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

MAGNUMCARE OF SAGINAW, LLC[1]

Employer

and **Case 07-RC-096829**

SEIU HEALTHCARE MICHIGAN

Petitioner

APPEARANCES:
Richard J. Seryak and Charles Oxender, Attorneys, of Detroit, Michigan for the Employer.
Matthew Carpenter of Detroit, Michigan for the Petitioner.

DECISION AND DIRECTION OF ELECTION

The Employer operates a long term nursing care facility in Saginaw, Michigan. The Petitioner seeks to represent all full-time and regular part-time licensed practical nurses (LPNs) in the charge nurse classification employed by the Employer at its Saginaw facility. The Employer contends that its charge nurses are statutory supervisors based on their authority to discipline, assign and responsibly direct the Certified Nurse Assistants (CNAs) using independent judgment, and thus the instant petition should be dismissed.

As discussed below, based on the record and relevant Board Law, I conclude that the Employer has not satisfied its burden to prove that the LPN charge nurses are statutory supervisors.

Overview

In May 2011, Magnumcare began operating the Saginaw facility herein, providing 24-hour long term and rehabilitative nursing care. Alicia Dietrich is the regional vice president of operations in Human Resources for Magnumcare, and has oversight responsibility for six Magnumcare facilities, in addition to the Saginaw facility. Dietrich's responsibilities include review of human resource decisions and negotiating collective bargaining agreements for her represented designated facilities.

[1] The name of the Employer appears as amended at hearing.

Leigh Flemming is the Saginaw facility administrator, overseeing all operations at the facility, including direct oversight of the business office. Reporting to Flemming are six department heads: Director of Nursing (DON) Gretchen Ricklefs; Director of Maintenance Chad Packard; Directors of Dietary Brandan Maas and Thelma Willard; Directors of Housekeeping/Laundry Brandan Maas and Chad Packard; Director of Human Resources Nicole Kloosterman, and a currently unfilled position of Activity Director. The parties stipulated, and I find, that all of the named individuals are supervisors under the Act, by their authority to hire, fire, discipline, or to responsibly direct employees.

Nursing Department

Reporting to DON Ricklefs are Unit Managers Tanya Williams and Ryan Waugh, each a registered nurse (RN), and Nurse Managers Tina Scherzer, RN Restorative; Becky Roupe, RN Wound Care; Pat Kinsmen, RN Minimum Data Set (MDS) and Kim Green, LPN MDS. The parties stipulated, and I find, that the foregoing named individuals are supervisors under the Act, by their authority to hire, fire, discipline, or effectively recommend such action, or to responsibly direct employees. Scheduler Mary Nidefski, and Becky Smith and Gogi West in Social Services, also report to the DON.

The Administrator, DON, and nurse managers, as well as other department heads, work from 8:00 a.m. to 4:30 p.m., Monday through Friday. The HR manager works 20 hours a week. Unit managers work randomly, covering all shifts, five days a week. The DON is always on call. The administrator, unit managers, or nurse managers rotate weekly as on-call manager, after hours and on weekends.

The Employer employs 22 charge nurses - the 16 LPN charge nurses at issue herein and six RN charge nurses.[2] The LPN and RN charge nurses share the same responsibilities and duties, except the RN charge nurses perform certain medical procedures based on their licensure, such as starting IVs, which LPNs do not perform.

The Employer maintains 98 beds, on four nursing wings or units: East, West, South, and North. East Wing is the skilled wing, typically occupied by short term patients, who are discharged within a few weeks of admission. Two charge nurses are assigned to the East unit because of the acuity of care required for the patients residing there, and ideally one of those nurses is an RN. Only one charge nurse is assigned to each of the other units.

The Employer has designated the East Unit nurse's desk as the point for calls and determinations for other staffing decisions, primarily for the off-hours, (weekends and night shift), although the record is somewhat inconclusive in that regard. The East unit desk is also the repository for various binders securing the schedules for nurses and CNAs, mandation sheets, patient census, and various other information sheets that a charge nurse may need during the course of off hour shifts, i.e., weekends and night shift. The charge nurses work three 12-hour shifts per week – 6:00 a.m. to 6:00 p.m.; and 6:00 p.m. to 6:00 a.m. There is no bargaining history covering the charge nurses.

[2] The Petitioner is not seeking to represent the RN charge nurses.

The Employer employs 43 certified nurse assistants (CNAs). Two to four CNAs work on each unit depending on the patient census and the shift. CNAs work eight-hour shifts, 6:00 a.m. to 2:00 p.m. (day shift); 2:00 p.m. to 10:00 p.m. (evening shift); and 10:00 p.m. to 6:00 a.m. (night shift). The CNAs are represented by Petitioner for purposes of collective bargaining, and their terms and conditions of employment are subject to a collective bargaining agreement between the Employer and Petitioner.

The State of Michigan requires that the Employer maintain 2.8 hours of hands-on care per patient per day (ppd). The Employer prefers to maintain 3.3 ppd, in order to provide quality patient care. The Employer tracks patient census, the number of occupied beds in the facility, daily, which averages about 90. Patient census sheets, charts indicating the number of CNAs and nurses required to work to satisfy the state imposed 2.8 ppd and its preferred 3.3 ppd, and various lists of CNAs and nurses relative to seniority and low census are also kept in one of the binders located at the East unit nurse's desk.

A. Board Law

Section 2(3) of the Act excludes from the definition of the term "employee" "any individual employed as a supervisor." Section 2(11) of the Act defines a "supervisor" as:

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

Individuals are "statutory supervisors if: 1) they hold the authority to engage in any one of the 12 listed supervisory functions, 2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment, and 3) their authority is held in the interest of the employer." ***NLRB v. Kentucky River Community Care***, 532 U.S. 706, 713 (2001). Supervisory status may be shown if the putative supervisor has the authority either to perform a supervisory function or to effectively recommend the same.

Consistent with ***Kentucky River***, the ***Oakwood Healthcare*** Board adopted an interpretation of "independent judgment" that applies to any supervisory function at issue "without regard to whether the judgment is exercised using professional or technical expertise." The Board explained that "professional or technical judgments involving the use of independent judgment are supervisory if they involve one of the 12 supervisory functions of Section 2(11)." ***Oakwood Healthcare***, 348 NLRB 686, 692 (2006). "[A]ctions form a spectrum between the extremes of completely free actions and completely controlled ones, and the degree of independence necessary to constitute a judgment as 'independent' under the Act lies somewhere in between these extremes." Id. at 693. The Board instructed that the relevant test for supervisory status utilizing independent judgment is that "an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by

discerning and comparing data." Id. Further, the judgment must involve a degree of discretion that rises above the "routine or clerical." Id.

The Board has reaffirmed that the burden to prove supervisory authority is on the party asserting it. Supra at 687; ***Kentucky River***, supra, at 711-712. In addition, the Board's well-established recognition that purely conclusionary evidence is not sufficient to establish supervisory status remains viable. The Board requires evidence that the individual actually possesses supervisory authority. ***Golden Crest Healthcare Center***, 348 NLRB 727, 731 (2006); ***Chevron Shipping Co.***, 317 NLRB 379, 381 fn. 6 (1995) (conclusionary statements without specific explanation are not enough). 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. Ed 405 (2nd Cir. 1998); ***The Door,*** 297 NLRB 601 n.5 (1990); ***Phelps Community Medical Center,*** 295 NLRB 486, 490 (1989). See also, ***Frenchtown Acquisition Co., Inc . v. NLRB***, 683 F.3d 298, 305 (6th Cir. 2012) enfg. 356 NLRB No. 94 (2011).

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). Job titles, job descriptions, or similar documents are not given controlling weight and will be rejected as mere paper, absent independent evidence of the possession of the described authority. Id.; ***Golden Crest***, supra at 731, citing ***Training School at Vineland***, 332 NLRB 1412, 1416 (2000), ***Frenchtown Acquisition***, supra at 308.

B. Application of Board Law to this Case

In reaching the conclusion that the LPNs are not supervisors within the meaning of the Act, I rely on the following analysis and record evidence.

*1. **Assignments***

In ***Oakwood Healthcare***, supra at 689, the Board clarified that the authority to assign under Section 2(11) means 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 an employee significant overall duties. Ad hoc instruction to perform a discrete task is not assignment, id., and is discussed here below in connection with the function of responsible direction.

The Board instructs that proof of independent judgment is undercut by evidence that decisions are dictated or controlled by detailed instructions or established practices or policies. However, the existence of instructions or policies does not preclude a finding of independent judgment, if the policies allow for discretionary choices by the putative supervisor. In a healthcare setting, a nurse uses independent judgment in assigning when she weighs the individualized condition and needs of a patient against the skills or special training of the available staff. ***Barstow Community Hospital,*** 352 NLRB 1052, 1053 (2008); ***Oakwood Healthcare***, supra at 693.

The charge nurse schedules are prepared by DON Ricklefs and maintained in one of the binders located at the East wing nurse's desk. The charge nurse schedules are prepared a month out at a time. The charge nurses are not involved in scheduling the CNAs for work. CNA work schedules are prepared by scheduler Mary Nidefski, and are maintained in the notebook at the East Wing desk, and posted near the employee time clock or in the employee break room. The CNA schedule indicates the day, shift and wing, but not the bed assignments. The Employer schedules one float nurse and one float CNA for each shift, to cover vacations, call-off s, and increases in patient census.

When a CNA reports to work during weekday shifts, she is checked in by the unit manager. When reporting to work on weekends or for the night shift, the CNA reports to the East Wing charge nurses, who refer to the prepared schedule to advise the CNA regarding her unit assignment.[3] If a CNA calls off from her shift during the weekday, she calls in to the unit manager, DON or scheduler. On weekends and the night shift, she calls in to the East unit nurse desk.

If the call comes in during off hours, the charge nurse on the East Wing will consult the patient census and the chart indicating how many CNAs and nurses are needed to satisfy the ppd. If the ppd dips below the state minimum 2.8 ppd, the charge nurses on the East wing must obtain CNA coverage. Initially, the charge nurses will contact unscheduled CNAs to determine if anyone wants to report to work. This appears to be a somewhat informal process, with CNAs sometimes calling other CNAs to determine whether they want the hours. There is some inconclusive testimony that overtime is to be avoided if at all possible in this volunteer/mandation process. If the solicitations are unsuccessful and no one volunteers, the nurses will canvas the CNAs already working, to determine whether anyone wants to volunteer to stay beyond their shift. If there are no volunteers, then the charge nurse "mandates" a CNA to stay beyond the shift. The Employer keeps an updated mandation list, which indicates the CNAs who were last mandated and the CNAs next in line for mandation, based on seniority and rotation. This process of seeking volunteers before mandating that a CNA work beyond her scheduled day is referenced in the CNAs' collective bargaining agreement at §17.12. The Employer has also instructed charge nurses to record the CNAs who are solicited to come in to work, and voluntarily to stay beyond a shift in order to monitor the practice for conformance with the collective bargaining agreement covering the CNAs.

In instances where the patient census is low, and the ppd will exceed 3.8, the Employer follows the reverse practice, and solicits volunteers among the CNAs to go home. In the event no volunteer is forthcoming, the charge nurse sends a CNA home based on seniority and the rotation schedule, and a list entitled "low census CNAs," which lists are also maintained in the binders at the East Wing nurse's desk. Similar mandation and low census lists are maintained for the charge nurses as well.

The evidence, at best, is inconclusive regarding the LPNs' authority to authorize overtime outside of the mandation procedure described herein. The Employer's witnesses Dietrich and

[3] The record was unclear whether CNAs maintain the same unit assignments for a set period of time, although there was some testimony regarding bids for that purpose.

Fleming testified generally and inconsistently regarding LPNs' role in authorizing overtime outside of the off hours mandations. The only LPN to testify briefly addressed the Employer's practice for switching shifts or picking up shifts, which at the least sheds a different light on the issue. She completes a request slip and submits it to DON Recklefs for approval. She also testified to a notice posted in time clock area, affirming this preapproval process, that such requests were to be submitted to the DON or unit manager, and noting that overtime would not be authorized.[4]

Preprinted daily CNA assignment sheets are kept at the nurses' desk in each unit. There are four assignment sheets in the record at Employer exhibit 14, two each for the North wing and two each for the West wing. The North wing sheet is different in format from the West wing sheet, but each sheet contains basically the same duties and information. These assignment sheets indicate the CNA who is assigned to specific rooms, daily routine duties, and break times. The assignment sheets also list handwritten duties, such as showers, appointments, tracking the bowl movements for named residents, and passing ice water. Testimony indicates that both CNAs and LPNs fill in the CNAs names, depending on the shift and the specific employees involved. But the additional hand writing regarding the various duties was authored by the LPN assigned to the unit.

The Employer argues that charge nurses use independent judgment in directing the CNAs in their daily duties, but the record testimony presented on this issue is leading and conclusionary. Rather, as for the assignment of duties, the record more clearly demonstrates that CNAs' overall tasks are largely defined by the routine assignment sheet (vitals, bathing, toileting, feeding, wheelchairs) indicated on the preprinted assignment sheets. In the spectrum set out by the Board, the nurses' assignment of discrete tasks and the isolated temporary switching of tasks by charge nurses fall closer to "completely controlled" actions, rather than "free actions." They do not involve a "degree of discretion that rises above routine or clerical." ***Oakwood Healthcare***, supra at 693. Thus, the assignment of tasks to the CNAs by the charge nurses does not require the use of independent judgment.

2. ***Responsibly Direct***

For direction to be responsible, the person directing must have oversight of another's work and be accountable for the other's performance. To establish accountability, it must be shown that the putative supervisor is empowered to take corrective action, and is at risk of adverse consequences for others' deficiencies. ***Oakwood Healthcare,*** supra at 691- 692. As with all of the supervisory indicia enumerated in 2(11), responsible direction must entail independent judgment. Thus, the responsible direction must be (a) independent, free of the control of others; (b) involve a judgment, that is, require forming an opinion or evaluation by discerning and comparing data, and (c) involve a degree of discretion that rises above the routine or clerical. ***Oakwood Healthcare***, supra at 692-693.

[4] Although Employer counsel objected to the admission of Union Exhibit 2 in the record, the Employer did not rebut this posting.

The first question is whether the Employer has established that its nurses *direct* other employees within the meaning of Section 2(11). The Employer identified two situations supporting the charge nurses authority to direct employees, as well as their purported authority in assignments of patients and duties to the CNAs.

In the instance of elopement - the term used when a resident is believed to have left the facility, an undisputedly serious event, if a resident cannot be found in the facility, the charge nurse responsible for that resident announces a code pink throughout the facility. All CNAs, dietary aides and in fact all employees, are required to commence a search for the eloped resident. If the resident is not found within 15 minutes of the nurse's discovery of the suspected elopement, the charge nurse will call the administrator, the DON, the local police, and the family. All ancillary staff (as described by administrator Fleming) have been instructed to search their departments for the resident, and then report the results of the search to the East Wing charge nurse, who in turn will convey the results of the search to the charge nurse where the eloped patient resides.

The Employer also asserts that in the event of an emergency, such as a flood, fire alarm, or inclement weather impeding staff ability to report to work, the charge nurse is in charge of ensuring patient safety and continuing operations of the facility. In support of this contention, it presented testimony that within two years of the hearing, a flood situation occurred at the facility, and the charge nurse contacted the assistant to the maintenance director (unnamed) to address the situation without first contacting the manager on call.

The record provides little evidence regarding direction beyond the notations on the assignment sheets. There is no record evidence that the charge nurses take a CNA's specific skill set into account. The testimony regarding elopements and emergencies was general and vague, and the record is silent with respect to the frequency of such events. The evidence is insufficient to establish that the nurses "direct" the CNAs within the meaning of the definition set forth in ***Oakwood Healthcare. Golden Crest Healthcare Center***, supra at 731. See also ***Frenchtown Acquisition,*** supra at 311, 312.

The next question is whether the Employer has established that the nurses are *accountable* for their actions in directing the CNAs. I find that the Employer has not met its burden. While Administrator Fleming testified that nurses can be and have been held accountable for CNA deficiencies, this testimony is conclusionary. The record lacks evidence that any nurse has been disciplined for failure to oversee or correct a CNA, or as a result of a CNA's failure to adequately perform her/his duties.

The Employer relies on seven documents, either disciplines or in-services issued to LPN Charge nurses in support of its argument that the LPNs responsibly direct CNAs. Contrary to the Employer's characterization of the record evidence, I find that the LPNs are not held accountable. Each of the write-ups covers LPN responsibilities, and none establish that the LPN was disciplined for a CNA's failure to perform his or her duties.

In Employer exhibit 10, an LPN was provided a disciplinary action report dated August 31, 2011, because of a failure to record CNAs' names on the daily assignment sheet.

Employer exhibit 19 consists of six separate Employer actions. The first Employer action is a Tendercare One-On-One In-Service, dated October 12, 2003. The LPN did not provide the resident with thickened liquids, did not write an order for thickened liquids on the 24 report, and did not notify the CENA (sic) of same. Documents 2 and 3 are employee conduct reports dated August 30, 2011, issued to two different LPNs. In each instance, the LPN failed to verify that resident showers were noted on the shower sheet by the CNA, and failed to perform the skin assessment. These conduct reports were not issued to the LPN for the CNA's failure to shower the patient as described by the Employer in its brief, but for the LPN's failure to verify that showers were documented, and then to conduct the appropriate skin assessment: each a duty within the LPN's purview. Document 4 of Employer exhibit 19 is an In-Service dated October 18, 2004, issued to the LPN because she did not review the ADL (activities of daily living) books to confirm that the CNAs were recording the appropriate data. Document 5, a Tendercare Employee Memorandum dated August 31, 2005, was issued to an LPN for "not following defined procedure." On two separate occasions, for two different patients, the LPN had not entered the order for "occult bld," and had not notified the CNAs that stool specimens needed to be obtained. Concerns aside for the questionable evidentiary value and reliability of these stale incident reports issued to LPNs well before the Employer assumed operations, none of the documents in either of these Employer exhibits establish that the LPNs were, or are, held accountable for the malfeasance of their direct-report CNAs.

The nurse job descriptions list oversight responsibilities for CNAs, as do the nurse performance evaluation record and the competency report. Job titles, job descriptions, or similar documents are not given controlling weight and will be rejected as mere paper, absent independent evidence of the possession of the described authority. ***Frenchtown*** Acquisition, supra at 307; ***Avante at Wilson, Inc.***, 348 NLRB 1056, 1057 (2006); ***Golden Crest***, 348 NLRB 727, 731 (2006), citing ***Training School at Vineland***, 332 NLRB 1412, 1416 (2000). Moreover, the one LPN witness to testify stated that her unit manager did not review the competency report or evaluation record with her when it was completed.

3. ***Discipline***

The Employer contends that one-on-one in-services constitute discipline for purposes of Section 2(11). It also maintains that LPN charge nurses discipline and make effective recommendations leading to discipline under the Employer's progressive disciplinary system. I cannot find so on either account.

First, what constitutes the Employer's progressive discipline policy is somewhat unclear in the record. The employee handbook, a vestige from the predecessor once removed - Tendercare, provides:

> Depending upon the circumstances of the misconduct and an employee's overall employment record, disciplinary action may

> include oral counseling, written documentation in your employment file, a written warning, suspension, probation or termination. One or more of the disciplinary actions may be taken individually or in conjunction with other forms of discipline. The nature of the misconduct violation will generally dictate the disciplinary action to be imposed.

This same handbook contains four pages of General Conduct Rules, including three sections on Conduct Violations, ranging from Class I, which "will normally result in discipline up to and including discharge for a first offen[s]e;" Class II with results "in penalties ranging from a written warning to discharge, depending on the circumstances;" and Class III violations which "will result in penalties ranging from a verbal warning to discharge, depending upon the circumstances."

The Employer presents a variety of pre-printed forms utilized over the years for disciplinary actions: "One-to-One In Service of Employees;" "Employee Conduct Report;" "Disciplinary Action Report;" "Tendercare (Michigan) Inc. Employee Memorandum;" and "In-service." Neither of the in-service documents indicate a level of discipline on the form. The Employee Conduct Report, Disciplinary Action Report, and Tendercare Employee Memorandum each have a section indicating a progressive level of discipline. The conduct report and action report have a section for first notice, second notice, final notice, discharge warning, and discharge. The Tendercare memorandum indicates written warning, 2nd written warning, final written warning, suspension, discharge and other. It is against this backdrop that the Employer asserts that the LPNs regularly issue employee discipline utilizing independent judgment.

First, the Employer claims that the in-service is the foundation for the progressive disciplinary procedure. While the collective bargaining agreement covering the CNAs provides "discipline will consist of the progressive disciplinary action in the Employee Handbook" (Section 11.3), the employee handbook makes no mention of in-services as steps in the progressive disciplinary policy.

Additionally, although the collective bargaining agreement covering the CNAs provides that a unit employee is entitled to union representation when being investigated regarding a disciplinary action, nothing in the record indicates that a CNA has been provided such representation when presented with a written in-service, whereas a few of the employee conduct reports indicate either that a steward was present or the CNA declined representation. There is no evidence that in-services are grievable personnel actions, although administrator Fleming testified that if a CNA disputed the in-service she could informally raise the issue with the administrator or DON. No specific examples were provided in support of this testimony.

Further, the testimony is conflicting and conclusionary regarding the role an in-service plays in the progressive disciplinary policy. Both Magnum HR vice president Dietrich and Employer administrator Fleming testified that the in-service is an education tool, and if the Employer continued to see a problem that's when the disciplinary action would continue. In that regard, unit manager Ryan Waugh also testified regarding one-on-one in services he presented to

a CNA on December 20, 2012, and January 3, 2013 (Board Exhibit 3). In each instance Waugh stated that there were a number of issues with the CNA involving patient care, and because she was in a potential discharge situation "we" (an unidentified and unnamed "we") decided to educate her. There is no record testimony that the decision to educate the CNA involved the respective charge nurse who initially reported to the unit manager regarding the CNA's patient care issues. The CNA remains employed.

The Employer has not satisfied its burden to show that in-services affect the employment status of CNAs. Consequently, the authority to issue them does not confer supervisory status upon charge nurses. ***Shaw, Inc.,*** 350 NLRB 354, n. 13 (2007); ***Heritage Hall***, 333 NLRB 458, 460 (2001).

The testimony regarding the LPN charge nurses' role in determining the level of discipline is also conclusionary. LPNs do not have access to employee personnel files; only the HR manager, who works but 20 hours per week, the administrator, and department heads have access to employee personnel files. Nor is there record evidence that charge nurses have been trained in the disciplinary policy. And while there are a number of Employee Conduct Reports, Disciplinary Action Reports, and Tendercare Employee Memorandums in the record, the testimony with respect to these disciplinary actions is inconclusive, and oftentimes in response to leading questions from counsel.

Employer exhibit 11 consists of nine documents, three entitled in-services, one employee conduct report that has hand written at the top "In Service 1:1," two employee conduct reports, one disciplinary action report, and two Tendercare Employee Memorandums. Neither the testimony nor the documents themselves indicate who marked the level of discipline nor how that was determined. Many of the documents contain multiple signatures and dates. The two Tendercare employee memorandums are dated 2008. Two of the disciplinary reports, one a disciplinary action and one an employee conduct, involved clear and egregious patient care lapses, such as residents left in urine soaked or dirtied briefs.[5]

Employer exhibit 12 consists of a series of five employee conduct reports issued to a CNA, culminating in a termination. The first disciplinary action, dated April 20, 2012, is signed by then unit manager Vicki Hall; the second one is signed by charge nurse LPN Nimitz. This disciplinary action also bears two sets of illegible initials, which were never identified. The record does not indicate who checked the discharge warning section on either document. The next employee conduct report in Employer exhibit 12 is unsigned and undated, and is followed by a resident statement transcribed and signed by nurse manager Kim Green. The related suspension notice is signed by the DON Ricklefs and witnessed by then restorative nurse manager Waugh. It also appears the administrator as well as the DON conducted an extensive investigation into the underlying incident, as indicated by the witness statements, including a

[5] Board exhibit 2 involves a write up on an employee conduct report for a similar offense, a resident left in the chair soaking wet in urine that was leaking under the chair, dating the offense January 12, 2013. The LPN signed the employee conduct report on January 12; it appears that the employee signed it January 14, as did DON Recklefs, The level of discipline is not indicated. (For clarification, the second page of Board exhibit 2 is the CNA statement referencing back to Employer Exhibit 11, document 4.)

telephone statement from an LPN obtained by administrator Leigh Fleming after the suspension was levied.

Employer exhibit 13 consists of two discipline actions. One is an employee conduct report, dated October 8, 2012, indicating suspension pending further notice due to the CNA's asserted disrespect to a supervisor and disruption of the workplace. This suspension notice is signed by DON Ricklefs and witnessed by unit managers Ryan Waugh and Vicki Hall. Also included in exhibit 13 are the response statement from the CNA, and a witness statement from the LPN for the incident underlying the October 8 discipline. The other is a Disciplinary Action report, dated December 20, 2011, issued to the same CNA for refusing mandation. This report is signed by Gary Lapeak, whom Administrator Leigh believes was a unit manager at the time, although she testified that "I do not remember his part of the disciplinary action." The only noted LPN involvement in the incident is in the CNA's response submitted on a witness statement form, and the LPN's signature at the bottom of the statement.

While there is a plethora of documentation, none of these reports or memos conclusively establishes that the charge nurses exercise independent judgment in completing them, or that their role in this process is beyond reportorial. The Board will not find supervisory status on that basis. ***Hillhaven Rehabilitation Center,*** 325 NLRB 202, 203 (1997); ***Ten Broeck Commons***, 320 NLRB 806, 813 (1996); ***Northwest Nursing Home***, 313 NLRB 491, 497-498 (1993). Administrator Fleming's testimony that she relies heavily on LPNs' recommendations in reaching termination decisions without any specific evidence in the record in support thereof is not dispositive.

The Employer's reliance on ***Heartland of Beckley***, 328 NLRB 1056 (1999), and ***Oak Park Nursing Center,*** 315 NLRB 27 (2007), is misplaced. In the former case, the Board found that the LPNs exercised independent judgment in determining what category of rule the CNAs violated, and what level of discipline to issue, based on the employer's clearly defined progressive disciplinary policy, and the record evidence establishing that the LPNs regularly issued warnings, with discretion to determine when and why to issue such warnings under the disciplinary system. Similarly, in ***Oak Park Nursing*****,** the Board found that the counseling forms utilized by the employer were a form of discipline, laying the foundation for future discipline. Moreover, the nurses had the discretion to document infractions, and alone decided whether the conduct warranted a verbal warning or written documents. The instant record is insufficient to reach any such conclusions in either regard.

Secondary Indicia

It is well established that where, as here, putative supervisors are not shown to possess any of the primary supervisory indicia, secondary indicia are insufficient to establish supervisory status. ***Golden Crest Healthcare,*** supra at 730 n. 10; ***Ken-Crest Services,*** 335 NLRB 777, 770 (2001).

Written job descriptions for the charge nurses suggest the presence of supervisory authority. But the expansive power set forth in the documents is at odds with the realities. The

Board has long cautioned that evidence of actual authority trumps mere paper authority. ***Avante at Wilson,*** supra at 1057; ***Golden Crest Healthcare***, supra at 731; ***Valley Slurry Seal Co.,*** 343 NLRB233, 245 (2004); ***Franklin Home Health Agency,*** 337 NLRB 826, 829 (2002); ***Training School at Vineland***, supra at 1416.; ***ChevronU.S.A., Inc.*** 309 NLRB 59, 69 (1992). I conclude that the charge nurses' written job descriptions are mere paper conveyances that do not impart actual supervisory authority.

The Employer highlights the LPN charge nurses' higher pay, as compared to the CNAs. This factor is of little utility, particularly in view of the LPNs requisite licensure, training and specialized skill set.

The Employer argues that if charge nurses are not statutory supervisors, on weekends and during off-hours there would be no supervisors in the facility. Unit managers work randomly, covering every shift, and during those portions of the LPNs' shift that a manager is not physically on site managers are on call. Nothing in the Act suggests that service as the highest ranking worker in a geographical area requires a supervisory finding. ***Training School at Vineland***, supra at n. 3. This is viewed as especially true in nursing home settings. ***Beverly Manor Convalescent Centers,*** 275 NLRB 943, 947 (1985); ***NLRB v. Hillview Health Care Center,*** 705 F.2d 1461, 1467 (7th Cir. 1983).

Finally, while I acknowledge that the ratio of supervisors to staff is a management prerogative, if charge nurses are supervisors, (and this would include the RN charge nurses because charge nurses hold the same responsibilities), there would be 43 CNAs to 29 supervisors, approximately 1.5 CNAs per supervisor - an unusual result.

CONCLUSIONS AND FINDINGS

Based on the foregoing discussion and on the entire record,[6] I find and conclude as follows:

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.

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.

[6] The parties timely filed briefs, which were carefully considered.

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 2160 North Center Road, Saginaw, Michigan; but excluding the wound care nurse, the minimum data set coordinators, all service and maintenance employees, registered nurses (RNs), business office clerical employees, professional employees, confidential employees, managerial employees, guards, and supervisors as defined in the Act.

Dated at Detroit, Michigan, this 7th day of March 2013.

/s/ Terry Morgan
Terry Morgan, 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 14, 2013**. 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**,[7] 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).]

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 **March 21, 2013**. The request may be filed electronically through the Agency's website, **www.nlrb.gov**,[8] but may **not** be filed by facsimile.

[7] 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, select the option to file documents with the **Regional Office**, and follow the detailed instructions.

[8] To file a Request for Review electronically, go to the Agency's website at **www.nlrb.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.