

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

BLOSSOM VIEW NURSING, INC.¹

Employer

and

Case 3-RC-073573

**RETAIL WHOLESALE & DEPARTMENT
STORE UNION/UFCW LOCAL 220**

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to 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,² I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated that Blossom View Nursing, Inc., hereinafter referred to as the Employer, is a New York State corporation with a facility located in Sodus, New York where it operates a skilled nursing facility. Annually, in conducting its business operations, the Employer derives gross revenues in excess of \$1,000,000, and

¹ The Employer's name appears as stipulated at the hearing.

² Briefs filed by the parties have been duly considered.

purchases and receives at its Sodus, New York facility goods and services valued in excess of \$5,000 directly from points located outside the State of New York.

Based on the parties' stipulation and the record as a whole, I find that the Employer is a health care institution as defined in Section 2(14) of the Act.

I also find that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated, and I find, that Retail Wholesale & Department Store Union/UFCW Local 220, hereinafter referred to as the Petitioner, is a labor organization within the meaning of Section 2(5) of the Act.

4. The parties stipulated that there is no collective-bargaining agreement that would bar a representation election with respect to the petitioned-for unit herein.

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

The Petitioner seeks a unit of all full-time and regular part-time licensed practical nurses ("LPNs"), including the nursing scheduler, employed by the Employer. The Employer maintains that all LPNs are either properly classified as senior staff nurse or staff nurse, herein called senior staff LPN and staff LPN and collectively called LPNs. The record discloses that the primary difference between the senior staff LPNs and staff LPNs are that senior staff LPNs are assigned to a specific shift and unit, while staff LPNs float between shifts and units.³

³ The Petitioner initially sought to include the night nurse supervisor, the nurse case manager and the MDS coordinator, but the parties later stipulated to their exclusion from the proposed unit.

The parties stipulated that the following classifications should be excluded from any bargaining unit found appropriate: all nurse case managers, night nurse supervisors, MDS coordinators, registered nurses, assistant to the director of nursing, certified nursing assistants, certified nursing assistant mentors, MDS auditors, dietary employees, activity employees, nursing secretaries, central supply employees, physical therapy employees, housekeeping employees, laundry employees, office and clerical employees, temporary employees, confidential employees, guards, all other professional employees and supervisors as defined in the Act.⁴

The Employer contends that all of the LPNs are statutory supervisors within the meaning of Section 2(11) of the Act and therefore the petitioned-for unit is inappropriate.⁵ Specifically, the Employer asserts that the LPNs are supervisors because they adjust grievances, issue discipline, correct work performance, evaluate employees, and exercise independent judgment and discretion in scheduling and assigning work to the Employer's certified nursing assistants ("CNAs").⁶ The Employer further contends that if any unit of LPNs is found appropriate herein, the nursing scheduler does not share a community of interest with the LPNs and therefore should be excluded from the unit.

The Petitioner contends the LPNs are not supervisors and that the nursing scheduler shares a community of interest with the LPNs and should be included in the bargaining unit. The Petitioner has agreed, however, to proceed to an election in any unit

⁴ The parties stipulated that the night nurse supervisors and nurse case managers are supervisors within the meaning of Section 2(11) of the Act, as they use independent judgment in directing the work of senior staff LPNs, staff LPNs and certified nursing assistants and effectively discipline and recommend discipline of these employees.

⁵ The Employer also contends that the nursing scheduler is a statutory supervisor because he effectively recommends disciplinary action and exercises independent judgment and discretion in scheduling and assigning work to employees and therefore should be excluded from the petitioned-for unit.

⁶ The record did not disclose the number of CNAs employed at the facility. However, I take administrative notice of the Decision and Direction of Election I issued in Case 3-RC-073193 to the extent that it stated there are approximately 55 CNAs employed at the facility.

found appropriate. There are approximately 28 employees employed in the disputed classifications, consisting of 19 senior staff LPNs, 8 staff LPNs and 1 nursing scheduler.

Based on the evidence adduced during the hearing and the relevant case law, I find that the Employer failed to establish that the LPNs and the nursing scheduler are statutory supervisors within the meaning of Section 2(11) of the Act. I further find that the nursing scheduler does not share a community of interest with the senior staff LPNs and staff LPNs and therefore should be excluded from the bargaining unit found appropriate herein.

FACTS

Background

The Employer's facility is located at 6884 Maple Avenue in Sodus, New York, where it operates a 130-bed skilled nursing home employing a total of 225 employees. Administrator Nancy Tourje oversees the entire facility and reports to the board of directors. Sherrie Curry is the director of nursing ("DON") and oversees the entire nursing department. She reports to Tourje.⁷ Additional departments include human resources, rehabilitation, social work, operations, activities, dietary and a business office.⁸

The Employer operates 24 hours a day, seven days a week, with day, evening and overnight work shifts.⁹ The DON generally works Monday through Friday. Reporting to the DON are three nurse case managers, two night nurse supervisors, evening nurse

⁷ The Employer has a position of assistant director of nursing, which is currently vacant.

⁸ In the rehabilitation department, there are physical, occupational and speech therapists and an RN who is a restorative nurse. The social work department is headed by a director who supervises two social workers. The operations department includes housekeeping, laundry and maintenance. The activity department is headed by a director who oversees the activities assistants.

⁹ The day shift is from 6:00 a.m. to 2:30 p.m.; the evening shift is from 2:00 p.m. to 10:30 p.m.; and the night shift is from 10:00 p.m. to 6:30 a.m.

supervisors and the nursing scheduler.¹⁰ The nurse case managers generally work from 8:00 a.m. to 4:30 p.m., Monday through Friday, and are responsible for their assigned unit.¹¹ The two night supervisors, Serena Lessord and Lisa Thrash, generally work from 10:00 p.m. to 6:30 a.m.¹² The evening nurse supervisors work from 2:00 p.m. to 10:30 p.m.¹³ One nurse supervisor is assigned to each shift and each one is responsible for the entire facility on their respective shift; however, the evening nurse supervisor only becomes responsible for the facility after the DON and nurse managers leave for the day. The nursing department also includes RNs working in the job classifications of education nurse and infection control nurse.¹⁴ The nursing department also includes medical records and billing personnel and a quality control manager.

Residents at the facility reside on one of three units: Cortland, a 40-bed unit; Empire, a 40-bed unit; and Baldwin, a 50-bed unit. The units are staffed based on the number of patients, their acuity and the shift. Generally, on the day shift, there are three LPNs, either senior staff LPNs or staff LPNs, assigned to each unit. During the day shift, there are five CNAs per unit assigned to Cortland and Empire, and six CNAs are assigned to Baldwin if it is at full capacity. On the day shift, one of the CNAs on each unit is a CNA mentor, who provides guidance to the CNAs. On the evening shift, 2:00

¹⁰ The parties stipulated to the identities of two nurse case managers: Kellie Bacon-Terruli and Christine Williams, however, the record reveals that there are three nurse case managers.

¹¹ Herein the term “nurse manager” refers to the position of nurse case manager.

¹² The record does not disclose the days of the week the evening and night supervisors work. The record did not disclose the number of evening supervisors employed at the facility.

¹³ The record discloses that the evening supervisors have the same duties, responsibilities and official job description as the night supervisors, whom the parties stipulated are statutory supervisors. I therefore find that evening supervisors are also statutory supervisors within the meaning of Section 2(11) of the Act, as they use independent judgment in directing the work of LPNs and CNAs and effectively discipline and recommend discipline of these employees. The record also discloses that there is a position of weekend supervisor held by RN Tom Carlin. As the parties stipulated that RNs are not to be included in any bargaining unit found appropriate herein, this job classification is not at issue.

¹⁴ These positions are not at issue as the parties stipulated that RNs are excluded from any unit found appropriate herein.

p.m. to 10:30 p.m., there are two LPNs per unit; four CNAs per unit assigned to Empire and Cortland and five CNAs assigned to the Baldwin unit if it is at full capacity. On the night shift, 10:00 p.m. to 6:30 a.m., there is one LPN per unit; two CNAs per unit assigned to Cortland and Empire and three CNAs assigned to the Baldwin unit. The LPNs may be called into work, or to work overtime based on staffing needs.

In each unit, the assignments are based on the residents' location. Each LPN is assigned to care for residents in a specific hallway. Each CNA is assigned a group of residents based on their hallway and room number.

The LPNs and CNAs provide direct care to the residents. During the day and evening shifts, LPNs primarily distribute medications and perform treatments on residents, such as wound care.¹⁵ They also ensure that CNAs perform their resident-care duties. CNAs provide basic resident care, including assistance with their feeding, bathing, grooming, dressing and walking. During the night shift, the residents are normally in bed for the night, which allows LPNs to make preparations for the day shift, such as setting up treatments and documenting the residents that need to be weighed. The night LPNs also administer medication, while the CNAs conduct rounds and continue to provide basic care to the residents, such as aiding them in using the facilities.

Senior Staff LPNs and Staff LPNs

ASSIGNMENT OF WORK

The record reveals that a formula issued by the New York State Department of Health governs the Employer's staffing levels. CNAs are scheduled based on these

¹⁵ The LPNs are required to have a nursing license issued by New York State.

staffing requirements.¹⁶ The nurse managers assign CNAs to care for specific residents called a grouping, which is their regular assignment.¹⁷ Each resident within the group also has an assignment sheet, created by the nurse manager, which details the CNAs' particular duties for that resident.¹⁸ When a regularly scheduled CNA is absent, the CNA filling in is assigned to the regularly scheduled CNA's resident group.

The groupings may be adjusted to equalize the workload when there is a change in the resident population. The record reveals that when the groupings are unequal in a designated hallway, the assigned LPN may equalize the workload between the CNAs by changing the assignment of one or two residents. Senior staff LPN Sanzotta testified that the CNAs decide the resident assignments, but if they can not agree she makes the assignment. Night nurse supervisor Lessord testified that senior staff LPNs and CNAs decide how to balance out the residents and that the senior staff LPN decides the assignments, if necessary. She further testified that in balancing out the residents, "I would probably make sure that the senior staff nurse didn't assign a heavier resident to the older CNA on the floor."

At times, the LPNs may adjust the order in which CNAs perform the tasks detailed in the assignment sheets or the order of resident care. The record discloses that an LPN will inform a CNA to get a resident ready first if the LPN needs to do a treatment or the resident has an appointment with a doctor or a hairdresser. Senior staff LPN Sanzotta testified that she is "constantly asking – directing the CNAs all through the day

¹⁶ In general, the CNAs work the same shift on the same unit, except for floater CNAs, whose shifts and units may vary.

¹⁷ Senior staff LPN Shelli Sanzotta testified that the groups are assigned by the nurse manager.

¹⁸ Administrator Tourje testified that the assignment sheets are created by the senior staff LPNs. However, senior staff LPN Sanzotta testified that they are created by the nurse managers and may be adjusted by the LPNs if a resident needs a treatment or has an appointment.

of, you know, what needs to be done.”¹⁹ Sanzotta further testified that “the CNAs look to us for help to direct them into what needs to be done first, second, last.”²⁰

CNAs may be called into work to prevent staffing shortages. If there is advanced notice that a CNA will be off or a CNA calls in during the day, the nursing scheduler will find someone to cover the CNA's shift. When a CNA calls in during the evening or night shifts, the nurse supervisor may find coverage for the shift by calling CNAs in order of their placement on a call list. Night nurse supervisor Serena Lessord testified that she may assign calling CNAs to an LPN if she is busy. Lessord also testified that when she is busy, an LPN might take the call from the CNA and find coverage for the shift by using the call list. If the CNAs on the list refuse to work, the nurse supervisor will mandate CNAs currently working to continue working into the next shift.²¹

TRANSFER

Occasionally, CNAs are transferred when a unit is short staffed. The record discloses that, by practice, a floater CNA from one unit will go to the unit that is short staffed. Absent a floater CNA, the CNAs and LPNs on the unit maintain a rotation list which dictates the order in which CNAs in the unit will be transferred.²² Generally, the LPNs and CNAs decide by consensus whose turn it is but, if necessary, the LPN will tell

¹⁹ The senior staff LPN's job description, states in relevant part that she: “[c]oordinates and monitors and/or directly trains, supervises, develops and evaluates all CNA mentors and CNA's involved in providing direct care services. Provides guidance, leadership and supervision to assigned mentors and CNAs.”

²⁰ The record reveals that the LPNs are not held accountable for the CNAs' job performance. Senior staff LPN Melissa Furnace testified that she has never been disciplined, spoken to or in any other way held accountable for the work that was expected of a CNA or the tasks that were expected of a CNA. She further testified that there was no discussion with the person who did her evaluation concerning her supervision of the CNAs. Sanzotta testified that during her job performance evaluation her nurse manager did not comment about her supervision of CNAs.

²¹ The CNAs are mandated based on their position on a mandate list.

²² The record is unclear as to who is responsible for creating, maintaining and updating the list.

a CNA that it is her turn based on the rotation list. Senior staff LPN Sanzotta testified that the LPNs are required to use the list.

Sanzotta testified she transfers CNAs among the units “all the time” due to staffing shortages and personality conflicts. Sanzotta testified that when she transfers CNAs to another unit because of personality conflicts, she solicits volunteers for the transfer. The record contains no evidence of any specific occasion when Sanzotta transferred a CNA due to a personality conflict. Human resources director and accounts manager Doris Gary testified that senior staff LPN Patty Slocum transferred a CNA due to a staffing shortage and staff LPN Erin Vanderbroek transferred a CNA.²³

Absent a staffing shortage, the record disclosed only two specific examples of CNA transfers. Gary testified that Lisa Moore, a senior staff LPN, transferred a CNA to a different unit due to a personality conflict. However, the record demonstrates that Moore was a nurse manager at the time of the transfer.²⁴ Night supervisor Serena Lessord testified that a senior staff LPN sought a CNA volunteer to change units with another CNA.²⁵ Lessord also testified in general that LPNs have the authority to transfer CNAs. The record contains no evidence as to whether LPNs can authorize a permanent transfer to a different shift or unit or whether it must be approved by a supervisor or manager.

²³ Gary learned about the transfers by virtue of her office location which allows her to overhear discussions occurring at the nurses’ station on the Baldwin unit. Gary provided no further details about the circumstances surrounding the transfers.

²⁴ The record is silent as to the circumstances involving Moore’s change in job classification.

²⁵ Lessord testified that the CNA was transferred to a different unit because the DON decided that the senior staff LPN and the CNA should not work together after the CNA filed a complaint against the senior staff LPN.

TIME OFF AND OVERTIME

The record reveals that CNAs primarily request time off from work by completing a time off request form, which is submitted to the nursing scheduler. Human resources director Gary and night nurse supervisor Lessord testified that LPNs can authorize leave for CNAs. Gary presented testimony and documentation that Lisa Moore approved a CNA's request to leave early to take her child to the hospital. However, the documentation, a time adjustment form, is undated, and it is unclear from the record whether Moore was a nurse manager or senior staff LPN at the time this occurred. Further, the record contains no evidence as to whether Moore cleared the request with a supervisor or manager prior to approving it. Gary also testified that LPNs can give permission to the CNAs to leave early, for example, if their children are sick, but she did not know if the LPNs first check with a supervisor. Night nurse supervisor Lessord also testified generally that, depending on the situation, either she or an LPN may be asked by a CNA if they can leave early. She further testified that the LPNs have the authority to allow a CNA to leave early without consulting her. Lessord provided one example when a CNA told an LPN she needed to leave because emergency medical personnel were at her mother's house and the LPN gave her permission to leave without Lessord's knowledge.

The record reveals that, at times LPNs are involved in CNAs working overtime for staffing purposes. Human resources director Gary testified that the LPNs' role in approving overtime is that "they have to have staff there. If it pushes them into overtime, it pushes them into overtime." She further testified that on a weekly basis an overtime

slip is signed by an LPN and submitted to payroll.²⁶ Senior staff LPN Sanzotta testified that all other staffing possibilities are exhausted before a CNA works overtime, and that, if there is overtime, it is because they must have the staffing. In such situations, Sanzotta testified she does not need prior authorization and she fills out the overtime slip and leaves it for the DON. Sanzotta did not provide any details or examples of the times she granted overtime, and the record contains no documentary evidence that Sanzotta ever signed an overtime slip. The record discloses two specific instances where the slips were signed by an LPN, one dated December 17, 2008 when a CNA worked overtime because someone called in, and the other dated December 26, 2008, when a CNA worked overtime to provide coverage for an open position. There is no evidence in the record whether the LPN approved the overtime slip on her own or sought approval in doing so.

DISCIPLINE

Administrator Tourje testified that all staff, including CNAs, are required to report an employee that is not following protocol and that an LPN's report of such infractions does not differ from a CNA's report. Tourje testified that if an LPN observes a CNA failing to follow protocol, the LPN retrains the CNA to do the task properly. If an LPN observes that the CNA is still performing the task improperly, the LPN gives the CNA a verbal warning.²⁷ She further testified that if the CNA continues to perform the task improperly, an LPN or anyone else who observes the CNA writes up the facts of the

²⁶ The overtime slip provides who worked, why they worked (a call in or an open position) and a signature line for a manager/supervisor.

²⁷ The record is unclear as to whether a supervisor, nurse manager or DON conducts an investigation or approves the discipline prior to a verbal warning being issued. As detailed herein, senior staff LPN Sanzotta testified concerning a discipline that was issued to an employee for refusing to be mandated to work and in that instance the nurse manager investigated the incident and issued a verbal warning. Night nurse supervisor Lessord testified concerning a CNA's failure to respond to bed alarms and that a verbal warning was issued, however, the record is silent regarding whether a supervisor, nurse manager or DON conducted an investigation or approved the discipline. The new disciplinary forms that designate a verbal warning as a level of discipline provide for the manager/director to sign the disciplinary notice.

incident and gives it to the nurse manager or supervisor. Thereafter, Tourje testified that the nurse manager investigates the incident and gives the information to the DON, who also investigates. Thus, the record establishes that higher management conducts an investigation prior to issuing any written discipline. Finally, Tourje testified the LPN, nurse manager and DON discuss the incident and the discipline to be issued. According to Tourje, the LPN and nurse manager each recommend the degree of discipline that is warranted.²⁸ Tourje testified that the recommendations of the LPN and nurse manager are followed “probably 98 percent of the time.” The LPN does not meet with the CNA concerning the disciplinary notice.²⁹

CNAs are issued written disciplines on an Employee Warning Notice. They are kept at the nurses’ station on each unit. The forms provide blanks for a recitation of the facts, boxes to check the degree of discipline issued, the name of the employee, and signature lines for the disciplined party and the manager/director. An older version of the Employee Warning Notice calls for similar information, but does not provide for the degree of discipline to be issued. The notice is placed in the CNA’s personnel file.

The record contains five disciplinary notices that human resources director Gary testified were prepared by LPNs. However, Gary did not know the circumstances under which the disciplinary notices were written and the record contains no evidence as to whether LPNs prepared the notices on their own initiative or were instructed to do so.

²⁸ Gary and Sanzotta testified that the Employer follows a progressive disciplinary policy. Sanzotta testified that discipline starts with a verbal warning, then a written warning, a suspension and ultimately termination in accordance with a policy book. The policy book is not in the record. The record did not disclose if an employee must receive a certain number of disciplines in one category before it is elevated to the next level of discipline.

²⁹ The senior staff LPN’s job description states, in relevant part, that she: “[i]n conjunction with Nurse Manager, gives oral and written disciplinary notices to CNAs that are not in compliance with state and federal regulations and Blossom View’s policies and procedures.” The staff LPN job description is silent regarding disciplinary notices except to state they are to “[n]otify Director of Nurses and Nurse Managers of patterns for disciplinary action.”

The notices are summarized as follows:

<u>Date</u>	<u>LPN Involved</u>	<u>Signing Manager</u>	<u>Reason</u>
11/18/11	Elizabeth Cormier Nicole VanGrafeeiland	DON Curry	Insubordination/ code of conduct ³⁰
09/08/11	Bennett Glum	DON Curry	Failure to follow ins.
11/02/11	Stephanie Gioia	Evening Supervisor	work instruction
12/06/11	Bennett Glum	Nurse Manager	Family complaint of poor care of resident
12/08/11	Emily Guinan	Evening Supervisor	Poor performance

All the reports were signed by the reporting LPNs except for the notice dated December 6, 2011, which was not signed, but which Gary identified as being written by senior staff LPN Bennett Glum based on the handwriting on the notice.³¹

Night nurse supervisor Lessord testified that LPNs “write people up. They give them verbal and written notices.” When pressed for an example, Lessord testified regarding a verbal warning issued to a CNA for failing to respond to the residents’ bed alarms.³² According to Lessord, the senior staff LPN first administered a documented verbal warning and, when the conduct continued, a written report. Neither document was introduced into the record. Lessord also testified that, as a senior staff LPN she believed

³⁰ This notice was comprised of two disciplinary notices prepared by LPNs on November 14 and November 17, 2011.

³¹ The notices are written on both the old and new forms. The LPN reports on the old forms do not offer the option of designating the level of discipline being issued. The LPN reports on the new forms contain boxes to be checked off to designate the discipline being issued. The new forms in evidence are signed by the managers and, as a result, it is impossible to discern whether the signing manager or the reporting LPN checked the box designating the discipline being issued. I note, however, that on the warning notice dated November 18, one of the LPN reports was written on the new form, and the box designating the discipline to be issued was not checked.

³² Lessord testified that the verbal warning was documented. However, the record reveals that only the new notice forms have an option to designate a verbal warning and no documented verbal warnings are in the record. Lessord provided no further details about this discipline, including whether a supervisor, nurse manager or DON conducted an investigation or approved the discipline.

she was involved with a written discipline; however, she provided no details concerning this discipline.

Senior staff LPN Sanzotta testified that she prepared a few write-ups. She recounted an incident where a CNA failed to help her with a resident who had fallen and she wrote it up on a disciplinary form and gave it to the DON. Sanzotta did not make a recommendation regarding the discipline to be issued, but she did tell the DON “something else has to happen other than what’s happening in the past, because the CNA is still not cooperating.” Sanzotta testified that the DON later told her that the CNA was terminated. However, Sanzotta did not know how much time passed between her write-up and the CNA’s termination or whether her write-up was a factor in the termination. Sanzotta also testified concerning another incident in which somebody (it is unclear in the record if it was another LPN or a CNA) refused to be mandated to work, so she wrote up the incident and gave it to the nurse manager, who investigated the incident and issued a verbal warning. Sanzotta also testified that she has written up a few people for calling in at the last minute and for other things, and that she gives these write-ups to the DON or nurse manager. Although Sanzotta testified that usually her write-ups at a minimum result in a verbal warning, there is no evidence that she has recommended that a verbal warning be issued.

Human resources director Gary testified that she and Lisa Moore terminated a CNA.³³ According to Gary, Moore brought the issue to her and Gary asked her what she wanted and Moore suggested termination. Gary testified that they called the employee

³³ Gary could not recall the CNA's last name or when it occurred, although she guessed that it occurred in October/November of 2011, and that it was within the last six months.

into Gary's office and she was terminated.³⁴ Gary further testified that she would "take" a termination from senior staff LPN Bennett Glum, although there is no record evidence that this has occurred.³⁵

Night nurse supervisor Lessord testified that LPNs can ask CNAs to leave the facility if they are not following policy and procedure or there is a direct danger to other staff members or residents, but she could not recount any time that such has occurred.

Administrator Tourje testified that the LPNs will report these situations to the supervisor and, if the situation is serious enough, the supervisor asks the employee to go home.

ADJUSTING GRIEVANCES

The record contains general testimony about the LPNs involvement in resolving and adjusting grievances. Administrator Tourje testified that LPNs are involved in adjusting grievances.³⁶ Night nurse supervisor Lessord testified that if there is a disagreement between two CNAs, the senior staff LPNs will resolve it by discussing it with the CNAs or by switching CNAs between units. Lessord did not provide any specific examples of such occurrences. Senior staff LPN Sanzotta testified that she is involved in resolving disputes, but she provided no examples of when she has done so.³⁷

³⁴ According to Gary, the CNA refused to help a senior staff member with a patient who had fallen, which is a terminable offense. The Employer provided no documentation regarding this termination and the record contains no evidence as to the extent of Moore's participation in the termination meeting.

³⁵ Gary also testified that Glum would probably take the issue to the DON, but that Gary did not think she had to.

³⁶ She testified that human resources had examples, but no specific examples are contained in the record.

³⁷ Sanzotta testified generally that a CNA might tell her that another CNA was busy picking up trays rather than helping with the residents' call bells, and that she would resolve the dispute by telling the CNA to help answer the call bells. Sanzotta also testified that if a CNA told her that she did not have the time to get a resident up, she would go to a different CNA and have her do it.

EVALUATIONS

The record discloses there are two types of performance evaluations for CNAs. One is a new hire evaluation that is completed after a probationary period. The other evaluation occurs periodically during the course of a CNA's employment. Human resources director Gary testified that newly hired employees, including CNAs, have a three-month probationary period, at the end of which their supervisor completes a new hire evaluation.³⁸ At that point, the CNA may be assigned to an open position. Thereafter, in the course of their employment, protocol requires the CNAs to be evaluated twice a year; however, the record reveals that evaluations may not occur that often. The periodic CNA evaluations consist of ratings in 13 categories, with each category assigned a maximum point value or rating, which totals 100 points.

Administrator Tourje testified that CNA evaluations are jointly completed by a senior staff LPN and either the nurse manager or supervisor, depending on the shift. Tourje also testified that the supervisor/nurse manager reviews the evaluations with the DON and that the DON makes adjustments to the evaluations, but does not change the ratings. The supervisor/nurse manager and DON meet with the CNA to review the evaluation. Human resources director Gary's testimony contradicted that of Tourje's. Gary testified that the senior staff LPNs complete the CNA evaluations and meet with the CNAs concerning their evaluations, and that the DON did not need to sign the evaluation. Gary did not provide any details concerning senior staff LPNs evaluating CNAs.

The record reveals that the experiences of the senior staff LPNs in evaluating CNAs varied. Night nurse supervisor Lessord testified that sometime last year, while she was a senior staff LPN, she completed and signed the evaluation forms for two CNAs

³⁸ The record did not contain any CNA new hire evaluations.

who worked under her and then gave the forms to her nurse manager. Lessord testified that she did not meet with the CNAs concerning their evaluations, but that the nurse manager and DON did.³⁹ Senior staff LPN Sanzotta testified that nurse managers ask the LPNs to complete sections of the CNAs' evaluations and that it is the nurse managers who meet with the CNAs to review their evaluations. Sanzotta testified that she has completed portions of the CNAs' evaluations, which she signed, and that on one occasion she met with a CNA to review an evaluation.⁴⁰ Senior staff LPN Melissa Furnace testified that she has never written an evaluation of a CNA or any other employee. The record contains one completed evaluation that was signed by Bennett Glum, a senior staff LPN, but there is no evidence regarding whether Glum completed this evaluation independently, and the impact, if any, the evaluation had on the CNA's terms and conditions of employment.

Human resources director Gary testified that evaluations, at times, can be used for a raise, promotion or a change in employment status.⁴¹ Gary testified that during a market adjustment of wages in 2011, the DON based the CNAs' wage increases on their evaluations. Specifically, Gary testified:

...well, here's the market value and she said here's the employee. This employee has been here 10 years, hasn't had any absenteeism. This person has been here a year and she's been absent 10 times. This person doesn't give good care. So that was her end of this adjustment.

Beyond this testimony, the record is silent as to how the evaluations impact the CNAs' employment.

³⁹ The record does not contain any evaluations completed by Lessord.

⁴⁰ The record did not contain any of the evaluations involving Sanzotta.

⁴¹ This testimony is echoed by Administrator Tourje who testified that the evaluations are used for purposes of job advancement or raises. She did not provide any specific example where an LPN's evaluation resulted in a CNA being promoted or rewarded.

The record also discloses that LPNs complete two evaluation forms for CNAs, one for transferring residents and the other for residents' daily activities. The forms assess whether CNAs use proper techniques and procedures in transferring residents and in performing the residents' daily living activities, such as doing their hair and nails. The transfer evaluation form is completed twice a year for each CNA, and lists numerous factors taken into account when a resident is transferred, for example from a chair to the toilet. These factors are assessed as being completed on a "satisfactory," "unsatisfactory" or "not applicable" basis.⁴² Upon observing the CNA perform the transfer, the LPN completes the form, which includes signing and dating it. Gary testified that if the CNAs fail to properly transfer a resident, it is reported to the CNA mentor, who retrain them. She also asserted that the CNAs can be disciplined for failing to properly transfer a resident. The record contains no evidence that a CNA has been disciplined as a result of the transfer evaluation form.⁴³ There is no evidence in the record what impact, if any, the transfer and activities of daily life evaluations have on the CNAs' terms and conditions of employment.

OTHER INDICIA

The record reveals that the LPNs attend weekly meetings held on Thursdays at 2:00 p.m. It is called an LPN meeting and in attendance are the LPNs, the DON, quality assurance manager, education nurse and nurse managers. At times Administrator Tourje attends the meetings and if there is a problem with scheduling, the nursing scheduler will attend. Administrator Tourje testified that there are also daily supervisor meetings at 9:00 a.m. with the nurse managers, DON, quality assurance manager, director of social

⁴² Sanzotta testified that the format of the daily living activities evaluation form is similar to the transfer evaluation form.

⁴³ Sanzotta testified that no one has failed to satisfactorily perform a transfer.

work and infection control nurse in attendance. The record reveals that LPNs do not attend these daily meetings.

The record reveals that all the employees at the facility have the same benefits. They have the same vacation and personal time. They also have the same health insurance options with the same Employer contribution. All employees share the same parking facilities and break room.

Nursing Scheduler

The nursing scheduler is required to have a high school diploma and one year of experience in healthcare staffing. The current nursing scheduler, Jim Keagle, is an LPN, supervised by the DON. He is assigned an office with a computer and works from 7:00 a.m. to 3:30 p.m. Monday through Friday.⁴⁴ LPNs do not work in or use the nursing scheduler's office. Keagle is an hourly employee and is paid \$19.00 an hour, which is similar to the LPNs' pay.⁴⁵ He is paid from the nursing department's budget from funds allocated for scheduling.⁴⁶

The nursing scheduler is responsible for ensuring the facility is appropriately staffed by scheduling the nursing staff's LPNs and CNAs. As part of this responsibility, he coordinates the nursing staff's vacations and leave requests. In order to request time off, a nursing staff member completes a time-off request form and gives it to Keagle, who determines whether that request can be granted, based on policies that determine how many people can be off duty at any one time. Within these parameters, time off requests are granted on a first come/first serve basis. The DON approves vacation requests. If an

⁴⁴ Both his desk and his office lock and only Tourje and the DON have keys to the office.

⁴⁵ Keagle wears what was described as "street clothes." The nurses wear nursing scrubs.

⁴⁶ Gary testified that the LPNs are paid from the nursing department's budget from funds allocated for LPNs and the CNAs are paid from funds allocated for CNAs.

employee requests to use personal time, Keagle checks with human resources to determine whether the employee has this time available. Human resources director Gary testified that if an employee does not have any time left, Keagle can deny the request based on the need for appropriate staffing.⁴⁷ She further testified that if an employee is abusing the attendance policy, Keagle can deny the employee's request to use vacation time after the employee has exhausted his/her personal time.⁴⁸ The record contains no evidence that Keagle has denied an employees' request to use vacation time for reasons other than for staffing purposes.

Keagle creates a monthly schedule based on employees' regularly-scheduled hours and time off requests.⁴⁹ When an employee calls off from a scheduled shift, Keagle uses three call lists to fill this vacancy.⁵⁰ The first list is per diem employees, who do not work a regular schedule. The second list is an "on-call" list of employees who are seeking extra hours of work. The third list is a mandate list that is prioritized based on the frequency an employee has been mandated to work.⁵¹ Keagle calls employees based on their order on the lists, and that he starts with the per diem list, then goes to the on-call list, and then finally the mandate list. Tourje testified that if the absence can only be filed by an employee working overtime or being mandated to work,

⁴⁷ The record contained five time-off request forms signed by Keagle. Gary testified that a CNA requested personal time to attend her mother's 60th birthday party, but that she did not have any time left and that Keagle could have denied her the time off based on the staffing needs of the facility. The form shows that the time off was approved by Keagle as unpaid, excused time, which is one of the options provided on the form. In another instance, Gary testified about a time-off request by a senior staff LPN; in that situation, Keagle denied one of the three days requested off because, according to Gary, "he must not have had enough staff that day or something." The other three requests were approved by Keagle.

⁴⁸ However, Gary also testified that an employee would need a supervisor's approval to use vacation time after exhausting his/her personal time.

⁴⁹ According to Tourje, employees are hired for a specific unit and shift.

⁵⁰ The record reveals that Keagle may be alerted by a nurse manager that an employee called off from work and that any employee who receives a call from an LPN or CNA reporting that she will not be able to work her scheduled shift completes a blue slip.

⁵¹ The record is unclear who is responsible for creating, maintaining and updating the lists.

Keagle must obtain approval from the DON.⁵² Employees inform Keagle if they are switching shifts. According to Gary, Keagle can approve employees' requests to leave early after checking with a senior staff LPN to ensure there is staffing on that floor, but the record contains no evidence that he has done so. Keagle also provides the hours worked by the nursing staff to human resources for payroll purposes.

The nursing scheduler's job duties also include tracking employees' absences. Tourje testified that Keagle reports the absences to the DON and human resources. Discipline for absenteeism is prescribed by the Employer's policy and procedures manual.⁵³ According to Tourje, the DON issues the disciplinary notice, but prior to doing so will look at the original attendance records. Tourje testified that the nursing scheduler does not have the authority to discipline employees.

Keagle's duties do not include providing direct care to residents, as the position does not require a nursing license. The record further reveals that from November 2009 to February 2010, prior to obtaining his current position on June 24, 2011, he worked occasionally as a per diem staff LPN at the facility and that since becoming the nursing scheduler, he worked once as a staff LPN in order to cover a shift.⁵⁴ Thus, the nursing scheduler does not provide direct patient care as part of his regular duties and the one occasion he worked as a staff LPN appears to be an aberration.

⁵² Gary generally testified that she would accept an overtime slip signed by Keagle, but the record contains no evidence that he has approved overtime. An employee time adjustment request form for a senior staff LPN signed by Keagle is in evidence. However, the record is silent as to whether the additional hours requested by the senior staff LPN resulted in overtime and if so, whether Keagle sought the DON's consent prior to approving the request.

⁵³ Tourje testified that if an employee uses all of the employee's personal days but continues to call in absent, the employee is given a warning notice for the absence and that after three notices is suspended. Keagle reports the absences to the DON and the DON meets with the employee and provides the written warning.

⁵⁴ The Employer asserts that he worked overtime as an LPN without prior permission.

ANALYSIS

Section 2(11) of the Act defines a statutory supervisor as any individual with the authority 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 not necessary that the individual possess all of the specified powers; rather, possession of any one is sufficient to confer supervisory status. Chicago Metallic Corp., 273 NLRB 1677, 1689 (1985).

The party asserting that an individual has supervisory authority has the burden of proof. Dean & Deluca New York, Inc., 338 NLRB 1046 (2003); NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706, 713 (2001). Purely conclusory evidence is not sufficient to establish supervisory status; rather, the party must present evidence that the employee actually possesses the Section 2(11) authority at issue. Golden Crest Healthcare Center, 348 NLRB 727 (2006). A “paper showing” or testimony merely asserting generally that individuals exercised certain supervisory duties is not sufficient to meet the burden of proof. Rather, the testimony must include specific details or circumstances demonstrating the existence of supervisory authority. Avante at Wilson, Inc., 348 NLRB 1056, 1057 (2006).

Individuals are statutory supervisors if they hold the authority to engage in any one of the twelve supervisory functions (e.g. assign or responsibly direct); their exercise of such authority is not of a merely routine or clerical nature but requires the use of

independent judgment; and their authority is in the interest of the employer. NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706, 713 (2001).

The Board in Oakwood Healthcare, Inc., 348 NLRB 686, 693 (2006), stated that in order to use independent judgment “an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” The judgment must also require a degree of discretion that rises above the “routine or clerical.” Id. Thus, “the exercise of some supervisory authority in a merely routine, clerical, perfunctory or sporadic manner does not confer supervisory status on an employee.” Somerset Welding & Steel, Inc., 291 NLRB 913 (1988)(quoting Feralloy West Co., 277 NLRB 1083, 1084 (1985)).

Senior Staff LPNs and Staff LPNs

The Employer contends, in its post-hearing brief, that the LPNs are supervisors under Section 2(11) of the Act because they (1) exercise independent judgment and discretion in assigning work to and scheduling CNAs; (2) discipline and correct the work performance of CNAs; (3) adjust the grievances of the CNAs; and (4) evaluate the work performance of CNAs.⁵⁵

ASSIGNMENT OF WORK AND SCHEDULING

I find that the Employer failed to meet its burden of demonstrating that the LPNs exercise independent judgment in assigning work to the CNAs. The record reveals that

⁵⁵ At the hearing, the Employer also asserted that the LPNs direct the CNAs' work and substitute for managers on occasion. There was no evidence in the record that LPNs substitute for managers. As to directing the work of the CNAs, senior staff LPN Furnace testified that she has never been disciplined, spoken to, or in any other way held accountable for the work or tasks expected of CNAs. Senior staff LPN Sanzotta also testified that during the evaluations of her job performance she did not discuss with her nurse manager her supervision of the CNAs. The Employer has failed to present evidence of actual or prospective adverse consequences to the LPNs' employment resulting from the CNAs' poor performance, and thus failed to establish the nurses are “responsible” for the CNAs' work performance under Section 2(11) of the Act. Golden Crest Healthcare Center, supra at 731; Oakwood Healthcare, Inc., supra at 691-692.

the LPNs do not assess the CNAs' abilities or the residents' needs in making assignments. Rather their assignments are routine and clerical in nature.

In Oakwood Healthcare, Inc., 348 NLRB 686, 689 (2006), the Board clarified the criteria for finding that a putative supervisor "assigns" or "responsibly directs" the work of others, and uses "independent judgment" in doing so. The Board held that the authority to assign refers to "the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties as opposed to discrete tasks. The authority to make an assignment, by itself, does not confer supervisory status. The putative supervisor must also use independent judgment when making such assignments. Id. at 692-693.

The Board has found that in order to exercise independent judgment, "an individual must at a minimum act or effectively recommend action, free of the control of others." Id. at 693. In a healthcare setting, a nurse uses independent judgment in assigning when she independently 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.

The Employer asserts in its brief that LPNs assign significant overall duties and tasks to the CNAs as they direct the work the CNAs perform throughout their shift. In support of this assertion, the Employer cites to testimony from night nurse supervisor Lessord and senior staff LPN Sanzotta that the LPNs constantly direct the CNAs on what needs to be done. However, there is no evidence regarding how the LPNs arrived at any judgment involving assignments, which precludes a finding that their authority in such

areas is exercised independently. Loyalhanna Care Center, 352 NLRB 863, 864 (2008); see also, Golden Crest Healthcare Center, 343 NLRB 727 (2006); Avante at Wilson, Inc., 348 NLRB 1056 (1999). The Employer cites as an example that senior staff LPN Sanzotta changes the timing of the care provided by the CNAs based on a resident's health and daily schedule. However, this establishes, at most, that the LPNs prioritize the work for CNAs, which does not demonstrate supervisory authority to assign work. See Oakwood Healthcare, Inc., supra at 689 (stating that "choosing the order in which [an] employee will perform discrete tasks within those assignments ... [is] not.. indicative of the authority to 'assign.'").

The Employer also asserts that the LPNs assign CNAs to the residents they will care for over the duration of their shift. However, the record demonstrates that resident groups are created by the nurse managers who assign a specific CNA to each group, and that the groups are only adjusted by the LPNs if there is a change in the resident population. The record further demonstrates that such changes are made to equalize the workload. The Board has found that assignments based on workload equalization are routine and clerical in nature and do not establish the use of independent judgment. Regal Health & Rehab Ctr., Inc., 354 NLRB 466, 471 (2009); Oakwood Healthcare, Inc., supra at 694. Furthermore, to the extent the LPNs make limited reassignments, the Employer has not shown that LPNs assess the CNAs' abilities and residents' needs when making such assignments and Lessord's testimony that she would ensure that the nurses do not assign a heavier patient to an older CNA, demonstrates that the assignments are subject to review. Therefore, I find that the Employer has failed to demonstrate that

LPNs exercise independent judgment in making or changing CNA assignments.

Oakwood Healthcare, supra at 693.

The Employer also argues that LPNs exercise independent judgment in assigning work because they can transfer a CNA to another unit. While the evidence demonstrates that LPNs are involved in CNA transfers due to staffing shortages, the Board has held that transfers based on equalization of the workload are routine and clerical in nature and do not establish the use of independent judgment. Regal Health & Rehab Ctr., Inc., supra at 471; Oakwood Healthcare, Inc., supra at 694. The record also fails to establish that in making the transfers, the LPNs make an assessment of the CNAs' abilities and residents' needs. Accordingly the Employer failed to demonstrate that they exercise independent judgment in this regard.⁵⁶ Oakwood Healthcare, supra at 693.

The Employer maintains that the LPNs' authority to assign work is evidenced by their transfer of CNAs due to personality conflicts. Although Sanzotta testified that she has transferred CNAs because of personality conflicts, she does so by soliciting volunteers and the record contains no examples of an LPN requiring a CNA to transfer due to such conflicts.⁵⁷ Further, there no evidence that LPNs performed an assessment of the CNA's abilities or the resident's needs when they performed the transfers.⁵⁸

Oakwood Healthcare, supra at 693.

The Employer argues the LPNs have the authority to independently allow CNAs to leave early, which demonstrates their ability to assign the CNAs. In support of its

⁵⁶ I also note that the record demonstrates that CNA transfers due to staffing shortages are governed by the rotation list; thus, the LPNs do not use discretion in effectuating such transfers.

⁵⁷ The Employer cites to human resources director Gary's statement that Lisa Moore transferred a CNA due to a conflict. However, the record demonstrates that Moore was a nurse manager at the time.

⁵⁸ Additionally, the Employer relies on Lessord's testimony that a senior staff LPN transferred a CNA; however, the record reveals that the DON had already determined that the CNA and the LPN should not work together. Thus, the record demonstrates that the senior staff LPN did not effectuate the transfer independent of the authority of others. Oakwood Healthcare, Inc., supra, at 693.

position, the Employer cites to the testimony from human resources director Gary that Lisa Moore permitted a CNA to leave early to care for a sick child. However, the record is unclear as to whether Moore was an LPN when this occurred. To the extent that the Employer also relies on night nurse supervisor Lessord's testimony that a senior staff LPN allowed a CNA to leave early upon learning that emergency medical personnel were with her mother, the Board has found that allowing employees to leave early in the midst of an illness or family emergency does not demonstrate the use of independent judgment. Loyalhanna Care Center, 352 NLRB 863, 864 (2008) (finding that the putative supervisor did not use independent judgment by releasing employees early due to illness or a family emergency); see also, Sam's Club, 349 NLRB 1007, 1014 (2007)(finding that where the putative supervisor allowed an employee to go home early because she felt ill did not involve the use of independent judgment).⁵⁹

As further evidence of the LPNs' authority to independently assign CNAs, the Employer maintains that the LPNs play a role in granting or approving overtime, and points to two CNA overtime authorization forms approved by LPNs. However, the record reveals the Employer's procedures mandate that the units be staffed appropriately and that there is a procedure in place dictating the method used to staff the units. The record further reveals that overtime is routinely permitted once all other avenues to staff the units have been exhausted. This lack of discretion in approving overtime undercuts any argument that LPNs exercise independent judgment. Moreover, there is no evidence

⁵⁹ Lessord also stated that staff LPN Erin Vanderbroek can permit an employee to leave early without consulting her. However, the record contains no evidence that Vanderbroek has ever done so. To the extent that Vanderbroek may have the authority to allow a CNA to leave early this secondary indicia of supervisory status in the absence of any evidence of primary supervisory indicia, is insufficient to establish supervisory status. Golden Crest Healthcare, supra at 730 fn. 10; Ken-Crest Services, 335 NLRB 777, 779 (2001).

that the assignment of overtime requires any assessment of the needs of the residents or the skills of the CNAs. Thus the Employer failed to demonstrate the LPNs used independent judgment. See Chevron Shipping Co., 317 NLRB 379 (1995) (captain's conclusory, nonspecific testimony that first assistant engineers typically assigned overtime to pump men and oilers found insufficient to establish supervisory authority, absent specific explanation that first assistant engineers in fact exercised independent judgment in making overtime assignments); see also Crittenton Hospital, 328 NLRB 879 (1999) (finding the employer failed to demonstrate the use of independent judgment where there was "no evidence showing how mandatory overtime or additional staffing needs are determined, or the process by which employees are selected for overtime ...").

The Employer also relies on the senior staff LPNs' job description as conveying supervisory authority to assign work. However, as the record is devoid of evidence demonstrating that the LPNs use independent judgment to assign work to the CNAs, job descriptions are merely a paper showing and insufficient to confer supervisory status. Avante at Wilson, supra at 1057; Golden Crest Healthcare Center, supra at 731.

DISCIPLINE AND EFFECTIVELY RECOMMEND DISCIPLINE

Based on the evidence contained in the record, I find that the Employer has failed to meet its burden in demonstrating that LPNs discipline CNAs or effectively recommend their discipline. On the contrary, I find the LPNs' role in discipline to be reportorial and I decline to find supervisory status on that basis. Ten Broeck Commons, 320 NLRB 806, 813 (1996)(where the Board found that LPNs who merely reported CNA misconduct which may or may not result in discipline were not statutory supervisors); see also,

Northcrest Nursing Home, 313 NLRB 491, 497-498 (1993); The Ohio Masonic Home, 295 NLRB 390, 394 (1989).

The Employer contends that LPNs exercise independent judgment in deciding whether a CNA needs verbal or written discipline and that this discipline is then placed in the CNA's file. However, the record reveals that disciplinary warnings are signed by either the DON, nurse manager, or evening supervisor and that the nurse manager/supervisor and/or DON investigate the LPNs' write-ups prior to issuing discipline. There is also insufficient evidence in the record to establish that the LPNs make a specific recommendation as to the degree of discipline that should be issued. Furthermore, to the extent that an LPN may make a recommendation there is insufficient evidence to establish that this recommendation is followed by the DON or nurse manager without further investigation.

To the extent that LPNs are involved with verbal warnings, the record is insufficient to establish that the LPNs independently issue verbal warnings. In this regard, senior staff LPN Sanzotta testified she reported an employee's refusal to be mandated to work and that her nurse manager investigated the incident and issued a verbal warning to the employee. Night nurse supervisor Lessord testified that an LPN issued a documented verbal warning to a CNA for failing to respond to bed alarms. However, in both examples discussed above, the warnings were not entered into evidence. The record does not contain any document reflecting solely a verbal warning. It is unclear from the record whether documented verbal warnings would also be signed by the DON, nurse manager or supervisor as the other disciplines are. As to Sanzotta's testimony, it is clear that the nurse manager conducted her own investigation prior to

issuing any discipline, which demonstrates that Sanzotta did not exercise independent judgment in issuing discipline. As to Lessord's testimony concerning the bed alarms, the record is unclear whether the discipline was issued without any further investigation. See Beverly Health & Rehabilitation Services, 335 NLRB 635 (2001)(finding that in order to confer supervisory status the exercise of disciplinary authority must lead to personnel action, without the independent investigation or review of other management personnel). Furthermore, to the extent that a senior staff LPN may have been involved in a verbal warning concerning the bed alarms, the record does not establish that no further investigation was conducted and I am unwilling to infer, based on this single incident that the LPNs have the authority to independently issue discipline. Id.; see also Springfield Terrace LTD, 355 NLRB No. 168 (2010); Browne of Houston, 280 NLRB 1222, 1225 (1986); John N. Hansen Co., 293 NLRB 63, 64 (1989) (exercise of supervisory authority of an irregular and sporadic basis is not sufficient to establish supervisory status); see also, Ken-Crest Services, 335 NLRB 777 (2001); Ohio Masonic Home, 295 NLRB 390, 393-394 (1989) (the authority to issue low-level discipline, such as oral warnings, does not in and of itself demonstrate supervisory authority).

The Employer asserts that the fact that the DON or nurse manager is involved in disciplinary action does not diminish the LPNs' role. The fact that the DON and nurse manager/supervisor conduct an independent investigation renders the LPNs' role in the discipline to be reportorial in nature. See Beverly Health & Rehabilitation Services, *supra*.

The Employer also relies on certain conclusory testimony in support of its position that LPNs have the authority to discipline CNAs. In this regard, night nurse

supervisor Lessord testified that a senior staff LPN gave a CNA a written warning for failing to respond to bed alarms. However, the record is silent as to who signed the discipline, whether the DON or any other supervisor conducted an investigation into the matter or whether the senior staff LPN made a recommendation concerning the degree of discipline to be issued. Regarding Lessord's testimony that, as a senior staff LPN, she was involved with one write-up issued to a CNA, the record contains no evidence concerning whether Lessord made any recommendations regarding the discipline to be issued, what the infraction was, who was involved or whether the nurse manager/supervisor or DON investigated the matter as well. Similarly, the Employer cites to human resources director Gary's testimony that Lisa Moore terminated a CNA for refusing to help another staff member when a resident fell.⁶⁰ However, the record demonstrates that, at most, Moore, on one occasion, recommended the termination of a CNA and that it was Gary who made the final decision to do so. The Board has stated that the sporadic exercise of supervisory authority is insufficient to confer Section 2(11) status.⁶¹ Robert Greenspan, D.D.S., P.C., 318 NLRB 70 (1995).

The Employer also relies on human resources director Gary's testimony that she would "take" a termination from senior staff LPN Bennett Glum. However, the record is devoid of any evidence that Gary has done so. In any event, Gary testified that she

⁶⁰ In considering Moore's involvement in the termination, I am viewing the facts in the light most favorable to the Employer, namely that Moore was a senior staff LPN at the time of the termination. However, my review of the record reveals an ambiguity as to Moore's job classification at the time of the termination. Gary's testimony about the date of the termination is vague, as she could only confirm that it had happened within the last six months; there is no documentation in the record that establishes the date of the termination; and there is no evidence in the record that establishes when Moore converted from a nurse manager to a senior staff LPN.

⁶¹ As noted above, Moore previously held the position of a nurse manager, and based on Tourje's testimony and the stipulations of the parties, exercised Section 2(11) authority to discipline and effectively recommend discipline. I am unwilling to infer, based on this isolated incident and the absence of other, more compelling evidence, that other LPNs' recommendations (of which there are no specific examples in the record) would carry the same weight.

believed that Glum would consult with the DON prior to recommending termination.⁶²

These conclusory statements, without detailed, specific evidence establishing that the LPNs made disciplinary recommendations and that disciplinary action was taken without further investigation by upper management are insufficient to establish that the LPNs have the supervisory authority to discipline CNAs, or to effectively recommend such discipline. Golden Crest Healthcare Center, surpa; Avante at Wilson, Inc., supra.

To the extent that the Employer relies on senior staff LPN Sanzotta's testimony that she participated in discipline that resulted in an employee's termination, I note that Sanzotta testified that she made no specific recommendation regarding the discipline to be issued, and that she did not know whether her write-up led to the termination. Regarding Sanzotta's testimony that she wrote up an incident in which an employee refused to be mandated, there is no evidence as to what discipline Sanzotta recommended, if any, and the record demonstrates that the DON conducted her own investigation and determined the level of discipline that issued. Sanzotta's actions in both instances do not establish supervisory authority, as no disciplinary recommendations were made and there is no evidence that the DON issued discipline without further investigation. Ten Broeck Commons, 320 NLRB 806, 812 (1996); Illinois Veterans Home at Anna L. P., 323 NLRB 890 (1997) (finding that reporting employee misconduct is not supervisory if the reports do not always lead to discipline, and do not contain disciplinary recommendations); see also, Beverly Health & Rehabilitation Services, 335

⁶² The Employer also cites to Lessord's conclusory testimony that LPNs can ask CNAs to leave if they are not following policy and procedure or there is a direct danger. However, Administrator Tourje testified that, in such circumstances, the nurses will report the situation to the supervisor who will ask the employee to go home. As Lessord's and Tourje's testimony is contradictory, the Board will find that supervisory status has not been established on that basis. New York University Medical Center, 324 NLRB 887, 908 (1997); The Door, 297 NLRB 601 n. 5 (1990); Phelps Cmty. Med. Ctr., 295 NLRB 486 (1989)(finding that when evidence is in conflict or otherwise inconclusive on a particular indicia, supervisor authority has not been established).

NLRB 635 (2001)(in order to confer supervisory status the discipline must lead to personnel action, without the independent investigation or review of other management personnel).

The cases cited by the Employer in its brief are distinguishable. In Oak Park Nursing Care Center, 351 NLRB 27 (2007),⁶³ the Board found that LPNs were supervisors by virtue of their authority to discipline, and effectively recommend discipline. In so finding, the Board relied on the fact that the LPNs had the authority to fill out employee counseling forms under the employer's progressive disciplinary policy, which then laid a foundation for future discipline against an employee. Additionally, the Board found that the LPNs had the authority to effectively recommend discipline against employees where those recommendations were accepted by the employer without further independent investigation. In the instant case, the record contains no evidence that an LPN actually makes a recommendation as to the degree of discipline to be issued. Finally, the record demonstrates that higher management (DON and/or nurse manager) conducts an independent investigation into the incident prior to discipline being issued.

The Employer also cites to Bon Harbor Nursing & Rehabilitation Center, 348 NLRB 1062 (2006), in support of its position that the LPNs' role in the disciplinary process is supervisory. However, in Bon Harbor Nursing & Rehabilitation Center, the Board found that LPNs were supervisors where they had the authority to provide written warnings, which were the first step of the disciplinary process; they indicated a level of discipline on the disciplinary action reports; their disciplinary determinations were never independently reviewed or overruled by higher management; and the disciplinary action reports issued by LPNs were relied on by the DON when administering subsequent

⁶³ The Employer cites the case as Berthold Nursing Care Center, Inc., 351 NLRB No. 9 (2007).

discipline. Here, the record fails to establish that the LPNs make any disciplinary recommendations regarding the degree of discipline that should be issued, and the evidence demonstrates that the reported incidents are independently reviewed by higher management.

Based on the foregoing and the record as a whole, I conclude that the Employer has failed to establish that the LPNs discipline CNAs or possess the authority to effectively recommend discipline of the CNAs.

ADJUST GRIEVANCES

I find that the record fails to establish that LPNs have the authority to adjust grievances. In support of the Employer's position, Administrator Tourje offered conclusory testimony that LPNs are involved in adjusting grievances. This conclusory testimony, without specific examples of LPNs resolving actual conflicts between employees is not sufficient to establish supervisory status. Golden Crest Healthcare Center, supra.

Senior staff LPN Sanzotta and night supervisor Lessord testified that LPNs are involved in resolving CNA disputes. Sanzotta testified generally that she resolves disputes such as a CNA's failure to help with resident call bells or a CNA who is unable to get a resident up. Night nurse supervisor Lessord also testified generally that senior staff LPNs resolve disputes by either discussion or separating CNAs. These instances, at most, amount to resolving workload issues or minor squabbles between employees. The Board has found that the fact that putative supervisors sometimes resolve minor employee complaints regarding workload or personality conflicts is insufficient to establish supervisory status. See Ohio Masonic Home, 295 NLRB 390, 394 (1989); see

also Ken-Crest Services, 335 NLRB 777, 779 (2001) and St. Francis Medical Center-West, 323 NLRB 1046, 1047-1048 (1997)(where the Board found that the authority to resolve personality conflicts or “squabbles” between employees does not warrant an inference sufficient to establish supervisory status).

In support of its position that employees who resolve minor grievances are supervisors, the Employer cites two Third Circuit court cases, Passavant Retirement & Health Center v. NLRB, 149 F.3d. 243, 248 (3d Cir. 1998) and NLRB v. Attleboro Associates, LTD, 176 F.3d 154, 166 (3d Cir. 1999) and a Board case, The Atlanta Newspapers, 306 NLRB 751 (1991). However, the Board in Ken-Crest Services, supra, which issued after these decisions, specifically adhered to the principle that the authority to resolve minor squabbles or disputes between employees does not sufficiently establish supervisory status, notwithstanding the dissent’s reliance on the same Third Circuit cases cited by the Employer.

EVALUATE

I find that the record fails to establish that the LPNs are supervisors based on their purported authority to evaluate CNAs. The ability to evaluate is not an indicia of supervisory status unless it directly results in rewards or promotions. As the Board stated in Elmhurst Extended Care Facilities, Inc., 329 NLRB 535, 536 (1999), “when an evaluation does not, by itself, affect the wages and/or job status of the employee being evaluated, the individual performing such an evaluation will not be found to be a statutory supervisor.” See also, Williamette Industries, 336 NLRB 743, 743 (2001). There is no evidence in the record that any portion of the evaluations that may be completed by an LPN directly results in a CNA receiving a wage increase or promotion.

Human resources director Gary, administrator Tourje and senior staff LPN Sanzotta all testified that evaluations are used for raises, promotions or changes in employment status. However, the record fails to demonstrate a specific connection between the CNAs' terms and conditions of employment and their evaluations. While Gary testified that the DON took the CNAs' evaluations into consideration when the Employer conducted a market adjustment of wages, the record demonstrates that it was not the CNAs' evaluations or rankings that impacted their raises, but rather the DON's familiarity with that employee's circumstances.⁶⁴ Conclusory statements, without detailed specific evidence demonstrating that the LPNs' input directly impacted CNAs' wages or other terms and conditions of employment, are insufficient to establish supervisory authority. Golden Crest Healthcare Center, 343 NLRB 727 (2006); Avante at Wilson, Inc., 348 NLRB 1056 (1999).

In support of its position concerning the evaluations, the Employer cites to Sanzotta's testimony that she completed portions of the CNAs' evaluations and Lessord's testimony that she evaluated CNAs when she was a senior staff LPN. However, senior staff LPN Furnace never evaluated a CNA and Administrator Tourje testified that evaluations are jointly completed by a senior staff LPN and either the nurse manager or supervisor, and that the DON adjusts the evaluations. To the extent that senior staff LPN Bennett Glum completed an evaluation of a CNA, there is no evidence as to what impact, if any, the evaluation had on the CNA's employment or whether Glum independently prepared the evaluation. Additionally, senior staff LPNs do not normally review the evaluations with the CNAs; this task is typically performed by either the nurse

⁶⁴ For example, Gary testified that the DON commented that the employee has been there 10 years without any absenteeism. The evaluation form itself has 12 other evaluation categories besides absenteeism.

manager/supervisor with the DON or by the nurse manager alone.⁶⁵ Regardless of the exact role the LPNs play in the evaluations, the record is devoid of any evidence that the input provided by the LPNs in the evaluations directly resulted in a wage increase. The Board will not find supervisory status without evidence that the purported supervisor's participation in the evaluation process was directly linked to wage increases. Ten Broeck Commons, 320 NLRB 806, fn. 12 (1996)(finding that while LPNs played an important role in preparing employee evaluations, their role was reviewed by a higher authority, was sometimes changed by the reviewer, and there was no direct connection between the LPNs' input and wage increases and, therefore, did not constitute the exercise of Section 2(11) authority).

The Employer also relies on the transfer and activities of daily life evaluations as evidence that the LPNs have supervisory authority. While human resources director Gary offered testimony that the transfer evaluations could result in discipline, she did not provide any specific examples of such discipline and her testimony was contradicted by Sanzotta, who testified that no one has failed to satisfactorily perform a transfer. This evidence is not sufficient to establish supervisory status. Golden Crest Healthcare Center, 343 NLRB at 731. Furthermore, the evidence is in conflict, and on that basis the Board will find that supervisory status has not been established. New York University Medical Center, 324 NLRB 887, 908 (1997); The Door, 297 NLRB 601 fn. 5 (1990); Phelps Cmty. Med. Ctr., 295 NLRB 486 (1989).

⁶⁵ Gary testified that the senior staff LPNs complete the evaluations and meet with the CNAs about their evaluations. However, Tourje, Sanzotta and Lessord testified that the nurse managers and/or the DON meet with the CNAs. The record contains only one example of a senior staff LPN meeting with a CNA and that was Sanzotta, on one occasion, several years ago.

The cases the Employer relies on in support of its assertion that LPNs are supervisors because of their role in evaluations are inapposite. In every case cited, the Board found that the putative supervisors were statutory supervisors because there was a direct correlation between the evaluation completed by the putative supervisor and the pay increase given. For example, in Trevilla of Golden Valley, 330 NLRB 1377 (2000), the Board determined that LPNs were statutory supervisors because they were the only individuals to complete the evaluation form and, based on the ranking they provided, the DON applied a formula to determine the nursing assistants' merit wage increase.⁶⁶ In the instant case, the Employer has failed to provide the same type of compelling evidence, specifically, that CNAs' wage increases are the direct result of the LPNs' input.

Based on the above and current Board case law, I find that the Employer has failed to meet its burden of establishing that senior staff LPNs and staff LPNs are supervisors within the definition of Section 2(11) of the Act and I shall include them in the unit found appropriate herein.⁶⁷

Nursing Scheduler

I find that the record demonstrates that the nursing scheduler does not share a community of interest with the senior staff LPNs and staff LPNs and I shall therefore

⁶⁶ The additional cases cited by the Employer essentially stand for the same proposition, i.e., that the Board found the putative supervisors to be statutory supervisors because they solely prepared the evaluations that the employer relied on in determining employees' wage increases. See Cape Cod Nursing & Retirement Home, 329 NLRB 233 (1999); Hillhaven Kona Healthcare Center, 323 NLRB 1171 (1997); and Bayou Manor Health Center, Inc., 311 NLRB 955 (1993).

⁶⁷ The Employer claims that LPNs attend supervisory meetings; however, the record demonstrates that LPNs do not attend the daily supervisory meetings. Rather the LPNs attend a weekly meeting, which is also attended by both supervisory personnel and the education nurse, whose supervisory status is unclear from the record.

exclude the nursing scheduler from the unit found appropriate herein.⁶⁸

In determining whether employees share a community of interest sufficient to warrant their inclusion in the same bargaining unit, the Board examines such factors as: (1) functional integration; (2) frequency of contact with other employees; (3) interchange with other employees; (4) degree of skill and common functions; (5) commonality of wages, hours, and other working conditions; and (6) shared supervision. See Publix Supermarkets, Inc., 343 NLRB 1023 (2004); Ore-Ida Foods, 313 NLRB 1016 (1994), affd. 66 F.3d 328 (7th Cir. 1995); see also, Specialty Healthcare and Rehabilitation Center of Mobile, 357 NLRB No. 83, slip op. at *9 (August 26, 2011). Among the most important factors in determining whether a group of employees enjoy a community of interest is whether they perform their day-to-day work under separate supervision and the degree of interchange with other groups of employees. See Executive Resources Associates, 301 NLRB 400 (1991); First Security Services Corp., 329 NLRB 235 (1999); Monsanto Research Corp., 185 NLRB 137 (1970).

Here, the nursing scheduler directly reports to the DON, while the LPNs report to either a nurse manager or supervisor. LPNs are required to have special training and education and must be licensed by the state. In contrast, the nursing scheduler does not provide direct care to the residents and is only required to possess a high school diploma

⁶⁸ The Employer contends that the position of nursing scheduler is supervisory as this person exercises independent judgment and discretion in: scheduling employees; assigning work to employees; and in effectively recommending discipline. Based on the record as a whole, I find that the nursing scheduler does not exercise independent judgment in scheduling employees or assigning work to employees. The record is devoid of any evidence that he makes an assessment of the employees' skills or the residents' needs in making assignments and his scheduling is merely routine in nature, as it is based on staffing needs. See Barstow Community Hospital, 352 NLRB 1052, 1053 (2008) (assignments based on the availability of employees to assist others with work assignments, without regard to individualized assessments of the employees' skills in relation to the needs of the residents, are routine and do not require independent judgment); Oakwood Healthcare, Inc., supra at 693; Children's Farm Home, 324 NLRB 61, 64 (1997). Furthermore, there is no evidence in the record that he uses independent judgment in effectively recommending discipline for absenteeism as such discipline is prescribed by the Employer's policy. See Oakwood Healthcare, Inc., supra at 693.

and one year of experience in healthcare staffing. In Salem Hospital, 333 NLRB 560, 560-561 (2001), the Board found that where case managers were either RNs or social workers, the “absence of a requirement for RN licensure for the [e]mployer’s case manager position demonstrates that case managers, some of whom hold an RN license, do not share a community of interest with the existing RN unit.” See also, Ralph K. Davies Medical Center, 256 NLRB 1113, 1117 (1981); Addison-Gilbert Hospital, 253 NLRB 1010, 1011-1012 (1981).

The LPNs’ primary duty is to provide direct patient care to the residents. The nursing scheduler primarily spends his time scheduling employees, including their vacation and personal time, an administrative task. The LPNs work on three shifts seven days a week. The nursing scheduler works Monday to Friday from 7:00 a.m. to 3:30 p.m., and the record is devoid of any evidence that the scheduler, unlike the LPNs, has ever been required to work overtime or that he is called into work. The LPNs work on the units and the nursing scheduler works in an office with his own computer. While he may be on the units, it is not to provide resident care, but rather to find employees to provide coverage for an open shift.⁶⁹

The Petitioner, in its brief, contends that the nursing scheduler has a community of interest with the LPNs in terms of wages, hours and other working conditions. The Petitioner further asserts that they share common supervision by the DON. However, the record demonstrates that the LPNs directly report to either a nurse manager or supervisor, while the nursing scheduler reports directly to the DON. The Petitioner also maintains that the nursing scheduler and LPNs have daily contact, including access to the same

⁶⁹ To the extent that the nursing scheduler has worked as an LPN since he obtained his position, the record demonstrates that he only did so on only one occasion.

break room, and that they share the same benefits and compensation. However, the record demonstrates that all the employees share the same break room and benefits. Based on the evidence that their direct supervision is different, their training and licensure requirements are different, their hours of work and work locations are different, as well as the administrative nature of the nursing scheduler's duties, and the absence of a significant overlap in the LPNs' and nursing scheduler's job duties, I find that the record as a whole mitigates against finding that the nursing scheduler shares a sufficient community of interest with the LPNs to warrant his inclusion in the unit.

Accordingly, as the nursing scheduler does not share a community of interest with the senior staff LPNs and staff LPNs, I shall exclude the position from the unit found appropriate herein.⁷⁰

CONCLUSION

Accordingly, I find that the following employees 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 licensed practical nurses, including senior staff nurses and staff nurses employed by the Employer at its 6884 Maple Avenue, Sodus, New York facility; excluding all nurse case managers, night nurse supervisors, evening nurse supervisors, weekend supervisors, MDS coordinators, nursing scheduler, registered nurses, assistant to the director of nursing, certified nursing assistants, certified nursing assistant mentors, MDS auditors, dietary employees, activity employees, nursing secretaries, central supply employees, physical therapy employees, housekeeping employees, laundry employees, office and clerical employees, temporary employees, confidential employees, guards, and all professional employees and supervisors as defined in the Act.

⁷⁰ The Employer stated on the record that the nursing scheduler position, absent a finding that the position is supervisory, is appropriate for inclusion in an office and clerical unit. While I take no position herein on the Employer's assertion, I note that the Employer has several job classifications that are administrative and clerical in nature.

There are approximately 27 employees in the bargaining unit found appropriate herein.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit, as described above. The employees will vote whether or not they desire to be represented for collective bargaining purposes by:

RETAIL WHOLESALE AND DEPARTMENT STORE UNION/UFCW LOCAL 220.

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 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 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 eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). The list must be 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 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 23, 2012**. 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,⁷¹ by mail, by hand or courier delivery, or by facsimile transmission at (716) 551-4972. 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 no copies need be submitted. If you have any questions, please contact the Regional office.

C. Notice of Posting Obligation

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 non-posting of the election notice.

⁷¹ To file the eligibility list electronically, go to www.nlr.gov and select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party. Further guidance for electronic filing can be found under the E-Gov heading on the Agency's website. Since the list will be made available to all parties to the election, please furnish a total of 2 copies, unless the list is submitted by facsimile or electronic filing, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

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, DC by 5 p.m. EDT **March 30, 2012**. The request may be filed electronically through the Agency's web site, www.nlr.gov,⁷² but may not be filed by facsimile.

DATED at Buffalo, New York this 16th day of March, 2012.

/s/ Rhonda P. Ley

RHONDA P. LEY, Regional Director
National Labor Relations Board, Region 3
Niagara Center Building – Suite 630
130 S. Elmwood Avenue
Buffalo, New York 14202

⁷² Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.