

Avante at Wilson, Inc. and United Food and Commercial Workers Union, Local 204, a/w United Food and Commercial Workers International Union, CLC,¹ Petitioner. Cases 11–RC–6495 and 11–RC–6496

October 31, 2006

DECISION ON REVIEW AND ORDER

BY MEMBERS SCHAUMBER, KIRSANOW, AND WALSH

On November 22, 2002, the Regional Director issued a Decision and Order in this proceeding (pertinent parts of which are attached as an appendix) finding that the petitioned-for licensed practical nurses (LPNs) and registered nurses (RNs), hereinafter “staff nurses,” are supervisors within the meaning of Section 2(11) of the Act because of their authority to discipline certified nursing assistants (CNAs) by ordering CNAs to leave the Employer’s facility, as well as their authority to adjust CNA grievances. The Regional Director accordingly dismissed the petitions.

Thereafter, in accordance with Section 102.67 of the National Labor Relations Board’s Rules and Regulations, the Petitioner filed a timely request for review of the Regional Director’s Decision and Order, contending that the staff nurses are statutory employees. The Employer filed a statement in opposition to the request for review. On July 21, 2004, the Board granted the Petitioner’s request for review.²

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

The Board has carefully considered the entire record in this case, including the parties’ briefs on review, and concludes, contrary to the Regional Director, that the Employer has failed to establish that staff nurses possess Section 2(11) authority with respect to disciplining CNAs by sending them home or adjusting CNA grievances. We therefore reinstate the petitions and remand these cases to the Regional Director for further appropriate action.

The Employer operates a nursing home in Wilson, North Carolina. The Employer and the Petitioner are parties to a collective-bargaining agreement that covers a unit of service and maintenance employees, including the CNAs. A facility administrator heads the Employer’s overall operations, and a director of nursing (DON) re-

ports to the facility administrator. Two unit managers report to the DON.³ The disputed staff nurses report to the unit managers, and the CNAs are subordinate to the staff nurses.

Staff nurses spend 50 percent of their time handling direct patient (resident) care and the remainder of their working hours dealing with residents’ families and doctors and with paperwork. Each staff nurse oversees the care of about 20 to 26 of the facility’s residents. Approximately 11 LPNs and 8 RNs served as staff nurses at the Employer’s facility at the time of the hearing. It is undisputed that there is no difference between the duties of the LPN staff nurses and the RN staff nurses. CNAs are responsible for performing personal care, such as bathing and feeding, on behalf of the facility’s residents. About 27 CNAs were employed at the Employer’s facility at the time of the hearing.

Section 2(3) of the Act excludes any individual employed as a supervisor from the definition of “employee.” Section 2(11) of the Act defines a “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.

Section 2(11) is read in the disjunctive and an individual therefore need possess only one of the enumerated indicia of authority in order to be a statutory supervisor, so long as the exercise of such authority is carried out in the interest of the employer and requires the use of independent judgment. *California Beverage Co.*, 283 NLRB 328, 328 (1987). The burden of proving supervisory status is on the party alleging that such status exists. *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 (1999).

In determining that staff nurses possess supervisory authority with respect to disciplining CNAs, the Regional Director found that “the act of sending someone home [for refusing to carry out an assignment] constitutes discipline,” and that staff nurses use independent judgment in deciding whether or not to send CNAs home. The record, however, contains scant evidence concerning staff nurses’ authority to send CNAs home. Neither the collective-bargaining agreement covering the CNAs nor the facility’s employee handbook refer to sending employees home or ordering employees to leave the facility

¹ We have amended the caption to reflect the disaffiliation of the United Food and Commercial Workers International Union from the AFL–CIO effective July 29, 2005.

² By the same order, the Board denied the request for review filed by the Employer, in which the Employer argued that the Regional Director erred in finding that the staff nurses do not have Sec. 2(11) authority with regard to assignment and responsible direction of CNAs.

³ The parties stipulated that the facility administrator, DON, and unit managers are statutory supervisors.

as disciplinary actions. When asked if she recalled a scenario where a staff nurse suspended a CNA for insubordination, Unit Manager Hope Barnes testified that she was “familiar with [staff nurses’] sending [a CNA] home” when the CNA refused to carry out work assignments, and that staff nurses do not have to check with their superiors before sending CNAs home. Phyllis Stephens, the facility’s DON, testified that when she served as a staff nurse for 3 months in the fall of 2000, she believed she had the authority to send a CNA home.

The above evidence does not meet the Employer’s burden of establishing supervisory status. First, the testimony is utterly lacking in specificity. See *Golden Crest Healthcare Center*, 348 NLRB No. 39, slip. op. at 5 (2006) (recognizing that “purely conclusory evidence is not sufficient to establish supervisory status,” and pointing out that the Board “requires evidence that the employee actually possesses the Section 2(11) authority at issue”); *Chevron Shipping Co.*, 317 NLRB 379, 381 fn. 6 (1995) (conclusory statements without supporting evidence do not establish supervisory authority); *Sears Roebuck & Co.*, 304 NLRB 193, 193 (1991) (same). Barnes said generally that she was familiar with staff nurses’ sending a CNA home, but she failed to particularize her testimony in any way, such as by specifying when any such incident took place, who was involved, what the alleged insubordination consisted of, whether higher-level managers had been consulted, or whether the situation was anything more than a one-time occurrence. Similarly, Stephens stated that she believed she had the authority to send CNAs home when she was a staff nurse, but she did not explain the basis of her belief (for example, that she had been told she had that authority by one of her superiors) or provide any examples of situations or details of circumstances where she or any other staff nurse actually ordered a CNA to leave the facility. Although Section 2(11) requires only possession of *authority* to carry out an enumerated supervisory function, not its actual exercise, the evidence still must suffice to show that such authority actually exists. On this record, the Employer has not so shown. And even assuming that the evidence was sufficient to show that the authority exists, it is insufficient to show that it was exercised with independent judgment, as required by Section 2(11).

Moreover, even assuming that staff nurses had the authority to send CNAs home for insubordination during the time periods when Barnes and Stephens were staff nurses, the Employer offered no evidence to show that the individuals working as staff nurses at the time of the hearing possessed that authority. Indeed, current staff nurses denied having any such authority. Staff Nurse Christina Ricketts testified that she had never been told

she had any authority to suspend or otherwise discipline CNAs. Staff Nurse Anne Mullins similarly affirmed that she was never informed by her superiors that she had any authority to discipline CNAs.

Because the record does not substantiate the Regional Director’s conclusions about the staff nurses’ authority to discipline CNAs by sending them home, we believe that the Regional Director erred in determining that staff nurses are statutory supervisors on that basis.

Turning to the issue of supervisory grievance-adjustment authority, the Regional Director grounded his conclusion that staff nurses adjust CNA grievances on the following: a collective-bargaining agreement provision stating that employees may present their complaints to their “immediate supervisors” for adjustment, and CNA Dorothea Lucas’ assertion that she understands her “immediate supervisor” to be a staff nurse; the LPN and RN job descriptions stating that the LPNs and RNs supervise CNAs, and the RN job description stating that RNs serve as the facility’s representative during the first step of the facility’s problem-solving process; and Unit Manager Barnes’ testimony that she personally resolved disputes between CNAs when she was a staff nurse.

Notwithstanding the existence of contractual and handbook provisions relating to grievance handling, however, the Employer provided no evidence to show that current staff nurses actually possess that authority through evidence of participating in the grievance-adjustment process. See *Golden Crest Healthcare Center*, 348 NLRB No. 39, slip op. at 5 (citing *Training School at Vineland*, 332 NLRB 1412, 1416 (2000) (“Job descriptions or other documents suggesting the presence of supervisory authority are not given controlling weight,” as the Board “insists on evidence supporting a finding of actual as opposed to mere paper authority.”)); *Heritage Hall, EPI Corp.*, 333 NLRB 458, 458–459 (2001) (acknowledging as well settled the principle that employees are not transformed into supervisors merely by virtue of their job titles or job descriptions). Both staff nurses who testified at the hearing—Ricketts and Mullins—said no superior has ever discussed with them any supposed authority to resolve CNA problems or adjust CNA grievances. Ricketts testified that only on a “rare” occasion does a CNA come to her to discuss a problem, and that in such an instance Ricketts usually tells the CNA to go speak with DON Stephens. The Employer proffered nothing to demonstrate that the testimony of Mullins and Ricketts is not representative of other staff nurses.

Additionally supporting the conclusion that the LPN and RN job descriptions do not accurately reflect the positions’ actual duties (and corresponding authority) is

the fact that, although the RN job description states that the RNs supervise the LPNs, the Employer stipulated at the hearing that the LPN and RN jobs are identical. Clear evidence of a significant inaccuracy renders the reliability of the LPN and RN job descriptions suspect.

The Regional Director placed undue emphasis on testimony by Unit Manager Barnes that CNAs take “any problems regarding other employees” to staff nurses, citing as an example a situation where a CNA who has been given a “hard time” by another CNA “will bring the issue to a staff nurse’s attention.” Barnes’ generalized testimony in this regard provides no evidence as to what, if anything, a staff nurse does when such incidents are allegedly brought to his or her attention. Merely being informed of a dispute between two CNAs does not indicate that staff nurses adjust or in any other way handle the problems at issue let alone establish the requisite independent judgment necessary to confer supervisory status. *Ken-Crest Services*, 335 NLRB 777, 779 (2001). In fact, Ricketts’ testimony discussed above suggests that staff nurses refer such disputes to the DON. In any event, Barnes is no longer a staff nurse. Her testimony reveals little about staff nurses’ current duties, particularly given the fact that it contains no reference to the time period or individuals involved.

We therefore find that the Employer failed to support with the requisite facts its position that staff nurses possess the authority to adjust grievances pursuant to Section 2(11) of the Act.

As we recently reiterated, “the Board . . . exercise[s] caution ‘not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied rights which the Act is intended to protect.’” *Oakwood Healthcare, Inc.*, 348 NLRB No. 37, slip op. at 3 (2006) (quoting *Chevron Shipping Co.*, 317 NLRB at 380–381). In sum, for the reasons explained above, we find that the Employer did not meet its burden of establishing that the staff nurses are statutory supervisors.⁴

ORDER

The petitions are reinstated and the cases are remanded to the Regional Director for further appropriate action.

⁴ We further note that, were we to find the staff nurses to be statutory supervisors, there would be an improbably high ratio of 22 supervisors to 27 employees. See *North Miami Convalescent Home*, 224 NLRB 1271, 1274 (1976) (in finding that the disputed LPNs were statutory employees, the Board noted that, were the LPNs determined to be Sec. 2(11) supervisors, there would be an “abnormal proportion” of 18 supervisors for 52 employees).

APPENDIX DECISION AND ORDER

The Employer, Avante at Wilson, Inc., a North Carolina corporation, operates a nursing home in Wilson, North Carolina, where it is engaged in providing residential nursing, housekeeping, and dietary services to its clients. The Employer and the Petitioner, United Food and Commercial Workers Union, Local 204, a/w United Food and Commercial Workers International Union, AFL-CIO, CLC, are now parties to a collective-bargaining agreement for a unit comprised of all full-time and regular part-time nursing assistants, orderlies, cooks, dietary employees, maintenance employees, ward clerks and central supply clerks, housekeeping and laundry employees and restorative nurses aides at the Employer’s Wilson, North Carolina facility. The contract is effective from November 1, 2001 through October 31, 2004.

The Petitioner has filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act in Case 11–RC–6495 seeking to represent a unit of all full-time and part-time licensed practical nurses at the Employer’s Wilson, North Carolina facility. Petitioner has also filed a petition in Case 11–RC–6496 seeking to represent a unit of all full-time and part-time registered nurses employed at the same facility. A hearing officer of the Board held a hearing and the parties filed briefs with me.

The parties agree and the record demonstrates that the licensed practical nurses and registered nurses all work in the position of staff nurse and, for all purposes relevant herein, their duties are indistinguishable. As evidenced at the hearing and in the briefs, the sole issue in this matter is the supervisory status of staff nurses. The Petitioner contends that staff nurses are not supervisors, whereas the Employer contends that they are supervisors, and that the petitions should be dismissed. The unit sought by the Petitioner in Case 11–RC–6495 has approximately 11 employees and the unit sought in Case 11–RC–6496 has approximately 8 employees.

I have considered the evidence and the arguments presented by the parties in regard to the supervisory status of staff nurses. As discussed below, I have concluded that staff nurses possess the authority to discipline employees and to adjust grievances, and are, therefore, supervisors under Section 2(11) of the Act. I shall, therefore, dismiss the petitions. To provide a context for my discussion of this issue, I will first provide an overview of the Employer’s operations. Then, I will present in detail the facts and reasoning that support my conclusion.

I. OVERVIEW OF OPERATIONS

The Employer operates a 110-bed nursing home facility that is routinely at full capacity. In charge of the operation is an Administrator to whom a number of departments heads or directors report. The Director of Nursing (DON) is the department head with overall responsibility for the staff nurses at issue. Below the DON are nurses holding the position of Assistant Director of Nursing (ADON), Weekend Supervisor and Unit Manager. At hearing, the parties stipulated that nurses holding those positions are supervisors.

The Employer houses its patients on two wings denoted “A” and “B” and on a hallway connecting the two wings, which is referred to as the cross-hall. The A and B wings are further subdivided into halls called “A front and back,” and “B front and back.” Staff nurses work 12-hour shifts, either 7 a.m. to 7 p.m. or 7 a.m. to 7 p.m. On the day shift, one staff nurse is assigned to each hallway location. On the night shift, one staff nurse is assigned to each wing, and one staff nurse, also called a lead nurse, is assigned to the cross hallway.³ Staff nurses spend approximately 50 percent of their working time providing direct patient care to from 20 to 26 patients. Specifically, staff nurses check each of their assigned patients every two hours, medicate patients at least three times per shift and treat their patients’ wounds, if necessary. The rest of a staff nurse’s time is spent dealing with family members, with certified nursing assistants (CNAs) and in completing paperwork.

CNAs, who are in the bargaining unit governed by the collective-bargaining agreement referred to above, work 8-hour shifts from 7 a.m. to 3 p.m.; 3 to 11 p.m.; and 11 p.m. to 7 a.m. Generally, 12 CNAs are assigned to work from 7 a.m. to 3 p.m.; 8 CNAs are assigned to work from 3 to 11 p.m.; and 7 CNAs are assigned to work from 11 p.m. to 7 a.m. Some CNAs have permanent assignments and routinely care for patients in one hallway in specific rooms, while other CNAs are designated as floaters. CNAs spend 90 percent of their working time bathing, grooming, feeding, transporting and taking the vital signs of patients. A staff nurse has no authority to change any given CNA’s permanent assignment, although she may change a CNA’s assignment during a given shift in response to staffing or patient needs.

On weekdays, the DON, ADON, and one of the unit managers are routinely present in the facility until 5 p.m. During weekends, a weekend supervisor is present from 7 a.m. to 7 p.m. Thus, none of the stipulated statutory supervisors are routinely present in the facility from 5 p.m. to 7 a.m. during weekdays and from 7 p.m. to 7 a.m. during weekends. However, there is always an on-call nurse, drawn from the ranks of department heads and the stipulated supervisors, available to the staff nurse for consultation regarding staffing or other problems by cell phone or beeper. Also, the DON is available by cell phone or beeper at all times.

II. STATUS OF STAFF NURSES

Before examining the specific duties and authority of staff nurses, I will briefly review the requirements for establishing supervisory status. Section 2(11) of the Act defines the term supervisor as “any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the

³ “Lead nurses” who work the night shift, earn \$.50 more per hour than other staff nurses. Because they are assigned to the cross-hall, they have a lighter patient load than the wing nurses do. To make up for this disparity in patient load, the lead nurse makes one round on each of the wings. Other than that, there is no evidence in the record that lead nurses have any other duties that are distinguishable from the duties of other staff nurses.

foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” To meet this definition, a person needs to possess only one of the 12 specific criteria listed, or the authority to effectively recommend such action. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir.), cert. denied 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. *Harborside Healthcare*, 330 NLRB 1334 (2000). The burden of proving supervisory status lies with the party asserting that such status exists. *Kentucky River Community Care, Inc.*, 532 U.S. 706, 711–712 (2001). Lack of evidence is construed against the party asserting supervisory status. *Michigan Masonic Home*, 332 NLRB 1409, 1409 (2000). Possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory status even if this authority has not yet been exercised. See, e.g., *Pepsi-Cola Co.*, 327 NLRB 1062, 1063 (1999); *Fred Meyer Alaska, Inc.*, 334 NLRB 646, 649 fn. 8 (2001). However, the absence of evidence that such authority has been exercised may be probative of whether such authority exists. See *Michigan Masonic Home*, supra at 1411; *Chevron U.S.A.*, 308 NLRB 59, 61 (1992).

With regard to whether the staff nurses possess any of the 12 criteria listed in Section 2(11), the parties stipulated that the staff nurses do not have the authority to hire, promote, lay off, recall or discharge employees. The Employer asserts, however, that staff nurses have the authority to assign, discipline, and responsibly direct CNAs and to adjust their grievances. In addition, the Employer asserts that staff nurses have the authority to reward CNAs by providing input into CNA evaluations that may affect whether a probationary CNA is hired as a permanent employee. Accordingly, I will discuss the authority of the staff nurse in assignments, responsible direction, discipline, adjustment of grievances, and rewarding of CNAs.

C. Discipline

A unit manager, who had held various positions including staff nurse, ADON and DON, testified that a CNA would be guilty of insubordination if she were to fail to heed the direction of a staff nurse. The unit manager further testified that the Employer tells CNAs throughout their employment, including during in-service training, that they are required to follow the instructions of staff nurses. In the context of testifying about discipline for insubordination, the unit manager further testified that, although a staff nurse did not have the authority to issue a formal written suspension, she did have the authority to send a CNA home for refusing to carry out work assignments, without getting prior approval from a higher level manager. Citing no specific examples, the unit manager stated that she knew that staff nurses had sent CNAs home for refusing to carry out work assignments.

In addition, the unit manager stated that other discipline of a CNA might begin with a staff nurse’s report to the DON or to a unit manager stating that the CNA did not complete her duties on time or had failed to timely perform a procedure that the

staff nurse ordered her to perform. Thereafter, however, the staff nurse would have no further input in the decision process.

Based on the foregoing, I find that the record contains sufficient evidence to establish that staff nurses possess the authority to discipline CNAs and that they exercise independent judgment when they impose that discipline. This conclusion requires analysis, in the first instance, of whether the act of sending someone home constitutes discipline, as well as whether the circumstances under which the staff nurse is authorized to send a CNA home reflect the use of independent judgment.

I find that the authority to send an employee home as a consequence of that employee's refusal to carry out a work assignment reasonably constitutes the authority to discipline employees, despite whether that action constitutes a formal suspension under a disciplinary procedure. Cf. *Leisure Chateau Care Center*, 330 NLRB 846 (2000) (in finding LPN and RN charge nurses not to be supervisors, Board distinguishes facts relied upon by the Third Circuit in *Passavant Retirement & Health Center v. NLRB*, 149 F.3d 243 (3d Cir. 1998), denying enfd. 323 NLRB 598 (1997); Board notes that nurses in *Passavant* had the disciplinary authority to send aides home for flagrant misconduct and had the authority to resolve minor problems and gripes). The authority to impose the consequence of separation from employment, even for the balance of one day, logically serves a disciplinary function when it is imposed for a refusal to carry out a work assignment.

In regard to independent judgment, the Board has held that when a staff nurse is authorized to send an aide home only when the aide has engaged in flagrant misconduct, the staff nurse is not exercising independent judgment in making that decision. See, e.g., *Northcrest Nursing Home*, 313 NLRB 491, 497-98 (1974), quoted in *Passavant Retirement & Health Center*, supra, 149 F.3d at 248. See also *Green Acres Country Care Center*, 327 NLRB 257 (1998). This rationale is predicated on the theory that the decision to send an aide home in those circumstances simply constitutes an automatic consequence for particularly bad behavior. In the present case, however, the record establishes that staff nurses are empowered to send a CNA home for refusing to carry out any given assignment. Thus, the discretion of the staff nurse is not limited by a requirement that the offending conduct must be flagrant or involve patient abuse before a staff nurse is authorized to send a CNA home. The present case, then, does not come within the Board's rationale concerning the impact of a limitation on the charge nurse's discretion in deciding to send a CNA home.

I find that the record supports the conclusion that staff nurses exercise the supervisory authority to discipline CNAs when they send them home for refusing to carry out a work assignment, and that the decision to do so is informed by the use of independent judgment.

D. Adjustment of Grievances

The record establishes that staff nurses possess the authority to adjust grievances, both through documentary evidence and testimony. The cornerstone of the documentary evidence is the collective-bargaining agreement covering the CNAs. A provision of this contract specifically provides that employees may

present certain complaints or problems to their immediate supervisor for adjustment. The Union's chief steward, a CNA, confirmed that she understood that the "immediate supervisor" of CNAs would be the staff nurse. This understanding is buttressed by the job descriptions of RN and LPN staff nurses, which provide that they supervise CNAs. In addition, the job description of the RN staff nurse specifically provides that he or she is to serve as the "facility's representative during the first step of the facility's problem-solving procedure." Because staff nurses are the immediate supervisors of CNAs, then, they have the authority under the Employer's formal complaint procedure to adjust grievances or problems of CNAs.⁴ This conclusion is further buttressed by the testimony of the unit manager, who testified that when she was a staff nurse, she personally had resolved disputes between CNAs. The Petitioner contends on brief that staff nurses have no supervisory authority to adjust grievances, although they "may try to informally resolve disagreements." Further, the Petitioner apparently argues that the Employer has not met its burden to prove that staff nurses have the authority to adjust grievances. In support of this argument, the Petitioner cites *Audubon Regional Medical Center*, 331 NLRB 374, 449 (2000) for the proposition that the Board has found proof of supervisory authority insufficient when there is reliance on job descriptions rather than the actual duties performed. The Petitioner also relies on *Northern Montana Health Center*, 324 NLRB 752, 754 (1997), for the proposition that summary assertions that employees have supervisory authority without providing specific examples of the exercise of such authority is insufficient to prove supervisory status.

I find the foregoing cases to be inapposite to the analysis here. As an initial matter, the reference to *Audubon Regional Medical* is misplaced, as the cited section simply contains the ALJ's recital of a party's position in that case, a position predicated upon an earlier decision of the Board in *Sunset Nursing Homes*, 224 NLRB 1271 (1976). In that latter case, the Board closely analyzed the facts when a job description provided that LPNs had the authority to make "effective recommendations" concerning a variety of matters, including hiring, discharges, suspensions, promotions, layoff, transfers, pay increases, and vacancies. The date of origin of the job description was questionable, and the Board noted that "oddly enough, the job description did not mention what would be considered the LPN's normal duties" related to patient care. *Id.* at 1272. Even with its apparent concern about the bona fides of the documentary evidence, the Board, nevertheless, found that the case presented a close issue when it concluded that the job description simply was not dispositive of the supervisory determination. *Id.*

In the present case, by contrast, the documentary evidence includes both the parties' collective-bargaining agreement and the employee handbook, as well as job descriptions that contain specific outlines of a full range of duties. The testimony includes that of the Petitioner's own witness and Chief Steward, who confirmed that staff nurses serve as the immediate supervi-

⁴ Although job title and the perception of supervisory status often function as secondary indicia of supervisory status, here those factors also serve to actually identify the role of staff nurses in an ongoing process of the facility, that is, the grievance adjustment procedure.

sors of CNAs on the floor. For these reasons, the Board's holding in *Sunset Nursing Homes* does not compel a conclusion that the staff nurses here are not supervisors. Similarly, the present case is distinguishable on the same grounds from *Northern Montana Nursing Home*, as the record evidence here contains both documentary and testimonial evidence concerning the actual authority and role of staff nurses in adjusting grievances as participants in the Employer's grievance or complaint adjustment procedure.

Finally, the foregoing conclusion is not undermined by the testimony of Petitioner's witness, a staff nurse, who stated that she had never adjusted any grievances. To establish the existence of supervisory authority, it is not necessary that all individuals in the disputed classification have exercised their actual authority. *Pepsi-Cola Co.*, 327 NLRB 1062, 1063 (1999).

Based on the foregoing, I find that the Employer has met its burden in establishing that staff nurses possess the authority to adjust grievances and that the record amply supports the finding of supervisory status under Section 2(11) based on this statutory indicium.

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F. Secondary Indicia

It is settled that secondary indicia, including the individual's job title or designation as supervisor, as well as the perception of others that the individual is a supervisor, may be used in making supervisory determinations when evidence of primary indicia is present. See, e.g., *Monarch Federal Savings and Loan Association*, 237 NLRB 844 (1978) (secondary indicia may inform supervisory determination when evidence of primary indicia is present); *Flex-Van Service Center*, 228 NLRB 956 (1977) (same). Thus, the foregoing findings regarding the primary statutory indicia of authority to discipline and to adjust

grievances are buttressed by the secondary indicia of job title, which is contained in the staff nurses' job description, as well as by the perception of both CNAs and management that staff nurses supervise CNAs.

Additional secondary support for the supervisory finding comes from the role of the staff nurses in adjusting CNA time records. CNAs routinely clock in and out, but in the event that a CNA fails to do so, a staff nurse corrects the timecard using an "E-time Correction/Adjustment Form," which she signs on a line denominated "Supervisor Signature."

III. CONCLUSION

The evidence does not sufficiently establish that staff nurses use independent judgment in making and adjusting CNA assignments and in directing the work of CNAs. Nor does the record establish that staff nurses have the authority to reward employees through the evaluation process. The record does establish, however, that staff nurses have the authority to discipline a CNA for insubordination by sending the CNA home upon a refusal to follow a direct order. The record further establishes that, as the Employer's representative at the first step of the grievance procedure in dealing with a CNA's grievance or complaint, the staff nurse has the authority to adjust grievances. In addition, the conclusion that staff nurses possess Section 2(11) authority is buttressed by secondary indicia, including designation of staff nurses as supervisors and the perception that staff nurses supervise CNAs.

Accordingly, I find that the Employer, as the party asserting supervisory status, has met its burden to prove that the staff nurses possess statutory indicia of supervisory authority in the areas of discipline and adjustment of grievances. Therefore, I find that the staff nurses are supervisors as defined by Section 2(11) of the Act, and I shall dismiss the petitions.