Berthold Nursing Care Center, Inc. d/b/a Oak Park Nursing Care Center *and* United Food and Commercial Workers Union Local No. 655.[1]
Case 14–RC–12485

September 26, 2007

DECISION ON REVIEW AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS KIRSANOW AND WALSH

On March 19, 2004, the Regional Director for Region 14 issued a Decision and Direction of Election, in which he found appropriate the petitioned-for unit of full-time and regular part-time licensed practical nurses (LPNs) at the Employer's facility in St. Louis, Missouri. The Regional Director rejected the Employer's contention that the LPNs should be excluded as supervisors within the meaning of Section 2(11) of the Act.

Thereafter, pursuant to Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, the Employer filed with the Board a timely request for review of the Regional Director's Decision. By Order dated April 20, 2004, the Board granted the Employer's request for review.[2]

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

After careful consideration of the entire record, we find, contrary to the Regional Director, that the LPNs are statutory supervisors by virtue of their authority to discipline, and effectively recommend discipline of, employees. Accordingly, the petition is dismissed.

I. FACTS

The Employer operates a long-term care facility in St. Louis, Missouri. The administrator is in charge of overall operations. Under the administrator, the hierarchy is as follows: director of nursing (DON), assistant director of nursing (ADON), department heads, charge nurses (LPNs and registered nurses (RNs)), certified nursing assistants (CNAs), and certified medical technicians (CMTs).

The facility's seven department heads are stipulated supervisors. The eight nondepartment head LPNs and three nondepartment head RNs are classified as charge nurses. There are a total of 36 CNAs and 4–5 CMTs.

The facility operates out of two stations: station A (A wing and an Alzheimer's unit), and station B (B wing). The LPNs and RNs are assigned to one of the two stations for one of three shifts: day, evening, or night. Station A usually utilizes one RN or one LPN charge nurse, one CMT and three to four CNAs. Station B has either two LPNs or one LPN and one RN charge nurse, one CMT and three CNAs.

The DON organizes and coordinates the day-to-day activities of the nursing department. The ADON has the responsibility for scheduling the nursing department employees. The LPNs, CNAs, and CMTs provide medical care to the residents. The LPNs monitor the activities of the CNAs and CMTs to ensure that residents are receiving proper care in accordance with Federal, State, and local regulations. Additionally, LPNs make "action" rounds on their shift in order to check on the residents' care; make notations on action communication sheets if any problems are found during their rounds; chart resident care; administer medications; and keep in contact with physicians. The CNAs provide daily care to residents. The CNAs bathe, clothe, and feed residents. They also take residents' temperature and weight, rotate patients in bed, and transfer residents.

All employees must adhere to the Employer's rules of conduct, as set forth in the personnel handbook. Failure to comply with these rules of conduct or policy and procedure will result in disciplinary action pursuant to the Employer's progressive disciplinary policy. That policy dictates that the first offense will result in a written verbal warning; the second offense will result in a written warning or suspension; and the third offense will result in a written warning with 1–3 days of suspension without pay, or termination. The listed offenses include, but are not limited to, habitual tardiness, poor personal hygiene, and abuse of residents' rights. The Employer's personnel handbook states the following:

> In each of the above offenses, a written *EMPLOYEE COUNSELING FORM* shall be used and signed by 1) the immediate supervisor, 2) a witness, [and] 3) the employee. The employee has the opportunity to respond in writing on the *EMPLOYEE COUNSELING FORM*. . . . All *EMPLOYEE COUNSELING FORMS* are sent to the Administrator for review and signature. [Emphasis in the original.]

The LPNs have the authority to fill out employee counseling forms. If an LPN finds an issue with the care given to a resident, she will verbally counsel the CNA who is in charge of that resident's particular care or she will fill out an employee counseling form on that CNA. LPNs do not need approval from their superior to fill out

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

[2] By the same Order, the Board denied that portion of the Employer's request for review which claimed that the Regional Director erred in finding that there was insufficient evidence to determine whether the LPN in-service coordinator was a supervisor or managerial employee, and that registered nurses need not be included in the petitioned-for unit because they are professional employees.

the form. Once an LPN fills out a counseling form, she gives it to either the DON or ADON, who will in turn present it to the CNA. The CNA is then asked to sign the form and is given the option to write a personal comment on the form. Sometimes the DON or ADON will request a conference with the LPN charge nurse and CNA to discuss the counseling form. The DON or ADON will impose the type of disciplinary action that needs to be taken against the employee in question, and then will place the form in the CNA's personnel file.

II. ANALYSIS

We find, contrary to the Regional Director, that the LPNs exercise independent judgment in disciplining, and effectively recommending discipline.[3] Under Section 2(11) of the Act, individuals are supervisors if they have the authority, in the interest of the employer, to discipline other employees, 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. *Oakwood Healthcare, Inc.*, 348 NLRB 9 (2006); *Arlington Masonry Supply,* 339 NLRB 817, 818 (2003). The burden of proving that an individual is a supervisor rests on the party alleging such status. *Arlington Masonry*, supra.

While the Regional Director found that the LPNs do have the authority to fill out employee counseling forms, he concluded that the LPNs' role in doing so was merely a reportorial role that did not evince any supervisory authority. His finding in this respect was based, in large part, on his determination that the counseling forms neither constitute discipline, nor automatically lead to discipline. Contrary to the Regional Director, however, it is clear that the counseling forms are a form of discipline because they lay a foundation, under the progressive disciplinary system, for future discipline against an employee. See *Promedica Health Systems*, 343 NLRB 1351 (2004), enfd. in relevant part 206 Fed. Appx. 405 (6th Cir. 2006), cert. denied 127 S.Ct. 2033 (2007).[4] For at least two CNAs, Freddie Kendricks[5] and Mark Mack, the progressive disciplinary process, which was initiated by LPNs filling out employee counseling forms, resulted in discharge and suspension, respectively.

LPN Sheila Carter filled out a counseling form on Kendricks on June 28, 2002. The counseling form indicated that Kendricks failed to, among other things, get a resident up when asked. According to the form, this was Kendrick's first offense, and the action taken against him was a verbal warning. Two days later, Carter filled out another employee counseling form on Kendricks. Among the reasons cited for the form were Kendricks' refusal to make rounds and leaving patients soiled. The form indicated that this was Kendrick's second offense, and he received his second verbal warning. The following year, in January of 2003, LPN Humphrey filled out a counseling form on Kendricks. The form was written because Kendricks was sleeping while on the job and engaged in poor patient care. Kendricks refused to sign this form.[6] Friday Marshall, the DON at the time, noted on the form that Kendricks was suspended, pending investigation, on January 30, 2003, and then terminated on February 15, 2003.

The Regional Director refused to rely on this evidence because "[a]ccording to the handbook, the second counseling form should have resulted in a written warning or suspension. The DON or ADON, however, determined the second counseling form would only be considered a second *verbal* warning." We find it irrelevant that the second counseling form resulted in a second verbal warning as opposed to a written warning or suspension. Rather, what is relevant is that, under the progressive disciplinary process, the counseling forms laid the foun-

[3] In light of our finding in this respect, we find it unnecessary to pass on the Regional Director's additional findings that the LPNs do not have the authority to send CNAs home, suspend or terminate CNAs, or evaluate CNAs within the meaning of the Act.

[4] In *Promedica*, an unfair labor practice case, the employer argued that it had not violated Sec. 8(a)(3) of the Act by issuing coachings to certain employees directed at their union activity. The employer argued that the coachings were not disciplinary actions. The Board disagreed, and explained

> that coachings play a significant role in the [r]espondents' progressive disciplinary process. Thus, if an employee has received a coaching or counseling for a particular infraction, that coaching or counseling is taken into consideration in determining whether further discipline is warranted, and the nature of that discipline, for future infractions. The Board has found that warnings and reprimands of this nature are part of a disciplinary process in that they lay "a foundation for future disciplinary action against [the employee]." *Trover Clinic*, 280 NLRB 6, 16 (1986).

343 NLRB at 1351.

Our colleague contends that *Promedica* is not relevant because it was an unfair labor practice case and not a representation case and did not present the issue of supervisory status. Our colleague misunderstands the case. While *Promedica* may indeed have been an unfair labor practice case, the salient issue involved whether coachings were *disciplinary*, and thus could be considered "discrimination" under Sec. 8(a)(3) of the Act. It was the determination of whether an action was disciplinary that was of importance in that case. Therefore, *Promedica* is instructive on what constitutes discipline, the definition of which should not change irrespective of the type of case involved. Here, we must also determine if the nurses are involved in *discipline*. Because it is plain that the counseling forms lay the "foundation for future disciplinary action" against an employee, we find that they do in fact constitute discipline.

[5] While there is uncertainty in the record as to whether the CNA's name is Freddie Kendricks or Freddie Fredericks, we will follow the Employer's lead and refer to this employee as Freddie Kendricks.

[6] Kendricks also refused to sign the two previous counseling forms.

dation for the ultimate adverse action against Kendricks—termination. Moreover, the first and second forms were given to Kendricks on the same day, July 5, 2002. We agree with the Employer that it is more plausible to infer from these facts that the more severe discipline, i.e., a written counseling, would be unnecessary in circumstances where the employee failed to receive the verbal counseling in advance of the next step in the policy.

As to CNA Mack, LPN Bonita Steele filled out an employee form on him for patient neglect on June 11, 2003. The form indicates that Mack was sent home that day and asked to return the following day, and that the next violation would result in suspension. Approximately 1 month later, LPN Steele filled out another employee counseling form on CNA Mack—this time for poor patient care and neglect. The form indicated that this was Mack's third offense and that the "CNA has had a previous write-up along with verbal warning." The form also stated that "[a]ny further counseling of this nature will result in termination of CNA position. Sent home this shift for poor work performance . . . failure to complete action rounds." The next violation, according to the counseling form, would result in discharge.

The Regional Director discounted Mack's counseling forms because, inter alia, the DON, not the LPN, completed the "resolution/action taken" sections of the forms. However, LPN Steele testified, without contradiction, that she filled in the "reason" portion of the second form, which states that, the "CNA has had a previous write-up along with verbal warning." Thus, by noting Mack's previous write-up, the LPN was laying the foundation for the discipline that Mack was to receive.

Accordingly, the examples above convince us that the counseling forms do constitute a form of discipline because they not only affect an employee's job status, i.e., suspension or discharge, *Wedgewood Health Care*, 267 NLRB 525, 526 (1983); *Northwoods Manor, Inc.*, 260 NLRB 854, 855 (1982), but they also lay the foundation for future discipline. *Promedica*, supra at 1351.

Moreover, the LPNs here have the discretion to document employee infractions on the counseling forms. In this respect, the LPNs alone decide whether the conduct warrants a verbal warning or written documentation. Because the LPNs here have the discretion to write-up infractions on employee counseling forms, we believe that they are vested with the authority to exercise independent judgment in deciding whether to initiate the progressive disciplinary process against an employee. See *Oakwood Healthcare*, supra, slip op. at 10 ("the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices.").

There is also evidence that the LPNs have the authority to effectively recommend discipline. LPN Sheila Carter recommended to former DON Friday Marshall that CNA Shimeka Simpson not work during the weekend after Simpson refused to clean a resident. It appears that, without independently investigating Carter's recommendation, Marshall suspended Simpson for the weekend without pay.[7] Also, former LPN Gloria Blissit testified that she had recommended to current DON, and former ADON, Mercedes Shobe, that CNA Cynthia Shurn be sent home after she neglected to check on her patients. Shobe, without independently investigating the incident, sent Shurn home.[8] In view of these incidences, we find that the LPNs exercise independent judgment in effectively recommending discipline. See *Mountaineer Park, Inc.*, 343 NLRB 1473 (2004); *Progressive Transportation Services*, 340 NLRB 1044 (2003).

Citing *Jochims v. NLRB*, 480 F.3d 1161 (D.C. Cir. 2007), reversing *Wilshire at Lakewood*, 345 NLRB 1050 (2005), our dissenting colleague asserts that the charge nurses' authority to complete counseling forms and its resulting discipline fails to establish the charge nurses' supervisory authority to discipline or effectively recommend discipline.

We recently addressed this same contention by our colleague in *Sheraton Universal Hotel*, 350 NLRB 1114 (2007). There we noted, as we do here, that *Jochims* was distinguishable:

> In *Jochims*, the individual at issue, a nurse, had authority to document infractions affecting residen-

[7] Marshall, the Petitioner's witness, testified, in general, that she would make "the final decision, regardless of [a charge nurse's] recommendation, because . . . [she was] the objective party." However, Marshall did not testify to this specific instance concerning charge nurse Carter's recommendation. Carter, however, pointedly testified that Friday Marshall accepted her recommendation with respect to CNA Simpson.

[8] Our dissenting colleague states that it is not possible to conclude that Blissit made an effective recommendation here because ADON Shobe and the DON spoke with the CNA for 20 minutes before sending her home. However, Blissit's testimony reflects that it is normal practice for the DON or ADON to explain to the CNAs why they are receiving the counseling form. In fact, as stated above, the DON or ADON will present to the CNA the form itself, and will attempt to obtain the CNA's signature on the form at that time. Such a meeting does not equate to an independent investigation. It may be that during this time the CNA will offer her "side of the story"; however, the meeting's purpose is to present the counseling form, i.e., the *disciplinary* form, to the CNA. Moreover, the counseling form for CNA Cynthia Shurn specifically states that she was "sent home *per charge nurse* for the remainder of shift." (Emphasis added.) Contrary to our colleague, this leaves no room for doubt that Blissit's recommendation that Shurn be sent home was accepted by the ADON and DON.

> tial care at her discretion. Supra at 1165. Those writeups would be placed in employees' files for review by management, and management would then decide whether any disciplinary action was warranted. Id. Therefore, the nurse's writeups contained no recommendation for discipline; the decision to discipline rested entirely with management.
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> . . . Initially, we note that *Jochims* is not on point. The court's holding made clear that its decision does not apply to the present case. The court stated that "this case is not about petitioner's involvement in a 'system' of progressive discipline." Id. at 1169. Finding that the Board had not relied on such a system in its underlying decision, the court dismissed the assertion on appeal as a post-hoc rationalization outside the scope of its review. This case, however, does concern the [Employer's] progressive disciplinary system.

Supra at slip op. 4.

Moreover, in *Jochims*, the connection between the writeups prepared by the nurse and any disciplinary action against an employee was attenuated. While the forms had been retained in the employee's personnel file, the court found that they presented only the possibility of discipline. There was no evidence that they were a prerequisite to discipline or routinely resulted in discipline. Supra at 1170. In this case, however, the counseling forms themselves are an integral part of the Employer's progressive disciplinary system in that they are used to document each phase of the disciplinary process and routinely result in actual discipline. See also *Sheraton Universal Hotel*, supra.

Our colleague further relies on *Vencor Hospital-Los Angeles*, 328 NLRB 1136 (1999), to establish that "the principles discussed in *Jochims*" are applicable "even where the write-ups involved are part of a progressive disciplinary process." That case, however, is also distinguishable. There, the Board declined to find that the issuance of verbal warnings, which were reduced to writing and placed in the employee's personnel file, established supervisory authority to effectively recommend discipline. The Board relied on the fact that the disputed employees did not make any recommendations as to discipline; upper management would not act on the reported incidents without conducting an independent investigation; and the absence of evidence as to how the report impacted employees' job status or tenure. Here, by contrast, LPNs Sheila Carter and Gloria Blissit made explicit recommendations of discipline for CNAs Shimeka Simpson and Cynthia Shurn, respectively.[9] Moreover, the evidence shows that it is common practice for the DON and/or ADON to meet with the CNA to discuss the content of the counseling form. In terms of impacting employees' job status, the forms can result in suspension without pay, and/or ultimately job termination, as shown above.

In view of the foregoing and the record as a whole, we find that the LPNs exercise disciplinary authority in the interest of the Employer, which requires the use of independent judgment. We therefore find that the Employer's LPNs are supervisors within the meaning of Section 2(11) of the Act, and that the unit which the Petitioner seeks to represent does not contain any employees. Accordingly, we shall dismiss the petition.

ORDER

The petition is dismissed.

MEMBER WALSH, dissenting.

The authority to fill out counseling forms, without more, does not constitute supervisory authority to discipline. Not only is that proposition settled law, but the Board was recently taken to the woodshed by a reviewing court for ignoring it. See *Jochims v. NLRB*, 480 F.3d 1161 (2007), reversing *Wilshire at Lakewood*, 345 NLRB 1050 (2005).[1] The majority has ignored it once again in this case. Contrary to my colleagues, the Regional Director correctly determined that the licensed practical nurses (LPNs) in this case are employees, not supervisors, and are entitled to representation under the Act. Accordingly, I dissent.

I. FACTS

The LPNs at this long-term care facility are authorized to issue employee counseling forms to the certified nursing assistants (CNAs). In the appropriate section of the form, an LPN describes the conduct at issue, but she typically does not complete the "resolution/action taken" section. Nor does she typically check one of the boxes to indicate what disciplinary action will be taken for future offenses. Even when the box is checked, it does not necessarily mean what it says: the LPNs occasionally use the form to indicate the discipline currently being issued rather than the discipline for future offenses.

[9] See also *Progressive Transportation Services*, supra at 1046 fn. 7, where the Board distinguished *Vencor* on a similar basis.

[1] In a far from run-of-the-mill decision, the court stated that "the Board's judgment in this case rests on nothing. Obviously, such a judgment must fail both for want of reasoned decisionmaking and a lack of substantial evidence." Id. at 1174. This is the second time in recent weeks that a Board majority has ignored that decision in an on-point case. See my dissent in *Sheraton Universal Hotel*, 350 NLRB 1114 (2007).

The LPNs also do not typically complete the section of the form indicating whether it is the offending employee's first, second, or third incident. That is because the LPNs lack access to the employees' personnel files when they are filling out the counseling forms. The only way an LPN might be aware of any previous counselings is if the particular LPN had written up the same CNA in the past.

The counseling form does not contain a section for the LPNs to make disciplinary recommendations to higher authority. An LPN completes her portion of the form and then gives it to the director of nursing (DON) or the assistant director of nursing (ADON), who decides what level of discipline to issue before the form is given to the CNA. Although the Employer maintains a progressive disciplinary system, the record demonstrates that the DON and ADON have the discretion to depart from that system, as exemplified by the discipline of employee Freddie Kendricks. When Kendricks received a second counseling form, the progressive disciplinary system stipulated that he receive a written warning or suspension. On that occasion, however, the DON or ADON opted to give Kendricks only a second verbal warning. There is also evidence of at least one instance in which the ADON decided not to issue a counseling form filled out by an LPN after talking to the CNA and other witnesses involved.

On those facts, the Regional Director concluded that the record fails to establish that the LPNs take any disciplinary action or make any disciplinary recommendations that are accepted without any independent investigation or review by higher management. He correctly found that where oral or written reports simply bring performance issues to the employer's attention, and where an admitted supervisor independently investigates the incident and determines what discipline to issue, as is the case here, the LPN's role is merely a reportorial function. *Passavant Health Center*, 284 NLRB 887, 890–891 (1987).

II. ANALYSIS

A. Authority to Discipline

In *Franklin Home Health Agency*, 337 NLRB 826 (2002), the Board restated the principles to be applied in cases like this one, where supervisory status is asserted on the basis of the putative supervisor's authority to issue a "disciplinary" form:

> [T]he power to "point out and correct deficiencies" in the job performance of other employees "does not establish the authority to discipline." Reporting on incidents of employee misconduct is not supervisory if the reports do not always lead to discipline, and do not contain disciplinary recommendations. To confer 2(11) status, the exercise of disciplinary authority must lead to personnel action, without the independent investigation or review of other management personnel.

Id. at 830 (internal citations omitted). Accord: *Ten Broeck Commons*, 320 NLRB 806, 813 (1996); *Phelps Community Medical Center,* 295 NLRB 486, 490–491 (1989).

Those principles were recently reiterated, with approval, by the D.C. Circuit in its *Jochims* decision. In *Jochims*, the Court found that the Board had deviated from its own precedent by finding that a nurse had supervisory authority to initiate discipline where she issued writeups that were reviewed by managers and occasionally resulted in discipline. The court summarized governing law as follows:

> A long line of Board precedent, dealing specifically with nursing homes, establishes that written reprimands do not, in and of themselves, constitute discipline or serve as evidence of supervisory authority.

Jochims, supra at 1170.

> For the issuance of reprimands or warnings to constitute statutory authority, the warning must not only initiate, or be considered in determining future disciplinary action, but also it must be the basis of later personnel action without independent investigation or review by other supervisors.

Id., quoting *Phelps Community Medical Center,* 295 NLRB at 490 (internal citations omitted in original).

Applying those longstanding principles to the facts here, it is plain that the LPNs do not possess supervisory authority to discipline, or to effectively recommend it. First, every counseling form filled out by an LPN is reviewed by the DON or ADON before it is given to the CNA. Second, the reports do not contain disciplinary recommendations. Third, any resulting discipline is not automatic, but rather a result of upper management's exercising independent judgment. The Regional Director correctly found that independent judgment is not exercised at the LPN level, but above.[2]

Relying principally on *Promedica Health Systems*, 343 NLRB 1351 (2004), enfd. in relevant part 206 Fed. Appx. 405 (6th Cir. 2006), cert. denied 127 S.Ct. 2033 (2007), my colleagues in the majority assert that "the counseling forms are a form of discipline because they lay a foundation, under the progressive disciplinary system, for future discipline against an employee." But

[2] The majority deems it irrelevant that the DON and ADON do not always follow the progressive disciplinary policy. It is relevant, however, because it demonstrates what independent judgment consists of, and at what level the Employer has chosen to exercise it.

Promedica Health Systems offers no support for their argument: it was an unfair labor practice case, not a representation case, and did not present the issue of supervisory status.[3] When 2(11) supervisory status is at issue, the Board has found, time and again, that nurses (like other employees) do not demonstrate disciplinary authority merely by issuing writeups, when those writeups are reviewed by upper managers who then decide what, if any, discipline to issue. See cases cited above, p. __.

The majority distinguishes *Jochims*, supra, on the basis that the counseling forms here are an integral part of a progressive disciplinary system that routinely result in actual discipline. However, the Board has applied the principles discussed in *Jochims* even where the writeups involved are part of a progressive disciplinary procedure. In *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1137 (1999), the Board found that RN team leaders did not possess supervisory authority to discipline employees where they were authorized to implement steps 1–4 of a progressive discipline policy independently (step 4 being a documented verbal warning placed in the employee's file), but where steps 5–7 (written warning, suspension and termination, respectively) were implemented by managers above the RN team leaders. In *Vencor*, the RN team leaders actually had more authority than the LPNs in this case since they could document a verbal warning and place it in the employee's file without review. Here, a counseling form filled out by the LPN is reviewed by the ADON or DON *before* the form is issued and placed in the CNA's file. Thus, the majority's finding that the LPNs possess supervisory authority to discipline is inconsistent with Board precedent.

B. Authority To Effectively Recommend Discipline

The Regional Director also correctly found that the LPNs do not possess supervisory authority to effectively recommend discipline. To reach the opposite conclusion, the majority relies on two specific examples of management's following the recommendations of LPNs. The majority, however, downplays the strongest evidence, the testimony of a former DON at the facility, which conflicts with its conclusion. In addition, the record does not demonstrate that the recommendations in the majority's two examples were adopted without independent investigation.

Former DON Friday Marshall testified, without contradiction, that she would make "the final decision, *regardless of [an LPN's] recommendation*, because . . . [she was] the objective party" [emphasis added]. That testimony should end the discussion. But the majority observes that, on one occasion, LPN Sheila Carter recommended to Marshall that a CNA should not be allowed to work for a weekend after the CNA refused to clean a resident, and that Marshall did in fact suspend the CNA for the weekend. The majority reasons that it can disregard Marshall's testimony because it is general, whereas Carter's testimony is about a specific incident. But there is simply no evidence in the record of what, if any, weight Marshall gave to Carter's recommendation when Marshall made her decision. The Regional Director properly concluded that the record fails to establish that the CNA was suspended solely because of LPN Carter's recommendation.

The other instance cited by the majority involves former LPN Gloria Blissit's recommendation to former ADON Mercedes Shobe that a CNA be sent home after neglecting to check on a patient who was lying on the floor bleeding. The majority claims that Shobe followed the LPN's recommendation without further investigation. The record, however, does not support that assertion. Blissit discussed the CNA's conduct with the ADON before she filled out the counseling form. Afterwards, ADON Shobe and the DON spoke with the CNA for 20 minutes before sending her home. Blissit was not present when the conversation took place. On those facts, it is simply not possible to conclude that Blissit made an effective disciplinary recommendation.

III. CONCLUSION

The evidence establishes that the LPNs did not possess authority to discipline within the meaning of Section 2(11) and the case law. And the evidence is insufficient to establish that the LPNs effectively recommended discipline. The majority, however, turns a blind eye to the law and appellate court criticism, and even to the record, and thereby deprives the LPNs of their right to organize under the Act. I am, therefore, compelled to dissent.

[3] The issue in *Promedica* was whether a form of counseling called a "coaching" could be considered "discrimination" under Sec. 8(a)(3) of the Act (see id. at 351), an entirely different issue from whether the person issuing such a counseling would be considered a "supervisor" within the meaning of Sec. 2(11) of the Act.