

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
Region 21

LIFEHOUSE VISTA  
HEALTHCARE CENTER, LLC<sup>1</sup>

Employer

and

Case 21-RC-063591

SEIU, SERVICE EMPLOYEES  
INTERNATIONAL UNION, CTW, CLC<sup>2</sup>

Petitioner

**DECISION AND DIRECTION OF ELECTION**

On August 29, 2011, the SEIU, Service Employees International Union, CTW, CLC, herein called the Petitioner, filed a petition seeking an election in a bargaining unit consisting of certain employees of LifeHOUSE Vista Healthcare Center, LLC, herein called the Employer. Specifically, the Petitioner seeks a unit consisting of all full-time, part-time, and on-call LVNs employed by the Employer at its facility located at 247 East Bobier Drive, Vista, California.

On September 8, 12, and 13, 2011, a hearing in this matter was held before a hearing officer of the National Labor Relations Board, herein called the Board. Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, herein called the Act, the Board has delegated its authority in this proceeding to the undersigned.<sup>3</sup>

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<sup>1</sup> The Employer's name appears as amended at the hearing.

<sup>2</sup> The Petitioner's name appears as amended at the hearing.

<sup>3</sup> The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The petitioner is a labor organization within the meaning of the Act.

**I. The Issue**

The sole issue to determine is whether Licensed Vocational Nurses, herein called LVNs, are supervisors within the meaning of Section 2(11) of the Act.

**II. Summary and Conclusion<sup>4</sup>**

Based upon the record, and the post-hearing briefs filed by the Employer and the Petitioner, I find that the employees known as LVNs are not supervisors within the meaning of Section 2(11) of the Act, and that the following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time, regular part-time, and on-call LVNs, including treatment nurses, employed by the Employer at its facility located at 247 East Bobier Drive, Vista, California; excluding all other employees, confidential employees, professional employees, payroll employees, medical record employees, registered nurses (RNs), guards and supervisors as defined in the Act.<sup>5</sup>

An election shall be directed in the above-described unit.

**III. The Facts**

**A. The Employer's Operation**

The Employer, a healthcare provider in Vista, California, is engaged in the operation of a skilled nursing facility. The facility provides 24-hour care for both long-term residents and short-term rehabilitation residents. The Nursing Department is headed by the Director of Nursing ("DON"), Dianna Klarenbach. DON Klarenbach oversees two Assistant Directors of Nursing ("ADON"), Christina Apostol and Rowena Fredeluces; a Director of Staff Development, Jerry Conchas; 14 Registered Nurses, herein RNs; approximately 39 Licensed Vocational Nurses, herein called the LVNs; approximately 90 Certified Nursing Assistants, herein called CNAs; and several Restorative Nurses Aides, herein called RNAs.

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<sup>4</sup> No party contends that LVNs have, or exercise, the authority on behalf of the Employer to hire, transfer, suspend, lay-off, recall, promote, or discharge employees, or to adjust their grievances.

<sup>5</sup> The Employer and Union stipulated to the inclusion of treatment nurses in the unit.

The Employer divides its daily nursing operations into the AM Shift, the PM Shift and the nocturnal shift, herein called the NOC Shift. LVNs work during these three shifts from 6:30 a.m. - 3:00 p.m., 2:30 p.m.-11:00 p.m., and 10:30 p.m. -7:00 a.m., whereas CNAs work from 7:00 a.m. - 3:00 p.m., 3:00 p.m. -11:00 p.m., and 11:00 p.m. -7:00 a.m.

The facility is divided into two stations: Station One and Station Two. Station One houses long-term resident patients and "skilled" patients. Skilled patients reside in the skilled unit on a temporary basis. Station Two houses patients suffering dementia, Alzheimer's disease, or similar mental impairments.

ADON Apostol oversees Station One and ADON Fredeluces oversees Station Two during the AM Shift. During the PM and NOC Shifts, when ADONs are not present, RNs who are specifically tasked with assuming the responsibility of the absent ADON are designated as "RN Supervisors." On average, between one and three RN Supervisors oversee the PM Shift and between one and two oversee the NOC Shift.

B. The Role of the Licensed Vocational Nurses<sup>6</sup>

1. General Duties of an LVN

LVNs begin their shift by meeting with the LVN they are relieving to count medication making sure that all of them are accounted for. Then, they go patient to patient and discuss any changes in condition. Finally, before the CNAs report to work, the LVNs write out the work assignments for the CNAs.<sup>7</sup>

After the CNAs come to work, the LVNs distribute medications to their patients.<sup>8</sup> As an LVN distributes medication to patients, the LVN is also responsible for verifying that the breakfast that is being provided to a patient is within the patient's dietary guidelines. LVNs also check on patients' bodies while they are taking showers to see if

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<sup>6</sup> The record provided no evidence of LVNs having the authority to hire, discharge, promote, suspend, lay-off, or recall employees.

<sup>7</sup> The record shows that during the weekends the RN manager will write out the assignments for the CNAs.

<sup>8</sup> LVNs are assigned from 20 to 26 patients a shift.

there are any changes in condition. LVNs then check on Labs (tests) and update doctors on any changes in the patient. During the patients' lunch the LVNs supervise patients for changes in condition while they eat in the dining halls. The LVNs also check patients' blood sugar and, after lunch, distribute any additional medication that patients are prescribed. Then, the LVNs fill out charts for each patient noting any changes that have occurred during the shift. Finally, the LVN meets with the next shift LVN and the process begins again.

During each shift, LVNs and CNAs constantly interact as they provide care for patients. CNAs are responsible for providing patients their food, pedicures, making their beds, helping them get in and out of bed, changing their clothes, helping them with showers, helping them when they have to go to the restroom, and cleaning them when any patients have soiled themselves.

### C. Supervisory Classification

Section 2(11) of the Act defines a "supervisor" as:

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

It is generally acknowledged that the enumerated functions in this section are to be read in the disjunctive and the existence of any of them is sufficient to convey supervisory status. *NLRB v. Yeshiva University*, 444 U.S. 672 (1980); *Butler-Johnson Corp. vs. NLRB*, 608 F.2d 1303, 1306 at fn.4 (9<sup>th</sup> Cir. 1979).

The party alleging supervisory status – in this case the Employer – must prove not only possession of at least one of the supervisory authorities enumerated above, but also

that the putative supervisors use independent judgment in the exercise of that authority. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006).

The evidentiary burden is both a significant and substantial one, in that “purely conclusory” evidence is not sufficient to establish supervisory status: a party must present evidence that the employees at issue actually possess the authority set out in the Act. *Avante at Wilson*, 348 NLRB 1056 (2006) (finding no supervisory status where the testimony was “utterly lacking in specificity” and the employer therein failed to show that the individuals at issue actually possessed the authority asserted). Moreover, testimony merely asserting as a general matter that individuals exercised particular supervisory indicia is insufficient. Rather, in order to meet the burden of proof, testimony must include specific details or circumstances making clear that the claimed supervisory authority exists and is exercised. See *Avante, supra*, at 1056 (testimony regarding certain employees’ authority to discipline other employees was found to be insufficient where it lacked specifics regarding asserted incidents of exercise of such authority). Further, asserted supervisors will not be found to have such authority if they were not informed that they possessed it or if they exercised it only sporadically. *Golden Crest Healthcare Center*, 348 NLRB 727, 739 at fn. 9 (2006).

Applying the criteria set forth in Section 2(11) and relevant Board law, I find that, as explained below, the Employer has failed to establish that LVNs are supervisors.

1. Assigning Responsibilities

- a. Facts

The Employer contends that LVNs have the authority to assign work to CNAs. Specifically, the Employer contends that LVNs assign CNAs patients, taking into consideration the patients’ acuity, the CNAs’ skill, patients’ gender preferences, tensions between CNAs and between CNAs and patients, and LVNs’ preference that all CNAs have

the opportunity to work and develop a relationship with patients. Further, the Employer contends that LVNs have the authority to assign overtime.

The record shows that the Staffing Coordinator schedules CNAs to their shifts and to their stations.<sup>9</sup> When LVNs come into work they look at the census and determine if there have been any changes in the number of patients. Then, they divide the number of patients with the number of CNAs and determine how many patients each CNA will be assigned. After determining how many patients each CNA will be assigned, LVNs look at the 24-Hour Log-In Sheet where DON Klarenbach and the ADONs write out any gender preference of patients or restrictions for where a CNA may be assigned. The record further shows that after considering the 24-Hour Log-In Sheet, LVNs assign CNAs to the same rooms and hallways in the facility as they have customarily been assigned.<sup>10</sup>

The record shows that the acuity of the patient and the skill of the CNA were not considered when assigning CNAs to patients; however, on occasion LVNs consider work load when making assignments. If they see that certain CNAs have more work because the patients they are assigned require more attention or were larger, they attempt to equalize the work among the CNAs. LVNs also consider language skills when assigning CNAs to patients. On one occasion an LVN assigned a Filipino patient to a Filipino CNA because both spoke Tagalog.

The record does not show that LVNs consider patients' preferences as to gender or CNAs when making patient assignments for the shift. The record, however, shows that LVNs receive instruction from management through the 24-Hour Log-In Sheet and other documents regarding patients' preferences. The record shows no evidence that LVNs

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<sup>9</sup> The Staffing Coordinator is responsible for setting up the monthly schedule for CNAs, receiving employees' vacation requests, sick leave requests, calling in CNAs when a CNA does not come in for a scheduled shift, and asking CNAs to work a second shift.

<sup>10</sup> LVNs make an effort to assign CNAs to sequential rooms to avoid CNAs working in different locations of the facility.

assign CNAs based on the tensions that may exist among CNAs or between CNAs and patients. Finally, the record contains no examples of LVNs making assignments based on LVNs' preference that all CNAs have the opportunity to work and develop a relationship with patients.

The record reveals that LVNs assign CNAs to shower patients. Patients are given a shower on a scheduled date that is set by the master schedule established by the Employer. The record shows that LVNs assign the showering duties by having the CNA who is assigned to the patient give the shower. If the patient requires more attention or a CNA has several assigned patients that are scheduled for a shower, the LVNs will distribute the shower assignments among other CNAs with less work in order to equalize the work. In some cases where the patient has a gender preference, the LVN will assign a CNA of the preferred gender to conduct the shower, if the patient's assigned CNA is the opposite gender.

The record also shows that the LVNs assign CNAs their lunch breaks, duties during patients' lunch, and chaperoning duties during patients' smoking break. The record reveals that all three periods—the CNAs' lunch break, the patients' lunch break and the smoking break—have a fixed time and that the LVNs simply rotate among the CNAs. In the case of CNAs' lunch break, LVNs rotate who will be taking what break or follow the break assignments of the past. In the case of duties during patients' lunch, LVNs make sure that all of the dining halls are covered and rotate the responsibilities among the CNAs without considering the acuity of patients or the skill of CNAs. And the smoking break is rotated among the CNAs, unless a CNA is pregnant.

The record reveals no evidence of LVNs having the authority to assign CNAs to work overtime, to work on a day off, or to require that CNAs arrive early; instead it shows that LVNs do not have such authority. In cases where the staff needs an additional CNA,

the LVN goes to the RN supervisor or the Unit Manager, and they are the ones that ask CNAs to stay an extra shift or to work additional hours.

The record also shows that LVNs do not have the authority to relieve a CNA from a task. The record shows that CNAs have set work duties dictated by management and the scope of their certification.

b. Analysis

In *Oakwood Healthcare, Inc.*, 348 NLRB at 689, the Board construed the term “assign” to refer to “the act of designating an employee to a place (such as a location, department, or wing), appointing an individual to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks to an employee.” The Board clarified that “[t]o ‘assign’ for purposes of Section 2(11) refers to the . . . designation of significant overall duties to an employee, not to the . . . ad hoc instruction that [an employee] perform a discrete task.” *Oakwood*, 348 NLRB at 689.

In describing independent judgment the Board stated: “If there is only one obvious and self-evident choice (for example, assigning the one available nurse fluent in American Sign Language (ASL) to a patient dependent upon ASL for communicating), or if the assignment is made solely on the basis of equalizing workloads, then the assignment is routine or clerical in nature and does not implicate independent judgment, even if it is made free of the control of others and involves forming an opinion or evaluation by discerning and comparing data.” *Id.* at 693.

Based on the record and applicable Board law, I conclude that the Employer has failed to meet its burden of establishing that the LVNs have the authority to assign CNAs work exercising their own independent judgment. The Employer has significant input into the assigning of patients by requiring CNAs to work on specific shifts and at specific stations. Then, the Employer guides LVNs further by providing them with written

suggestions on which gender should be assigned to which patient and restrictions as to where some CNAs should be assigned. *Oakwood*, 348 NLRB at 693. The remaining designations are generally filled by LVNs assigning CNAs to the same halls and rooms they have customarily been assigned to.

The few times where LVNs deviated from the customary assignments were to equalize work, to link a patient and a CNA who speak a common language, to accommodate a gender preference, or to provide large patients with a strong CNA. However, this is not an exercise of independent judgment. The Board has found that assigning employees based on language skills, the gender preference of patients, the size of a patients, or to equalize work does not establish independent judgment. *Oakwood*, 348 NLRB at 693, *Regal Health Care Center*, 354 NLRB No. 71 (2009).

The Employer claims that LVNs consider a number of factors when assigning patients to CNAs. However, the Employer mostly provided conclusory statements and the Board has found that “conclusory statements made by a witness in their testimony, without supporting evidence, do not establish supervisory authority.” *Sears Roebuck & Co.*, 304 NLRB 193, 193 (1991).

As for LVNs’ assignments for lunch breaks, patients’ lunch break duties, shower duties, and smoking chaperon, the record shows that LVNs’ authority is limited. Smoking breaks and lunch breaks for patients and for CNAs are at a fixed time and LVNs are not allowed to change them. The LVNs select the CNA responsible for the task, but they do so in a routine manner without the use of independent judgment. They go down the list of CNAs or follow previous assignment sheets, showing no evaluation of circumstances or independent thinking. Further, the showers of patients are generally assigned to the CNA assigned to the patient. When there is a deviation it is because the LVN is trying to distribute the work fairly or to accommodate a patient’s gender preference. This limited

amount of discretion does not show that LVNs exercise independent judgment. *Regal Health and Rehab Center, Inc.*, 354 NLRB No. 71 (2009).

The Employer provided LVNs a job description stating several authorities, including the authority to assign work. However, such a document, without evidence of actual authority, is not given controlling weight. *Training School of Vineland*, 332 NLRB 1412, 1416 (2000).

## 2. Responsibility to Direct

### a. Facts

The LVNs' job description states that LVNs have the 'responsibility to direct' as supervisor and are held accountable for the performance of CNAs under their supervision. The Employer contends that the LVNs are responsible for monitoring the work of CNAs and educating them when they fail to properly do one of their tasks. Also, the Employer contends that LVNs have the authority to direct CNAs according to skill when assigning them to tasks.

The record establishes that LVNs are not responsible for directing CNAs as they work; instead CNAs have set responsibilities established by the Employer and limited by their certification. Once CNAs know which patients they are assigned to, they go about their work without being given specific orders for each patient. Further, LVNs do not monitor CNAs as they work. Rather, LVNs have their own work responsibilities that are separate from the duties of CNAs. However, both interact with each other throughout the day as they provide care to patients. While working there are occasions when LVNs will notice that a patient needs to be toileted or needs to be shaved and will notify a CNA of that fact, but the LVNs do not have the authority to require a task be done by a certain time. If the LVN is not satisfied with the work of the CNA they may tell the CNA that they need to get the job done or even explain to them how the job should be done properly.

The record establishes that LVNs do not have the authority to relieve a CNA from a task. Instead the record shows that CNAs have the authority to move freely and help each other with the transfer of patients and other tasks without receiving permission from LVNs. The record also shows that LVNs do not have the power to move CNAs from their assigned hall. If an LVN is unsatisfied with the work of a CNA the LVN may complain to the RN supervisors or Unit Managers, but they will not necessarily follow the LVN's recommendation.

The record shows that there are occasions when LVNs will direct a CNA to take the vital signs of a patient because the patient's condition changed or because a doctor made the request. Generally, these directives are given to the CNA that is assigned to the patient and are not based on skill. There may be occasions when the CNA assigned to the patient is busy and the patient requires vital signs to be taken immediately. During such occasions the LVN directs the CNA closest to the patient to take the vital signs in an effort to give the best care possible to patients.

The record establishes that LVNs are not accountable for the actions of CNAs. The Employer provided several disciplines issued to LVNs relating to the failure of the LVNs to make sure that a pad alarm (an alarm that lets the staff know that a patient has moved from his/her bed or seat) was functioning and that a landing pad was in place. The disciplines themselves state that they were issued because of gross negligence in the performance of assigned duties and failure to follow patient care policy. No mention of CNAs is contained in the disciplines. Further, the record shows that LVNs are specifically responsible for making sure that the pad alarm and the landing pad are present and functioning because they are required to sign the Medication Administration Records where they verify that the devices are present and functioning.

The Employer further contends that an LVN was held responsible for a CNA not caring for a patient that had soiled himself. The record establishes that the acting Unit Manager considered issuing the LVN a warning because he failed to care for a patient himself after being notified of the patient's need for care, and that it was not because of the CNA's actions.

b. Analysis

The Board has held that the authority responsibly to direct employees is not limited to department heads. It may be exercised by any person below the department head who have rank-and-file employees under them and who decide what job shall be undertaken next and who shall do it, provided that the direction is "responsible" and carried out with independent judgment. *Oakwood*, 348 NLRB at 691.

For direction to be responsible, "the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly." *Id.* at 691-692. "Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps." *Id.* at 692. Such adverse consequences must materially affect the putative supervisor's terms and conditions of employment, either positively or negatively, as a result of their performance in directing others. *Golden Crest Healthcare Center*, 348 NLRB at 730-731.

Based on the record and applicable Board law, I conclude that the Employer has failed to meet its burden of establishing that the LVNs have the authority to responsibly

direct CNAs. The record reflects that CNAs and LVNs work together, but they each have independent responsibilities dictated by the Employer's procedures and their respective certifications. There are occasions when the LVNs will make CNAs aware of a patient needing care within the CNAs' responsibility, but such direction is done without independent judgment. The Board has held that routine direction "in order to maintain the quality of [the] work" does not implicate the exercise of independent judgment. *Ten Broeck Commons*, 320 NLRB 806, 811-12 (1996). So, in this case the LVNs, by making CNAs aware of patients' needs, do not establish that they have the authority to responsibly direct.

The Employer contends that LVNs consider the skill of CNAs when directing them to do certain tasks; however, the record fails to show any specific details. Without examples, there cannot be a finding of authority.

To the extent that LVNs may periodically request that a CNA perform a discrete task in order to assist with patient care, the record does not establish that the LVNs are held accountable for any alleged performance deficiencies in the CNAs' performance of those tasks; nor does the record establish that the LVNs have been specifically informed that they will be held so accountable.

In each of the disciplines provided by the Employer it is clear that the discipline was being issued to the LVN for his or her failure to meet their own obligations. None of the disciplines mentioned CNAs; instead they state that the LVNs themselves failed to meet their obligations. Without evidence that the LVNs can be held accountable for the actions of CNAs, no finding of authority to direct can be found.

### 3. LVNs' Authority to Discipline

#### a. Facts

The Employer also contends that LVNs have the authority to discipline or effectively recommend the discipline of employees. The LVNs' job description states that part of their essential functions is to participate in "counseling, disciplinary action and termination of staff, to the extent permitted by the Nursing Practice Act" as well as conduct evaluations. DON Klarenbach stated that LVNs have authority to suspend employees, and issue written and verbal warning. In addition, DON Klarenbach stated that LVNs have the authority to educate employees when they make an error.

The record establishes that as LVNs move from one patient to another they notice when CNAs have failed to complete a task or completed a task incorrectly. On those occasions LVNs have the right to talk to the CNA about the mistake and give them advice on how to resolve it in the future. In cases where the LVN has given the CNA advice or talked to the CNA about a mistake, the conversation stayed between the CNA and the LVN. There is no evidence that the conversation was recorded or went to supervisors for further action.

In cases where the CNA makes a mistake repeatedly, the LVN goes to their supervisor and the supervisor decides whether or not to issue a discipline. On occasion the supervisor asks the LVN to write out a report as to what they saw, and the supervisors uses that report as evidence that the violation occurred. Also, there are times when a supervisor will tell an LVN to issue the discipline to the CNA himself.

The Employer provided several examples of disciplines signed by an LVN; however, most of the time the LVN was acting as a Unit Manager at the time the discipline was issued. In the other disciplines provided by the Employer, the LVN who signed the

discipline was not present at the hearing to testify about the discipline. Finally, some of the disciplines mentioned by the Employer had not been issued.

The Employer also contends that LVNs effectively recommend the discipline of CNAs; however, the evidence fails to show any examples. The evidence shows that LVNs tell their supervisor about persistent issues that may affect patient care. They do not, however, recommend an action. In one case, an LVN went to the supervisor and made the supervisor aware that a CNA had given a blind patient food in an inappropriate way. The LVN asked if discipline was appropriate. The RN supervisor stated that it was, but wanted to seek further input from the Director of Nursing.<sup>11</sup> The supervisor asked the LVN to write out a report as to what had happened and then took it to the Director of Nursing. She was the one that finally approved the discipline.

Finally, the record contains no examples of LVNs suspending CNAs or of LVNs having that right. Also, the record fails to show that the LVNs participated in CNAs' evaluations. The Employer provided one example of how an LVN was asked to evaluate a CNA, but the record failed to show what happened to the evaluation, who was evaluated, or if the evaluation led to a change in working conditions for the CNA.

b. Analysis

"It is well established that the mere exercise of a reporting function which does not automatically lead to discipline or adverse action against an employee does not establish disciplinary authority." *Lincoln Park Nursing Home*, 318 NLRB 1160, 1162 (1995). Thus, the Board will not find that employees possess supervisory authority to discipline if they merely present the employer with evidence of poor performance by another employee, without recommending disciplinary action.

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<sup>11</sup> At the time of DON Klarenbach was not the Director of Nursing.

Furthermore, the power to point out and correct deficiencies of other employees is not enough to establish Section 2(11) status. *Passavant Health Center*, 284 NLRB 887, 889 (1987).

Based on the record evidence and applicable Board law, I find that the Employer has failed to meet its burden of establishing that LVNs discipline other employees. Although the Employer argues that LVNs enforce the Employer's rules and verbally reprimand CNAs, the record only establishes that LVNs, like any other employee, may take it upon themselves to criticize or correct CNAs; and may report misconduct or rules violations by CNAs to management.

Regarding verbally criticizing or correcting CNAs, the record does not establish that such communications are regularly reported to or even tracked by the Employer. To the contrary, the record reflects that these conversations are usually kept between the two parties. Further, the record does not establish that such conversations are the initiating stages of discipline or lead to a subsequent personnel action.

The Employer points to several written disciplines signed by LVNs as evidence of their authority to discipline. However, most of them were issued by LVNs while they were acting Unit Managers and the ones that were not were either not issued at all or the LVN who issued it did not testify at the hearing. It is the burden of the Employer to establish that the LVNs are supervisors and the Employer has failed to provide the necessary detail to make a finding of authority to discipline.

The Employer also argues that LVNs have the authority to effectively recommend discipline. The record shows that LVNs made supervisors aware of CNAs' failure to follow work rules. However, the LVN made no recommendations. In the case where the LVN asked if discipline was appropriate there was no recommendation, only a question. Further, the supervisor did not make a decision, instead she took the information that the

LVN provided to the Director of Nursing and the Director of Nursing was the one that made the decision to issue a discipline. Therefore, the LVN simply brought forward the information and it was the RN supervisor and the Director of Nursing that debated whether or not to issue discipline.

The Employer contends that LVNs have a part in suspending CNAs; however, conclusory statements will not be sufficient without other evidence for a finding of authority. The Employer also contends that LVNs participate in the evaluation of CNAs, but there was no evidence showing any impact on the CNAs' working conditions. The Board has found that when charge nurses perform evaluations that do not, by themselves, affect other employees' job status, there cannot be a finding of authority. *Ten Broeck Commons*, 320 NLRB at 813. So in this case, there can be no finding of authority.

#### 4. Time Adjustment Request Form

##### a. Facts

The Employer contends that LVNs have the authority to grant compensation to employees and direct the use of the Employer's financial resources. It also contends that LVNs authorize compensation by signing a Time Adjustment Request Form, herein called the TARF, which is used when an employee was not able to clock in.

The record establishes that LVNs do not have the authority to grant overtime or ask an employee to stay late or come in early. Such authority rests with the Staffing Coordinator or the Unit Manager. On occasion an LVN is asked to verify that an employee working on their hall was actually present and working, by signing the TARF. A CNA or a Unit Manager will hand the LVN the TARF already filled out and the LVN will verify if the time stated was actually worked by the CNA. The TARF then goes to the Administrator of the facility to sign. Next, the accounting department gets the TARF and

adds the hours to the CNA's work hours. DON Klarenbach stated that without the signature of the Administrator, the CNA would not be paid.

b. Analysis

In *Palagonia Bakery Co.*, 339 NLRB 515, 534-535 (2003), the putative supervisor initialed employees' time cards verifying the time they worked, and the Board found that such a function was clerical in nature and did not amount to exercising independent judgment.

The Employer argues that the LVNs have the authority to grant compensation through the TARF. However, the record shows that CNAs would not be paid unless the administrator signed the TARF. Further, the record shows that LVNs signed TARFs only to verify that the CNA worked the time stated in the TARF. The record also shows that the LVN had no authority to assign overtime or ask employees to come in early or stay late, so the LVN was not involved in granting permission to work additional hours. Therefore, the record does not support the Employer's argument that the LVNs had the authority to grant compensation.

5. Rewards

a. Facts

The Employer contends that LVNs have the authority to issue rewards for CNAs' work. DON Klarenbach stated that LVNs have the authority to give out Employer-purchased gift cards to fast-food restaurants to employees who have performed well, without asking for permission from a Unit Manager. DON Klarenbach also stated that the Employer has reimbursed LVNs when they reward CNAs with lunch.

The record establishes that LVNs do not have authority to issue rewards. On one occasion an LVN issued a gift card to a CNA. On that occasion she was acting as a Unit Manager and she still went to DON Klarenbach and asked if she could issue a new

employee a gift card because she was doing really well. After the acting Unit Manager received approval, she issued the gift card to the employee.

Further, the record establishes that an LVN went to a McDonald's Restaurant and purchased lunch for the CNAs because they were assigned a larger than normal amount of work. He wanted to thank them and show that he appreciated their work—the Employer did not ask him to buy the lunch. After bringing the food into the facility the Employer became aware of it and asked to reimburse him for the meal.

b. Analysis

An indicia of supervisory status is an individual's authority to "reward" employees in performance of their work. 29 U.S.C. Sec. 152(11).

The Employer failed to prove that LVNs have the authority to reward CNAs for their work. The evidence shows that an LVN issued a gift card while she was acting as a Unit Manager and she requested permission from her supervisor to issue the gift card. In regards to LVNs having authority to buy CNAs lunch, the evidence shows that the LVN acted on his own and was simply trying to thank his co-workers. The Employer did reimburse the LVN after the fact, but the LVN never had that expectation. Therefore, LVNs do not have the authority to grant awards.

In conclusion, based upon the foregoing, I find that the LVNs do not possess any of the enumerated authorities on behalf of the Employer as described in Section 2(11) of the Act, nor can they effectively recommend same.

The Board has consistently held that "whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia."

*Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). *See also New York University Medical Center*, 324 NLRB 887, 908-10 (1997). In so concluding, I am

mindful that in enacting Section 2(11) of the Act, Congress emphasized its intention that only supervisory personnel vested with “genuine management prerogatives” should be considered supervisors, and that the Board has frequently warned against construing supervisory status too broadly because in individual deemed to be a supervisor loses the protection of the Act. *See, e.g., Oakwood Healthcare*, supra 348 NLRB at 689.

D. It is Unnecessary to Examine Secondary Indicia in the Absence of Any Primary Indicia of Supervisory Status

It is well settled that in the absence of any primary indicia of supervisory status, secondary indicia are insufficient by themselves to establish supervisory status. *See, e.g., Ken-Crest Services*, 335 NLRB 777, 779 (2001).

Inasmuch as I have concluded above that LVNs do not possess any of the primary supervisory indicia set forth in Section 2(11) of the Act, it is not necessary to consider the Employer’s secondary indicia issues, including the job description for the LVNs or the supervisor to employee ratio.

**IV. Conclusion**

Based on the evidence and the entire record, I find that the following is an appropriate unit and I shall direct an election in this unit:

All full-time, regular part-time, and on-call LVNs, including treatment nurses, employed by the Employer at its facility located at 247 East Bobier Drive, Vista, California; excluding all other employees, confidential employees, professional employees, payroll employees, medical record employees, registered nurses (RNs), guards and supervisors as defined in the Act.

There are approximately 39 employees in the unit.

**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 the **SEIU, Service**

**Employees International Union, CTW, CLC.** The date, time, and place of the election will be specified in the notices of election that the Board's Regional Office will issue subsequent to the 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 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 Co.*, 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 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.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in return, 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 **October 28, 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, [www.nlr.gov](http://www.nlr.gov),<sup>12</sup> by mail, or by facsimile transmission at (213) 894-2778. 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 **four** copies of the list, unless the list is submitted by facsimile or e-mail, in which case only **one** copy need be submitted. If you have any questions, please contact the Regional Office.

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<sup>12</sup> To file the eligibility list electronically, go to [www.nlr.gov](http://www.nlr.gov) and select the **Cases & Decisions** tab. Then click on the **File Case Documents** link on the menu, and follow the detailed directions.

### C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

### 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 14<sup>th</sup> Street, N.W., Washington DC 20570-0001. This request must be received by the Board in Washington by **November 4, 2011**. The request may be filed electronically through E-Gov on the Agency's website, [www.nlr.gov](http://www.nlr.gov),<sup>13</sup> but may not be filed by facsimile.

DATED at Los Angeles, California, this 21<sup>st</sup> day of October, 2011.

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/s/William M. Pate,  
Acting Regional Director, Region 21  
National Labor Relations Board

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<sup>13</sup> To file the request for review electronically go to [www.nlr.gov](http://www.nlr.gov) and select the **Cases and Decisions** tab. Then click on the **File Case Documents** link on the menu and follow the detailed instructions. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located on the Agency's website, [www.nlr.gov](http://www.nlr.gov).