UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

TRINITY CONTINUING CARE SERVICES
d/b/a SANCTUARY AT MCAULEY[1]

Employer

and **Cases 7-RC-23402**
7-RC-23403

SEIU HEALTHCARE MICHIGAN,
SERVICE EMPLOYEES INTERNATIONAL UNION, CTW

Petitioner

APPEARANCES:
David E. Khorey and Jeffrey T. Gray, of Grand Rapids, Michigan, for the Employer
Neeraj Agarwal, of Muskegon, Michigan, and Krista Sturgis, of Detroit, Michigan
for the Petitioner

DECISION AND DIRECTION OF ELECTION

Upon petitions[2] filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,[3] the undersigned finds:

---

[1] The name of the Employer appears as corrected at the hearing.
[2] The Petitioner filed Case 7-RC-23402 to represent the licensed practical nurses and Case 7-RC-23403 to represent the registered nurses.
[3] The Employer filed a timely brief, which was carefully considered. The Petitioner filed a brief on the due date by facsimile transmission, which is not permitted. Board's ***Rules and Regulations*** 102.114(g). The Petitioner also submitted its brief via U.S. mail, postmarked February 22, 2011, the date briefs were due. The Board considers documents postmarked on or after the due date untimely. ***R & R*** 102.111(b). Thus, the Petitioner's brief was untimely filed and was not considered.

1. The hearing officer's rulings are free from prejudicial error and are affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

Overview

The Employer operates a skilled nursing home at its facility located at 1380 East Sherman Boulevard, Muskegon, Michigan. The Petitioner seeks to represent a unit of registered nurses (RNs) and licensed practical nurses (LPNs).[4]

At issue is whether the LPNs and RNs, who work as unit managers, are supervisors within the meaning of Section 2(11) of the Act. The Employer asserts that the unit managers have authority, within the meaning of Section 2(11) of the Act, to discipline, assign, responsibly direct, and transfer employees, to adjust their grievances, and to make effective recommendations in those areas as well as in hiring, suspension, promotion, and discharge. The Employer also contends that unit managers have authority to evaluate employees, a function not explicitly recited in Section 2(11)'s definition of the term "supervisor." The Petitioner disputes that unit managers possess such authority. Despite evidence that the unit managers have issued disciplines to employees, I conclude that the Employer has not met its burden to prove that its unit managers are statutory supervisors because their authority to discipline certified nurse assistants (CNAs) is circumscribed by upper management's independent investigation, review of, and changes to such disciplines. In addition, I find that unit managers do not utilize independent judgment in directing CNAs because their tasks are largely predefined by the Employer's schedule, policies, and the collective bargaining agreement between the Petitioner and the Employer covering the CNAs.

[4] In Case No. 7-RC-21533, filed by the Petitioner and involving the same Employer and facility as herein, the undersigned issued a Decision and Direction of Election on April 30, 1999, finding that it was appropriate to conduct an election under ***Sonotone Corp.,*** 90 NLRB 1236 (1950), for the Employer's RNs and LPNs. Certification of Representative for a unit of LPNs and RNs issued on June 4, 1999. There is no evidence that a collective bargaining agreement was ever negotiated with respect to the unit.

Also at issue is whether a former RN unit manager, who now occupies the position of an MDS nurse, is appropriately included in the unit managers' bargaining unit. The Employer contends that the nurse is a managerial or administrative employee and does not share a community of interest with the unit managers.[5]

The Facts

Employer Operations

The highest ranking authority at the Employer's facility is the interim administrator, Lori Ann Portfleet, who has held this position since October 28, 2010. Included among the members of her management team or administrative staff, as she described them, are the staff development director, the clinical resource manager, the activities director, and the director of infection control.[6] The director of nursing (DON) Heather Hartman reports to the interim administrator.[7] The DON is responsible for reviewing staffing patterns and, ultimately, all patient care issues.

Three clinical care coordinators (CCCs) report to the DON. They work Monday through Friday, approximately 8 a.m. until 4:00 p.m. Each of the three CCCs is in charge of one of three resident halls. The CCCs coordinate the care of the residents, in conjunction with physicians and the interdisciplinary team.[8] CCCs discipline employees, including CNAs and unit managers. The CCCs assign work to the CNAs on a daily basis, as discussed below, by creating daily assignment sheets for them.[9]

The Employer's facility is staffed 24 hours a day and 7 days a week. The Employer's administrative staff generally works Monday through Friday, 8 a.m. to 5 p.m. An activities director and her staff are located in the center of the building at the activity center. The south wing has additional support services with a resident dining room, medical records, and social services. The business manager has an office in front of the administrator's office, which is located just off the main entrance in the administration building.

---

[5] At the outset of the hearing, the Employer also asserted that the MDS nurse was an office clerical employee; however, the Employer did not present any evidence to this effect during the hearing and explicitly rejected an opportunity to do so offered by the hearing officer at the end of the hearing.

[6] I find that Interim Administrator Portfleet is a supervisor within the meaning of Section 2(11) of the Act based on her authority to hire, fire, discipline and responsibly direct employees. The record is silent with respect to the supervisory authority of the other listed classifications. The Petitioner does not seek to represent the staff development director or the clinical resource manager, although they are RNs.

[7] I find that DON Hartman is a supervisor within the meaning of Section 2(11) of the Act based on her authority to hire, fire, discipline and responsibly direct employees.

[8] The parties stipulated that the CCCs are supervisors within the meaning of Section 2(11) of the Act.

[9] One hall has been operating without a CCC since the beginning of January 2011 due to illness. Her position is being covered by the staff development coordinator, the DON, and the other CCCs, and, to a lesser extent, by the unit managers.

There are three resident units in the facility that are called 400, 500 and 600 halls with corresponding room numbers. Each of the three units has a nursing desk. There are 36 beds in the 400 hall which is utilized to provide long-term care. There are 22 beds in the 500 hall which is where residents are admitted for short-term rehabilitation. As a result, the 500 hall has the greatest turnover. There are 40 beds in the 600 hall which is also used for long-term care. Typically, there are about 94 residents, with a maximum of 98. Most residents are frail and elderly, although some are short-term rehabilitation patients who come from the hospital for physical, occupational, and speech therapy. There are 10-15 residents who require skilled nursing care; the rest do not.

The Employer operates three shifts in the units, which are slightly staggered between the unit managers and the CNAs. For unit managers, the first shift runs from 6:45 a.m. to 3:15 p.m.; the second shift runs from 2:45 p.m. to 11:15 p.m., and the third shift runs from 10:45 p.m. to 7:15 a.m. For CNAs, the first shift starts at 6:00 a.m. and ends at 2:00 p.m., the second shift starts at 2:00 p.m. and ends at 10:00 p.m., and the third shift starts at 10:00 p.m. and ends at 6:00 a.m.

A nurse manager, as distinguished from the unit managers, is scheduled on-call after hours and on weekends. The CCCs, the director of infection control, and the MDS nurse rotate weekly as on-call nurse manager.[10] Unit managers call the nurse manager if there is an emergency or staffing problems. Unit managers also contact the physician on call in the evenings or the weekends for medical issues. While the DON is not in the nurse manager rotation, her phone number is posted in each hall in the event unit managers need to call her, such as to resolve staffing issues or if residents have fallen or display a previously unknown bruise.

Unit Managers

There are 14 unit managers: two RNs and 12 LPNs.[11] There is one unit manager assigned to each hall on each shift. The unit managers report to the CCC in charge of their hall.

RN unit managers and LPN unit managers maintain different state licensure, although their job duties and authority as unit managers are essentially the same. From a staffing or scheduling standpoint, the two classifications are interchangeable. One could have either an RN or an LPN unit manager on the unit. However, under state and federal requirements, there must be an RN in the building each day of the week, but not 24 hours a day. From Monday through Friday, the DON and the CCCs, who are all RNs, fulfill

[10] The testimony conflicted regarding whether the human resources manager also rotated into the nurse manager position.

[11] The parties stipulated that the RN unit managers and the MDS nurse, who is an RN, are professional employees within the meaning of Section 2(12) of the Act.

this requirement. An RN unit manager is scheduled each day on the weekend, but not necessarily for 24 hours.

Unit managers' job descriptions and the competency assessments, which are administered prior to the completion of their probationary period, suggest many supervisory duties. For example, both the RN and the LPN job descriptions provide that the unit managers are to "[d]irect the day-to-day functions of the nursing personnel," and "[i]ssue disciplinary action to assigned nursing staff." However, it is undisputed that at least one item in the job description does not apply: that unit managers "[a]ctively participate in the interviewing and hiring of nursing staff."[12] In addition, the Employer presented evidence that unit managers took courses in the "Trinity Continuing Care University," a leadership training series covering topics such as "team building," "performance management," and "performance evaluation" as well as "essential principles of effective leadership." However, there is no evidence that LPNs and RNs have participated in the leadership training series since 2005.

Although the hours vary slightly, RNs and LPNs typically work 32 hours/week, which is considered full-time. Some LPNs work part-time. The RNs earn between $21.50 to $25.69 an hour, and the LPNs hourly wage ranges from $15.85 to $22.04. Wages have been frozen for three years for LPNs and RNs.

Unit managers pass medication and change residents' dressings. Unit managers count narcotics, monitor blood sugars, and evaluate residents' incisions. If a resident falls, the unit manager assesses the extent of the resident's injuries. Unit managers also maintain a 24 hour report wherein they document admissions, transfers, discharges, changes of conditions, different medication orders or other information that needs to be passed on from shift to shift, or to the CCCs, in order to care for the residents.[13]

At the beginning of a shift, the oncoming unit manager receives a report from the off-going unit manager regarding the residents' activities during the shift and any specific needs. The unit managers read down a sheet with the residents' names and discuss the status of each resident and such matters as whether they have doctor appointments or eye pain. This takes from 15 minutes to half an hour. There is some testimony that the unit managers also meet with the oncoming CNAs to inform them of their assignments; however, the Employer's interim administrator testified that the oncoming CNAs meet with the outgoing CNAs to receive this report.

[12] One unit manager testified that she participated in a group interview, but this occurred when she was a CNA. The Employer's collaborative interviews involve the CNAs, CCCs and unit managers voting on whether someone should be hired.

[13] The DON believes that about one hour of the unit manager's time is spent during the shift making up assignments, giving directions, dealing with call-ins, doing the ADLs on residents, confirming work has been done, disciplining, and evaluating the CNAs' performance, as opposed to direct care of the residents. The interim administrator claims the unit managers devote half of their time to such tasks.

The unit managers do not have the authority to resolve matters that impact other shifts or departments. For example, a unit manager could not respond to a CNA complaint about a form by eliminating a form that came from the corporate policy manual, and cannot alter such matters as shift starting or ending times.

Unit managers can try to resolve minor issues, such as if a CNA is assigned to too many residents who are difficult to care for, or a female resident does not want a male caregiver. Unit managers can ask for trades between caregivers to accommodate such concerns.

CNAs

There are 54 full-time and part-time CNAs. Typically, four CNAs work on the first shift on each of the 400 and 600 halls, three each on the second shift of both halls, and two CNAs work on the third shift. On the 500 hall, two CNAs work on the first shift and one on the second and third shift. All CNAs have the same basic skills.

CNAs give residents showers, ambulate them, dress them, take them to meals, feed them if necessary, change them if they are incontinent, take them out of their rooms for daily activities and various professional therapy sessions, including with occupational and speech therapists. CNAs transfer residents from bed to wheelchair to toilet and back, and turn and reposition residents to avoid skin breakdown. They pass ice water to the unit, pass linens and straighten up the linen closets. CNAs groom residents in accordance with the Employer's policy and procedure.

CNAs generally work in the same wing every day as the Employer seeks consistent staffing. This enables the CNA to become familiar with the needs of the residents. Long-term care residents generally have the same CNAs who perform the same tasks for those residents daily unless the resident's condition changes and the residents need additional services, such as having their vital signs or temperature taken more frequently. CNAs routinely prepare residents for appointments, as required by their very detailed job descriptions.

CNAs are part of a collective bargaining unit which includes all full-time and regular part-time service and maintenance employees including cooks, dietary aides, floor care technicians, housekeepers, janitors, laundry aides, nursing aides, orderlies, physical therapy aides, and restorative CNAs.[14] CNAs earn $12.48 an hour, pursuant to the contract.

[14] The collective bargaining agreement is entered into between the Petitioner and Trinity Continuing Care Services doing business at four different locations, including the McAuley Place Living Center. The collective bargaining agreement expired June 30, 2010, and the new one is awaiting signature. The parties agree that there have been no significant changes in the agreement that should impact this decision.

Plan of Care and Care Tracker

Each resident has a plan of care. Initially, upon a resident's admission, the CCCs and the unit manager compile the physician's orders, which cover such matters as whether the resident's limbs are weight bearing, and therapy orders to complete the plan of care. The plan provides special instructions for transferring residents from bed to chair to shower, etc. For example, the plan of care indicates whether a resident needs to be transferred by more than one CNA or with a Hoyer lift, which is a mechanical lift. The plan of care is kept current by the CCC and the unit managers, and is kept at one of the three designated nursing stations in the resident's hall.

The DON also writes notes on residents' care plans, indicating a resident's preference, for example, to have the door and curtains open. The plan of care might contain a directive to maintain "Red Star," which is a program involving alarms for residents who are at higher risk for falls. CNAs can also record information on the plan of care. For example, a CNA can report that a resident is having trouble chewing, which would trigger dietary changes.

Since about December 2010, the Employer utilizes a "Care Tracker" computerized system. Essentially, it tracks the same information as the plan of care, and the CNAs are required to check off on the computer tasks they have completed for the day, including bathing, transferring, assisting with feeding, positioning, ambulation, meal consumption, and toileting. Unit managers refer to this system to ensure that the tasks that the aides are performing are being completed and documented correctly. Care Tracker does not show all the assignments the aide has on the shift. For instance, it does not include information about a resident's vital signs.

One hour before the end of the CNA shift, the unit managers are required to generate a compliance report to make sure that all of the Care Tracker documentation and tasks have been completed for the shift. The unit managers turn an initialed Care Tracker sheet into the staff development director. On the printout, at the bottom, the unit manager often writes the names of the CNAs who performed the work. If a task is not recorded on the sheet as having been completed, the unit manager can return to the computer system and pull up that resident's data to see what documentation had not been completed for the shift.

Daily Work Schedule

The Employer's scheduler produces a daily work schedule reflecting which unit managers and CNAs are scheduled to work and the unit on which they are scheduled to

work.[15] This schedule is kept at the nurses stations on each of the three halls. It is posted the day prior by the scheduler before she leaves at 3 p.m. The scheduler types the printed names on the schedules. Both unit managers and CNAs initial the schedule daily, after they have punched in for their shift.[16] The scheduler makes adjustments to the schedules during her work hours. Unit managers also write changes onto the schedule if a CNA calls off work or leaves early. Individuals in the payroll department write on each schedule how many hours each employee worked on that particular day.

Charting Lists

Charting lists are posted on the bulletin boards at the facility. The lists reflect activities that must be performed and documented for the residents.

The CCCs record information on the charting lists concerning residents who require skilled nursing care under Medicare, such as identifying residents who need their vital signs to be taken daily.[17] Other charting lists concern residents with non-skilled care who may have had some problem during the week. For example, the CCC makes a list of anyone who had a fall because they are to be monitored for the first 72 hours with vital signs taken every shift. In addition, every hall has the same type of shower lists. Although the format may differ, (such as whether it is vertically or horizontally aligned), each shower list is pre-made by the CCC. By state regulation, residents are required to be showered once per week, at a minimum.

Daily Assignment Sheets

A CCC transfers information from the charting lists to the CNAs' daily assignment sheets. Each hall uses a slightly different form for its daily assignment sheet. The daily assignment sheets list the CNAs duties for the day. CCCs record on the daily assignment sheets a range of information covering window periods for CNA break times, meal times, and such items as whether residents need blanket warmers. The CCCs add information to the daily assignment sheet throughout the day. The CCCs change items such as the frequency CNAs take residents' weights or vital signs, if necessary.

During the week, if a resident has fallen or been prescribed antibiotics, either the unit manager or the CCC adds to the assignment sheet that more frequent vital signs are

[15] The name of the scheduler is not revealed in the record.

[16] There was some testimony from a CCC that the unit manager can authorize aides to switch their assignments when there is agreement between them, but the CCC could not think of any specific instance. She testified that she has overheard nurse aides say "I'm glad to be down here. I was going to work here, but someone switched with me."

[17] The determination of which residents require skilled nursing care occurs at the Employer's weekly meeting called Med-A. The unit managers are not part of these meetings. The purpose of the meeting is to discuss the progress of the Medicare beneficiaries as well as their potential discharge plans. Although the record is not clear in this regard, it appears that this Med-A meeting may be another term for the interdisciplinary team.

required. At times, CCCs tell the unit manager to add items to the list. The CCCs include areas in the assignment sheet for the unit managers to write in the actual break times, and when showers are to be given.

The unit manager who is going off shift adds information to the daily assignment sheets from a variety of sources, including the 24 hour report, from her own assessments of residents' status throughout the shift, the shower list, and several charting lists. Instructions about taking vital signs are written on the daily assignment sheet by the unit manager or the CCC who notes that this involves "writing in the room numbers from our daily charting list." The DON has mandated that all residents must be weighed at the beginning of each month. The dietician requires that some weights need to be taken weekly. If there is a change to a prescribed blood pressure medicine, the doctor may require that caregivers monitor the resident's blood pressure and pulse for five days. The doctor may provide special instructions, for example, that a resident should not eat or drink before a medical appointment. The doctors order whether the staff should check oxygen saturation. It is an Employer policy that any resident on antibiotics must have his or her temperature monitored throughout the day for the full course of the antibiotics. All of this is recorded on the daily assignment sheet.

The unit managers sometime write special instructions on the daily assignment sheet for the CNAs. For example, if a resident has an appointment outside the facility, the transportation specialist schedules the appointment; the unit manager looks at the appointment book and the unit manager writes down on the assignment sheet which residents have an appointment. The unit manager may write on the assignment sheet that wheelchairs are to be cleaned or that certain residents must take sheets and blankets to dialysis.

Direction of Work

Based on who is available and whether an employee is on break, a unit manager decides who among the CNAs would take a patient's vitals or who will help prepare a resident for a trip to the hospital. If the patient is ill, the unit manager might ask a CNA to check the resident's temperature and vital signs. If a resident complains about a CNA, the unit manager must, according to the Patient Bill of Rights, change the caregiver. However, if it is a day when residents are not ill, there are no falls, and nothing out of the ordinary occurs, the CNAs' work is largely predetermined by the schedule and the daily assignment sheet. In her testimony, the CCC from 400 hall, Dana Boertman, acknowledged that, on such a day, the CNAs "have their job assignments already mapped out, and then, of course, with the daily assignment sheets, they would go about their business."

The testimony regarding care provided to residents post mortem illustrates the different positions of the witnesses regarding the extent to which unit managers direct

CNAs. From one perspective, the Employer's witness, DON Heather Hartman, testified that unit managers direct CNAs in a post mortem situation to pack up the resident's belongings, change rooms, or help family members. From the perspective of the unit manager Rachel Jones, the CNAs are trained in how to provide post mortem care: the CNAs get a wash basin with wash rags and clean the resident. Sometimes the CNAs will tuck a towel or pillow under the chin of the deceased to facilitate keeping the mouth closed. The CNA puts dentures and eyeglasses in place, to help make the resident look presentable, and covers the resident. CNAs know that when someone dies, it is their responsibility to clean the body and prepare it for the family.

If a resident falls, the unit manager instructs a CNA to complete orthostatic blood pressure with the resident sitting, lying down, and standing. The unit manager directs the staff to put other fall precautions in place to prevent the person from falling again, take the resident's vital signs, call 911, and prepare appropriate paperwork. This assumes that an initial directive is to pick the resident up from the floor, as the CNAs also understand that a resident cannot be left laying on the floor.

Under the CNAs' collective bargaining agreement, CNAs are entitled to breaks. Because everyone on a hall cannot take a break at the same time, CNAs ask the unit manager if they can leave for break. Breaks do not have to be at a certain time. For the first and second shifts, the scheduler lists a range of break times and lunch times, but does not do so for the third shift. On the first and second shift, there are two 15 minute breaks within a half hour window set forth on the daily assignment sheet. On third shift, the unit managers assign breaks, except they cannot schedule breaks from 4:30 a.m.-6:00 a.m. The unit manager writes break times for the next shift, not the shift she is on. Some testimony indicated that CNAs may also decide among themselves when to take their breaks, and inform the unit managers when they leave the floor.

Unit managers can assign one aide to pass water and one to pass linen. Passing water consists of filling water cups, bringing them to the unit and giving the residents a fresh glass of water for the shift. The aides can also decide on their own who passes the water and who passes linen.

The Employer asserts that unit managers are disciplined if they do not properly direct CNAs work and, by way of example, describes how the DON issued a written warning to a unit manager for failing to perform job duties on June 10, 2010. The unit manager left a resident who was not breathing and had no heartbeat in order to call 911, and the CNAs had to perform CPR and call for another unit manager to assist. The Employer points to this incident as an example of a unit manager being held accountable

for failing to provide direction to CNAs; however, it appears that the unit manager was being held accountable for her own actions.[18]

On July 2, 2007, CCC Dana Boertman disciplined unit manager Colleen Goodman with a verbal warning when emergency medical technicians brought a resident back from the hospital and CNAs were not available to help with the transfer of the resident because they were otherwise occupied. Boertman testified generally that there are no consequences faced by unit managers if they do a poor job in assigning tasks for the CNAs, or if they forget to assign work or assign necessary additional work. She stated that no unit manager has ever been suspended or terminated for such conduct.[19]

Granting Time Off

Unit managers do not have the authority to grant time off to CNAs. They do not have the authority to grant vacation leave. They do not have the authority to grant sick leave or schedule personal days; the scheduler and the DON do this. If a CNA calls off work, the unit manager notes it on a time card exception form slip and drops it in the nurse scheduler's box. The DON signs off on this form.

If a CNA seeks to go home early or otherwise take time off for a family emergency or illness, the unit manager may allow her or him to do so, but cannot excuse the absence under the Employer's no-fault attendance policy.[20]

Unit Managers' Role When CNAs Call Off Work or Leave Work Early

State regulation requires that there be one caregiver for every 8 residents on day shift, one caregiver for every 12 residents on second shift, and one caregiver for every 15 residents on third shift. Caregivers include nurses and CNAs - anyone providing direct care to the residents. Federal guidelines provide that there must be 2.25 hours of care delivered per resident per day. The Employer surpasses its compliance with this requirement by providing three hours of care per patient per day. Caregiving includes hours worked by CNAs, unit managers, and restorative nurse aides.

---

[18] In its brief, the Employer asserts that the unit manager Robin Walley was disciplined "more generally for poor supervision of nurse aides" in 2004; however, the discipline is not in evidence, and Walley initially testified that she did "not recollect" receiving a personal development plan indicating that she needed to supervise the CNA's job performance and that she did not subsequently discipline CNAs.

[19] In another situation, in December 2010, unit manager Rachel Jones was issued a "Corrective Action Notice" for signing off on a time card exception form approving a missed punch and indicating a CNA had been in the facility when in fact the CNA had not. The discipline was for dishonesty. Individuals in payroll also sign time card exception forms.

[20] The Employer's policies provide that caregivers must leave work if they have a fever. Unit manager Rachel Jones testified that the only time that she sends someone home is if they are running a temperature per policy and guidelines, because they may infect the rest of the community.

If a CNA calls off during the week while the nurse scheduler is working, the scheduler calls other CNAs to replace the absent CNA after speaking with the DON. When the nurse scheduler is not present, generally during the second and third shifts and on the weekends, the unit managers call from a preprinted list of CNAs provided by the scheduler, kept at the nurse stations. The list is in order of seniority pursuant to the CNAs' collective bargaining agreement. Unit managers cannot require CNAs to come into work. Usually, the CNA who is called in fills the slot of the CNA who called off. The nurse managers on rotation are also available to make such calls.

If no CNA wants to come in, the unit manager calls the DON or the nurse manager on-call to report that the facility is understaffed, and she could not get anyone to fill the open positions. Then, the unit managers can mandate CNAs from the off-going shift to stay. According to the CNA's collective bargaining agreement, CNAs can be mandated to stay only for four hours, by reverse seniority order. There is a "mandate list" for the unit manager to refer to in determining which CNA is to be mandated. There is no evidence that unit managers can discipline CNAs for disregarding a mandate to stay beyond a shift.

If there are too many CNAs working, the unit managers can send CNAs home only if the nurse scheduler instructs them to do so by noting same on the daily schedule. If CNAs are sent home, seniority governs who goes home first. It is not clear what would happen if not enough CNAs were working, and a unit manager failed to obtain adequate coverage. The Employer's interim administrator, Portfleet, testified that if "hypothetically the unit was left uncovered because someone didn't try to call, didn't replace, and didn't mandate, and resident care [was] affected," discipline would be administered. However, she did not provide examples of this having occurred.

The Employer maintains that the unit manager might not replace a CNA if there was a vacancy lasting only two hours. The Employer also asserts that the unit managers consider residents' acuity in determining whether other staff would be called in. These assertions are contradicted by the testimony of unit manager Rachel Jones, who explained that if a CNA had to leave early, she would automatically call another CNA in. Jones acknowledges that she has been told by management that she has the discretion not to call someone in if she does not think additional staff are needed, but she has also been told that she has to follow the guidelines about resident-staff ratio. Since she does not know what the ratio is supposed to be, she does not send staff home without replacement out of fear that the Employer would fall below the guidelines. The Employer did not provide evidence that the unit managers are trained or educated in the proper resident-staff ratios.[21]

[21] The Employer also presented testimony that unit managers can assign a CNA to one-on-one care with a resident in some type of distress. If the DON is present at the facility, the unit manager discusses this assignment with her first. On the weekends, a unit manager may be responsible for determining this on her own; however, no examples of this were provided.

A grievance had been filed in the past when a CNA alleged that she was not called to cover a shift. The step 2 response came from the nursing home administrator and was not copied to the unit manager. Also, the unit manager was apparently not present at the step 1 meeting.

Unit managers document deviations from a CNA's scheduled work time on the Employer's "Time Card Exception Forms." Payroll staff also initiates these forms.

Discipline of CNAs

The Employer maintains a progressive disciplinary policy consisting of a verbal counseling, a written counseling, a final written warning, and a termination, as set forth in the CNAs' collective bargaining agreement at Article 11.3. The Employer reserves the right to skip steps and proceed with immediate termination as it determines appropriate; however, this is not routinely done. The disciplines are entitled "Corrective Action Notices" and contain a section for describing the nature of the infraction, employee comments, and an "improvement plan," and possible consequences if expectations are not met.

As a preliminary matter, there is no evidence that unit managers have recommended suspending CNAs. One unit manager indicated on a corrective action notice that she wanted to suspend a CNA, but she did not do so. Also, the Employer's human resources department and the DON play a determinative role with respect to CNA terminations. There is no evidence of unit managers recommending the termination of CNAs.

While unit managers have issued some disciplines to CNAs, their role in doing so appears to be circumscribed by both the DON and human resources department, and there is little evidence that their recommendations are followed, although disciplines administered by unit managers are placed in the employee's personnel file. Unit managers do not participate in steps 2 or 3 of the grievance procedure, and there is limited and inconclusive testimony of their participation at step 1 and a pre-grievance step.

The human resources department maintains information about a CNA's current level of discipline. Unit managers must go through the human resources department as the keeper of the records to secure this information, and there is some evidence that unit managers are not aware of this procedure.

There are approximately 20 verbal and written disciplines in evidence wherein unit managers played some role. Most of the disciplines were not accompanied by testimony elucidating their circumstances. DON Hartman testified with respect to a

July 2, 2010, written counseling issued to a CNA on July 2, 2010. Allegedly, the CNA refused to help a resident who had requested to get out of bed early. The unit manager Melissa Tyler described the situation to the DON, who recommended that the unit manager write up the CNA. Indicating that the issuance of discipline was not an ordinary event, the unit manager raised concerns with the DON because the CNA had a strong personality, and Tyler was worried about the possible repercussions. The DON told her that she would "support her and be with her through the process." The write-up was a final written warning, and the DON was present when the unit manager gave the discipline to the CNA.

On December 12, 2010, unit manager Rachel Jones reported to the DON that a CNA had not recorded the taking of residents' vital signs or weights on the assignment sheet. The DON asked Jones if the vital signs information might be found in the machine or written somewhere other than on the assignment sheet (there are a few different sheets for documenting vital signs). The DON and the unit manager checked the machine and reviewed the sheets to verify. Jones told the DON that this CNA had failed to record weights two or three times. The DON told Jones to write-up the CNA. Jones told the DON that she did not know what level of discipline to mark at the top of the disciplinary form, but marked verbal warning. Jones filled out the first two sections of the "Corrective Action Notice," recording the CNA's name and that she had not completed her vital signs on the shift, then gave the discipline to the DON because she was not sure what to do with it. The DON said she would take care of it and wrote under the "improvement plan" that the next steps were final warning and termination, and signed the bottom. In the meantime, the CNA had gone home for the day, so the DON told Jones that she - the DON - would talk to human resources, and learn if there were previous disciplinary occurrences.[22] When Jones saw the form at the hearing, she noted that the DON must have crossed out her recommendation for verbal warning because written warning was added instead, with the DON's initials. The discipline was ultimately signed by the DON, and on December 14, 2010, the DON met with the CNA to give her the disciplinary action.

On December 17, 2010, unit manager Jones completed the top sections of a discipline for another CNA, who assertedly did not do vital signs. Again, Jones went to the DON who asked if she was sure that the CNA did not do them, and if she was sure it was not still in the automatic blood pressure machine that records the vital signs. The DON instructed Jones to check whether the CNA might have recorded the vital signs and whether they were still in the machine. The DON looked and could not find them, and then asked Jones if she wanted to write the CNA up, or wait. Jones agreed to let it go.

[22] According to the DON, Jones left a voicemail that she was going on vacation and asked the DON to deliver the action. The DON found the write-up slip underneath her door.

The next day the CNA did not record vital signs again. Jones told the DON, and after checking the machine, the DON told Jones to write her up if she wanted. Jones again filled out the first sections of the discipline, and the DON then added a line indicating "the specific date and nature" of the offense and also recorded the information as to what the next disciplinary steps would be. The DON told the unit manager to ask if the CNA wanted union representation. Then the DON told Jones to give the discipline to the CNA. Jones presented it to the CNA, and the CNA signed it. The DON testified that she wanted to use the opportunity to show Jones that she needed to make sure that everything is filled out on a corrective action notice, and not leave blank sections. Jones herself testified that she was never told the procedure to follow if a CNA failed to take the vital signs, or failed to do something required. No one had ever told her she had the authority to issue a write-up; this is why she did not know how to do it.[23]

Another example of a discipline issued by a unit manager that was subsequently investigated and altered by the DON was one initially issued by unit manager Lauren Hill to a CNA for the failure to perform job duties and insubordination, on July 2, 2010. In a July 15, 2010, letter denying the grievance, the Employer's human resources director wrote that the DON "Heather Hartman investigated the write-up, she spoke with the Unit Manager again; other CENA's (sic) working that day and reviewed your previous corrective action notice." In resolution of the grievance, the Employer agreed to remove the "failure to provide job duties" from the corrective action.

Unit manager Jenn Zoern issued a "Corrective Action Notice" to a CNA on January 20, 2010, for failure to perform duties "according to established standards." In answering the related grievance, then administrator Gail Ranville wrote: "I investigated the write-up, as well as the . . . [relevant rule] . . ." and, that she agreed to reduce the corrective action from a written warning to a verbal counseling.

There are other disciplines of CNAs in the record dating back to 2001 which I have considered. However, without information about how the discipline came to be written, whether it was prompted by upper management, whether the level of discipline was ultimately reduced by upper management, and whether upper management conducted an independent investigation, they are not probative of the issue before me.

Some of the disciplines concern absenteeism and attendance. However, the Employer's interim administrator, Portfleet, testified that unit managers have not written attendance disciplines for four years since the function has been turned over to the payroll and human resources managers to ensure it was timely fulfilled, and the unit managers no longer play any role in such disciplines. Among the attendance disciplines in the record

[23] The only other time that Jones was involved in an employee discipline was when she tried to discipline a CCC for signing that someone was in the building when they were not, after Jones herself had been disciplined for similar conduct. The discipline was thrown out.

there are four instances – November 3, 2006, and February 23, April 12, and April 24, 2009 – where three different unit managers signed corrective action forms that appear to have been written by someone else.

Grievances

Grievances concerning disciplines are responded to by the human resources director after she interviews the unit manager as part of an investigation of the facts. Also, the interim administrator hears the step two grievances and reviews step one responses. There is no evidence in the record of a unit manager having the authority to resolve grievances at any step in the grievance procedure. The only example that comes close occurred in late 2010, when unit manager Laura Hill wrote up a CNA for insubordination, and the CNA told Hill that she did not agree with the write-up. Hill met with the CNA and her union representative, before any grievance was written. Subsequently, when a grievance was written, the interim administrator met with the grievant and the union at the second step of the grievance procedure. The grievance was downgraded from a written warning to a verbal counseling, and the original discipline, which was for "failure to perform job duties" and "insubordination" was modified. The former was crossed out, leaving only "insubordination."

Evaluation of CNAs

The Employer requires annual performance evaluations for all staff in the facility. Unit managers evaluate CNAs based on their own observations and input from other sources.

The evaluation form sets out different categories, including administrative functions, admission, transfer and discharge functions, and lists all the job responsibilities enumerated in the CNA job description. The CNA is evaluated on a continuum from "considerably exceeds expectation" to "needs in-service training." The evaluation form has space at the end for written comments rating appearance, respect for one another, responsiveness and wait times, courtesy, and adaptability and flexibility. For the most part, unit managers do not fill out the written comment portion of the evaluations. The DON testified that she disciplined a unit manager after having received an incomplete evaluation, directing the unit manager to discuss appearance, attitude, and respect with examples on the back side of the page.[24]

Unit managers do not meet with the CNAs to review their evaluation. After the unit managers complete the evaluations, the evaluations are provided to the human resources director for filing in the CNAs' personnel files. It is unclear whether anyone

[24] There is no corresponding document in evidence.

meets with the CNA, or at what point in the process, if ever, the CNA is provided with a copy of the evaluation.

During the tenure of the interim administrator, no unit manager has been suspended for failing to completely fill out a performance evaluation. For purposes of timely completing an evaluation, human resources maintains a calendar, and reminds the unit manager when an appraisal is due.

Despite the Employer's conclusionary evidence that the evaluations could be used for consideration of promotions, transfers to different shifts, or assignments to different schedules, there is no documentary evidence of this. The CNAs' collective bargaining agreement requires that internal candidates be considered first and the CNA with the most seniority would have the employment opportunity offered to him or her.[25] The human resources department handles the application function, and the DON makes the ultimate decision. CNAs do not face corrective action as a result of evaluations, nor is there any evidence that CNAs face wage consequences as a result of the evaluations. The CNAs' collective bargaining agreement determines wages.

LPNs and RNs also sign off on interim probationary forms for CNAs, including "Competency Tools." The CCCs sign off on the final probationary forms for CNAs. Unit managers take note of the strengths and weaknesses of the CNAs, indicating, for example, a CNA is a "team player." However, there is no evidence that the Employer takes action if a unit manager provides an unsatisfactory assessment. For example, with respect to a negative assessment by an RN unit manager from July 28, 2010, there is no indication that the CNA's probation was extended or affected in any way. With respect to a CNA who did not complete her probationary period, the DON testified that she met twice with the CNA and conducted her own investigation of the CNA's problems.[26]

Resident Abuse

Pursuant to regulatory requirements, all staff must report instances of resident abuse or neglect to their supervisor, the DON, and the administrator, even if the incident occurs on the weekend when the unit managers are the highest ranking employees on the premises.

Staff are provided in-service training on the Employer's policies regarding resident abuse. If a resident were to complain that "someone hit me" or "they were rough with me," each staff member is required to immediately take action regardless of the

[25] Article 6.2 of the collective bargaining agreement provides that "[j]ob classification seniority shall be used for layoff, recall and job bidding purposes."

[26] On December 17, 2010, a unit manager, Candice Weldon, completed a probation form for a CNA, indicating she had not met expectations. The CNA is still employed, and there is no evidence as to whether her probation was extended because of Weldon's evaluation.

identity or status of the alleged abuser. All staff, including unit managers, are to remove the resident from the situation.

If there is an allegation of abuse, the unit manager's first action is to intervene. If the allegation is against a CNA, then the unit manager would separate the resident from the CNA, directing the accused CNA to switch residents with another CNA. The unit manager can procure staff statements as can the DON, the director of staff development, the administrator, and the social workers. Then the unit manager would report the incident to the DON or CCC. The DON is responsible for sending the CNA home in the case of an abuse allegation. The DON independently investigates the abuse allegations, discusses with the administrator whether or not the incident of abuse is substantiated and should be reported to the State of Michigan.

The administrator questions the unit manager about the signs and symptoms manifested by the allegedly abused resident, the resident's behavior, what the resident said happened. If an incident occurs on the night shift, the unit manager obtains as much information as she can until the end of the shift, and then hands off the investigation to the DON, director of staff development, the administrator, and social workers on the day shift. If an incident occurs on the weekend, these individuals would be brought in to help with the investigation depending on the significance of the injury.

Since October 28, 2010, there have been two allegations of an employee verbally abusing a resident. In each instance, the Employer issued a final written warning to the employee. During the interim administrator's tenure, there has been no instance when unit managers have unilaterally suspended CNAs, or when there was not additional investigation by higher management into the abuse allegations.

If an abuse allegation is substantiated, the accused employee must be terminated. The administrator and human resources department handle these terminations.

Transfer of Employees

Unit managers do not have the authority to unilaterally transfer CNAs on a permanent basis. The collective bargaining agreement has provisions concerning the posting, application, and awarding of positions.

A unit manager can temporarily move or reassign a CNA to another area of the hall and other rooms in the same hall. If a resident requests a change, the Patient Bill of Rights provides that it is the resident's right to choose if he or she does not care for a particular caregiver. While the Employer's witnesses testify that a unit manager can move or reassign a CNA to another hall, no specific examples have been offered except for one situation, when a unit manager called in a CNA to work, and the CNA indicated

that she would do so only if she could work on the 400 hall, thus requiring a trade with a CNA already stationed there.

Benefits Comparison – Unit Managers and CNAs

With 0-5 years of employment, CNAs receive 3 weeks of vacation, and the LPNs and RNs receive 4 weeks of vacation. With 5-10 years of employment, CNAs receive 4 weeks of vacation, and the LPNs and RNs receive 5 weeks. After 10 years plus, the CNAs receive 5 weeks of vacation, and the LPNs and RNs receive 6 weeks. There is no sick or personal leave. All employees have paid holidays, short-term disability (60 percent), and long-term disability of 60 percent after one year of service. The nonunion non-exempt employees receive the same benefits as the CNAs. The payroll processor is in the group of nonunion hourly employees, as are the receptionist, concierge, and nurse scheduler. The LPNs and RNs are in the same benefit structure as the exempt, and salaried exempt management personnel.

LPNs and RNs are eligible for medical/dental/vision/legal plans after 30 days of employment, and the CNAs are eligible after 90 days. LPNs and RNs receive one more week of vacation than nonunion hourly employees and hourly union-represented employees after 30 days of employment. Union-represented employees are not eligible for paid time-off benefits until they have completed 90 days of employment. LPN and RNs receive the value of their annual salary for life insurance if they are part-time or twice the value if they are full-time. CNAs receive $5,000 for part-time and $10,000 for full-time service. LPNs and RNs are eligible for an additional 30 cents an hour for all hours worked if they achieve perfect attendance, up to a maximum of $48 per month. CNAs are eligible for a lump-sum payment if they have perfect attendance for an entire quarter; part-time CNAs receive $75, and full-time CNAs receive $150. Full-time LPNs and RNs are paid 50 percent of their normal gross earnings for any approved medical leave of absence. Full-time CNAs are paid 50 percent of their normal gross earnings for an approved medical leave of absence.

The MDS Nurse

The clinical resource manager, Sharon Frelland, reports to the interim administrator.[27] Frelland is responsible for the completion and submission of the minimum data set (MDS) which is a resident assessment instrument and tool to record information regarding the level of care that each resident needs. The MDS was previously called the resident assessment instrument (RAI). This data is submitted to the federal government for payment and to track resident conditions over time for Medicare purposes.

[27] The record is silent with regard to Frelland's 2(11) status.

The MDS nurse, Marge Kane, who is also referred to as the MDS coordinator, reports to and shares an office with the clinical resource manager. Kane, an RN, was hired into this position on April 11, 2010, and had previously been a unit manager. She works full-time, 7:30 p.m. until 4 p.m., Monday through Friday. She earns $26.83 an hour, about $1.14 more per hour than the highest paid RN unit manager.[28] She receives the same benefit package as the salaried exempt managers, as do the unit managers. Kane attended a three-day certification training before she was able to work on the MDS. The Employer requires that this position be filled by a registered nurse because only a registered nurse may sign the MDS before it is submitted.

Kane takes very short breaks because she is busy collecting the data and putting it into the computer for submission. She takes her break at her desk. Unit managers take their lunch in the break room. However, unit managers have seen the MDS nurse in the break room.

Kane is on the computer between 75 to 80 percent of her time. She enters the information for submission to Medicare. She collects the information that is recorded in the clinical record by other interdisciplinary team members during the other 20 percent of the time. The interdisciplinary team is comprised of the activities director, the dietician, the social worker, the MDS nurse, the CCCs, and therapists. Kane consults with them to gather information to use for the MDS or to iron out inconsistencies.

Kane also receives information from the nursing floor and consults with the unit managers and the CNAs. Kane goes out to the unit and talks to staff about the resident, makes copies of charts and brings them back to her office for inputting into the MDS system. The unit managers provide Kane with assessments of new residents. She attends meetings with the unit managers when they are coordinating a plan of care. She also fills in on the floor as a unit manager when necessary, having done so twice in the month preceding the hearing in this matter, when the Employer was short staffed or there was a call-in. Kane also participates in the nursing management on-call, as do the CCCs and the staff development director.

Analysis

Supervisory Status of Unit Managers

At issue is whether unit managers are supervisors under Section 2(11) of the Act with the authority to discipline, assign, responsibly direct, or transfer employees, to adjust their grievances, or to make effective recommendations in those areas as well as in hiring, suspension, promotion, or discharge.

[28] It is unclear whether she received an increase in pay upon taking the MDS position.

The party that alleges an individual is a supervisor carries the burden of proof. ***NLRB v. Kentucky River Community Care***, 532 U.S. 706, 711-712 (2001); ***Elmhurst Extended Care Facilities, Inc.***, 329 NLRB 535, 536 n. 8 (1999). The burden is met by fulfilling a preponderance of evidence standard. ***Oakwood Healthcare, Inc.***, 348 NLRB 686, 694 (2006); ***Dean & Deluca***, 338 NLRB 1046, 1047 (2003).

A party shouldering the burden of proof on these points must heed the Board's long-standing warning that purely conclusionary evidence is not sufficient to establish supervisory status. ***Golden Crest Healthcare Center***, 348 NLRB 727, 731 (2006); ***Chevron Shipping Co.,*** 317 NLRB 379, 381 n. 6 (1995) (conclusionary statements without supporting evidence are not enough.) This record is replete with such evidence. While broad pronouncements and generalizations may be material, they are not substitutes for details. Evidence in conflict or otherwise inconclusive will not be grounds for a supervisory finding. ***New York University Medical Center***, 324 NLRB 887, 908 (1997), efd. in relevant part 156 F.3d 405 (2nd Cir. 1998): ***The Door***, 297 NLRB 601 n. 5 (1990); ***Phelps Community Medical Center***, 295 NLRB 486, 490 (1989). Job titles, job descriptions, or similar documents are not given controlling weight and will be rejected as mere paper, absent independent evidence of the possession of the described authority. Id.; ***Golden Crest***, supra at 731, citing ***Training School at Vineland***, 332 NLRB 1412, 1416 (2000).

Assignment of Work

The Board defines assigning work as "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***, supra at 699.

The Board instructs that proof of independent judgment is undercut by evidence that decisions are dictated or controlled by detailed instructions or established practices or policies. In a healthcare setting, a nurse uses independent judgment in assigning when she weighs the individualized condition and needs of a patient against the skills or special training of the available staff. ***Barstow Community Hospital***, 352 NLRB 1052, 1053 (2008); ***Oakwood Healthcare***, supra at 693.

Time

The record establishes that the scheduler sets the CNAs' scheduled hours and sets a half-hour window for when CNA's 15-minute breaks should take place on the first and second shifts. The initial scheduling of CNAs involves no choices on a unit manager's part. If a CNA calls off work during the week while the scheduler is at the facility, the scheduler handles calling in a replacement, after consulting first with the DON. If a CNA calls off work on the second or third shift during the week, or on the weekends, the unit

managers must follow the dictates of the collective bargaining agreement covering CNAs and call CNAs into work from a prewritten seniority list provided by the scheduler. If the unit managers are unsuccessful obtaining coverage through the call-in list, they mandate employees to stay over in reverse seniority order, again according to the dictates of the CNA's collective bargaining agreement. Thus, the Employer's policies do not allow for choices by the unit managers with regard to calling CNAs into work or requesting them to stay beyond their regularly scheduled shifts.

When CNAs need to leave work early, they inform the unit manager; however, a unit manager cannot excuse the absence because the CNAs receive points under the Employer's no-fault absenteeism policy which the unit manager does not administer.

The interim administrator testified that the unit managers could choose to leave a vacant slot unfilled, and in doing so they conduct an analysis of the acuity of the patients. However, no specific examples were provided, and there is no evidence that the Employer trained unit managers to comply with the strict caregiver-resident ratios.

The scheduler sets the schedule, and the dictates of the CNA collective bargaining agreement and the Employer's absenteeism policy are factors that circumscribe a unit manager's authority below the level requiring finding independent judgment. ***Oakwood Healthcare***, supra at 693. The Employer has not established the possession of supervisory authority by unit managers in scheduling CNAs.

Place and Tasks

In ***Oakwood Healthcare***, the Board found that the assignment of emergency room charge nurses to geographic areas within the emergency room fell within the definition of "assign" for purposes of Section 2(11). ***Oakwood Healthcare***, supra at 695. Here, the scheduler assigns CNAs to their units. Because the Employer's policy favors consistent care by CNAs of the same residents, for the most part CNAs remain assigned to the same residents, rooms, and halls in order to ensure continuity of care.

Once assigned, CNA's daily tasks such as the taking of vital signs, bringing residents to meals, and ambulating residents are defined by the schedule and the daily assignment sheets, which are largely completed by the CCCs, although the unit managers can insert additional information. When the unit manager does add to the assignment sheet, the unit manager knows to do so by looking at the charting lists, plan of care, and the appointment book. As the CCC, Dana Boertman acknowledged the CNAs "have their job assignments already mapped out, and then, of course, with the daily assignment sheets, they would go about their business."

CNAs' significant overall duties are defined by the residents they tend. The situations that may result in the unit manager adjusting room assignments -

accommodating resident preferences or reallocating rooms because a CNA had too many difficult residents - do not require judgments that rise above the routine. The record demonstrates that CNAs possess the same training and skills. Their assignments are routine in nature and based on their title, rather than on any particular expertise. For example, in providing post-mortem care, the CNAs rely on their training and the Employer's standard policy. Moreover, the Employer has not shown that unit managers perform a detailed analysis of CNAs' abilities and residents' needs in making assignments. The interim administrator's testimony that the unit managers do so is devoid of specifics. Asserting, without more, that a disputed individual assigns by taking patient acuity into account is too conclusionary to meet the required evidentiary threshold. ***Loyalhanna Health Care Associates***, 352 NLRB 863, 864 (2008); ***Lynwood Manor***, 350 NLRB 489, 490 (2007). Testifying in general terms that occasions exist, but omitting any details as to the unit managers' precise roles or how they arrived at any judgments, precludes a finding that their authority in such areas is exercised independently. ***Loyalhanna Health Care***, supra.

Responsible Direction

For direction to be responsible, the person directing must have oversight of another's work and be accountable for the other's performance. To establish accountability, it must be shown that the putative supervisor is empowered to take corrective action, and is at risk of adverse consequences for others' deficiencies. ***Oakwood Healthcare***, supra at 691-692. As with all of the supervisory indicia enumerated in Section 2(11), responsible direction must entail independent judgment. For responsible direction to be exercised with independent judgment, it must (a) be independent, free of the control of others, (b) involve a judgment that requires forming an opinion or evaluation by discerning and comparing data, and (c) involve a degree of discretion that rises above the routine or clerical. ***Oakwood Healthcare***, supra at 692-693.

The charting lists, residents' ADL plans, and the daily assignment sheets, which are initiated by the CCCs, not the unit managers, instruct CNAs regarding specific care for each patient. CNAs check off tasks as they complete them, on the Care Tracker computer program. Absent a change in a patient's condition, the CNAs know what to do with little need for direction. Thus, the unit managers' directions to CNAs are subject to the control of others, and are not free from the control of others.

The Employer alludes to situations, such as readying a resident for outside appointments, conducting post-mortem care, and the taking of vital signs if a resident falls or experiences a decline in health, and urges that unit managers prioritize the order in which these tasks occur. However, most of the evidence proffered by the Employer consists of conclusionary testimony from the interim administrator and the DON about the types of directives that unit managers give. Reciting the many things that a unit

manager may call upon a CNA to do is not proof that the unit manager exercises independent judgment. To satisfy its burden to establish a sufficient quantum of discretion, an employer must present concrete evidence that explains how the unit managers arrive at particular directives at particular moments, i.e., what factors she takes into account and how she weighs competing concerns. The record is devoid of such evidence.

The unit manager may occasionally assign a discrete task, such as cleaning a linen closet, to a CNA, and the unit manager may pick one of two CNAs to deliver water or linen to residents; however, assignments of such tasks is closer to "ad hoc assignments" described in ***Croft Metals***, 348 NLRB 717, 721 (2006), rather than the emergency room assignments discussed in ***Oakwood***. In ***Croft Metals***, supra at 721, the Board found that the switching of tasks by lead persons among employees assigned to their line or department was insufficient to confer supervisory status. Similarly, the unit managers' assignment of discrete tasks to CNAs here is also insufficient to constitute supervisory status.

Even if the record showed that unit managers direct with independent judgment, which it does not, the Employer failed to establish that they responsibly direct. What is needed but lacking here is sufficient evidence showing that unit managers face the real prospect of adverse action for CNAs' poor performance. The Employer has presented three examples of disciplines purportedly issued to unit managers because of CNAs' conduct. In one, the unit manager was disciplined for leaving a resident in distress, not for any failure on the part of the CNAs who were under the unit manager's purview. In the second instance, again, the unit manager was not disciplined for the CNAs' misconduct, but for the unit manager's failure to assign the CNAs to transfer a resident coming from the hospital. In the third discipline, the unit manager was disciplined for signing off on a time card exception form indicating that a CNA was in the facility when in fact the CNA was not. It was the unit manager's shortcoming, not the CNA's, that caused the discipline. Finally, CCC Boertman verified that unit managers do not face consequences if they do a poor job in assigning tasks for the CNAs or if they forget to assign work. The Employer has not demonstrated that unit managers are held accountable for those they direct. I find, therefore, that they do not possess the authority to responsibly direct. ***Lynwood Manor***, 350 NLRB 489, 491 (2007); ***Golden Crest Healthcare***, supra at 731.

Evaluation and "Promotions" of CNAs

Unit managers evaluate CNAs largely through the use of preprinted forms, checking items as to whether the CNAs have fulfilled the duties delineated in their job descriptions, although some unit managers also provide written comments.

The Employer contends that evaluations completed by unit managers may influence the DON and human resources to transfer or promote a CNA. However, there is no showing that evaluations of CNAs affect their job tenure or status as the CNAs' collective bargaining agreement requires that positions be awarded by seniority. The evaluations are not used to determine whether a CNA receives a raise, because the CNAs' collective bargaining agreement dictates the CNAs' wage schedule, including the timing of the raises. Moreover, evaluating employees is not a statutory indicia of supervisory authority. The Employer has not established any practice of unit managers' involvement in the CNA evaluation process that establishes supervisory authority.

With respect to the probationary evaluations, the record does not contain a single example of a CNA whose probation was lengthened or who did not remain employed by the Employer as a result of the unit manager's evaluation. There is one example of a unit manager indicating that a CNA had not successfully completed probation; however, there is no evidence with respect to what happened to that CNA as a result of the evaluation. The Board has consistently declined to find supervisory status based on evaluations without evidence that they constitute effective recommendations to reward, promote, discipline, or likewise affect the evaluated employee's job status. ***Coventry Health Continuum***, 332 NLRB 52, 53-55 (2000); ***Ten Broeck Commons***, 320 NLRB 806, 813 (1996).

Discipline and Suspension

The Employer argues that unit managers have the authority effectively to recommend discipline, including suspension. To prevail, the Employer must prove that: (1) unit managers submit actual recommendations, and not merely anecdotal reports, (ii) their recommendations are followed on a regular basis, (iii) the triggering disciplinary incidents are not independently investigated by superiors, and (iv) the recommendations result from the unit managers' own independent judgment. Id. (reportorial function is not supervisory); ***The Ohio Masonic Home, Inc.***, 295 NLRB 390, 394 (1989) (same); ***ITT Lighting Fixtures***, 265 NLRB 1480, 1481 (1982), enf. denied on other grounds 712 F.2d 40 (2nd Cir. 1983), cert. denied 466 U.S. 978 (1984) (to be effective, a recommendation must be both followed and not independently investigated). A showing that recommendations are usually or even always followed is not enough. The party alleging supervisory status must show that the recommended action is taken with no independent investigation by upper management. ***Family Healthcare***, 354 NLRB No. 29, slip op. at 5 (2009); ***American Directional Boring, Inc.*** 353 NLRB 166 (2008).

I find that the Employer has not presented sufficient evidence to satisfy its burden to establish that (ii), (iii), and (iv) above apply.

As a preliminary matter, cases cited by the Employer are inapposite. ***Promedica Health Systems***, 343 NLRB 1351 (2004), did not involve a representation case and the

only dispute was whether coachings amounted to a step in the disciplinary procedure. Similarly, in ***Oak Park Nursing Care Center***, 351 NLRB 27 (2007), which was a representation case, the Board's decision did not address the employer conduct at issue herein, that is, conducting additional investigation of a discipline, changing the level of disciplines, or directing purported supervisors to discipline employees.

At first glance, with the record containing some 20 verbal and written warnings signed by unit managers dating back to 2001, it might seem that there is sufficient evidence of the unit managers' authority to discipline under Section 2(11). However, upon closer scrutiny, the circumstances behind recent disciplines raise doubt whether the unit managers' authority to recommend discipline truly exists. For example, the DON testified that she was the one to instruct unit manager Melissa Tyler to write up a CNA, demonstrating that the recommendation for discipline did not result from Tyler's own independent judgment. Unit manager Jones' testimony about the disciplines she wrote on December 12 and 17, 2010, reveals the following: After Jones reported a problem with the CNA failing to complete assigned tasks, the DON conducted additional investigation by checking machines to see if the CNA had, in fact, recorded vital signs. It was the DON who looked at the CNA's personnel file to determine the appropriate level of discipline. The DON spoke with the human resources department about the discipline without Jones' participation or input. The DON superseded Jones' recommendation to issue a verbal warning and issued the CNA a written warning. Jones filled out only the description sections of the discipline without recommending future action. It was the DON who had the meeting with the CNA and gave her the discipline and determined what the future action would be. This sequence of events was largely repeated with the second discipline signed by Jones, although the DON required that Jones be the one to present the discipline to the CNA. Again, the DON conducted her own investigation.

The DON independently investigated the circumstances of other disciplines. With respect to the discipline issued by unit manager Lauren Hill to a CNA for failure to perform job duties and insubordination, the record shows that the DON independently investigated the discipline by speaking with Hill and other CNAs working that day and by reviewing the CNA's previous corrective actions.

The Employer's former administrator wrote in a step 2 response to a grievance, that she had investigated a discipline issued by unit manager Jenn Zoern, whose discipline recommendation for a written warning was reduced to a verbal warning.

Unit managers are not included in upper management's investigations of misconduct or in the grievance procedure (after the grievance is written), except when they are interviewed as witnesses. The Employer acknowledges that upper management writes <u>all</u> attendance disciplines, even when they are signed by unit managers. There is no showing that the unit managers are routinely informed when CNAs receive disciplines, and there is no regular mechanism, as far as the record reveals, to advise them

of the outcome. Other disciplines are presented by the Employer without context. With respect to the disciplines discussed above, the Employer has not satisfied its burden that upper management conducts no additional investigation, that the disciplines result from the unit managers' independent judgment, or that the unit managers' recommendations are routinely followed.

Finally, the record contains no examples of unit managers independently suspending CNAs. All disciplines presented by the Employer purportedly issued by unit managers involved verbal or written warnings. The fact that one unit manager mused, in writing on a corrective action form, that she wanted to suspend a CNA is insufficient to confer supervisory authority. The Employer's policy requires CNAs to leave the facility if they are accused of abuse; however, the record indicates that the DON would be contacted before a CNA would be suspended.

Resolving Grievances

Unit managers do not play any role in the CNAs' contractual grievance procedure. The Employer adduced one purported example in which a unit manager met with a CNA's union representative regarding a disputed write-up. However, this took place before any grievance had been written, nothing was resolved, and the unit manager had no further involvement in the grievance procedure. Subsequently, her recommendation for a written warning was reduced to a verbal warning, and the unit manager's initial claim in the discipline that the CNA had failed to perform job duties was crossed out. One isolated incident of a unit manager meeting with a collective bargaining representative is not indicative of a unit manager's authority. ***American Medical Services, Inc***., 262 NLRB 1458 (1982) I cannot find, on this record, that unit managers independently resolve grievances within the meaning of Section 2(11).

Secondary indicia

The existence of secondary indicia, such as title and higher pay, standing alone, is insufficient to demonstrate supervisory status**.** ***Shen Automotive Dealership Group***, 321 NLRB 586, 594 (1996).

Written job descriptions and the Employer's job postings for the unit managers suggest the presence of supervisory authority. But the expansive authority set forth in the documents is at odds with the realities. The Board has long cautioned that evidence of actual authority (or lack thereof as in the instant matter) trumps paper authority. ***Golden Crest Healthcare***, supra at 731; ***Valley Slurry Seal Co.***, 343 NLRB 233, 246 (2004); ***Franklin Home Health Agency***, 337 NLRB 826, 829 (2002); ***Training School at Vineland***, 332 NLRB 14123, 1416 (2000); ***Chevron U.S.A., Inc***., 309 NLRB 59, 69 (1992). I conclude that the unit managers' written job descriptions and job postings are mere paper conveyances that do not impart actual supervisory authority. Similarly, the

fact that the Employer has the unit managers sign routine incident reports as "supervisor" is without import.

The Employer claims the unit managers' higher pay is a further indication of their authority. However, the record is devoid of evidence of the pay of acknowledged managers; thus, no conclusions can be drawn. The Employer states that unit managers received leadership training. However, there is no evidence that any unit managers received such training since 2005. The Employer's claim that unit managers are the highest ranking officials present in the facility in the evenings and during the weekends is undercut by the assignment of the on-call nurse managers, and the DON's availability for telephone calls during off hours.

Finally, a finding that unit managers are statutory supervisors would have two interesting consequences. First, every nurse employed at the facility would be a supervisor, with the possible exception of the MDS nurse. Second, during the daytime hours between 6:45 a.m. through 2 p.m., there would be 7 nursing supervisors, including the DON, the 3 CCCs, and the 3 unit managers, to supervise 10 CNAs. From 2:45 p.m.-4:30 p.m., the ratio would be 6 nursing supervisors for 8 CNAs. From 4:30 p.m.-10 p.m., there would be 3 nursing supervisors for 8 CNAs, and from 10 p.m.-6 a.m., the ratio would be 3 nursing supervisors for 5 CNAs. Although not quite as stark, on the weekends, on the first shift there would be 3 nursing supervisors for 10 CNAs, on the second shift there would be 3 nursing supervisors for 8 CNAs, and on the third shift there would be 3 nursing supervisor for 5 CNAs. Overall there would be 18 supervisors for approximately 54 CNAs, an unusually top-heavy, 1:3 ratio. ***Oakwood Healthcare***, supra at 715-716; ***Beverly California Corp. v. NLRB***, 970 F.2d 1548, 1555-1556 (6th Cir. 1992) (classifying 25 percent of nursing home staff as supervisors makes ranks of supervisors "pretty populous"); ***NLRB v. Res-Care, Inc.***, 705 F.2d 1461, 1468 (7th Cir. 1983) (33 percent found to be high); ***Airkaman, Inc.***, 230 NLRB 924, 926 (1977) (1:3 ratio is unrealistic and excessively high).

MDS Nurse

Managerial Analysis

The Employer contends that the MDS nurse is a managerial employee. Managerial employees are defined as employees who have the authority to formulate, determine, or effectuate employer policies by expressing and making operative the decisions of their employer and those who have the discretion in the performance of their jobs independent of their employer's established policies. ***Tops Club, Inc.***, 238 NLRB 928 fn. 2 (1978), quoting ***Bell Aerospace***, 219 NLRB 384 (1975).

The record is devoid of evidence that the MDS nurse formulates or determines any employer policies. The Employer asserts that her determinations of whether a resident is

qualified to receive Medicare or Medicaid somehow constitutes policy making or implementation; however, the record indicates that she simply gathers information from the interdisciplinary team and from unit managers and CNAs and inputs that information into a computer program. The Board has explicitly held that an employee in a virtually identical position whose "primary responsibility is to insure that the hospital provides care that is reimbursable by insurers by reviewing patient charts to determine whether the treatment provided and length of stay are consistent with established utilization guidelines" was not a managerial employee. ***George L. Mee Memorial Hospital*** 348 NLRB327, 333 (2006).[29]

Community of Interest Analysis

In establishing an appropriate unit, the Board considers whether employees share a community of interest. Community-of-interest factors include: (a) similarity of employee skills, qualifications, and training; (b) degree of functional integration; (c) frequency of contact and interchange among employees; (d) commonality of supervision; (e) similarity in benefits, hours, and other terms and conditions of employment; and (f) bargaining history. ***Ore-Ida Foods, Inc.***, 313 NLRB 1016, 1019 (1994), enfd. 66 F.3d 328 (7th Cir. 1995); ***Kalamazoo Paper Box Corp.***, 136 NLRB 134, 137 (1962).

As an RN, the MDS nurse has similar skills, qualifications, and training as the unit managers. She received only three days additional training to become the MDS nurse. She previously was a unit manager. In addition, her position is functionally integrated with the unit managers in that she secures information from them with respect to residents' care. She has interchange with the unit manager in that she works as a unit manager when the Employer is short staffed and had done so at least twice in the last month before the hearing. She has a different supervisor than the unit managers in that she reports to the clinical resources director. She receives the same benefits and about a dollar more pay than the unit managers. The Board has long held that differences in compensation levels or methods of payment are not adequate bases for excluding employees from an appropriate unit. ***Four Winds Services, Inc.***, 325 NLRB 632 (1998); ***Aurora Fast Freight, Inc.***, 324 NLRB 20, 21 (1997); ***Embry-Riddle Aeronautical University, Inc.***, 242 NLRB 689, 689-690 (1979). She has been seen in the break room by the other unit managers. Since this is a new position, there is no bargaining history. Moreover, the Board is reluctant to leave a residual unit where the employees could be included in a larger group. ***Huckleberry Youth Programs***, 326 NLRB 1272 (1998). See also ***United Rentals, Inc***., 341 NLRB 540 (2004).

[29] The record shows that the MDS nurse rotates with five others, including the three CCCs and the staff development director, to serve as the nurse manager on-call once every six weeks. The Employer's interim administrator described this position as one of replacing any unit managers who are absent. The Union's witness, Rachel Jones, testified that the nurse manager on call was available for consultations. The Employer has provided no evidence to establish that the nurse managers possess supervisory authority under Section 2(11) when they are acting in their on-call status, and indeed the Employer does not assert in its brief that the MDS nurse is a supervisor.

I find that the MDS nurse is properly included in the unit with the unit managers.

5. In view of the foregoing, I find the following employees of the Employer **may** constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

> All full-time and regular part-time registered nurses and licensed practical nurses, including the MDS nurse, employed by the Employer at its facility located at 1380 E. Sherman Boulevard, Grand Rapids, Michigan; but excluding all management staff, confidential employees, clinical care coordinators, office clerical employees, and guards and supervisors as defined in the Act.

The unit set out above includes professional and nonprofessional employees. However, the Board is prohibited by Section 9(b)(1) of the Act from including professional employees in a unit with nonprofessional employees unless a majority of the professional employees vote for inclusion in such a unit. Accordingly, the desires of the professional employees must be ascertained as to inclusion in a unit with nonprofessional employees.

Therefore, I shall direct separate elections in the following voting groups:

> **VOTING GROUP A:**
>
> All full-time and regular part-time licensed practical nurses employed by the Employer at its facility located at 1380 E. Sherman Boulevard, Grand Rapids, Michigan; but excluding all management staff, confidential employees, registered nurses, clinical care coordinators, office clerical employees, and guards and supervisors as defined in the Act.
>
> **VOTING GROUP B:**
>
> All full-time and regular part-time registered nurses, including the MDS nurse, employed by the Employer at its facility located at 1380 E. Sherman Boulevard, Grand Rapids, Michigan; but excluding all management staff, confidential employees, licensed practical nurses, clinical care coordinators, office clerical employees, and guards and supervisors as defined in the Act.

The nonprofessional employees (Voting Group A) will be polled to determine whether they wish to be represented by the Petitioner. The professional employees (Voting Group B) will be asked the following two questions on their ballot:

1. Do you desire to be included with nonprofessional employees in a single unit for the purposes of collective bargaining?

2. Do you desire to be represented for the purposes of collective bargaining by SEIU Healthcare Michigan, Service Employees International Union, CTW?

If a majority of the professional employees (Voting Group B) vote "Yes" to the first question, indicating their desire to be included in a unit with non-professional employees, they will be so included. Their votes on the second question then will be counted together with the votes of the nonprofessional employees (Voting Group A) to determine whether the employees in the overall unit wish to be represented by the Petitioner. If, on the other hand, a majority of the professional employees vote against inclusion, they will not be included with the nonprofessional employees. Their votes on the second question will be separately counted to determine whether they wish to be represented by the Petitioner in a separate unit.

Thus, the unit determination is based, in part, upon the results of the election among the professional employees. However, I make the following findings in regard to the appropriate unit:

If a majority of the professional employees vote for inclusion in the unit with nonprofessional employees, I find the following single unit will constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time registered nurses and licensed practical nurses, including the MDS nurse, employed by the Employer at its facility located at 1380 E. Sherman Boulevard, Grand Rapids, Michigan; but excluding all management staff, confidential employees, clinical care coordinators, office clerical employees, and guards and supervisors as defined in the Act.

If a majority of the professional employees do not vote for inclusion in the unit with nonprofessional employees, I find the following two groups of employees will constitute separate units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Unit A:

All full-time and regular part-time licensed practical nurses employed by the Employer at its facility located at 1380 E. Sherman Boulevard, Grand Rapids, Michigan; but excluding all management staff, confidential employees, registered nurses, clinical care coordinators, office clerical employees, and guards and supervisors as defined in the Act.

Unit B:

All full-time and regular part-time registered nurses, including the MDS nurse, employed by the Employer at its facility located at 1380 E. Sherman Boulevard, Grand Rapids, Michigan; but excluding all management staff, confidential employees, licensed practical nurses, clinical care coordinators, office clerical employees, and guards and supervisors as defined in the Act.

Those eligible shall vote whether they wish to be represented for the purposes of collective bargaining by SEIU Healthcare Michigan, Service Employees International Union, CTW.

Those eligible shall vote as set forth in the attached Direction of Election.

Dated at Detroit, Michigan, this 4th day of March 2011.

(SEAL)

/s/ Stephen M. Glasser

Stephen M. Glasser, Regional Director
National Labor Relations Board, Region 7
Patrick V. McNamara Federal Building
477 Michigan Avenue, Room 300
Detroit, Michigan 48226

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by **SEIU HEALTHCARE MICHIGAN, SERVICE EMPLOYEES INTERNATIONAL UNION, CTW.** The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have quit or been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. ***Excelsior Underwear, Inc.*** 156 NLRB 1236 (1966); ***NLRB v. Wyman-Gordon Company***, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. ***North Macon Health Care Facility***, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on

the list should be alphabetized (overall or by department, etc.). I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **March 11, 2011**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website at *www.nlrb.gov*,[30] by mail, or by facsimile transmission at **313-226-2090**. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Posting of Election Notices

Section 103.20 of the Board's Rules and Regulations states:

a. Employers shall post copies of the Board's official Notice of Election on conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.

b. The term "working day" shall mean an entire 24-hour period excluding Saturday, Sunday, and holidays.

c. A party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 days prior to the commencement of the election that it has not received copies of the election notice. [This section is interpreted as requiring an employer to notify the Regional Office at least 5 full working days prior to 12:01 a.m. of the day of the election that it has not received copies of the election notice. ***Club Demonstration Services***, 317 NLRB 349 (1995).]

[30] To file the eligibility list electronically, go to the Agency's website at *www.nlrb.gov*, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.

d. Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Section 102.69(a).

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001**. This request must be received by the Board in Washington by **March 18, 2011**. The request may be filed electronically through the Agency's website, *www.nlrb.gov*,[31] but may **not** be filed by facsimile.

[31] To file the request for review electronically, go to the Agency's website at *www.nlrb.gov*, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.