recommendations made by Assistant Chiefs have been followed by higher level managers. *Id.* There are several reasons why these findings are misguided.

*First*, as explained in detail by CPMC's Manager of Labor Relations, the Human Resources Department does not "approve" the disciplinary actions of CPMC managers. They merely advise managers of the potential risks involved:

HR doesn't approve the decisions. We consult and provide feedback to the operational leadership of the risks associated, based upon the review of the investigation. We don't actually say manager -- we don't require it of the managers in terms of what the final outcome is. The operational manager, supervisor, director, whoever within the operational leadership command structure, are the ones who make the final decision. Tr. 89:8-14.

The HR Department is there to assist and advise CPMC managers, not to supervise them. Indeed, the Manager of Labor Relations testified that he "hoped" and "expected" that unpaid suspensions were "issued in consultation with HR" but he couldn't say "definitively a hundred percent" that all the managers follow this guideline. Tr. 89:2-4, 18-20.

*Second*, this position ignores the unequivocal testimony that Assistant Chiefs can issue verbal warnings without consulting the Human Resources Department. Tr. 83:7-9; 285:11-21. Verbal warnings and even instances of informal counseling are significant because they can (but are not necessarily required to) lead to greater discipline, such as written warnings, unpaid suspensions, and terminations. Er. Exhs. 12 through 23. In fact,

each disciplinary notice form includes a section where the supervisor can indicate whether the disciplined employee has received prior corrective notices. *Id.*

*Third*, the Board has squarely rebutted identical arguments. As explained in *Progressive Transportation Services, Inc.*, 340 NLRB 1044, 1045 (2003), putative supervisors “effectively recommend” discipline under Section 2(11) when they “initiate” the disciplinary process, even if a higher-level supervisor must “sign-off” on it:

Yozzo effectively recommends discipline to Farinacci when she brings rule infractions and misconduct to Farinacci’s attention, thereby initiating the discipline process. When Yozzo decides to bring a disciplinary issue to Farinacci, Farinacci does not conduct an independent investigation of the incident. Rather, Farinacci decides the level of discipline and advises Yozzo on the wording of the discipline notice based on the incident as Yozzo describes it. The 33 disciplinary notices in the record signed by Yozzo establish that Farinacci follows Yozzo’s recommendations; that is, when Yozzo decides that a potential disciplinary issue should be brought to Farinacci’s attention, discipline ensues. Discipline of the dispatchers therefore begins with Yozzo’s recommendation to Farinacci. Accordingly, although Yozzo does not unilaterally impose discipline without consulting Farinacci first, Yozzo does effectively recommend discipline. *See Venture Indus.*, 327 NLRB 918, 919 (1999) (authority to discipline found where employees in question issued oral and written reprimands and recommended suspensions as part of progressive discipline system, and those recommendations were followed 75 percent of the time).

The *Progressive Transportation* Board then directly addressed the dissent’s misguided insistence that Section 2(11) supervisors must have the authority to issue discipline unilaterally:

Our dissenting colleague would further find that Yozzo’s authority is merely reportorial and does not require independent judgment, because she brings discipline issues to Farinacci rather than issuing discipline unilaterally. However, Section 2(11) requires only that a supervisor have the

authority to “effectively recommend” discipline—not that he or she have the final authority to impose it. Considering the absence of independent investigation by Farinacci and the myriad notices showing that Yozzo’s recommendations to Farinacci do in fact result in discipline, we find that the record amply demonstrates that Yozzo “effectively recommends” discipline to Farinacci. *Id.* at 1046.

Here, the Assistant Chiefs have even more discretion to discipline than did the putative supervisor in *Progressive Transportation*. Further, contrary to the authority cited by the Regional Director, Assistant Chiefs do more than simply bring discipline issues to the next level supervisor. See *Northcrest Nursing Home*, 313 NLRB 491, 497 (1993) (finding no supervisory status for charge nurses because no independent judgment involved in disciplining employees, and “in many cases, the charge nurses do not typically recommend what, if any, further action should be taken, and even when they do make such recommendations, generally an independent investigation by acknowledged managers or administrators *form the basis* for further disciplinary action” (emphasis added)). Assistant Chiefs’ actions and decisions form the basis of discipline and Assistant Chiefs effectively recommend discipline of rank-and-file bargaining unit members. Assistant Chiefs determine whether to issue discipline or informal counseling, what type of discipline to issue, and whether a performance improvement plan is required. Tr. 204:20-205:25. Moreover, they unilaterally issue discipline, except in cases requiring suspension or termination, which require the approval of the Human Resources Department. And even in those cases, the Assistant Chiefs, like the putative supervisor in *Progressive Transportation*, “effectively recommend” discipline by initiating the discipline process. Whether or how frequently disciplinary recommendations have been followed by higher level managers is not a determinative factor in the analysis as the Regional Director’s Decision and Order would indicate. The authority to determine whether to issue discipline, the type of discipline to issue, and initiating the disciplinary process constitutes the authority to “effectively recommend”

discipline. Thus, as a result of their exercise of Section 2(11) disciplinary powers, Assistant Chiefs should be considered statutory supervisors.

**3. Assistant Chief Engineers Make Assignments and Responsibly Direct Bargaining Unit Members.**

In *Oakwood Healthcare*, the Board construed the term “assign” to refer to the “act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e. tasks, to an employee.” *Oakwood Healthcare*, 348 NLRB at 689. Moreover In *Oakwood Healthcare* and *Golden Crest Healthcare Center*, the Board interpreted the Section 2(11) phrase “responsibly to direct” as follows: “If a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both ‘responsible’ (as explained below) and carried out with independent judgment.” Thus, putative supervisors “responsibly direct” bargaining unit members if they 1) *direct* other employees to perform tasks, with the authority to take corrective action; and 2) are *accountable* for the performance of those tasks. *Oakwood Healthcare*, 348 NLRB at 692; *Golden Crest*, 348 NLRB 727, 730 (2006).

The job responsibilities of Assistant Chiefs satisfy both elements of responsible direction as well as the requirements for making assignments. When work orders (*i.e.*, requests for engineering services) are submitted to the engineering department, either the Chief or the Assistant Chief will make arrangements to assign the task to an engineer and make sure the task is completed in a timely matter. Tr. 201:3-19. The type of projects run the gamut; they range from preventative maintenance tasks, replacing a toilet or light bulb, to repairing a boiler or an air conditioning unit. Tr. 283:2-7; 309:3-310:23. Assistant Chiefs use their judgment to determine which tasks to assign to which engineers, based in part on the needs of the project and the skills of the engineers. Tr. 202:5-20. They also take the engineer’s workload into account, and have the authority to

direct engineers to stop projects that they are working on, and go work on different projects. Tr. 201:22-25; 202:21-23. See *Golden Crest*, 348 NLRB at 730 (charge nurses at a retirement community “directed work” under the meaning of Section 2(11) when they directed CNAs to “clip residents’ toe-nails and fingernails, to empty catheters, or to change an incontinent resident.”). If the Assistant Chief determines that a project is completed unsatisfactorily, they have the authority to take correct action. Tr. 204:2-19. See also Section V.A.2., *supra*. The written job description for Assistant Chiefs support their authority to assign and direct work. See Er. Exh. 5 (Assistant Chiefs must “supervise and direct Engineering Department personnel,” “instruct other [engineers] in the performance of tasks” and “schedule and supervise” engineering work).

The Assistant Chiefs are also held *accountable* for their direction of the bargaining unit members. The Board in *Golden Crest* found that this element is met when the putative supervisor experiences “material consequences to her terms and conditions of employment, either positive or negative, as a result of her performance in directing” employees. *Golden Crest*, 348 NLRB at 731. Here, Assistant Chiefs are evaluated, with the potential for management incentive bonuses, based on the performance and assessments of their subordinates, not just on their own individual performance. Certain criteria in the performance evaluations for Assistant Chiefs are part of the “management incentive program” that rewards managers for achieving certain goals. See Er. Exhs. 8 and 9 (sample performance reviews for Chiefs and Assistant Chiefs); Tr. 29:25-30:1 (Manager of Labor Relations’ explanation that “these items are all items that the management of the department would be accountable for”). For example, Item 2.1 is an incentive objective for measuring customer satisfaction through the effective leadership of their engineering team. Tr. 30:4-6; Er. Exhs. 8 and 9. Item 6.1 identifies the Chief/Assistant Chief’s goal for improving their overall “Experience of Work” score, which is a score based on an annual survey of subordinates’ evaluations about their managers. Tr. 30:6-19; Er. Exhs. 8 and 9. These specific items, as well as many of the

other criteria under which Assistant Chiefs are evaluated, are based on the performance and assessment of the entire team, and have the potential for management incentive bonuses. Tr. 30:20-24; 64:22-25.

Despite the evidence on the record, the Regional Director determined that Assistant Chiefs do not have the authority to assign because they do not assign shifts, work locations or vacation schedules as such assignments are controlled by the collective bargaining agreement between CPMC and the Union. Decision and Order at 20. However, under *Oakwood Healthcare*, even if such assignments are dictated by a collective bargaining agreement, a supervisor still has assignment authority for giving significant overall duties i.e., *tasks*, to an employee. *Oakwood Healthcare*, 348 NLRB at 689 (emphasis added). Further, the Regional Director found that Assistant Chiefs “merely assist the chief engineers in making work assignments” rather than having authority to give employees significant overall duties. Decision and Order 20. The Regional Director additionally stated that Assistant Chiefs’ assignment of work is based on routine decision making because the “work assignments are largely dictated by when and where the job must be performed and who is available that possesses the necessary skill to do it.” *Id.* These findings are contrary to the abundance of evidence on the record.

As discussed above, Assistant Chiefs assign many significant duties, or tasks, based on CPMC’s needs, such as critical maintenance repairs, which would qualify as authority to assign under the Board’s construction in *Oakwood Healthcare*. *Oakwood Healthcare*, 348 NLRB at 689 (finding that a charge nurse’s assignment of an employee to “certain significant overall tasks (e.g., restocking shelves) would generally qualify as ‘assign’ within [the Board’s] construction”). Additionally, Assistant Chiefs use their judgment in making assignments to determine which tasks to assign to which engineers, based on balancing the needs of the project and the skills of the engineers. Tr. 202:5-20. They also take the engineer’s workload into account, and have the authority to direct

engineers to stop projects that they are working on, and to begin work on different projects. Tr. 201:22-25; 202:21-23. In sum, Assistant Chiefs fulfill the supervisory requirements of assignment of under Section 2(11).

The Regional Director also determined that Assistant Chiefs do not have the authority to direct with independent judgment and that “assuming that they exercise the authority to direct with independent judgment, there is no evidence that they have been held accountable for their direction of the work of other engineers.” Decision and Order at 21. As discussed above, the determination of whether a putative supervisor has the authority to “responsibly direct” bargaining unit members is based on whether the supervisor 1) *directs* other employees to perform tasks, with the authority to take corrective action; and 2) is *accountable* for the performance of those tasks. *Oakwood Healthcare*, 348 NLRB at 692; *Golden Crest*, 348 NLRB at 730. The record evidence demonstrates that Assistant Chiefs have the authority to direct other employees to perform tasks, to direct work to be stopped, and to re-direct an employee’s continuation of work on a different project based on the Assistant Chief’s judgment. *See* Tr. 201:22-25, Tr. 202:5-20, Tr. 202:21-23. Moreover, Assistant Chiefs are held accountable for the work of other employees in the bargaining unit as evidenced by the criteria upon which they are measured, as outlined above. The consequences that Assistant Chiefs face in their performance evaluations based on 1) the performance and assessments of their subordinates; 2) customer satisfaction through their effective leadership of their engineering team; and 3) subordinates’ evaluations, among other criteria, is not “only paper accountability,” as the Regional Director states. Decision and Order 22. To the contrary, Assistant Chiefs face material ramifications for their performance in directing employees, as required by the Board’s test of accountability in this context. *See Golden Crest*, 348 NLRB at 731.

The Regional Director’s decision regarding Assistant Chiefs’ authority to responsibly direct the work of others also relied upon the authority to decide time off

requests. Decision and Order 21. In his Decision and Order, the Regional Director focuses on the fact that the record includes “only four time off requests” approved solely by an Assistant Chief, William Wong. *Id.* The Regional Director further relies on his conclusion that the decision to grant or deny time off requests “appears to involve only routine decision-making, and not the exercise of discretion and independent judgment.” *Id.*

The record evidence, specifically the testimony of Brian Cassel, a Chief Engineer at CPMC, demonstrates that Assistant Chiefs have the authority to decide to grant and deny time off to rank-and-file bargaining unit members and exercise this authority as needed. Tr. 215:15-25; 216: 1-13. While Chiefs are involved in the decision to grant and deny time off, the Chiefs can defer the decision of the Assistant Chiefs on this matter of authority. Tr. 216: 11-13. Further, the decision to grant or deny time off requests involves the exercise of discretion and independent judgment required under Section 2(11) of the Act and is not simply a routine decision, as found by the Regional Director. Decision and Order 21. Assistant Chiefs decide to grant or deny time off after considering the needs of the business and the work schedule and whether the time off would hinder the needs of the “critical facility” in which the Local 39 members work at CPMC. Tr. 215:15-25; 216: 1-13. The analysis required to make such time off decisions given the complications of managing a critical facility rises above that of routine decision making and exhibits the discretion and independent judgment that constitutes supervisory authority within the meaning of the Act.

**B. Secondary Factors Also Indicate That Assistant Chief Engineers Are Statutory Supervisors.**

While the Regional Director declined to find that the evidence of secondary indicia was sufficient to determine whether an individual is a “supervisor” within the meaning of the Act, secondary factors are instructive. Here, the secondary factors overwhelmingly support the exclusion of Assistant Chiefs from the bargaining unit.

One indicia of supervisory status is whether the individuals are physically set apart from other bargaining unit employees. *McClatchy Newspapers, Inc., Publisher of the Sacramento Bee*, 307 NLRB 773 (1992) (relying in part on the putative supervisors' access to supervisory offices). Here, Assistant Chiefs at all four campuses have their own private offices (or private work stations, at certain campuses), and each have their own computers with individual email accounts. Tr. 121:14-25; 123:12-19; 125:5-15; 126:5-7, 12-14, 18-20. Assistant Chiefs' private offices and work stations are set apart from the work stations of other, non-supervisory engineers in the bargaining unit. Tr. 122:11-17, 124:20-125:1; 125:21-126:1; 127:1-3. Non-supervisory engineers do not each have their own offices or computers; they are provided with general-use computers, which they share. Tr. 122:23-24; 125:2-4; 126:2-4; 126:15-17.

Another secondary factor is whether the individual attends management meetings, at the exclusion of other bargaining unit members. *See McClatchy Newspapers*, 307 NLRB at 773 (relying on putative supervisors' attendance at management meetings and training sessions). Assistant Chiefs attend meetings and trainings that other bargaining unit members are not invited to attend. For example, CPMC conducts an annual management training seminar for "supervisors, managers, directors and vice presidents." Tr. 56:2-10. Assistant Chief Engineers are invited. Tr. 56:11-16; 98:8-19; 323:1-11. However, rank-and-file stationary engineers are not invited. Tr. 323:6-9. Further, Assistant Chiefs attend a variety of training classes in order to learn and maintain management skills, such as "Employment Law for Managers and Supervisors," "Maintaining an Ethical Workplace and Business Environment: Compliance Guidance for Supervisors and Managers," "PSDP Objective Setting for Management Staff," and "Discipline and Investigations." Tr. 349:21-350:14.

Finally, another relevant secondary indicia is whether the putative supervisor receives different benefits from fellow employees, such as benefits reserved for management personnel. *North Shore Weeklies, Inc.*, 317 NLRB 1128 (1995); *McClatchy*

*Newspapers*, 307 NLRB at 773; *Trans World Airlines*, 211 NLRB 733 (1974). Here, Assistant Chiefs are eligible for “management incentive bonuses,” and have been eligible for these bonuses for at least the past six years. Tr. 25:25-26:17; *see also* Section III.A.3., *supra*. The other members of the bargaining unit are not eligible for these management incentive bonuses. *Id.*

**C. Historical Inclusion In The Bargaining Unit Is Irrelevant To The 2(11) Status Of Assistant Chief Engineers.**

During their case in chief, the Union presented testimony and documents establishing that Assistant Chiefs have been included in the bargaining unit at CPMC since the 1990-1993 collective bargaining agreement between CPMC and Local 39, which was the first contract signed by CPMC. Tr. 279:25-280:13; U. Exh. 5. The Union also presented testimony and evidence that prior to the existence of the CPMC corporate entity, the hospital facilities that now constitute CPMC had negotiated contracts with Local 39, including Assistant Chiefs in the bargaining unit. U. Exhs. 2 through 4. It is expected that the Union will urge the Board again to rest its decision on the historical inclusion of Assistant Chiefs. However, the Regional Director here did not rely on this historical evidence, nor should the Board do so on this request for review.

CPMC does not dispute that Assistant Chief Engineers were covered by prior collective bargaining agreements with Local 39. But past inclusion of job classifications in a bargaining unit is irrelevant. The only relevant issue is whether Assistant Chiefs exercise 2(11) supervisory functions. To exclude Assistant Chiefs at this stage would not undermine the collective bargaining relationship in any way in this situation, where the collective bargaining agreement had come to an end. *Cf. Ariz. Elec. Power Cooperative, Inc.*, 250 NLRB 1132, 1133 (1980) (noting that the Board may refuse to entertain unit clarification petitions filed during the middle of a contract term). Indeed, the parties expressly stipulated there was no contract bar. Tr. 7:7-13; Bd. Exh. 2.

In *Arizona Electric*, as in the instant case, the employer had voluntarily included

supervisors (load dispatchers) in the bargaining unit in the past. During the term of an existing contract, the employer withdrew recognition from the union for all the load dispatchers on the ground that they were supervisors. *Id.* at 1133. The Board held that it would not permit the employer to flout its obligation to bargain in good faith with the union, during the agreed-upon term of the parties' collective bargaining agreement. *Id.* at 1133-1134. However, the Board continued: "Of course, were the load dispatchers found to be supervisors or managerial employees, *Respondent's duty to bargain concerning them would terminate on the expiration of the current contract, provided that Respondent took appropriate steps at that time to contest their continued inclusion in the unit.*" *Id.* at 1134 n.10 (emphasis added).

Indeed, the Board has explicitly recognized that even in situations where disputed classifications have historically and voluntarily been included in the bargaining unit, the Board is *required* to exclude positions from the bargaining unit where the inclusion of those positions "would violate the principles of the Act." *Washington Post Company*, 254 NLRB 168, 169 (1981). For example, because the Act provides specifically for the exclusion of supervisors, the Board is required to exclude them. *Id.* Here, the contract had expired and CPMC then took the "appropriate steps" to contest the continued inclusion of Assistant Chiefs in the unit. Even though, like in *Brotherhood*, Assistant Chiefs have been included in the bargaining unit for years, their status as 2(11) supervisors compels their exclusion from the unit.

## VI. CONCLUSION

For the reasons stated above and based on consideration of the record as a whole, CPMC respectfully requests that review of the Regional Director's Decision and Order be granted and that the bargaining unit at issue be clarified to exclude as statutory

supervisors Assistant Chief Engineers, as was requested in CPMC's amended Unit Clarification Petition.

June 12, 2012

Respectfully submitted,



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**PROOF OF SERVICE**

1  
2 1. I am over eighteen years of age and not a party to this action. I am employed in the County  
3 of San Francisco, State of California. My business address is 3 Embarcadero Center, 7<sup>th</sup>  
Floor, San Francisco, CA 94111.

4 2. On June 12, 2012, I served the following document(s):

5  **REQUEST FOR REVIEW OF REGIONAL DIRECTOR  
6 DECISION AND ORDER DATED MAY 29, 2012**

7  The document(s) served are included in the attached List of Documents.

8 3.  I served the document(s) on the following person(s):

9 Kristina Hillman  
10 Weinberg, Roger & Rosenberg  
11 1001 Marina Parkway, Suite 200  
12 Alameda, CA 94501-1091  
13 Email: khillman@unioncounsel.net

14  The names, addresses, and other applicable information about the persons served is  
15 included in the attached Service List.

16 4. The documents were served by the following means:

17  **By U.S. mail.** I enclosed the document(s) in a sealed envelope or package addressed to the  
18 person(s) at the address(es) in Item 3 and (**check one**):

19  deposited the sealed envelope with the United States Postal Service, with the postage  
20 fully prepaid.

21  placed the envelope for collection and mailing, following our ordinary business  
22 practices. I am readily familiar with this business' practice for collecting and processing  
23 correspondence for mailing. On the same day the correspondence is placed for collection  
24 and mailing, it is deposited in the ordinary course of business with the United States Postal  
25 Service, in a sealed envelope with postage fully prepaid.

26 I am employed in the county where the mailing occurred. The envelope or package was  
27 placed in the mail at Los Angeles, California.

28  **By Overnight Delivery/Express Mail.** I enclosed the documents and an unsigned copy of  
this declaration in a sealed envelope or package designated by Federal Express addressed to  
the persons at the address(es) listed in Item 3, with fees prepaid or provided for. I placed the  
sealed envelope or package for collection and delivery, following our ordinary business  
practices. I am readily familiar with this business' practice for collecting and processing  
correspondence for express delivery. On the same day the correspondence is collected for  
delivery, it is placed for collection in the ordinary course of business in a box regularly  
maintained by Federal Express or delivered to a courier or driver authorized by Federal  
Express to receive documents.

**By Messenger Service.** I served the documents by placing them in an envelope or package  
addressed to the persons at the address(es) listed in Item 3 and providing them to a  
professional messenger service for service. (See Declaration of Messenger below.)

1  **By Facsimile Transmission.** Based on an agreement between the parties to accept service  
2 by facsimile transmission, which was confirmed in writing, I faxed the document(s) and an  
3 unsigned copy of this declaration to the person(s) at the facsimile numbers listed in Item 3  
4 on [type date], at [type time]. The transmission was reported as complete without error by a  
transmission report issued by the facsimile machine that I used immediately following the  
transmission. A true and correct copy of the facsimile transmission report, which I printed  
out, is attached hereto.

5  **By Electronic Service (E-mail).** Based on a court order or an agreement of the parties to  
6 accept service by electronic transmission, I transmitted the document(s) and an unsigned  
7 copy of this declaration to the person(s) at the electronic notification address(es) listed in  
8 Item 3 on June 12, 2012 before 5:00 p.m. PST. **(add, as applicable)**

9  The transmission of the document was reported as complete and without error by  
10 electronic receipt of a delivery confirmation, a true and correct copy of which is attached  
11 hereto.

12  I did not receive, within a reasonable time after the transmission, any electronic  
13 message or other indication that the transmission was unsuccessful.

14  **Via Court Notice of Electronic Filing.** The document(s) will be served by the court via  
15 NEF and hyperlink to the document. On [type date], I checked the CM/ECF docket for this  
16 case or adversary proceeding and determined that the person(s) listed in Item 3 are on the  
17 Electronic Mail Notice List to receive NEF transmission at the email addresses indicated in  
18 Item 3 [or on the attached service list, if applicable].

19  **STATE:** I declare under penalty of perjury under the laws of the State of California that the  
20 foregoing is true and correct.

21  **FEDERAL:** I declare that I am employed in the office of a member of the bar of this court  
22 at whose direction the service was made.

23 Dated: 6/12/12 Signature: Georgie M. Price  
24 Type or Print Name: Georgie M. Price

25 **DECLARATION OF MESSENGER**

26  **By personal service.** I personally delivered the envelope or package received from the  
27 declarant above to the persons at the addresses listed in Item 3. (1) For a party represented  
28 by an attorney, delivery was made to the attorney or at the attorney's office by leaving the  
documents in an envelope or package, which was clearly labeled to identify the attorney  
being served, with a receptionist or an individual in charge of the office or in a conspicuous  
place in the office, between the hours of nine in the morning and five in the evening.  
(2) For a party, delivery was made to the party or by leaving the documents at the party's  
residence with some person not younger than 18 years of age between the hours of eight in  
the morning and six in the evening. At the time of service, I was over 18 years of age. I am  
not a party to the above-referenced legal proceeding. I served the envelope or package, as  
stated above, on [type date].

I declare under penalty of perjury under the laws of the State of California that the foregoing  
is true and correct.

Dated: \_\_\_\_\_ Signature: \_\_\_\_\_  
Type or Print Name: \_\_\_\_\_