

NATIONAL LABOR RELATIONS BOARD

HOSPITAL HERMANOS MELÉNDEZ

CASE: 24-RC-090556

Employer

And

UNIÓN GENERAL DE TRABAJADORES

Petitioner

**OPPOSITION TO EXCEPTIONS FILED BY THE PETITIONER IN REGARDS TO
THE HEARING OFFICER'S REPORT AND RECOMMENDATION ON
CHALLENGED BALLOTS**

TO THE HONORABLE BOARD:

COMES NOW, Hospital Hermanos Meléndez, Inc., through its undersigned attorney and very respectfully states and prays:

1. On February 11, 2013, we received via regular mail Petitioner's Exceptions to the Hearing Officer's Report and Recommendation (HORR) in the instant case. The same relied exclusively on two arguments. First, that the HORR failed to "mention and discuss" the testimony of Ms. Jessica Perez-Morales in which she allegedly established that she was verbally admonished by the Head Nurse, Ana Quintero and that she also participated in another disciplinary process that led to Perez-Morales' suspension of employment for 10 days. Second, that the Performance Evaluation, as well as the Competency Evaluation of the Head Nurses established that

they responsibly directed the work of the Registered Nurses and the Licensed Practitioner Nurses.

2. Petitioner's allegations are incorrect and in total conflict with the HORR's contents, as well as the totality of the evidence on record. We are unaware if they were timely filed, since its due date was February 8, 2013. However, if they were timely filed, they lack merit and represent a gross misrepresentation of the actual record of the case and thus we present our opposition.

3. The HORR not only mentions, but also thoroughly discusses the testimony of Perez-Morales in regards to the alleged verbal admonishment from Ana Quintero, as well as her alleged suspension. As early on as page 7 of the HORR, the Hearing Officer makes reference to Jessica Perez - Morales as part of the witnesses that the Petitioner presented in support of its contention that the Head Nurses in question were supervisors under the meaning of the Act. Later on, at page 18 of the HORR, the Hearing Officer expressly addressed the testimony of Mrs. Perez- Morales. At the third paragraph of page 18, the Hearing Officer established that "Perez admitted that she has never been disciplined for those instances in which HN Quintero has reviewed a record in which she missed something and subsequently had been requested to complete it". In other words, that she was never subjected to a disciplinary action because of these alleged verbal admonishments. In harmony with this, the Hearing Officer concluded, at the first paragraph of page 34 that the Board has held that those sorts of oral warnings, which have no impact on the employment status of the person being warned, are not evidence of disciplinary action.

4. Later on, at pages 21-22 of the HORR, the examining officer expressly discussed the alleged suspension testified by Perez-Morales. It was correctly established therein that in accordance with her testimony the suspension imposed because of her absences, tardiness and use a cell phone was issued and signed by an officer of the Human Resources Office. No evidence was presented by the Petitioner that the HN Ana Quintero had any participation in the imposition of this suspension. At page 34 of the HORR, once again the examining officer refers to the suspension for the alleged cell phone violation by Mrs. Perez Morales. Therein the hearing officer refers to the claims made by Mrs. Perez Morales that Ana Quintero allegedly notified the supervisor of her use of the cell phone during working hours and that this in turn led to the imposition of the disciplinary action. The hearing officer took this into consideration and concluded that the board has held that the role of reporting incidents is merely reportorial and is not indicative of supervisory status.¹

5. It is clear that the Petitioner's contention, that Mrs. Perez-Morales testimony was not mentioned and discussed by the Hearing Officer is erroneous. The fact is that the same was considered and given the appropriate probative value in light of the totality of the record. To this extent it is imperative to underscore other areas of the HORR. In regards to the power of a Head Nurse to impose disciplinary actions, as well as her participation in the discipline process, the hearing officer took into consideration, and gave credibility, to the testimony provided by the Nursing Director, Laura Pagan, the head of Human Resources Maria Colon and the testimony of the Head

¹ Page 34 paragraph 2.

Nurses that appeared for the evidentiary hearing. All of them testified that Head Nurses have no power to impose disciplinary action and do not make recommendations in regards to disciplinary actions to be imposed to other employees.² In fact, based on the totality of the record, the Hearing Officer expressly concluded that the Petitioner failed to submit any evidence to establish that the Head Nurses had any authority to hire, fire, lay off, promote or reward employees or effectively recommend any of those actions.³

6. Petitioner tries to misconstrue the actual testimony given by Mrs. Perez Morales by only citing pages 199 to 207 of the transcript of the evidentiary hearing. Petitioner claims that within those pages Mrs. Perez-Morales establishes that she was disciplined by the Head Nurse Ana Quintero and that she had direct participation in the disciplinary process that culminated with her suspension. However, during Mrs. Perez cross-examination she expressly admitted that she lacked personal knowledge to testify if in fact Ana Quintero told her supervisor that she was using her cell phone, reason for which she was later on suspended.⁴ She also admitted that even though at one point Ana Quintero told her that she was not supposed to use her cell phone, she did not impose any disciplinary action to her.⁵ She further admitted that she lacked any personal knowledge of the participation, if any, that Ana Quintero may have had in the

² HERR at page 11 paragraph 2; page 21 paragraph 2;

³ HERR at page 11 paragraph 3.

⁴ TR-Volume 3page 205 1.25-p.206-1.20.

⁵ TR-Volume 3page 207 1.8-1.15.

process to determine the imposition of her suspension.⁶ In addition she admitted that no disciplinary action went to her personnel file in regards to any situation in which Ana Quintero talked to her about her tardiness.⁷ In fact, during her cross-examination, Mrs. Perez Morales admitted that the head nurse had never disciplined her and was not aware of any participation she had in any discipline imposed to her.⁸

7. It is clear that the Hearing Officer took into account the testimony of Mrs. Perez-Morales. The same failed to establish any supervisory duties of the Head Nurse Ana Quintero or any other of the Head Nurses whose ballots were challenged by the Petitioner. Petitioner's request for exceptions under this allegation is meritless and should be rejected. The Hearing Officer in the instant case went into great detail as to the testimony presented before her. The same overwhelmingly established the lack of any supervisory duties of the Head Nurses. This was supported even from the testimony provided by the Petitioner's own witnesses.

8. The second argument brought forward by the Petitioner to sustain its request for exceptions, is the allegation that from the Head Nurses' Performance Evaluations as well as the Competency Evaluations, it is established that they responsibly directed the Registered Nurses and the License Practitioner Nurses. Petitioner does not explain or argue the specific instances or areas in which this is established or how. It relies on a blanket assertion making vague references to certain numbers which seem to represent items within these documents. This in itself should

⁶ TR-Volume 3page 209 l.17-1.22.

⁷ TR-Volume 3page 208 l.18-1.21.

⁸ TR-Volume 3page 205 l.3-p.209-1.22.

warrant the immediate rejection of the request for exceptions. However, even going into the merits of the Petitioner's claims, the same should be rejected as it was done by the Hearing Officer.

9. The claim that these documents allegedly establish independent judgment or responsible direction was presented by the Petitioner in its Brief. However, that contention was analyzed and rejected by the Hearing Officer based on the totality of the evidence in the record. The Hearing Officer expressly addressed this issue at the HORR at page 35. After careful evaluation, and citing Golden Crest Health Care Center, 348 NLRB 727 (2006), the hearing officer concluded "Petitioner's reliance on the evaluation forms as evidence that the Head Nurses have authority responsible direct and or to evaluate and or discipline other employees is misplaced, as petitioners evidence, at best, showed mere paper authority and not actual authority as required by the Board in order to establish supervisory status". Furthermore, addressing Petitioner's contention, the Hearing Officer also established that Petitioner had failed to demonstrate accountability and that in accordance with the Board's decisions, absence of any actual evidence of the prospective consequences to the Head Nurses' terms and conditions of employment resulting from a rating in the performance evaluation factor, the prospect of adverse consequences was merely speculative and insufficient to establish accountability.⁹

10. The fact is that the record is completely void of any evidence of actual authority, assignment, independent judgment or responsible direction in regards to any

⁹ HORR at page 36-37.

of the Hospital's Head Nurses. Mere evaluations taking out of context are not sufficient to establish responsible direction. The petitioner had the burden of presenting evidence that would establish the supervisory nature of the Head Nurses. Even Petitioner's own witnesses testified to the contrary. As part of their case in chief the union presented Mrs. Cristina Vazquez as a witness. Mrs. Vazquez is one of the head nurses whose ballots were challenged. Through Mrs. Vazquez' testimony it was clearly established that the head nurses are occasional group leaders that exercise no independent judgment or discretion at all nor supervisory duties, and that most of the time they are engaged in the direct treatment of patients. It was further clarified that this "group leader" designation is equally shared with any other registered nurse on the other two shifts in which there is no head nurse, and even on shifts where the head nurse is working. The following facts were established from the uncontroverted and responsive¹⁰ testimony presented by this union witness:

- a. A head nurse continues to be a registered nurse as it pertains to all of his or her functions. TR. Volume 8 p.610 l.16 - l.20.
- b. The majority of the time the head nurse is giving direct care to the patient. TR. Volume 8 p.653 l.15 - p.654 l.12.
- c. The head nurse gives direct care to the patient together with the graduate nurses. TR. Volume 8 p.616 l.1 - l.3.
- d. The person responsible for the supervision of the registered nurses, the licensed practitioner nurses and the graduate nurses is the supervisor of the area. TR. Volume 8 p.616 l.11 - l.14.

¹⁰ TR. Volume 8 p.618 l.1 - l.8.

- e. Contrary to the department supervisors, the head nurse rotates on the weekends. TR. Volume 8 p.619 l.19 – p. 620 l.20.
- f. When the department supervisor is not present the general supervisors of the hospital are in charge of the different departments. There are 2 to 3 general supervisors per shift. TR. Volume 8 p.620 l.21 – 621 l.3; TR. Volume 9 p.742 l.4 – p.743 l.16.
- g. Head nurses are regularly assigned to the 7 AM to 3:30 PM shift. However, every work shift has a group leader that can be the head nurse or any other registered nurse. TR. Volume 8 p.681 l.8 – p.683 l.25; TR. Volume 9 p.728 l.20 – p. 729 l.9.
- h. The area supervisor determines who will be the group leader for each of the three shifts. This determination will be based on the workload of the unit and takes into consideration pending files, special cases that need to be handled, and the rotation of the area. TR. Volume 8 p.677 l.17 – l.21; TR. Volume 9 p.727 l.7 – p. 728 l.3.
- i. The group leader will in turn assign patients to the registered nurses and specific duties based on the pre-existing protocols established by the hospital. The group leader has **no authority or discretion** to deviate from the established protocols in order to assign patients or duties. The group leader, including the head nurse performs no analysis or independent judgment in regards to assignment of patients. TR. Volume 8 p.633 l.7 – l.14; TR. Volume 9 p.717 l.16 – p. 721 l.18.
- j. When a head nurse works as a group leader she has to abide by the pre-existing protocols to determine the assignment of patients and duties. The head nurse has no authority or discretion to deviate from the established protocols. She exercises no independent judgment in the process of assigning patients. TR. Volume 9 p.717 l.16 – p. 721 l.18.
- k. The hospital's protocols establish a number to be given for every treatment or condition that a patient has. Based on those, the numbers and added obtaining a

result. Using that result the patients are assigned to the nurses. TR 9 p.720 l.10 - p.721 l.17.

1. The fact that a head nurse works on a specific shift does not mean that she will be the group leader. Regularly the supervisor will select a graduate nurse as a group leader even on shifts where there is a head nurse assigned. This group leader will assign patients and duties to all graduate nurses including the head nurse. TR. Volume 8 p.677 l.10 p.678 - l.15; TR. Volume 8 p.680 l.11 - p.683 l.21; TR. Volume 9 p.724 l.14 - p. 729 l.9.

m. As a head nurse she:

- a. has no power to impose disciplinary actions. TR. Volume 9 p. 698 l.1 - l.4.
- b. does not make recommendations in regards to disciplinary actions to be imposed. TR. Volume 9 p. 701 l.6 - l.9.
- c. makes no determination whether a violation has taken place. TR. Volume 9 p. 703 l.11 - l.13.
- d. does not participate on the disciplinary process and ignores its results. TR. Volume 9 p. 703 l.19 - p. 704 l.3
- e. does not issue incident reports when a registered nurse fails to fill out a form or makes mistakes. TR. Volume 9 p. 706 l.12 - p. 713 l.17;
- f. verifies, as well as any other registered nurse acting as a group leader, the attendance of the personnel in order to make sure that the department has the needed personnel, but makes no recommendation for disciplinary action in regards to this issue. TR. Volume 9 p. 739 l.20 - p. 741 l.23.

- g. cannot authorize absences or make any modifications to a work schedule. TR. Volume 9 p. 741 l.20 - p. 742 l.3; TR. Volume 9 p. 743 l.17 - p. 745 l.5.
- h. has no participation in the recruitment process. TR. Volume 9 p. 747 l.9 - p. 753 l.12.
- i. Has no power to lay off employees or make recommendations in regards to that matter. TR. Volume 9 p. 753 l.16 - p. 754 l.1.
- j. Has no power to promote or reward employees. TR. Volume 9 p. 755 l.16 - l.24.
- k. Has no power to approve overtime. TR. Volume 9 p. 755 l.25 - p. 756 l.2.
- n. The registered nurse taking care of the patient also submits reports of incidents and situations. TR. Volume 9 p. 703 l.14 - l.17.
- o. The registered nurses also verify that every document relating to the patient is filled out completely and correctly. Every registered nurse is responsible for the well-being of all the patients. TR. Volume 9 p. 706 l.12 - p. 713 l.17; TR. Volume 9 p. 737 l.1 - p. 738 l.15.
- p. Head nurses are paid the same way registered nurses are paid, including overtime. TR. Volume 8 p.679 l.6 - p. 680 l.10.
- q. Head nurses register their attendance by punching in and out using an electronic system. TR. Volume 9 p. 764 l.7 - l.14.

11. Based on this uncontroverted testimony presented by the **union's own witness**, it is clear that the head nurse is simply a facilitator that frequently works as a group leader during her shift. However, she exercises no independent judgment or

supervisory duties in order to make them a supervisor under the Act. Even the instances in which they assign patients and duties to other registered nurses, they do so using the specific protocols established by the hospital, from which they cannot deviate. The same is true in regards to the duties that require them to verify the treatment received by the patients and the information contained on the different treatment records. Their evaluation is based on hospital protocols and checklists. However, and most important, these evaluations are done exclusively for the treatment of the patient and not to evaluate or impose disciplinary action unto their coworkers. These same responsibilities are shared by other registered nurses, who are not the head nurses, but are selected daily as group leaders by the area supervisor for every shift. They perform exactly the same work with the same limitations.

12. The Petitioner cannot rely on certain evaluations taken out of context to create inferences of supervision. Even more so in a case in which all other evidence supports the contrary. Petitioners have not provided any arguments by which the legal precedents cited by the Hearing Officer in the HORR should not be followed. They have not presented either evidence that contradicts her findings. They have the burden of proof and they have simply failed to establish the supervisory nature of the Head Nurses.

13. An individual, in order to be defined as a supervisor, must be endowed with genuine management prerogatives. This is to prevent an overly broad construction of the language contained in Section 2(11), denying the individual found to be supervisor the employee rights that are protected under the National Labor Relations

Act¹¹. As a result, in conducting this inquiry, the Board and "reviewing courts must take care to assure that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach." Holly Farms Corp. v. NLRB, 517 U.S. 392, 399, 116 S. Ct. 1396, 134 L. Ed. 2d 593 (1996) "[I]t is important for the Board not to construe supervisory status too broadly, for a worker who is deemed to be a supervisor loses his organizational rights." Williamson Piggly Wiggly v. NLRB, 827 F.2d 1098, 1100 (6th Cir. 1987).

14. In the instant case, based on the evidence on record the Hearing Officer analyzed and applied the Board's precedents. She expressly concluded that the elements of assignment, responsible direction and independent judgment were not present based on the evidence produced by the Petitioner. In fact the Hearing Officer concluded that the lack of supervisory nature was established by the evidence presented by the Petitioner. In accordance with the precedents of Oakwood Healthcare, Inc. 348 NLRB 686 (2006) and Golden Crest, supra, the Hearing Officer correctly concluded that the Head Nurses were not supervisors under the Act and the challenged ballots must be opened. The petitioner has not presented any evidence whatsoever or legal arguments that contradict the Hearing Officer's findings. In accordance its request for exceptions should be denied.

¹¹ Accord Edward Street Daycare Center, Inc. v. NLRB, 189 F.3d 40, 1999, (1st Cir., Aug. 20, 1999).

WHEREFORE, the appearing party respectfully request that the Request for Exceptions presented by the Petitioner be denied and the Report and Recommendation issued by the Hearing Officer be adopted and the ballots challenged by the Petitioner be open and counted.

RESPECTFULLY SUBMITTED,

In San Juan, Puerto Rico this 15th day of February, 2013.

I HERBY CERTIFY that copy of this motion was notified to the *Unión General de Trabajadores* to its address: Calle Niza #611, Esquina Verona, Urb. Villa Capri, Rio Piedras, Puerto Rico 00924 and via email to: nolan@ugt.org.

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