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

In the Matter of BANNISTER HOUSE Employer and NEW ENGLAND HEALTH CARE EMPLOYEES UNION, DISTRICT 1199, SEIU Petitioner	Case 01-RC-081292

DECISION AND DIRECTION OF ELECTION[1]

The Employer, Bannister House, operates a nursing home in Providence, Rhode Island. The Union seeks to represent a bargaining unit of all full-time, regular part-time and per diem registered nurses (RNs) employed at the nursing home. Bannister House asserts that the RNs, all of whom serve as shift supervisors, are statutory supervisors and that the petition, therefore, must be dismissed. The Union maintains that the RNs are

[1] 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. In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

Upon the entire record in this proceeding, I find that: 1) the hearing officer's rulings made at the hearing are free from prejudicial error and are hereby 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 in this matter; 3) the labor organization involved claims to represent certain employees of the Employer; and 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.

non-supervisory employees. I find that Bannister House has failed to demonstrate that the RNs are statutory supervisors, and I shall conduct an election in the requested unit.

Background and staffing at Bannister House

Bannister House is a 95-bed nursing home with two patient care units. The second floor of the nursing home has 49 beds for residents with psychiatric issues, behavioral issues, and/or alcohol or drug addiction issues. The third floor has 46 beds for elderly residents with many medical issues.

Carol Mancini has been the Administrator at Bannister House for six years. Mancini works at the nursing home on Monday through Friday, about 65 hours per week. She is present for most of the day shift and parts of the evening and night shifts. RN Jemima Tutu has been the Director of Nursing Services (DNS) at the nursing home for less than a year.[2] She works Monday through Friday from 8:30 a.m. to 4:30 or 5 p.m.

According to the Union's petition, Bannister House employs nine RNs. These RNs all work as shift supervisors.[3] In addition, the nursing staff at Bannister House includes licensed practical nurses (LPNs) who serve as charge nurses, certified medical technicians (CMTs), and nursing aides (CNAs).

The LPN charge nurses, CMTs, and CNAs are currently represented by the Union as part of a bargaining unit that also includes activity aides, housekeeping employees, laundry employees, dietary employees, and maintenance employees. This bargaining unit is the subject of a collective-bargaining agreement between the Union and Bannister House.

The nursing staff provides coverage on the three traditional shifts employed by nursing homes: a day shift that runs from 7 a.m. to 3 p.m., an evening shift from that runs from 3 p.m. to 11 p.m., and a night shift that runs from 11 p.m. to 7 a.m.

There is one RN shift supervisor on duty for each of the three shifts.[4] During the day and evening shifts, in addition to the shift supervisor, there are two LPN charge

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[2] The parties have stipulated, and I find, that DNS Jemima Tutu, and Minimum Data Survey (MDS) nurses Kim Woodruff and Kathy Souza, all of whom are RNs, are statutory supervisors who should be excluded from any unit found appropriate.

Mancini and Tutu were the only witnesses who testified at the hearing. Tutu testified about her personal experience as a shift supervisor. Prior to becoming DNS, Tutu worked for about a year as a shift supervisor for the 11 p.m. to 7 a.m. shift. For about six months prior to that, she worked as a per diem and picked up shifts both as a charge nurse and a shift supervisor.

[3] The RNs sometimes work a "pick-up" shift as a charge nurse if no LPN bids on the shift or no LPN is available.

[4] By law, Bannister House is required to have an RN on duty during every shift.

nurses on duty, one for the second floor and one for the third floor. During the night shift, there is one LPN charge nurse on duty for the third floor. The shift supervisor for the night shift performs a dual role, acting both as the shift supervisor for the entire facility and as the charge nurse for the second floor.

During the day and evening shifts, there is one CMT assigned to the second floor and one to the third floor. No CMTs are assigned to work during the night shift. Two to six CNAs work on each floor at a given time; the number of CNAs varies, depending on the shift and the floor.

The shift supervisors' role with respect to responsible direction

Mancini testified that the shift supervisors oversee the LPN charge nurses, CMTs, and CNAs who work under them during their shifts. The shift supervisors direct the work of those employees and are responsible for ensuring that the nursing home's residents receive quality care.[5]

Every resident at the nursing home has a care plan that outlines their daily needs. The shift supervisors assess new residents and create a generic care plan upon admission, until the MDS nurse does a full assessment. The shift supervisors are responsible for communicating the care plans to the nursing staff and for making sure they are implemented. The shift supervisors start each shift by taking report from the prior shift. They communicate any relevant information to the rest of the nursing staff, e.g., that a resident's medication was changed, that a resident needs a lab test, or that a resident is to have nothing by mouth after midnight.

The CNAs perform tasks such as getting residents up from bed, dressing, bathing, shaving, feeding, changing, weighing, positioning, transferring, and transporting residents, and monitoring their "ins and outs," referred to as "I and O's." The CNAs are supposed to document these activities on "flow sheets." The shift supervisors review the flow sheets at the end of every shift to make sure the CNAs have documented the care they have provided as well as the I and O's. They have conversations with the CNAs about correcting errors in the flow sheets. The shift supervisors watch the CNAs perform resident care. Tutu testified that, when she was a shift supervisor, she would correct the CNAs if they did something wrong while performing resident care. If a resident complained about rough handling by a CNA, Tutu would do a small "in-servicing" for the CNA, showing them how to transfer a resident or help them stand up. She provided "in-services" on how to feed the residents, telling the CNAs to sit rather than to stand while feeding residents, so as to have contact with the residents while feeding them. She directed the CNAs to perform tasks they had forgotten to do, such as cutting a resident's nails or showering them. In the case of diabetic residents, she instructed the CNAs to look for signs of diabetic reaction and told the CNAs that only a charge nurse or shift supervisor should cut the nails of diabetic residents.

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[5] Tutu acknowledged that the charge nurses, whether LPNs or RNs, are also responsible for ensuring the quality of care on their units.

Shift supervisors are responsible for overseeing the administration of medications by LPN charge nurse and CMTs. If a doctor calls in an order, they make sure the order is transcribed, communicated to the nursing staff, and carried out. They make sure the medications are ordered, given, and transcribed on a monthly medication administration record referred to as "MARS." The CMTs administer medications to the residents. Tutu testified that the shift supervisors make sure that the CMTs give the medications correctly. As a shift supervisor, she instructed the CMTs, based on her knowledge, not to pre-pour or mix medications and to wash their hands as they entered a resident's room. She told the CMTs to let her know if a resident refused medication. The CMTs maintain a medication book. As a shift supervisor, Tutu had to correct the CMTs on occasion concerning how they kept the medication book. Tutu instructed the CMTs to make sure they signed the medication book as they went along. Mancini testified that if something is written incorrectly in the CMT medication book, the shift supervisors should complete a medication error report and then do a counseling or go to the next step in the disciplinary process.

Tutu testified that shift supervisors make sure that the charge nurses are doing their job. A "treatment" nurse who works on the day shift administers skin care such as treatment for wounds, creams, and shampoos. Charge nurses on the other shifts perform whatever treatments are necessary during their shifts. These treatments are recorded in a "treatment book." Shift supervisors review the treatment books at the end of each shift to make sure that the required treatments have been done. They may remind LPN charge nurses who have failed to do so to perform and document "body checks" by the end of their shift. The shift supervisors make sure that the charge nurses are doing required diabetic monitoring.

Shift supervisors ensure that employees on their shift are wearing their badges, as required by law, and that they are appropriately dressed. If allegations of abuse or neglect arise when higher managers are not present at the facility, the shift supervisors are required to report the allegations to the Health Department.

The shift supervisors at Bannister House are given a "supervisors' book," which includes copies of Bannister House policies, the collective-bargaining agreement, a document entitled "Daily/Weekly Supervisor's Responsibility List" and a May 12, 2010 memorandum from a former DNS. The Supervisor's Responsibility List includes a lengthy list of duties. It states, "There are many items on this list that can be delegated to your staff with authorization from your Director of Nursing. However, you will be held accountable for ensuring all areas remain in compliance." Mancini testified that this language means that "anything that came up during the course of your shift that you would be accountable for it, to answer to both the director of nurses first, and then myself or to both of us." Mancini testified that at various nursing monthly meetings with the RNs, "we have always gone over back again their accountability to what they're supposed to do on a unit" and that they have done so by "talking about what's happening and different things that have come up over the course of the years and how they should be accountable to what is happening on that unit."

The May 12, 2010 memorandum from former DNS Nancy Sime is addressed to "All Nursing Staff."[6] In the memo, Sime wrote that, effective immediately, she would be checking the CMT medication books, the CNA flow sheets, treatment books, and nurses' medication books every Friday. She wrote, "Please remember to do your documentation by the end of each shift. Failure to do so may result in disciplinary action."

The RNs at Bannister House receive an annual evaluation on the same form used to evaluate the rest of its nursing staff. On the form, the RNs are rated with respect to various qualities, none of which are supervisory in nature. The form includes a place for written comments, including "Major weaknesses." In the April 2012 evaluation of RN Carmele Presume, the DNS wrote, under "Major weaknesses," "Do not write her staff up for failed A."[7] There is no evidence that the evaluations have any impact on the RNs' pay or job status.

The shift supervisors' role in discipline

Mancini testified generally that shift supervisors have authority to discipline employees on their shift. In this regard, the shift supervisors have copies of verbal counseling forms and warning forms. Mancini also testified generally that shift supervisors are allowed to dismiss employees if there is grounds for immediate dismissal. No disciplinary forms completed by shift supervisors were submitted into evidence, however. Shift supervisors do not have access to employee personnel records. As for specific instances in which shift supervisors have disciplined employees, the Employer's witnesses testified as follows:

Mancini testified that about two and a half months ago a CMT bid into a new position. The CMT and the shift supervisor for her new position had a personality disagreement and did not want to work with one another. The shift supervisor explained her position to the DNS. The CMT went to her union delegate and explained her position. Mancini arranged a meeting between herself, the DNS, the shift supervisor, the CMT, and the union delegate. She wanted the parties to talk. At the meeting, the shift supervisor reversed her position and said they would try to work together. About a week later, the CMT asked to be transferred back to her original position.

Mancini testified that, about two years ago, shift supervisor Millicent Boateng asked CNA Maria DeLorenzo to go home during her shift. In this regard, Boateng called Mancini and related to her that she had asked DeLorenzo to come out of the break room to help a resident. DeLorenzo refused, saying she was on her break. DeLorenzo became belligerent and insubordinate. Boateng told Mancini that she had asked DeLorenzo to go

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[6] Although the memo is addressed to "All Nursing Staff," Mancini testified that she believes it was only given to RNs, although she does not have first-hand knowledge as to whom it was distributed.

[7] The record does not reveal the meaning of the letter "A" in the comment.

home, stating "You are terminated and you need to leave the building for direct insubordination." Boateng told Mancini that DeLorenzo had refused to go home. At that point, DeLorenzo got on the phone with Mancini. DeLorenzo was screaming continuously and was very upset. Mancini believed that DeLorenzo was so upset that the situation could potentially affect resident care. Mancini asked DeLorenzo to leave the building. She told DeLorenzo, "The supervisor had asked you to leave and now you're terminated due to insubordination. Come back tomorrow with a delegate and we will figure out what we need to do." DeLorenzo then left the facility. She never returned, never filed a grievance, and never asked for her job back. Mancini testified that a report concerning this incident was prepared, but no documentary evidence concerning the incident was submitted into evidence.

Tutu testified that, as a shift supervisor, she believed she had authority to discipline and had occasion to do so. On one occasion, CNA Kimma Roberts refused to come to report and started arguing. Tutu told Roberts to be quiet and listen or go home, because they were there for the residents. Roberts apologized and was quiet and the rest of the shift went well.

Tutu testified about another incident, during her time as a shift supervisor, in which CNA Miada Toppa refused to assist a resident who was very agitated and verbally abusive. Toppa said the resident was ringing too much and she would not go into his room. Tutu told Toppa she must answer the residents no matter how many times they call. Toppa refused. Tutu told Toppa that if she would not help the resident she had to go home. Toppa became insubordinate and yelled to Tutu, "Who do you think you are?" Tutu called a security guard to escort Toppa out. Toppa still would not leave, stating that Carol Mancini would have to send her home. Tutu called Mancini, and the three had a conversation by speaker phone. Tutu told Mancini that she was sending Toppa home because she had refused to do what Tutu told her to do. Toppa gave Mancini her explanation of what had occurred. At the end of the conversation, Toppa left the facility. No documentary evidence concerning this incident was submitted into evidence.

Tutu testified that, in both instances, when she told the CNAs to go home, the reason was that they were being disruptive of the staff and residents on the floor.

<u>The shift supervisors' role in performing evaluations</u>

All employees at Bannister House must be evaluated annually, by law. Both shift supervisors and LPN charge nurses complete annual evaluations of CNAs. The evaluations do not include numerical ratings and play no role in determining wage increases for the CNAs, which are dictated by the collective-bargaining agreement.

<u>Secondary indicia of supervisory status</u>

When the Administrator and DNS are not present at the nursing home, i.e., nights, weekends, and holidays, the shift supervisors are the highest ranking individuals at the facility. Mancini testified that she frequently gets calls from shift supervisors regarding

patient issues and, occasionally, staff issues, if they feel they cannot handle it. The DNS is also on call when she is not in the building regarding nursing issues. Mancini also receives calls from security and from the receptionist, who calls her about staffing issues. Union delegates call her about employee issues on a routine basis.

Shift supervisors do not usually perform direct care of residents, although there are times when they assist the charge nurses with treatments or other nursing care responsibilities. As noted above, shift supervisors sometimes fill in as charge nurses, and the shift supervisor for the night shift always doubles as the charge nurse for the second floor.

CONCLUSION

Pursuant to Section 2(11) of the Act, the term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, where the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. To qualify as a supervisor, it is not necessary that an individual possess all of the powers specified in Section 2(11) of the Act. Rather, possession of any one of them is sufficient to confer supervisory status. *Chicago Metallic Corp.*[8]

The burden of proving supervisory status rests on the party alleging that such status exists. *NLRB v. Kentucky River Community Care*.[9] The status of a supervisor under the Act is determined by an individual's duties, not by his title or job classification. *New Fern Restorium Co.*[10] The Board will refrain from construing supervisory status too broadly, because the inevitable consequence of such a construction is to remove individuals from the protection of the Act. *Quadrex Environmental Co.*[11]

Bannister House asserts that the RN shift supervisors are statutory supervisors based on their authority to responsibly direct employees and their role in discipline, and because they possess certain secondary indicia of supervisory authority.[12]

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[8] 273 NLRB 1677, 1689 (1985).

[9] 532 U.S. 706, 121 S.Ct. 1861, 167 LRRM 2164 (2001).

[10] 175 NLRB 871 (1969).

[11] 308 NLRB 101, 102 (1992).

[12] At the hearing, the Employer's witnesses also testified concerning the shift supervisors' role in adjusting grievances, permitting employees to leave early, and finding replacements in the event of an absent employee. In its post-hearing brief, however, Bannister House did not rely on any of this evidence as the basis for its assertion that the shift supervisors are Section 2(11) supervisors.

The shift supervisor's authority to responsibly direct

In *Oakwood Healthcare, Inc.*,[13] the Board refined its analysis of the terms "assign," "responsibly direct," and "independent judgment" in assessing supervisory status.[14] With respect to "responsible direction," the Board explained in *Oakwood* that, if a person has "men under him" and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both "responsible" and carried out with independent judgment. For direction to be "responsible," the person directing the oversight of the employee must be accountable for the performance of the task by the other. To establish accountability, it must be shown that the employer delegated to the putative supervisors authority to direct the work and take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisors if they do not take these steps.[15]

Finally, the Board held in *Oakwood* that to establish that an individual possesses supervisory authority with respect to any of the statutory functions, the individual must also exercise independent judgment in exercising that authority, which depends on the degree of discretion with which the function is exercised. "[T]o exercise independent judgment, an individual must at a minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data."[16] "[A] judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement."[17] The Board also stated that the degree of discretion exercised must rise above the "routine or clerical."[18]

Bannister House has established that its shift supervisors have authority to direct the charge nurses, CMTs, and CNAs. In this regard, the shift supervisors oversee the job performance of these employees and correct them when they are not providing adequate care. For example, the shift supervisors make sure that the CNAs have performed the

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The Employer relies on the shift supervisors' role in evaluating employees only as a secondary indicium of supervisory status.

[13] 348 NLRB 686 (2006).

[14] Bannister House does not rely on authority to assign as a basis for its contention that the shift supervisors are statutory supervisors.

[15] Id. at 689-692.

[16] Id. at 693.

[17] Id.

[18] Id.

requisite care, such as feeding and bathing residents, and that they have documented the care given on flow sheets. They make sure that the CMTs have administered medications correctly and that charge nurses have administered treatments correctly. They direct the CNAs to perform tasks they have forgotten to do, such as cutting a resident's nails or showering a resident and correct them if they do something wrong by instructing them how to perform a task correctly, such as how to transfer or feed a resident. They correct CMTs who have failed to sign the medication book and remind charge nurses to perform body checks, if they have failed to do so. *Golden Crest Healthcare Center*[19] (employer established that its charge nurses have authority to direct CNAs, where they oversee the CNAs' job performance and correct them when they are not providing adequate care, e.g. by directing them to clip residents' nails, to empty catheters, or to change an incontinent resident, and, for instance, by correcting a CNA who is not using proper procedures in giving a resident a bath).

Bannister House has failed to establish, however, that shift supervisors are held accountable for the performance of the charge nurses, CMTs, and CNAs. Bannister House argues that it has established the requisite accountability by virtue of the statement in the "Supervisor's Responsibility List" that the shift supervisors will be held accountable for ensuring that all areas remain in compliance and by virtue of Mancini's testimony that shift supervisors have been told at nursing meetings that they are accountable for what happens on the unit. Such general and conclusory evidence, however, does not demonstrate that shift supervisors face the requisite "prospect of adverse consequences" as a result of their performance in directing the nursing staff.[20] *Golden Crest Healthcare Center*.[21] See *Springfield Terrace LTD*,[22] in which the Board held that conclusionary testimony by the DON and administrator that LPNs were held accountable and were "responsible" for the work of CNAs was not sufficient to establish

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[19] 348 NLRB 727, 730 (2006).

[20] Bannister House does not argue in its post-hearing brief, nor does it appear to be a valid argument, that the May 10, 2010 memorandum from former DNS Nancy Sime demonstrates that shift supervisors face the prospect of discipline if the nursing staff fails to complete its documentation in a timely manner. The memo was addressed to "All Nursing Staff" rather than to the shift supervisors and it appears to suggest that the CMTs, CNAs, and charge nurses who fail to complete their documentation, rather than the shift supervisors, will themselves be subject to discipline.

In its post-hearing brief, Bannister House does not rely on the annual evaluations of the RNs as evidence of their accountability, nor do the evaluations provide such evidence. I note that the RNs are not rated in their evaluations on any qualities that are supervisory in nature, that the comment in one evaluation, "Do not write her staff up for failed A," is ambiguous, and that there is no evidence that any action, either positive or negative, has been or might be taken as a result of the RNs' evaluations. *Golden Crest Healthcare Center*, supra at 731.

[21] Id. at 731-732.

[22] 355 NLRB No. 168, slip op. at 8 (2010).

accountability, which requires specific evidence that LPNs will potentially suffer adverse consequences due to the performance of the CNAs. The Board noted that there was no evidence that LPNs had received discipline for the performance of the CNAs, that the LPNs were evaluated based on the performance of the CNAs, or that the LPNs had ever been informed that they could receive adverse consequences for the work performance of the CNAs. Here, Bannister House has presented no evidence that shift supervisors have experienced any material consequence, either positive or negative, as a result of their performance in directing the nursing staff, nor has Bannister House presented any evidence that shift supervisors have ever been informed that any such material consequences might result from their performance in directing the nursing staff.

Finally, Bannister House has failed to establish that the shift supervisors exercise the requisite independent judgment in directing the work of the nursing staff. Bannister House has failed to articulate how the types of judgments made by the shift supervisors in directing the nursing staff constitute independent judgment. I note that the Board has generally found that preparing a care plan and directing other employees to carry it out does not usually require the use of 2(11) independent judgment. *Franklin Home Health Agency*;[23] *Springfield Terrace LTD*.[24]

The shift supervisors' authority to discipline

Bannister House asserts that the shift supervisors have authority to effectively recommend discipline. It is well established that authority to "effectively recommend" an action "generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed. *DirecTV*;[25] *Children's Farm Home.*[26] In order for discipline by an individual to confer supervisory status, the discipline must lead to personnel action without independent investigation or review by other management personnel. *Franklin Home Health Agency*;[27] *Beverly Health and Rehabilitation Services*.[28] The evidence in this case fails to demonstrate that the shift supervisors' authority to recommend discipline meets that standard.

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[23] 337 NLRB 826, 831 (2002), citing *Meridian Home Care Services*, Case 22-RC-12098 (2002) (review denied in an unpublished decision).

[24] Supra, slip op. at 8.

[25] 357 NLRB No. 149, slip op. at 3 (2011).

[26] 324 NLRB 61, 61 (1997).

[27] 337 NLRB 826, 830 (2002).

[28] 335 NLRB 635,664 (2001), enfd. in pertinent part, 317 F.3d 316 (D.C. Cir. 2003).

I note, at the outset, that Bannister House introduced no disciplinary forms completed by shift supervisors into evidence, nor any documentary evidence of their role in any disciplinary incidents. Contrary to the assertion of Bannister House, the incident in which a CMT and a shift supervisor did not get along does not demonstrate that the shift supervisor effectively recommended discipline, that the shift supervisor made any recommendation for discipline, or even that the CMT was disciplined at all. Rather, the record evidence demonstrates only that a CMT and a shift supervisor had a personality disagreement, that the Administrator intervened, and that the CMT herself ultimately asked to be transferred back to her original position. Nor does the incident in which Tutu threatened to send CNA Kimma Roberts home for arguing and refusing to come to report demonstrate the shift supervisors' supervisory status. See *Freeman Decorating Co.*,[29] in which the Board found that a threat to send an employee home, which was never carried out, did not establish supervisory status.

Nor do the two incidents in which then-shift supervisor Tutu and shift supervisor Boateng told CNAs to go home establish the shift supervisors' authority to effectively recommend discipline. The authority to send employees home for engaging in misconduct is typically considered evidence of supervisory authority, although the Board has recognized an exception to this rule where the authority to send home is limited to instances of egregious employee misconduct. That authority has not been found to require the exercise of independent judgment and thus has not been typically considered to constitute statutory supervisory authority. *Bredero Shaw*.[30] The behavior of CNAs DeLorenzo and Toppa, who became belligerent and yelled as they refused to assist residents, appears to have been disruptive enough of the nursing home floor to constitute egregious misconduct. Thus, it required no independent judgment for the shift supervisors to order the CNAs, albeit unsuccessfully, to go home. *Freeman Decorating Co*.[31] (senior employee's decision to send home an insubordinate employee who refused a work assignment did not require the use of independent judgment and was not sufficient to establish supervisory authority); cf. *Bredero Shaw*[32] (neither an employee who "got smart" with the lead verbally nor two employees who had a heated argument were engaged in egregious misconduct, so the leads' discretion in sending them home established their supervisory authority).

Regardless of whether the CNAs' conduct is deemed to fall within the "egregious misconduct" exception, these two incidents do not establish that the shift supervisors effectively recommended discipline for the additional reason that Administrator Mancini independently investigated each incident before following the shift supervisors' recommendation to send the CNAs home. I note that, in each case, the CNA refused to

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[29] 330 NLRB 1143, 1144 (2000).

[30] 345 NLRB 782, 783 (2005).

[31] Supra at 1144.

[32] Supra at 783-78.

go home at the directive of the shift supervisor, suggesting that the CNAs did not believe the shift supervisors had independent authority to send them home.[33] In each instance, Mancini got on the phone with both the shift supervisor and the CNA and heard explanations from the CNAs involved in each incident before determining herself to send the CNA home. Mancini personally heard DeLorenzo screaming continuously and determined that her behavior could potentially affect resident care. In these circumstances, it cannot be said that the shift supervisors' recommendations to send an employee home were followed without independent investigation by their superior.

Secondary indicia of supervisory status

Bannister House asserts that certain secondary indicia of supervisory authority support its position that the shift supervisors are statutory supervisors. In this regard, Bannister House points out that the shift supervisors are the highest-ranking individuals on duty at the facility at night and on weekends and holidays, that the shift supervisors evaluate employees, and that the "Supervisor Responsibility List" shows they responsibly direct employees. Assuming that these are all secondary indicia of supervisory status, secondary indicia are insufficient by themselves to establish supervisory status when there is no evidence presented that an individual possesses any one of the several primary Section 2(11) indicia. *Golden Crest Healthcare Center*;[34] *Ken-Crest Services*.[35]

Accordingly, based upon the foregoing and the stipulations of the parties at the hearing, I find that the following employees of the Employer constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:[36]

> All full-time, regular part-time and per diem registered nurses employed by the Employer at its Providence, Rhode Island facility but excluding guards and supervisors as defined in the Act.

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[33] Toppa, in fact, yelled to Tutu, "Who do you think you are?" and stated that Carol Mancini would have to send her home.

[34] 348 NLRB 727, 730 fn. 10 (2006).

[35] 335 NRLB 777, 779 (2001).

[36] The parties have stipulated, and I find, that the Board's standard formula for determining the regularity of employment of part-time or per diem employees shall be used, i.e., employees who regularly averaged four hours or more of work per week during the quarter preceding the eligibility date shall be included in the unit. *Sister of Mercy Health Corp.*, 298 NLRB 483 (1990).

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 **New England Health Care Employees Union, District 1199, SEIU**. 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.

Voting Eligibility

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

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

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.). This list may initially be used by me to assist in determining whether there is 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 June 20, 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.nlrb.gov,**[37] by mail, or by facsimile transmission at 617-565-6725. To file the eligibility list electronically, go to the Agency's website at www.nlrb.gov, select **File Case Documents,** enter the NLRB Case Number, and follow the detailed instructions. 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.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to 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 Service*s, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board,

[37] To file the eligibility list electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu, and follow the detailed instructions.

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 June 27, 2012**.** The request may be filed electronically through the Agency's website, www.nlrb.gov,1 but may not be filed by facsimile.

DATED: June 13, 2012

/s/ Rosemary Pye

Rosemary Pye, Regional Director
First Region
National Labor Relations Board
Thomas P. O'Neill, Jr. Federal Building
10 Causeway Street, Sixth Floor
Boston, MA 02222-1072