

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

**SHANTA CORPORATION d/b/a  
ST. ANNE'S CONVALESCENT CENTER<sup>1</sup>**

**Employer**

**and**

**Case 07-RC-072836**

**SEIU HEALTHCARE MICHIGAN**

**Petitioner**

**APPEARANCES:**

Sean F. Crotty, Attorney, of Detroit, Michigan for the Employer  
Matt Carpenter, Attorney, of Detroit, Michigan for the Petitioner

**DECISION AND DIRECTION OF ELECTION**

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

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

Upon the entire record<sup>2</sup> in this proceeding, the undersigned finds:

1. The hearing officer's rulings are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.
3. The labor organization involved claims to represent certain employees of the Employer.

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

<sup>2</sup> The Petitioner and Employer timely submitted briefs, which were duly considered.

4. 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.

## **OVERVIEW**

The Employer operates an extended care residential nursing facility located at 6232 Cadieux Road in Detroit, Michigan. The Petitioner seeks to represent all full-time and regular part-time licensed practical nurses (LPNs) employed by the Employer, excluding all employees currently represented by the Petitioner, ward clerks, restorative aides, registered nurses, and all guards and supervisors as defined by the Act.

At issue is whether the LPNs are supervisors within the meaning of Section 2(11) of the Act. The Employer contends that the LPNs have authority to independently discipline Certified Evaluated Nurse Assistants (CENAs), including issuing verbal warnings, formal write-ups, and sending CENAs home. The Employer further contends that the LPNs responsibly direct CENAs, are held accountable for the performance of the CENAs, and assign CENAs to perform work. The Employer contends that the LPNs help resolve CENA complaints and participate in the evaluation of CENAs used for promotion, transfers, wage increases, and other employment actions, and periodically act as house supervisor. In short, the Employer contends that all of these above-mentioned tasks and duties qualify LPNs as supervisors within the meaning of Section 2(11) of the Act. The Petitioner disputes that the LPNs have such authority to qualify them as supervisors. I conclude that the Employer has not met its burden to establish that the LPNs are supervisors as they do not possess requisite independent discretion to assign work, discipline employees, or evaluate CENAs.

## **THE FACTS**

### ***Employer Operations***

The Employer operates an extended care residential nursing facility on Detroit's east side. The facility consists of three floors, with a maximum capacity of 83 residents. Seventy-two residents currently occupy the facility. The Employer's facility is staffed 24 hours a day, 7 days per week. There are three shifts. The day shift begins at 7:00 a.m. and ends at 3:30 p.m.; the afternoon shift begins at 3:00 p.m. and ends at 11:30 p.m.; and, the midnight shift begins at 11:00 p.m. and ends at 7:30 a.m.

Bradley Mali is the president and owner of the Employer, and Roger Mali is the executive director. Laura Smigielski is the facility's administrator, and she reports to the executive director. Caroline Simmons, a registered nurse (RN), is the director of nursing, and she reports directly to Smigielski. Cruz Rivera is the assistant director of nursing, and Rivera along with unit managers Barb Walton and Peggy Jackson report directly to

Simmons, Rivera, Walton and Jackson are LPNs. Walton is assigned to the first floor, and Jackson is assigned to the second floor. Assistant Director of Nursing Rivera serves as unit manager for the third floor, which houses the dementia unit.<sup>3</sup>

There are 11 LPN and 5 RN charge nurses.<sup>4</sup> According to the Employer's organizational chart, LPNs and RNs directly report to the assistant director of nursing and the unit managers. The CENAs are listed directly below the charge nurses.

The Petitioner currently represents, as part of a separate bargaining unit, all full-time and regular part-time CENAs, housekeeping aides, dietary aides, medical records clerks, and activities aides. This bargaining unit contains about 75 employees, 40 of them CENAs. The Petitioner and Employer have a collective bargaining agreement governing the bargaining unit's terms and conditions of employment.

### ***Scheduled Hours, Management/Supervision***

The director of nursing, assistant director of nursing and unit managers typically work Monday through Friday. Simmons works from 8:00 a.m. to 4:00 p.m.; Rivera works from 11:00 a.m. to 7:30 p.m.; Walton works from 5:30 a.m. to 2:00 p.m.; and Jackson works from 7:30 a.m. to 4:00 p.m.

State regulations dictate that there must always be someone at the facility officially designated as in charge of the facility. The Employer calls this person "house supervisor." When the director of nursing is present, she is the house supervisor. When she is not present, either the RN on duty or the assistant director of nursing is designated house supervisor. In the absence of an RN or the assistant director of nursing, the first floor LPN will serve as the house supervisor. The director of nursing testified that LPNs are usually designated as house supervisors on the weekend shifts when RNs are not scheduled to work. The Employer looks at the schedule to determine whether an LPN should be designated as house supervisor, and the designation as house supervisor rotates according to who is on the schedule. The record does not indicate the method the Employer utilizes in selecting which LPN to assign as house supervisor when the schedule is evaluated. The Employer did not provide any quantitative estimate of how frequently LPNs serve as the house supervisor.<sup>5</sup>

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<sup>3</sup> The Employer and Petitioner stipulated that Smigielski, Simmons, Rivera, Walton and Jackson are supervisors within the meaning of Section 2(11) of the Act based on their authority to hire, discipline, evaluate and fire employees. I also find that owner Bradley Mali and executive director Roger Mali are supervisors within the meaning of Section 2(11) of the Act.

<sup>4</sup> The Employer refers to LPNs and RNs as "charge nurses" or simply "nurses" which practice I have adopted herein. Throughout the hearing, the Employer asserted, and the Petitioner did not refute, that charge nurse RNs and LPNs have the same duties. The parties stipulated that all charge nurse LPNs have the same duties. The parties also stipulated that RNs are professional employees within the meaning of Section 2(12) of the Act. The Petitioner is not seeking to represent the RNs.

<sup>5</sup> The record does not indicate what, if any, are the duties of the house supervisor, nor how they differ, if at all, from the duties of the charge nurse.

The Employer also designates an “on-call manager,” who is responsible for the facility “after hours” and on weekends.<sup>6</sup> The designation of on-call manager rotates weekly between the director of nursing, assistant director of nursing, and the two unit managers.<sup>7</sup> The Employer does not designate charge nurse LPNs or RNs as on-call manager. Although the exact function of the on-call manager is not entirely clear in the record, it appears that LPNs must contact the on-call manager in order to alter a CENA’s shift start and end-time, when calling in a CENA to fill a staffing vacancy which would result in overtime for the CENA, and in the event of any misconduct situation involving the nursing department. One LPN testified that she called the on-call manager to authorize moving residents from an area of the facility adjacent to a leaning street lamp/utility pole that had been struck by a car. LPNs contact the on-call manager in instances involving significant resident care issues, such as a fall, death, or a change in health status.

### *Unit Managers*<sup>8</sup>

The duties of unit managers include overseeing the nurses and carrying out the specific directives of the director of nursing. Unit managers monitor charts and documentation that the nurses complete during the nurses’ rounds.

According to an Employer memo that issued in about 2008, unit manager Walton’s duties include: MDS (material data set) assessment and care planning; [compliance with] Medicare guidelines; RUG score monitoring and review; serving as care conference coordinator; chart and medication administrative records’ auditing and follow-through; providing resident care, treatment and services as needed; and, supervising the first floor. Walton is also responsible for creating the CENA work schedule.

The same memo indicates that unit manager Jackson’s duties include: restorative/rehabilitation (including incident/accident report); bowel and bladder training; food acceptance record and flow sheet review; monthly psychoactive med[ication] monitoring and behavior documentation; assisting with care conference coordination as needed; chart and MAR (medication administration records) audits and follow-through; potential resident referral review as needed; daily nursing staffing as needed; provide resident care as needed; write all orders and care plans r/t restorative care – follow up; and, supervising the second floor.

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<sup>6</sup> It can be inferred from the record that “after hours” covers Monday through Thursday, about 7:30 p.m. – 5:30 a.m., when no one from management (director of nursing, assistant director of nursing, or unit managers) is present in the facility.

<sup>7</sup> The record does not indicate how the duties of the on-call manager differ, if at all, from that of the house supervisor.

<sup>8</sup> Neither unit manager testified during the hearing. The parameters or boundaries of a unit are not specifically defined in the record, but it appears that one floor constitutes a unit.

The unit managers have offices, but also spend substantial time on the floor. Walton spends more time in the office than Jackson because of her responsibility to complete the material data set which requires considerable data input.

The director of nursing testified that she meets with the unit managers, assistant director of nursing, management nurses, and department nurses once a week to discuss the Employer's operations.<sup>9</sup> The unit managers wear scrubs and a white lab coat.

## **LPNs**

### ***Job Descriptions***

The Employer presented three documentary exhibits encompassing the LPN job descriptions and duties.

The first document is undated and entitled "The Duties and Responsibilities of the Floor/Unit Charge Nurse." This document states, among other things, that the nurses are responsible for meeting with their assigned staff (CENAs) to review their work schedule, duties to be carried out during the shift and plan the services to be provided to ensure established policies and procedures are followed (which includes review of the CENA care plan, care schedules, special assignments, appointments, etc.). The document also requires that the nurses make periodic resident checks to ensure that CENAs are properly providing resident care, review and evaluate the CENA work force to ensure fair distribution of work load, and make changes or recommendations to change work force, monitor CENAs to ensure that they are following all guidelines, participate in CENA education, re-education and training, and administer disciplinary action.

The second document, untitled, contains a job description specifically for LPNs. The document indicates that it was last revised in 1993. The job summary states that LPNs are responsible for, among other things, providing adequate supervision to assure quality resident care.

The third document is entitled "Charge Nurse Position Description and Duties." This document includes the statement that the primary purpose of the job is to provide direct nursing care and to supervise the day-to-day nursing activities performed by nursing assistants on the unit. The document further states that the nurses are part of the management team, and delineates the duties expected [of the nurses] as part of the management team.

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<sup>9</sup> The record does not indicate the identity of these management nurses and department heads, nor their specific functions. The record is clear, however, that these individuals are not the charge nurse RNs and LPNs.

The director of nursing testified that the LPNs perform, and are responsible for, all of the duties listed in the documents described above. Simmons further testified that she provided training to the LPNs on the subjects contained in the documents, but she did not provide any detail as to when the training occurred. An LPN testified that she did not receive the aforementioned documents containing the job descriptions until one week before February 10, 2012, the second day of the hearing in this proceeding (the first day of hearing was February 6). This LPN testified that the director of nursing called her at home the day before she received the documents, and said that she was going to give the LPN a quick in-service training over the telephone. The LPN testified that the director of nursing began to tell her about a fire drill and then told her that she would be given a new job description. The following day, the unit manager handed the LPN the three documents described above. The LPN refused to sign the 1993 job description document, and instead of signing it, she wrote in the comment section of the job description that she was not a supervisor and disagreed with the language.

### ***Resident Care***

The Employer's Nursing Services Procedure Manual, a virtual tome, governs every aspect of resident care, from bed making to post mortem. Each topic lists a purpose statement, key procedural points, equipment and supplies (if warranted), step-by-step guidelines, and reporting and documentation.

LPNs pass medications to residents, check their vital signs, and generally monitor their well-being. LPNs do rounds for their assigned patients every two hours. LPNs also communicate with other LPNs, CENAs, doctors, and management regarding residents' conditions. LPNs spend a significant amount of time completing residents' charts and other documentation required by state regulations. At the beginning of each shift, the LPNs round with the out-going nurse, who is either an LPN or RN, with the purpose of updating the status of the residents. During this time, LPNs may confer with out-going CENAs regarding residents who are assigned to the LPN or to the CENA. LPNs and RNs wear scrubs with a white lab coat. CENAs wear scrubs of their own choosing.

### ***Scheduling***

Director of nursing Simmons establishes the work schedules for the charge nurses. One nurse, either an LPN or RN, is assigned to each floor per shift. On some occasions during the midnight shifts, a nurse calls off work, and the charge nurses will be assigned to cover one and a half floors.

On the first shift, four CENAs are assigned to the first floor, four CENAs are assigned to the second floor, and two CENAs are assigned to the third floor. On the second shift, two CENAs are assigned to the first floor, three CENAs are assigned to the second floor, and two CENAs are assigned to the third floor. On the third shift, two

CENAs are assigned to the first floor, two CENAs are assigned to the second floor, and two CENAs are assigned to the third floor. The record does not indicate how many other employees in other classifications besides CENA work during the first, second, and third shifts.

LPNs do not schedule CENAs' shifts. Unit manager Walton creates the work schedule for CENAs and determines their hours of work. Government regulations mandate staff-patient ratios, and the Employer must abide by these regulations when scheduling LPNs and CENAs. The record indicates that LPNs do not alter the start times of CENAs, but in limited circumstances LPNs have sent CENAs home early, with and without the permission of a higher ranking management official. For example, LPNs have allowed CENAs to leave work in the case of illness or family emergency. The director of nursing also testified that an LPN sent a CENA home because the CENA refused to work on a specific floor. The incident apparently occurred on a weekend. The CENA was assigned to a floor different from what she expected, and the charge nurse advised her to work on the assigned floor, or go home. Neither the LPN or CENA involved in this situation testified at the hearing, and no written documents memorializing the event were introduced at hearing. LPNs cannot instruct a CENA to continue working beyond his or her shift, nor can an LPN authorize overtime. If a CENA vacancy materializes after hours, an LPN may call a CENA to come to work to provide coverage, utilizing a prepared roster of CENAs. If such coverage should implicate overtime for the CENA, the LPN must obtain the approval of the unit manager, assistant director of nursing, or the director of nursing before scheduling the CENA.

### ***Hiring/Firing/Layoff/Recall/Promotions/Evaluations***

LPNs do not hire, fire, promote, layoff, or recall CENAs or any other classification of employees. There was testimony that an LPN suggested to the director of nursing that a CENA be promoted to a restorative aide, which would include a pay increase. The director of nursing did not promote the CENA to the position based on her assessment of the CENA's qualifications, and her desire to fill the position with someone experienced in restorative treatment.

The Employer asserts that it seeks input from the LPNs when evaluating CENAs, and the LPNs' input is given significant weight in the evaluation process. There is no procedure for this, nor does the one CENA evaluation in the record indicate any input from an LPN. One LPN testified that she had been asked her opinion of a CENA's performance, but she stated that she has never been directly involved in the issuance of an evaluation to a CENA and she was unaware that any comments she provided were relied upon in the CENA's evaluation. Three other LPNs testified that they had never been consulted by unit managers, the director of nursing, or the assistant director of nursing regarding CENA evaluations.

### *Assignment of Work*

For every shift, an assignment sheet is completed that indicates what tasks CENAs are required to complete for the day, as well as their assigned rooms. The top of the daily assignment sheet lists the date, shift hours, and nurse assigned to the shift. The Employer asserts that the nurses complete the daily assignment sheet by handwritten notations. However, the nurses and the CENA who testified assert that the CENAs complete the sheets via handwritten insertions, but the nurses sign off on the sheet. The daily assignment sheet contains blank spaces for a CENA to insert his or her name to correspond to a set of rooms and tasks. CENA names are handwritten on the chart. The sheet also contains a section entitled “additional duties,” which is pre-printed on the sheets. The actual duties in this section are handwritten. The daily assignment sheet in the record shows that the additional duties for the day were “linen,” “trays,” and “water.” The daily assignment sheet contains a section for breaks and lunch periods. The break and lunch times are handwritten on the sheet. The daily assignment sheet contains sections for resident care needs, such as “feeders,” “tube feeders,” “restorative care,” “intake/output,” “special procedure,” and “appointments.” Underneath the feeders, tube feeders, and intake/output sections, are handwritten lists of room and bed numbers. The daily assignment sheet in the record does not have any room or bed numbers under the restorative care, special procedure, and appointments’ section. The chart is designed so that it is clear as to which CENA is assigned to each task and when each CENA will take a break.

The sets of assigned rooms rotate on a weekly basis among CENAs. With respect to the tasks listed on the daily assignment sheets, the Employer asserts that the nurses assign the tasks according to patient need, CENA availability, and other needs of the facility.<sup>10</sup> Three of the LPNs who testified stated that the CENAs assign themselves work, and the LPNs are not involved in the process. These LPNs testified that CENAs on the shift work among themselves to assign each other particular tasks and that they schedule their own breaks. One of the LPNs testified that the CENAs and the LPNs work together in assigning the tasks listed on the sheet.

At times, an LPN will ask a CENA to assist a resident who was not originally assigned to the CENA according to the daily assignment sheet, or to work a floor different from that indicated on the assignment sheet. LPNs may request a CENA to do so based on staffing needs and/or resident request. The Employer contends that the LPNs will consider the resident’s needs and an assessment of the quality or skill of the CENA in making these requests, but did not provide any specific details or examples in this regard.

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<sup>10</sup> The record is unclear whether the CENAs’ tasks rotate on a weekly or daily basis.

The principle job duties of CENAs are to assist with the day-to-day living of the residents as it pertains to feeding, changing, bathing, grooming, and other similar duties. The record indicates that many of the CENAs know which tasks they are responsible for completing, and do not require much instruction from the nurses, unit managers, assistant director of nursing, or director of nursing. When LPNs notice that a CENA has not completed a required task within the CENA job description, they usually approach the CENA and ask that he or she complete the task. The CENAs and LPNs work very closely together with respect to caring for the residents in the facility.

### ***Responsible Direction***

The Employer asserts that LPNs can be disciplined for failing to properly instruct a CENA or failing to ensure that the CENAs have properly completed tasks assigned to them. The Employer further asserts that LPNs have received in-service trainings on how to supervise and instruct CENAs. The LPNs testified that they have never been disciplined for failing to properly instruct CENAs nor have they been disciplined for failure to ensure that CENAs properly completed their tasks. Moreover, the LPNs testified that they have never been trained on how to instruct CENAs. One LPN described an incident when the director of nursing told her that a CENA, who was assigned to her unit, had not taken out the trash and removed linens. However, the LPN was unable to recall with any specificity what the director of nursing told her in this regard, or any other details about this conversation. There is no documentary evidence in the record memorializing this incident.

As evidence that the Employer has disciplined LPNs for failure to properly instruct CENAs or ensure that CENAs have completed their jobs, the Employer presented several disciplinary warning notices issued to LPNs for their failure to document certain counts, measurements, or other tasks with respect to resident care and well-being. These notices do not mention CENAs, nor make any reference to supervisory or instructional responsibilities.

There are three completed LPN evaluation forms in the record. Two are for new hire orientation, one from 2003 and the other from 2010. The 2003 evaluation consists of four pages, of various duties and responsibilities enumerated in a lined grid with a rating column and a comments column. One line reads “supervision of unit and direct care staff.” The 2010 evaluation consists of two of four pages of the same form, with the same “supervision of unit and direct care staff.” The third evaluation form is also from 2003, and the “annual” box at the top of the first page is checked. This form is a two-page document, and in a narrative format as opposed to a grid format. There is no section which specifically identifies supervision of employees. The LPN who received the 2003 annual evaluation testified that she does not recollect receiving the evaluation, and she has not received an evaluation for quite a long time, possibly not since 2005.

## *Discipline*

The Employer maintains a progressive disciplinary procedure set forth in its employee handbook, applicable for all employees. The discipline procedure provides different levels of discipline and disciplinary progressions based on offense, and culminates in discharge. The Employer issues “Disciplinary Warning Notices” to employees, which are used in the progressive disciplinary procedure. There are three boxes midway on the form, below the area for checking the specific infraction, which designate [ ] verbal warning, [ ] 1<sup>st</sup> written warning, [ ] 2<sup>nd</sup> written warning, and then below those, [ ] suspension, and [ ] termination. The notice contains a signature line for “supervisor,” “employee,” and “administrator.” There is also a box at the bottom indicating “employee refused to sign.” Director of nursing Simmons testified that she presents the disciplinary warning notices to employees, and if they refuse to sign, she signs at the bottom of the document.

The Employer presented 21 disciplinary warning notices issued to CENAs in 2011, based on 18 discrete incidents.<sup>11</sup> The director of nursing testified that these 21 comprise all of the disciplinary warning notices issued to CENAs in 2011.<sup>12</sup> All of the disciplinary warning notices presented contained the signatures of the director of nursing or other stipulated supervisors, although not all of the signatures are dated. Many of the disciplines contain multiple signatures, as well as handwriting of one or more individuals, and which appear to describe the CENA’s misconduct and/or the specific policy violated. Five of the disciplinary warning notices were issued for attendance policy violations, which LPNs do not monitor, and four of the disciplinary warning notices were issued as a result of audits conducted by Simons and Walton.<sup>13</sup>

The Employer asserts that LPNs have directly disciplined employees within the parameters of the progressive disciplinary procedure. In this regard, the Employer identified a disciplinary warning notice signed by an LPN and issued to a CENA in August 2011 regarding the CENA’s break time; a disciplinary warning notice signed by an LPN and issued to a CENA in July 2011, regarding the placement of a food tray; and a disciplinary warning notice signed by a RN regarding a CENA’s failure to report to work area in September 2011 and subsequent failure to leave the building as instructed.<sup>14</sup> Each

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<sup>11</sup> There were 18 discrete incidents because the two CENAs involved in a physical altercation were each issued two disciplinary warning notices: a suspension and a termination notice.

<sup>12</sup> One of the disciplines included in this packet actually occurred in 2010.

<sup>13</sup> Because the relevant consideration herein is the LPNs’ authority to discipline, I do not rely on these nine disciplinary warning notices to reach my determination herein. The director of nursing also testified that the 21 proffered disciplines includes one the RN treatment nurse issued to a CENA. Because it does not appear that this RN treatment nurse is one of the five RNs the Employer refers to as charge nurse, I do not rely on the disciplinary warning notice issued by the RN treatment nurse for purposes of this discussion or for the analysis.

<sup>14</sup> Two days after the incident leading to this discipline, the CENA was discharged. A separate document, entitled “Termination Notice”, signed only by the director of nursing, issued. This and the other termination notices in the record are not included in the discussion regarding the disciplinary warning notices and the LPNs’ supervisory status.

of the foregoing disciplinary warning notices was signed by someone in higher management. The break notice was signed by the administrator, and the food tray, failure to report to work area and failure to leave building notices were signed by director of nursing Simmons. None of the disciplinary warning notices indicate the level of discipline, except the one for the failure to leave the building (which is discussed in detail below). None of the nurses involved in these disciplinary warning notices testified during the hearing. The Employer asserts that these nurses did not consult with anyone in upper management regarding the written disciplinary notices, nor were they required to do so.

With regard to the August 2011 notice regarding the CENA's break, it contains multiple hand written notations in the remark section, written by the administrator<sup>15</sup> based on an investigation into the CENA's time clock punches, and the director of nursing's remark that "will be notified of suspension days in the future." There is little record testimony regarding the food tray incident, other than the CENA refused to sign the disciplinary warning notice when the director of nursing presented it to her, so Simmons signed the notice at the bottom, and the nurse who signed the notice is no longer employed.

The September 2011 incident concerning the CENA reporting late to the floor eventually involved multiple disciplinary actions. This incident occurred on Saturday, September 24. The CENA did not report to her floor until one hour and 45 minutes into her shift. When the charge nurse questioned her regarding this (and maybe even mentioned that she would be written up, although this is unclear in the record because Simmons testified regarding this incident in only the most general terms), the CENA became angry and began screaming, including yelling obscenities. The LPN called the on-call manager, unit manager Walton, who overheard the CENA yelling obscenities. Simmons testified that the charge nurse called her after the incident occurred to advise her of its occurrence.

There are two disciplinary write ups, each dated September 25 at the top of the form where indicated – one for the CENA's failure to report to the floor, and the other for the CENA's failure to leave the facility as instructed by the nurse and yelling obscenities on the resident floor. The former notice is signed by the nurse on the supervisor/date line (but not dated), notes in the remarks section "...did not report to Floor until 1 h and 45 min into shift[.] After being asked to twice." This notation is also signed by the nurse. This notice does not indicate the level of discipline. Simmons signed at the bottom and the "employee refused to sign" box is checked. The latter notice is signed by the nurse on the supervisor signature line, and dated, and notes in the remarks section "Employee refused to leave the bldg when asked to by writer. Employee screaming and using profanity in area of residents." This notation is also signed and dated by the nurse. The remarks section includes additional handwriting indicating that "this conduct is

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<sup>15</sup> The administrator at the time was Thomas' Beauvai.

unprofessional and against facility policy this will serve as termination.” This notation is initialed by director of nursing Simmons, and dated September 27. The termination of Employment box is checked.

Simmons also testified that when she returned to work (on September 27) she had a packet on her desk containing the two disciplinary warning notices signed by the nurse, a brief statement dated September 26 written by Walton attesting to the CENA’s yelling, and a testimonial from an LPN regarding the CENA’s typically good conduct and the back story of the day in question. The Employer also presented a statement written by the CENA and dated September 27, asserting that she was told to report to the floor only once, as opposed to twice as written by the nurse. The separate termination notice indicates that the CENA was discharged by Simmons on September 27.

One LPN testified that the assistant director of nursing directed her to write up a disciplinary action regarding an incident involving a CENA, but the LPN was unable to recall the details or circumstances leading to the discipline. There is no corresponding discipline in the record. The other LPNs testified that they have never issued discipline to anyone, including CENAs.

The Employer asserts that many of the disciplinary warning notices issued to CENAs were initiated by oral reports from nurses, and that there was no investigation after the nurses’ reports. For example, the director of nurses testified that (1) an afternoon nurse told her that a CENA reported to work out of uniform in July 2011, and based on that information, Simmons issued a disciplinary warning notice without conducting an investigation, and (2) Simmons issued a disciplinary warning notice to a CENA without investigation based on an LPN’s report that the CENA brought her underage child to work in August 2011. None of these disciplinary warning notices were signed by the LPN or RN who reported the incidents. In fact, the disciplinary warning notice regarding the uniform issue was signed by the director of nursing only, and notes in the remark section “...Witnessed by two nursing managers Mrs. Rivera and Mrs. Jackson. Write up stands.” The disciplinary warning notice regarding the underage child was signed by the director of nursing and the administrator.

The director of nursing testified that she investigated nurses’ oral reports of CENA misconduct in the following instances, and based on her investigation, she issued discipline: (1) when a midnight nurse informed her that a CENA violated a work rule regarding disorderly conduct, on or about April 4; (2) when a nurse reported that two CENAs were involved in a physical altercation on the resident floor, on about November 29; and (3) when a nurse reported that a CENA repeatedly left her shift early without permission, on about October 24.

The disciplinary warning notice regarding disorderly conduct was signed by the director of nursing and administrator. Simmons testified that she did not remember

which of three nurses on midnights reported the incident. Simmons prepared the disciplinary warning notice but when she presented it to the CENA, the CENA disputed the narrative of the incident. Simmons conducted an additional investigation, including allowing the CENA to write a statement and interviewing the resident involved in the incident.

The disciplinary warning notice regarding leaving the shift early was signed by the director of nursing, the unit manager, and the administrator. When Simmons presented this notice to the CENA, the CENA denied leaving work early. Simmons immediately obtained the Time Card Report from human resources which verified the early departures.

The disciplinary warning notices issued to the two employees involved in the fight, one each for a three-day suspension and then a termination notice for each employee, were signed by the director of nursing and administrator. The fight occurred on the day shift on the resident floor shortly after breakfast. The LPN on the floor reported the fight, as Simmons testified, so that a “STAT” call could be made because the LPN needed assistance to separate the CENAs. Both the administrator and the director of nursing investigated the incident.

The director of nursing further testified that some reports of misconduct must be investigated if it involves incidents such as alleged resident abuse, resident injury or employee injury. The LPNs do not have access to employee personnel files, disciplinary records or attendance records.

## **ANALYSIS**

The sole issue is whether the LPNs are supervisors under Section 2(11) of the Act. Section 2(11) of the Act defines a supervisor as any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or adjust their grievances or to effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). An individual does not need to engage in all of the tasks listed in Section 2(11) of the Act, but only one of the tasks. However, this function must be a regular and substantive portion of the employee’s work time. *Id.* at 681, 694.

### ***Burden of Proof***

The party asserting that an individual is a supervisor carries the burden of proof. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711-712 (2001); *Elmhurst Extended Care Facilities, Inc.* 329 NLRB 535, 536 n. 8 (1999). The party asserting

supervisory status must prove that the individuals are supervisors by a preponderance of the evidence. *Oakwood Healthcare* supra at 694; *Northcrest Nursing Home*, 313 NLRB 491, 496 n. 28 (1993). Conclusionary evidence is not sufficient to establish supervisory status. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006); *Chevron Shipping Co.*, 317 NLRB 379, 381 n.6 (1995). Job titles and descriptions or similar documents are not given controlling weight and will be rejected as “mere paper” without independent evidence of possession of the described authority. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989); *Golden Crest Healthcare Center* supra at 731, citing *Training School at Vineland*, 332 NLRB 1412 (2000). Although the Act demands only the possession of Section 2(11) authority not its exercise, the evidence still must be persuasive that such authority exists. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006)

In the instant case, the Employer did not carry its burden of proof. Although the employer’s brief is persuasive on its face, the record evidence does not support the factual assertions relied upon by the Employer in arguing its case. Much of the testimony elicited from the Employer’s witnesses regarding the alleged duties of the LPNs was general and conclusionary. There is little probative value in eliciting testimony that parrots labor law terms of art, or supplies glib “sound bites” for a post-hearing brief. While broad pronouncements and generalizations may be material, they are not substitutes for details. Further, evidence in conflict or otherwise inconclusive will not be grounds for a supervisory finding. *New York University Medical Center*, 324 NLRB 887, 908 (1997), enfd. in relevant part 156 F.3d 405 (2<sup>nd</sup> Cir. 1998); *The Door*, 297 NLRB 601 n.5 (1990); *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

### ***Primary Indicia of Supervisory Status***

#### **Assignment of Work:**

The Employer asserts that the LPNs use of independent discretion in assigning CENAs to perform certain tasks pertaining to resident care qualify them as supervisors within the meaning of Section 2(11) of the Act.

The Board defines assigning work as “the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e. tasks, to an

employee.” *Oakwood Healthcare* supra at 689. Ad hoc instruction to perform a discrete task is usually not an assignment. *Oakwood Healthcare, Inc.* at 689. A nurse uses independent discretion in assigning when the nurse weighs the individualized condition and needs of a patient against the skills or special training of the available staff. *Id.* at 693; *Barstow Community Hospital*, 352 NLRB 1052, 1053 (2008). In analyzing whether individuals are supervisors on the basis of their ability to assign work, the Board distinguishes between the exercise of independent judgment and the giving of routine instructions, between effective recommendation and forceful suggestion, and between the appearance of supervision and the act of supervision. *Mississippi Power & Light Co.*, 328 NLRB 965, 969 (1999), citing *McCullough Environmental Services*, 306 NLRB 565 (1992), enf. denied 5 F.3d 923 (5th Cir. 1993).

With respect to the CENAs’ daily work assignments, the record evidence reveals that the CENAs and LPNs jointly complete the daily assignment sheets. Further, the evidence shows that CENAs are assigned room sets according to a rotation procedure, from which there is infrequent deviation. The LPNs and CENAs testified that the CENAs are well aware of their duties and responsibilities, and require limited direction. In *Oakwood Healthcare*, the Board held that nurses utilize independent discretion in assigning work when they weigh the individualized condition and needs of the patient against the skills or special training of the available staff. *Id.* at 693. The director of nursing testified, in a conclusionary manner, that the LPNs consider the individualized condition of the resident when directing CENAs to perform certain tasks. There is no detailed evidence presented in this regard nor is there any other specific evidence pertaining to the factors LPNs consider in directing CENAs to perform tasks. The LPNs and CENA testified that LPNS may direct a CENA to perform a task based on overall staffing needs of the units, or at times, based on resident preference. However, the LPNs and CENA did not testify in a detailed manner either. Accordingly, to the extent that the LPNs actually assign work to the CENAs, I do not find that the LPNs utilize independent judgment. I find that the evidence presented by the Employer was conclusionary at best, and not persuasive. *Golden Crest Healthcare Center*, supra.

At times, LPNs may request that a CENA perform a specific task that is not detailed on the daily assignment sheet, but there is no quantitative evidence as to how frequently this occurs. The LPNs’ assignments of CENAs to the discrete tasks in these circumstances are closer to the ad hoc assignments described in *Croft Metals*, 348 NLRB 717, 721 (2006). In *Croft Metals*, the Board found that switching tasks by lead persons among employees assigned to their departments was insufficient to confer supervisory status.

Further, LPNs do not set the CENA work schedule or determine their hours of work. LPNs cannot alter the start times of CENAs, instruct a CENA to continue working

after the end of his or her shift, or authorize overtime. After hours or on weekends LPNs may call CENAs to come to work to fill a staffing need, but this is based on a roster sheet prepared and provided by management. If such coverage will incur overtime, the LPN must first obtain approval of the unit manager, the assistant director of nursing or the director of nursing, all of whom are stipulated statutory supervisors. Although LPNs can send CENAs home for illness or family emergencies, this conduct is insufficient to confer supervisory authority. *Lakeview Health Center*, 308 NLRB 75, 79 (1992); *Eventide South*, 239 NLRB 287, 288 (1978), citing *Pinecrest Convalescent Home*, 222 NLRB 13 (1976). Additionally, sending an employee home for refusing to accept a work assignment does not establish supervisory authority, because a limited response to an obvious violation requires no independent judgment. *Lincoln Park Nursing Home*, 318 NLRB 1160 (1995); *Loffland Bros. Co.*, 243 NLRB 74, 75 n.4 (1979).

For these reasons, I find that the Employer has failed to establish that the LPNs assign work within the meaning of Section 2(11) of the Act.

Responsible Direction:

The Employer contends that the LPNs responsibly direct CENAs. For direction to be responsible, the person directing must have oversight of another's work and be held accountable for the other's performance. To establish accountability, the Employer must show that the alleged supervisor is employed to take corrective action, and is at risk of adverse consequences for others' deficiencies. *Oakwood Healthcare*, supra at 691-692. As with all the other indicia of supervisory authority, the responsible direction must be done with independent judgment.

As an initial matter, there is very little evidence that the LPNs actually direct CENAs. The evidence indicates that LPNs provide limited instruction to CENAs as to how to perform their jobs and/or to complete certain tasks. To the extent that LPNs do direct CENAs to perform tasks, it appears that the amount of time spent doing so is minimal and does not constitute a substantive portion of the LPNs' duties.

The LPNs and CENAs work side-by-side, which provides the LPNs with an opportunity to observe the CENAs' work, and notice whether a CENA has properly done his or her job. However, the record evidence does not show that the LPNs are held accountable for deficiencies in CENAs' performance of their job duties. All of the LPNs testified that they had never been disciplined for the deficient job performance of a CENA. With respect to an LPN's testimony that the director of nursing spoke to her regarding a CENA's failure to take out the trash and remove linens in one of the rooms assigned to the LPN, the LPN could not recall the details of the conversation. Nor did the Employer provide any written memorialization of this incident. The same LPN testified

that she had never been disciplined for any failings of a CENA. Thus, I am unable to find that the Employer held the LPN responsible for the CENA's conduct. See *New York University Medical Center*, supra; *The Door*, supra; *Phelps Community Medical Center*, supra. (Evidence in conflict or otherwise inconclusive will not be grounds for a supervisory finding).

The Employer proffered certain disciplinary notices issued to LPNs as examples of holding LPNs accountable for failing to supervise CENAs. These disciplines appear to be a result of the LPN failing to perform the LPN's documenting duties or nursing care responsibilities, and not for the CENAs' failure to perform the underlying tasks. Nothing on the face of the proffered disciplinary warning notices indicates that they were issued because the CENA was derelict in his or her duties, and the LPN, as supervisor, failed to catch or correct the situation. These disciplinary records do not persuade me that the LPNs "face a prospect of adverse consequences" based on the poor performance of CENAs. See *Lynwood Manor*, 350 NLRB 489, 490-491(2007) (Employer failed to show with specificity that nurses are held accountable in directing CNAs).

Accordingly, I do not find that LPNs responsibly direct employees within the meaning of Section 2(11) of the Act. This finding is further supported by analyzing the LPN evaluations, which do not establish that LPNs are evaluated on the basis of their oversight of CENA duties.

The Employer cites *Lynwood Manor* in support of its argument that LPNs direct employees. However, as noted above, very little evidence was adduced in this regard in the instant matter. Moreover, I find the Employer's reliance on *Lynwood Manor* somewhat curious, for, although the Board found that the CNAs therein both assign and direct CNAs, the Board also found that the employer did not establish that CNAs utilized independent judgment in the assignment of significant overall duties to the CNAs, nor that the nurses were accountable for their actions in directing the CNAs, much like my findings herein.

#### Discipline:

The Board does not require that an individual must exercise its alleged supervisory authority in order to be found to have such authority. *Mountaineer Park, Inc.*, 343 NLRB 1473, 1474 (2003). That a putative supervisor does not exercise her authority to discipline does not mean that she does not possess disciplinary authority within the meaning of Section 2(11) of the Act; provided, however, the putative supervisor is able to use independent discretion in determining whether to discipline or effectively recommend discipline. With respect to discipline, an individual uses independent discretion when the action is taken without the investigation of superiors. *Children's Farm Home*, 324 NLRB 61, 61 (1997).

Under the circumstances of this case, I do not find that the LPNs use independent discretion with respect to their disciplinary functions. The Employer presented disciplinary warning notices, but the nurses involved did not testify. For this reason and the reasons discussed below, I am unable to determine the level, if any, of independent discretion used. With respect to the one LPN who did testify regarding her involvement in the discipline of a CENA, she did not issue the discipline with independent discretion, but at the direction of her superior.

The Employer presented disciplinary warning notices, dated August 26, July 25 and September 25, 2011, which it asserts were directly issued by nurses to CENAs. None of these notices indicate the level of discipline. Director of nursing Simmons testified regarding these incidents in the most general terms. The August 26 write up concerning break times was further investigated before Simmons presented it to the CENA. In that regard, every disciplinary warning notice is first submitted to Simmons, who presents it to the CENA upon Simmons' review.

Additionally, with regard to the September 25 disciplinary notices, the CENA was one hour and 45 minutes late reporting to her floor, and then when approached by the nurse regarding her tardiness, the LPN commenced to scream and yell obscenities on the floor, within earshot of residents and other employees. Reporting behavior, or issuing discipline to employees for gross misconduct including perceived threats to patient safety, has never been viewed as proof of supervisory authority, because a limited response to an obvious violation requires no independent judgment. *Lincoln Park Nursing Home*, supra; *Loffland Bros. Co.*, supra. Moreover, the RN called the on-call manager during the CENA's angry tirade, and called the director of nursing after the incident was under control. Although the record does not indicate if the on-call manager or director of nursing instructed the nurse to write out the disciplinary notice, it can be safely assumed that they condoned the issuance of the notice. Additionally, the director of nursing conducted an investigation into the incident before presenting the CENA with her write-ups.

The Employer further proffers as probative evidence of the LPNs' supervisory authority, an incident wherein an LPN assertedly sent a CENA home because the CENA refused to work on a specifically assigned floor. The Employer did not present a corresponding written disciplinary notice or any document memorializing this event, nor did the nurse or CENA testify regarding this incident. The Board has stated that for "the issuance of reprimands or warnings to constitute supervisory authority, the warning must not only initiate, or be considered in determining future disciplinary action, but also it must be the basis of later personnel action without independent investigation or review by other supervisors" *Phelps Community Medical Center*, supra at 490 (1989) (quoting *Passavant Health Center*, 284 NLRB 887, 889-890 (1987); accord, *Jochims v. NLRB*,

480 F.3d 1161, 1170 (D.C. Cir. 2007). In the instant case, there is no evidence that this incident served as the basis for later personnel action of the involved CENA. Moreover, sending an employee home for gross misconduct has never been viewed as proof of supervisory authority, because a limited response to an obvious violation requires no independent judgment. *Lincoln Park Nursing Home*, supra; *Loffland Bros. Co.*, supra.

The Employer contends that LPNs effectively recommend discipline, and presented disciplines of CENAs whom the director of nursing contends were issued as the result of nurses' effective oral recommendations, without any additional investigation. Specifically, the director of nursing presented the written disciplinary notice of a CENA who was disciplined for being out of uniform and a written disciplinary notice of a CENA who was disciplined for bringing her underage child to work. Neither of these disciplinary notices was signed by the nurses involved. The former was signed by the director of nursing only, and the latter was signed by the director of nursing and administrator. From the face of the documents, one cannot determine who initiated the discipline or recommended that the discipline issue. Moreover, with regard to the uniform incident, the disciplinary notice makes no mention of the nurse, but notes "witnessed by 2 nursing unit managers Mrs. Rivera and Mrs. Jackson[.]", stipulated statutory supervisors.

Finally, the Employer presented three disciplinary warning notices that were issued by director of nursing Simmons after investigating the nurses' oral report of the CENA's conduct. For the April 8 disorderly conduct warning and the October 24 leaving shift early warning Simmons conducted an investigation when the CENA in question disputed the underlying events. For the disciplinary write-ups over the physical altercation on the resident floor, both the administrator and the director of nursing investigated the incident. Moreover, even if a nurse's role in calling for a STAT is considered a report or recommendation for discipline, reporting gross misconduct is not viewed as proof of supervisor authority, because a limited response to an obvious violation requires no independent judgment. *Lincoln Park Nursing Home*, supra; *Loffland Bros. Co.*, supra.

The Employer relies on *Oak Park Nursing Care Center*, 351 NLRB 27 (2007) in support of its argument that the LPNs are supervisors based on their ability to discipline. In *Oak Park Nursing Care Center* the Board, in reversing a regional director's finding that the LPNs' counseling reports were merely anecdotal and unrelated to the disciplinary procedure, determined that the LPNs alone decided whether CENA conduct justified a verbal warning or a written discipline. The LPNs exercised discretion to write-up infractions on employee counseling forms, which were utilized in the progressive disciplinary system. Further, there was evidence that the LPNs recommended the level of discipline, and that the discipline was issued without independent investigation of

superiors. Notably, the LPNs who effectively recommended various disciplines in that record testified in the proceeding. *Id.* at 29.

That is not the evidentiary record herein. In contrast to *Oak Park Nursing Care Center*, there is insufficient evidence that the LPNs *alone* exercise discretion to issue the disciplines. First and foremost, none of the nurses assertedly involved in the disciplinary decisions testified in this proceeding. In many regards, and as noted throughout, much of the director of nursing's testimony regarding the disciplinary process lacked specificity and was conclusionary.<sup>16</sup> The disciplinary warning notices contain the signatures of stipulated supervisors, such as the director of nursing, unit manager, or administrator. No disciplinary warning notice is presented to a CENA by an LPN. All are presented by the director of nursing, after she has reviewed them. None of the write ups initially authored by a nurse indicates the level of discipline, and the nurses do not have access to the employees' personnel or disciplinary files. The instant case is further distinguishable from *Oak Park Nursing Care Center* with respect to the oral recommendations from LPNs, about which the director of nursing testified with specificity, regarding situations where she has independently investigated the underlying incidents.

#### Hiring/Firing/Promotions/Laying Off/Recalling/Evaluating:

The record is clear that LPNs do not hire, fire, promote, layoff or recall employees, nor is there any evidence that they recommend such action. There is limited record testimony that an LPN recommended a CENA to become a restorative aide, but the Employer did not choose the recommended employee.

The Employer also contends that the LPNs are involved in the evaluation process of CENAs. The record evidence does not support this. LPNs do not participate in the evaluation of CENAs nor do they sign off on any evaluation forms. One LPN testified that she has been asked her opinion of a CENA's work performance. This generalized statement is not sufficient evidence to show that LPNs evaluate employees within the meaning of Section 2(11) of the Act.

#### *Designation as House Supervisor*

The Employer contends that the LPNs periodic designation as house supervisor qualifies them as a statutory supervisor. I disagree. First, there is no evidence in the record establishing what the "house supervisor" is or does, beyond satisfying a state requirement to have someone in the facility at all times designated as "in charge."

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<sup>16</sup> Moreover, counsel for the Employer excessively led his witness, director of nursing Simmons, throughout the hearing which fatally diminishes the probative value of her testimony. See *CKS Tool & Engineering, Inc.*, 332 NLRB 1578, 1581 (2000).

Second, the record does not contain any detailed quantitative evidence as to how frequently an LPN may serve as house supervisor besides the director of nursing's generalized testimony that an LPN may be designated as such on weekends. Because there is no quantitative evidence with respect to how frequently LPNs serve as house supervisor, I am unable to determine the significance of this duty in relationship to the LPNs' overall duties pertaining to resident care. Moreover, the Board has declined to find nurses to be statutory supervisors based on their sporadic "supervisory" duties. See *Oakwood Healthcare* at 694.

Additionally, on the weekends and after-hours, LPNs must consult the on-call manager (who is either the director of nursing, assistant director of nursing, or unit manager) for the authorization of overtime, and with respect to significant patient care events, such as a resident fall, death, and major distress. Thus, it appears that even if the LPN is acting as house supervisor on the weekends, any authority she has is circumscribed by that of the on-call manager.

### ***Secondary Indicia***

It is well settled that secondary indicia, i.e. indicators of supervisory status not specifically enumerated in Section 2(11) of the Act, are considered only if there are one or more Section 2(11) primary indicia present. See e.g. *Central Plumbing Specialties*, 337 NLRB 973, 975 (2002); *Shen Automotive Dealership Group*, 321 NLRB 586, 594 (1996).

The Employer asserts that LPNs are responsible for communicating company policies and act as the voice of management. The Employer further asserts that it solicits LPNs' opinions during the CENA review process; LPNs are addressed on a more formal last name basis than CENAs and wear white lab coats to distinguish themselves from CENAs who wear scrubs; and, the Employer's hierarchal structure indicates the supervisory status of LPNs. The Employer also asserts that if the nurses are not supervisors, it would leave no one in charge to supervise employees on weekends.

As an initial matter, the Employer's contention that if the nurses are not supervisors there would be no one in charge of the facility on the weekends, does not withstand scrutiny. The Employer designates an on-call manager, who is the director of nursing, the assistant director of nursing, or either of the two unit managers, on the weekends and after hours. Charge nurses must consult the on-call manager in a variety of situations. In any event, even if the nurse was the highest ranking individual in the facility at a particular time, nothing in the Act suggests that such service requires a

supervisory finding. *Training School at Vineland*, 332 NLRB 1412, 1416, ft. 3 (2000); *Beverly Manor Convalescent Center*, 275 NLRB 943, 947 (1985).

The record does not establish that LPNs' duties include communicating company policies and directives, except for the director of nursing's conclusionary testimony, and duties listed in the documents in evidence regarding the LPN job descriptions. The job descriptions and duties detailed in the documentary evidence were directly refuted by the testimony of several LPNs. In accord with the Board case law regarding paper evidence such as job descriptions without corroborating evidence, the job descriptions and duties are insufficient to buttress the Employer's supervisory arguments. See *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989); *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006), citing *Training School at Vineland*, supra. See also, *New York University Medical Center*, 324 NLRB 887, 908 (1997), enfd. in relevant part 156 F.3d 405 (2<sup>nd</sup> Cir. 1998); *The Door*, 297 NLRB 601, n. 5 (1990); (Evidence in conflict or otherwise inconclusive will not be grounds for a supervisory finding.)

The other factors the Employer relies upon such as work attire and surname usage are not persuasive indicators of supervisory status. The nurses wear white lab coats to distinguish them from the CENAs. It is undisputed that the nurses have different job duties and qualifications than the CENAs with respect to resident care. It stands to reason, then, that residents and residents' family and friends want to distinguish the nurses from the CENAs, and work attire is an apparent indicator of the nurses' status. With respect to surname usage, the record indicates that nurses are commonly addressed by their last names, but there is no evidence that CENAs or other employees are required to refer to nurses by their last names or that LPNs do not likewise refer to CENAs by their last names.

Finally, if charge nurses (LPNs and RNs) are considered to be supervisors under the Act, the ratio between the nurses and the CENAs would be three to ten (3:10) on the first shift, three to nine (1:3) on the second shift, and two to six on the (1:3) on the third shift. These ratios are extraordinarily low. Further, these ratios do not account for the director of nursing, assistant director of nursing, and the unit managers, all stipulated supervisors, whose shifts overlap with the shifts of the CENAs and nurses. If the stipulated supervisors are included in the ratios, the ratio of supervisors to CENAs would be even lower per shift, or, for the nursing department as a whole, 20 to 40 (1:2) which suggests the unlikelihood that the nurses possess supervisory authority over the CENAs. Because I have found that the charge nurses are employees, I address the foregoing only to respond to the Employer's arguments regarding secondary indicia.

## CONCLUSION

Based on the above and the record as a whole, I conclude that the LPNs are not supervisors within the meaning of Section 2(11) of the Act.

5. The following employees of the Employer 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 (LPNs) employed by the Employer at its facility located at 6232 Cadieux Road, Detroit, Michigan; but, excluding all employees currently represented by the SEIU Healthcare Michigan, ward clerks, restorative aides, registered nurses, and all guards and supervisors as defined by the Act

Dated at Detroit, Michigan, this 20th day of March 2012.

(SEAL)

*/s/ Dennis R. Boren*

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Dennis R. Boren, Acting Regional Director  
National Labor Relations Board, Region 7  
Patrick V. McNamara Federal Building  
477 Michigan Avenue, Room 300  
Detroit, Michigan 48226

## **DIRECTION OF ELECTION**

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

### **A. Voting Eligibility**

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

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

### **B. Employer to Submit List of Eligible Voters**

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

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

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

To be timely filed, the list must be received in the Regional Office on or before **March 27, 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](http://www.nlr.gov),<sup>17</sup> by mail, or by facsimile transmission at **313-226-2090**. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

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

### **C. Posting of Election Notices**

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

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

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

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

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<sup>17</sup> To file the eligibility list electronically, go to the Agency's website at [www.nlr.gov](http://www.nlr.gov), select **File Case Documents**, enter the NLRB Case Number, select the option to file documents with the **Regional Office**, and follow the detailed instructions.

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

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001**. This request must be received by the Board in Washington by **April 3, 2012**. The request may be filed electronically through the Agency's website, **www.nlr.gov**,<sup>18</sup> but may **not** be filed by facsimile.

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<sup>18</sup> To file a Request for Review electronically, go to the Agency's website at **www.nlr.gov**, select **File Case Documents**, enter the NLRB Case Number, select the option to file documents with the **Board/Office of the Executive Secretary** and follow the detailed instructions.