

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

MANOR AT ST. LUKE VILLAGE
FACILITY OPERATIONS, LLC d/b/a
THE MANOR AT ST LUKE VILLAGE
and THE PAVILION AT ST LUKE
VILLAGE FACILITY OPERATIONS,
LLC d/b/a THE PAVILION AT ST LUKE
VILLAGE

Employer

Case 4-RC-101711

and

AFSCME, DISTRICT COUNCIL 87

Petitioner

**EMPLOYER'S REQUEST FOR REVIEW OF DECISION
AND DIRECTION OF ELECTION AND REQUEST TO
STAY ELECTION**

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I. INTRODUCTION AND PROCEDURAL HISTORY

The Manor at St Luke Village Operations Facility, LLC d/b/a The Manor at St Luke Village and The Pavilion at St Luke Village Operations Facility, LLC d/b/a The Pavilion at St Luke Village, together the “Employer” herein, respectfully submits this Request for Review of Regional Director Dennis P. Walsh’s Decision and Direction of Election (“Decision”) in the above-captioned case in accordance with Section 102.67 of the Board’s Rules and Regulations. Compelling reasons exist for granting this Request for Review on the following grounds: (1) the Regional Director’s decision on substantial factual issues was clearly erroneous on the record and such error prejudicially affected the rights of the Employer, (2) substantial questions of law and policy were raised because of the Regional Director’s departure from officially reported Board precedent, and (3) the Hearing Officer’s decision to quash the Employer’s subpoena of AFSCME District Council 87 representative Matt Balas and the Regional Director’s denial of the Employer’s special appeal from that decision prejudicially affected the rights of the Employer. For the reasons set forth below, the Board should grant the Employer’s Request for Review. The Board should also stay further processing of the petition, including postponing the election, pending its decision as to whether the Decision was erroneous as well as further rulings from the courts with respect to the authority of both it and the Regional Director to decide this case.

On April 1, 2013, AFSCME District Council 87 (“Union”) filed a petition seeking to represent a proposed bargaining unit including all full-time and regular part-time LPNs, including pool LPNs and MDS LPNs. A hearing was held before a Hearing Officer on April 16-17, 2013. On May 16, 2013, the Regional Director issued the Decision finding that the LPNs are not statutory supervisors and the MDS coordinators have a community of interest with the other LPNs despite performing functions quite different than the other LPNs. The Decision directs an election in the unit for which the Union petitioned. That election is scheduled for June 13, 2013.

II. STATEMENT OF FACTS

A. The Campus and its Operation

The St. Luke campus consists of the Pavilion and the Manor, both of which are skilled care nursing homes, and cottages called Amity Village, which house residents who live independently and to which the Employer's nursing staff do not attend except in the event of emergencies. The Pavilion houses residents on 2 floors. The Manor houses residents in 4 wings, 2 of which are designated "east" and 2 of which are designated "west". The Pavilion and Manor each have an Administrator, a Director of Clinical Services ("DCS"), and an Assistant Director of Clinical Services ("ADCS"). Each also has RNs, LPNS, and CNAs to care for its residents. There are also pool RNs and pool LPNS as well as part-time RNs and LPNs who work at both facilities. There is no formal title "charge nurse", but that term is used to denote an RN or LPN who has responsibility for an entire floor at the Pavilion or the "east" or "west" wing at the Manor. The distinction between an LPN performing his or her regular resident care duties as opposed to discharging his or her responsibilities as a charge nurse is denoted by referencing the LPN as a "treatment nurse" as distinct from a "charge nurse".

Both facilities are 3 shift operations, with staff reporting and concluding shifts at the following times: day shift starting at 6:45 am and ending at 3:15 pm; evening shift starting at 2:45 pm and ending at 11:15 pm; and night shift starting at 10:45 pm and ending at 7:15 am.

The Pavilion staffs its shifts as follows on each of 2 floors:

<u>Day shift</u>	1 RN (unit manager), 2 LPNs (team leaders), 6-7 CNAs When the RN does not work because of a day off or vacation and a pool RN does not fill that position, an LPN does so and acts as a charge nurse
<u>Evening shift</u>	1 RN (nurse supervisor), 2 LPNs (team leaders), 5-6 CNAs When the RN does not work because of a day off or vacation and a pool RN does not fill that position, an LPN does so and acts as a charge nurse

Night shift 1 RN for the entire building (house supervisor)
1 LPN on each floor
3-4 CNAs on each floor
Each LPN has the responsibility to act as a charge nurse for that floor

The Manor staffs its shifts as follows for the entire building (which consists of 4 wings) as follows:

Day shift 2 RNs (unit managers)
4 LPNs (pod leaders)
8-9 CNAs

Evening shift 1-2 RNs (unit managers)
4 LPNs (pod leaders)
8 CNAs
When only 1 RN is on shift, certain LPNs have the responsibility of acting as a charge nurse

Night shift 1 RN
2 LPNs (pod leaders)
5-6 CNAs
When only 1 RN is on shift, certain LPNs have the responsibility of acting as a charge nurse

B. The LPN Position is Supervisory and the Chain of Command is for CNAs to Report to LPNs

The job description for the LPN position makes clear that a principal purpose of the individual holding the position is to supervise CNAs. The heading on the job description is “Clinical Nurse I (LPN)” and states as follows:

Purpose of Your Job Position

The primary purpose of your position is to provide direct nursing care to the residents, and to **supervise the day-to-day nursing activities performed by nursing assistants...** You are entrusted to provide innovative, responsible healthcare with the creation and

implementation of new ideas and concepts that continually improve systems and processes to achieve superior results.

Job Function

As Clinical Nurse 1-LPN, you are delegated the administrative authority, responsibility, and accountability necessary for carrying out your assigned duties....Supervise Nurse Techs.

Duties and Responsibilities

1. **Act in the capacity as a Team Leader...**
3. **Supervise Nurse Techs. Participate in Nurse Tech evaluations.**

Resident Rights

Ensure that nursing staff personnel honor the resident's refusal of treatment request.

Specific Requirements

Must possess leadership and **supervisory ability** and the willingness to work harmoniously with and **supervise other personnel**.

Must possess the ability to plan, organize, develop, implement, and interpret the programs, goals, objectives, policies and procedures, etc., that are necessary for providing quality care.

(Employer Exhibit 1)(emphasis added). The job description marked as Employer Exhibit 2 clearly defines "Nurse Tech I" as a "Certified Nursing Assistant". That CNA job description further states (under the section entitled "Purpose of Your Job Position") that the CNA provides services as "directed by your supervisors", without distinguishing between RNs and LPNs.

Several times a year, sometimes monthly, the Employer conducts in-service training sessions in which personnel receive education and reminders about various subjects. Several of the in-service sessions reviewed “chain of command” and emphasized that LPNs are responsible for “Supervision of CNAs” (Employer Exhibits 4 and 5, sheet entitled “Daily Nursing Tasks, right side of page referencing “LPN”; Tr. 52:17-53:16; 55:1-9; 58:17-20). The record also reflects that often there are in-service sessions that are attended solely by RNs and LPNs (Tr. 403:8-22; 587:22-24; Employer Exhibits 58-61, 63, 66, and 67).

The Employee Guidebook includes a section on “Corrective Action” (Employer Exhibit 6). That section indicates that the Employer’s philosophy is to remedy, rather than punish, performance problems to the extent possible. That section further indicates that an employee and his or her “supervisor must sign” corrective action forms. Moreover, when a witness is necessary, the Guidebook indicates that “a member of management” must serve as the witness (Employer Exhibit 6 at 32 [4 lines above “Corrective Action Procedure” and next-to-last sentence under “Termination”]).

LPNs testifying at the hearing acknowledged familiarity with the LPN job description and its statement that they supervise the CNAs (Tr. 323:16-25; 429:22-431:4). Several acknowledged that CNAs report to them and that they supervise those CNAs (Tr. 325:2-4; 326:7-13; 430:7-15; 241:23-242:9; 253:16-22); see also Tr. 25:17-18; 25:25-26:6 (ADCS Wilkinson testified that CNAs are instructed to report directly to LPNs and LPNs are instructed that CNAs are to report directly to them). Even the 3 LPNs who denied that they conduct themselves as supervisors (Lindsay Borchick, Esther Haupt, and Patricia Clement) acknowledged knowing of the job description (Tr. 492:10-493:17; 537:3-538:16; 619:4-12).

C. The LPNs Discipline the CNAs as well as Recommend Discipline of the CNAs

The record reflects that LPNs have the authority to discipline CNAs and exercise that authority when appropriate and necessary.

There are 18 disciplinary notices in the record covering the period 2008 through 2013 in which an LPN was the sole supervisor who signed the disciplinary notice as the “Supervisor Presenting the Corrective Action Form” (Employer Exhibits 13-17, 20-25, 31-32, 40-41, 43, 45-46). There are an additional 3 disciplinary notices covering the period 2008 through 2013 in which both an LPN and either an RN, the ADCS, or the DCS signed the disciplinary notice as presenting supervisor (Employer Exhibits 9-10, 18). In some instances a disciplinary notice states that its purpose is educational (Employer Exhibit 24). LPN Susan Smith acknowledged having issued discipline, pointed out that the need to do so was limited because the crew of CNAs is capable, and confirmed that LPNs have the authority to issue discipline when necessary (Tr. 214:7-215:10). It is undisputed that in the ordinary course any person issuing discipline, including the ADCS or DCS, does not know the disciplined employee’s previous disciplinary history and must rely upon Human Resources to provide that history, which has significance in determining what quantum of discipline is in order at any given time (Tr. 201:15-203:2).

D. The LPNs Responsibly Direct and Assign CNAs

LPNs as Treatment Nurses

The record reflects that LPNs, acting solely in their role as treating nurses, have the authority to direct and schedule CNAs, exercise their authority to direct them in the ordinary course, and occasionally exercise their authority to schedule them.

Treating LPNs direct the CNAs with respect to what they should do each shift (Tr. 33:15-34:5; Tr. 252:20-253:1; 254:25-255:15). While regularly scheduled CNAs often attend to the same rooms and residents, each day differs in what is expected of them (Tr. 325:10-25; 326:1-2;

365:11-20). After an LPN starting a shift receives a report from the LPN concluding a shift, the LPN starting the shift informs the CNAs what is expected that day, including doctor's appointments or other non-routine matters (Tr. 29:17-30:13; 119:25-120:4) Direction is also necessary when medicines change, care requirements change, or a new resident arrives at the building (Tr. 252:20-253:1; 253:5-254:2). CNAs that do not regularly work the shift necessarily require fuller direction with respect to the residents for whom they are responsible since they do not have a daily routine and, therefore, are not familiar with each resident's requirements (Tr. 215:22-216:2; 243:15-19; 244:25-245:8; 364:18-20; 369:20-22; 327:1-18; 329:6-22). The LPNs also monitor the CNAs to ensure that they are fulfilling their responsibilities (Tr. 30:24-31:2; 31:8-32:4; 34:6-21; 207:6-12; 124:21-25; 125:10-11; 326:17-25; 333:19-24).

Treating LPNs schedule CNAs occasionally (Tr. 122:7-18; 199:6-20; 243:25-244:22). If the flow of work is such that a CNA has not been able to take his or her break when initially scheduled or within a 15-minute leeway, the LPN will work out with the CNA when that break can be taken. In other instances, a CNA may not be able to advance or finish his or her work at the pace anticipated, a CNA might have "called off" or have to leave the shift prematurely, or some other circumstance might arise that necessitates a balancing of work load among CNAs (Tr. 367:19-24). The treating LPN will then address these circumstances and balance work load by assigning one CNA rooms and/or residents other than what was initially scheduled (Tr. 31:2-6; 327:24-328:3; 367:2-4).

LPN Jennings estimated that in the course of an ordinary day, by virtue of the fact that the LPN interacts so much with the CNAs, the LPN supervises the CNAs 50% of the time while the RN supervises them 50% of the time as well (Tr. 335:19-336:4).

LPNs as Charge Nurses

The record reflects that all LPNs are capable of serving as charge nurses and were told at orientation that it was a requirement of the job that they so serve if requested (Tr. 43:8-10; 43:22-44:4; 111:5; 268:10-17; 372:1-9). ADCS Susan Wilkinson testified that she would not compel someone to serve as a charge nurse if an LPN was not comfortable doing so (Tr. 107:15-16), but she has never had anyone refuse her request that they serve in that capacity (Tr. 107:14-15). Most LPNs have served as charge nurse at one time or another (Tr. 263:1-2). There are certain LPNs that regularly serve as charge nurses, whereas other LPNs do not or have not except in very occasional circumstances (Tr. 39:14-40:14; 42:6-43:9; 48:8-23; 264:7-8; 264:15-18; 264:20-23; 265:1-8; 266:1-267:10; 329:23-330:4; 354:4-10).

As charge nurse, the LPN schedules other LPNs and CNAs (Tr. 38:16-39:11; 45:7-24; 195:24-196:5; 117:18-118:22; 254:5-24). Although personnel are scheduled weekly, the charge nurse completes a daily schedule. LPN Jean Jennings serves as charge nurse at the Manor on 3 shifts every 2 weeks (Tr. 328:4-8; 354:1-3) and schedules personnel for the day (Tr. 328:25-329:5). Jennings testified that even when she is not serving as charge nurse, she routinely prepares the daily schedule for the day shift at the Manor if it has not been completed on the previous shift since the day shift RN is frequently late (Tr. 369:23-370:1; 336:5-15; 337:1-9; 339:11-15).

The charge nurse is also responsible for his or her floor or wing. On the night shift, when there is only a single house RN and that RN is occupied with other matters, from time-to-time the LPN serving as charge nurse (especially the LPN on the floor or wing on which the RN is not present) will have to make judgments regarding deployment of CNAs and handling of residents (Tr. 46:11-21; 47:3-12; 263:8-14). While certain of the LPNs called by Petitioner testified that in the regular course of business they do not have to schedule CNAs or make other independent

judgments, the reality remains that any LPN serving as a charge nurse must be able to exercise such authority if circumstances call for it.

E. The MDS Coordinators Should be Excluded from the Election Unit

The 2 MDS employees are LPNs Michelle Alexander and Marla Furlani. The Employer maintains that they should be excluded from the election unit because they do not share a community of interest with the other LPNs. They do not deliver care to residents (Tr. 380:1-3). They attend daily meetings of department heads. No one else from the election unit attends those meetings. The MDS coordinators report to the DCS (Tr. 376:14-15), rather than an RN (to whom the other LPNs report), and their responsibilities include gathering and analysis of confidential financial information concerning the Employer (Tr. 375:17-23; 376:9-13; 380:18-381:20). The employees in the MDS position work in offices rather than on the floor (Tr. 379:19-25). They work office hours (8 am to 4 pm or 9 am to 5 pm) rather than hours similar to the LPNs (Tr. 381:24-382:1).

III. ARGUMENT

A. Neither the Regional Director Nor The Board Has The Power To Decide This Case Or Otherwise Process The Petition

In *Noel Canning v. NLRB*, ___ F.3d ___, No. 12-1115, 2013 WL 276024 (D.C. Cir. Jan. 25, 2013), the United States Court of Appeals for the District of Columbia Circuit held that the Board was without a quorum to issue a decision and, therefore, did so in excess of its power. In *NLRB v. New Vista Nursing and Rehabilitation*, ___ F.3d ___, Nos. 11-3440, 12-1027, 12-1936 (May 16, 2013), the Third Circuit Court of Appeals echoed *Noel Canning* in holding that the decision of the Board in that case also was invalid because the Board had issued it without a quorum.

The entirety of this case, from the filing of the petition onward, has taken place while the Board has been without a quorum. The Regional Director has processed the petition in accordance with the Board's unlawful delegation of authority to him under § 3(b) of the Act. Moreover, the Board appointed the Regional Director whose Decision is under review while it was without a quorum. The Board did not have the Constitutional authority to make that appointment and the Regional Director has been acting pursuant to both an invalid appointment and delegation of authority.

As a result of the Board's unlawful actions, the Decision is *ultra vires* and invalid. Both the Board's delegation of authority and appointment of the Regional Director exceeded its power. For the reasons set forth in *Noel Canning* and *New Vista*, the Employer respectfully submits that the Board must dismiss the petition herein or, at minimum, stay the case. Suspension of the case would include postponing the election so that it is not held on June 13, 2013.¹

The remainder of this submission assumes that the Board decides this Request for Review even though it does not have the power to do so.

B. The Regional Director's Conclusion That The LPNs Are Not Statutory Supervisors Is Clearly Erroneous On The Instant Hearing Record

The Regional Director's determination that the Employer failed to prove by a preponderance of the evidence that the LPNs have supervisory authority and exercise it is clearly erroneous. First, the Decision mischaracterizes the record in an effort to minimize the scope and breadth of the instant LPNs' supervisory authority, wrongly affording insufficient significance to

¹The Employer is aware of the Board's pronouncements to the effect that it must continue to execute its statutory duties despite parties registering objections of the kind set forth above. Accordingly, insofar as the Employer continues to participate in this case, it does so reserving all its rights and remedies and without prejudice to its position that the Board is acting in excess of its Constitutional authority and unlawfully in proceeding.

the existence of LPNs' supervisory authority merely because the need for its exercise is not as frequent as might otherwise be the case in a facility that is not run as well as the St Luke campus. Second, the Decision also disregards substantial evidence indicating that LPNs have the authority to evaluate CNAs and do so, failing to recognize that although that authority was not exercised regularly until recently after a long lapse the Employer renewed its efforts to regularize LPN evaluation of CNAs before it became aware of the Union organizing drive. Third, the Decision disregards a multitude of disciplinary notices that LPNs issued or were involved in issuing despite the fact that they are business records properly admitted into evidence.

1. The LPNs Have Authority to Assign and Responsibly Direct CNA Work, Often Exercise it, and Even When They Do Not Their Failure to Exercise that Authority Does Not Nullify Their Supervisory Status

While the proponent of supervisory status bears the burden of proof, *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 711-12 (2001), when analyzing whether supervisory status exists the focus is on whether the employer has vested that authority in the individual, **not on how frequently the individual exercises the authority, or if it is exercised at all.** *Barstow Community Hospital*, 352 NLRB 1052, 1053 (August 18, 2008) (“Section 2(11) requires only possession of authority to carry out an enumerated supervisory function, not its actual exercise....”). The Decision rejected or downplayed the Employer's evidence of supervisory authority largely because the Regional Director concluded that LPNs only exercised certain responsibilities occasionally or sporadically and only some of the LPNs acknowledged having such responsibility or executing it (Decision at 4, 10, 17). Since the Employer established the existence of supervisory authority in some of the LPNs and all of the LPNs (other than the MDS coordinators) were obligated to perform such duties, the Decision is clearly erroneous insofar as it failed to apply the law to the facts properly across the entire election unit.

One instance in which the Decision deviates from *Barstow Community Hospital* in this way is its finding that the LPNs do not assign work to CNAs. The Decision acknowledged that “some LPNs occasionally decide which CNAs will care for which residents in their area” (Decision at 10). In the very next breath, the Decision negated the importance of that authority:

Of course, the fact that **some LPNs** may determine resident assignments does not establish that all of the Employer’s LPNs exercise supervisory authority, especially where the Employer has not generally decided that LPNs are responsible for these assignments to CNAs. At most, it appears that LPNs in some areas and shifts have taken on this task.

As an initial matter, the Regional Director was arbitrary and without record support in finding that such authority is not indicative of LPNs having a supervisory role on the supposed ground that certain LPNs assumed such responsibility rather than having it conferred upon them by management. There is no basis in the record for that determination. Beyond that, the Regional Director clearly erred in concluding that the authority to assign residents was not a power that inhered in all LPNs. The record establishes that all LPNs were clothed with supervisory authority over CNAs generally (Employer Exs. 1; 4 and 5 [sheet entitled “Daily Nursing Tasks, under LPN, states “Supervision of CNAs”]; Tr. 52:17-53:16; 55:1-9; 58:17-20). The record further demonstrates that several LPNs decided to close their eyes to their power to supervise CNAs even though they acknowledged that they had such authority (Tr. 492:10-493:17; 537:3-538:16; 619:4-12) and transparent in their inability to explain the disconnect between their knowledge of the job’s requirements and their failure to perform those responsibilities (Tr. 494:3-506:21; 538:17-547:23; 620:14-635:20). The failure of those LPNs, who happened to testify at the instance of the Union, to exercise authority over CNAs that other LPNs exercised does not establish the absence of that authority. Rather, it merely demonstrates a

reluctance of failure (or claimed reluctance or failure) to exercise it, **not** the absence of such authority.

The Decision attempts to sidestep the problem to which the above erroneous reasoning gives rise by rationalizing away the deficiency on the ground that assignment of residents based upon equalization of workloads does not constitute an exercise of independent judgment sufficient to clothe such authority as supervisory (Decision at 11). However, the record does not establish that the judgments made in doing so are per se routine. Accordingly, the Decision is deficient in so finding.

The Decision is also clearly erroneous insofar as it confined the assignment of work finding to “resident assignments”, as quoted above, and failed to acknowledge record evidence that supports the conclusion that LPNs assign CNAs work more extensively. The record establishes that CNAs that do not regularly work the shift necessarily require fuller direction with respect to the residents for whom they are responsible since they do not have a daily routine and, therefore, are not familiar with each resident’s requirements (Tr. 215:22-216:2; 243:15-19; 244:25-245:8; 364:18-20; 369:20-22; 327:1-18; 329:6-22). Treatment LPNs provide direction that way as well as others. For example, the record establishes that while regularly scheduled CNAs often attend to the same rooms and residents, each day differs in what is expected of them (Tr. 325:10-25; 326:1-2; 365:11-20). LPNs provide daily direction to the CNAs with regard to what is expected of them with respect to specific residents, including doctor’s appointments or other non-routine matters (Tr. 29:17-30:13; 119:25-120:4). Direction is also necessary when medicines change, care requirements change, or a new resident arrives at the building (Tr. 252:20-253:1; 253:5-254:2). One LPN testified that in the course of an ordinary day, by virtue

of the LPN's intensive interaction with the CNAs, the LPNs are responsible for about half of the CNAs' supervision while the RNs are responsible for the other half (Tr. 335:19-336:4).

LPNs schedule LPN and CNA daily assignments in both their "treatment" capacity when RNs are late to work and not present for the beginning of a shift (Tr. 369:23-370:1; 336:5-15; 337:1-9; 339:11-15) as well as their "charge" nurse capacity (Tr. 38:16-39:11; 45:7-24; 195:24-196:5; 117:18-118:22; 254:5-24). The Decision attempted to minimize the importance of LPNs serving as charge nurses on the supposed ground that they do so infrequently (Decision at 16-17). However, the record makes clear that certain LPNs serve as charge nurses regularly (Tr. 328:4-8; 354:1-3; 328:25-329:5) and that **all** LPNs began their employment as LPNs having been told that they could be called upon to serve as charge nurses **at any time** (Tr. 43:8-10; 43:22-44:4; 111:5; 268:10-17; 372:1-9). Despite the Regional Director's finding that the Employer only showed that 3 LPNs have served as charge nurses with even arguable regularity, the record establishes that **most** of the LPNs have served as charge nurses at some time (Tr. 107:14-15; 263:1-2; 39:14-40:14; 42:6-43:9; 48:8-23; 264:7-8; 264:15-18; 264:20-23; 265:1-8; 266:1-267:10; 329:23-330:4; 354:4-10). Aside from scheduling LPNs and CNAs, charge nurses on the night shift (especially on the floor or wing on which the single RN on duty is not present) will have to make judgments regarding deployment of CNAs and handling of residents (Tr. 46:11-21; 47:3-12; 263:8-14). The reality that LPN charge nurses schedule LPNs and CNAs and that all LPNs are obligated to serve as charge nurse if asked underscores the deficiency of the Decision insofar as it diminishes the importance of the existence of supervisory authority even when not exercised by some of the LPNs. Under *Bartow Community Hospital*, the fact that the LPNs have supervisory authority, even when not exercised by all of them, is a factor that the Regional Director should have afforded greater weight, which necessitates reversal of the Decision.

The Decision found that the Employer also failed to establish supervisory status in connection with the “responsible direction” factor because it had not supported its assertion that the LPNs are held responsible for CNA performance (Decision at 11). The Decision acknowledged the record support for the proposition, but took issue with the Employer’s showing on two grounds: the witnesses who testified that they understood that they could suffer discipline for not ensuring that the CNAs that they supervised had performed proficiently did not explain the basis for that understanding and did not testify as to any instance in which such discipline was imposed. There is no principled basis for finding the Employer’s showing deficient. First, there is no basis for a finding that an absence of such LPN discipline should be construed against the Employer. Indeed, there is authority for the proposition that in a well-run operation there will be little or no need to impose discipline and, therefore, the infrequency or absence of imposed discipline cannot be determinative of supervisory authority. *Lakeland Health Care Associates v. NLRB*, 696 F.3d 1332, 1338 (11th Cir. 2012). Second, there is no basis for a finding that the witnesses’ failure to ascribe their understanding that they could suffer adverse consequences to a specific comment or directive from management renders their testimony unreliable or unworthy of crediting. Neither the Union nor the Hearing Officer established that this testimony was speculative, concocted, or without basis in fact. On this record, the fact that certain LPNs have performed their jobs understanding that their failure to exercise oversight of CNAs could result in them suffering adverse consequences underscores nothing other than that the supervisory responsibilities of these LPNs was imparted to them from the very inception of their commencement of LPN duties, reinforced thereafter, and should not be in doubt (Employer Exhibits 1, 4-5).

Below the Employer argues that the record is sufficient to establish that it demonstrated the LPNs' supervisory authority through their power to discipline and evaluate. To the extent that the record shows that the LPNs had such authority but did not exercise it, this section supports the conclusion that the existence of that authority was sufficient to establish supervisory status and the Regional Director's failure to so hold was a departure from *Bartow Community Hospital* necessitating reversal of the Decision by the Board.

2. LPNs Evaluate CNAs in Connection with "Responsibly Directing" Them

The record reflects that for many years LPNs completed written evaluations of the CNAs that they supervised and then presented their evaluations to the CNAs verbally. The Decision afforded this evidence no weight in rejecting the Employer's position since the practice of LPNs evaluating the CNAs had lapsed for several years. However, the Regional Director erred in disregarding this evidence because the Employer resumed the practice in recent months. Moreover, despite the suggestion that the practice resumed because of the petition, as shown below the record makes clear that the practice resumed **before** the Employer knew of a petition that preceded the instant one and that the Union was attempting to organize the LPNs.

The petition was filed on April 1, 2013. Although not part of the record, the Union had filed an earlier identical petition on or about March 18, 2013. The evaluations marked Employer Exhibits 48, 50, 51, and 56 were completed, respectively, on March 10, 2013, February 10, 2013, February 19, 2013, and November 12, 2012. Accordingly, each was completed before, and some well before, even the initial petition was filed. Any suggestion that the Employer resumed the practice of having the LPNs evaluate the CNAs in writing because of the Union organizing effort is, therefore, mistaken and inappropriate.

The Decision dismisses such evaluation of the CNAs by the LPNs as occurred on the ground that there is no demonstrated nexus between completion of the evaluations and the CNAs' terms and conditions of employment (Decision at 12). That analysis is flawed. The evaluations evidence supervisory authority in that the Employer looks to the LPNs, as members of management who monitor CNA performance, to assess CNA performance and provide feedback not just to senior management but the CNAs as well. The principle that completion of the evaluation is not an indicia of supervisory authority because there is no direct nexus between the evaluation and the CNAs' terms and conditions of employment overlooks the significance of the relationship between LPN and CNA in terms of feedback, performance improvement, continued monitoring of performance, and the impact of that dynamic on future assignment and direction. The failure of the Regional Director to recognize the importance of that dynamic in terms of supervisory authority is a substantial question of law and policy requiring review and redress.

3. LPNs Discipline CNAs or Exercise a Supervisory Role in Recommending or Assisting With Discipline of CNAs

The Decision rejects the Employer's position that the documents and testimony in the record concerning disciplinary authority of LPNs establishes their supervisory status. The Employer submits that the Regional Director's determination is clearly erroneous.

The Decision states that the documentation is not probative because the witnesses through which they were introduced into evidence were without personal knowledge sufficient to support the argument that they established the LPNs' supervisory authority (Decision at 13). Moreover, the Regional Director found that to the extent LPNs with first-hand knowledge testified about disciplinary documents in the record, they confirmed that they had not exercised disciplinary authority but, instead, had merely done what their superiors had instructed and/or

served as conduits for or witnesses to the imposition of discipline (Decision at 13-14). The problem with the Regional Director's analysis is that he relies upon only some of the record evidence in reaching these findings and in doing so extrapolates from it without being able to refute the probative value of other record evidence. While the witnesses called by the Union (Borchick, Cepil, Garcia, Haupt, and Clement) maintained that they did not exercise independent judgment in issuing the disciplinary notices on which their names appeared, the Decision acknowledges but then fails to grapple with the reality that 15 disciplinary notices show only LPNs Ann Rupert and Lisa Simko as the supervisor signing and presenting the discipline in issue in those instances. While no testimony was adduced from either (Simko no longer works for the Employer), these documents were admitted into evidence as business records and, as such, speak for themselves. In the absence of evidence that calls into question that Rupert or Simko independently decided that imposition of the discipline reflected by these 15 exhibits was warranted, the Regional Director's failure to afford them the weight that they warrant in support of the Employer's contention is clearly erroneous.

The Regional Director also concluded that imposition of discipline by LPNs was not sufficient to establish supervisory status because the LPNs do not decide the magnitude of the discipline to be imposed (Decision at 13). However, the Regional Director's conclusion in this respect is clearly erroneous for two reasons. First, every manager or supervisor, not just the LPNs, must rely upon human resources to provide the necessary information regarding an employee's disciplinary history before the magnitude of discipline can be decided (Tr. 201:15-203:2). Second, the fact that the LPNs' superiors decide the magnitude of discipline does not detract from the authority that LPNs have to decide that discipline should be imposed. The authority to impose discipline, without regard for who determines the magnitude of such

discipline, is indisputably an indicia of supervisory authority. Accordingly, the Regional Director erred in concluding otherwise.

The Decision also failed to address an important point set forth in the Employer's post-hearing brief, specifically, that the Employee Guidebook section on "Corrective Action" states that only "a member of management" can serve as a witness to the imposition of discipline (Employer Exhibit 6 at 32 [4 lines above "Corrective Action Procedure" and next-to-last sentence under "Termination"]). While the Decision minimizes the importance of the Employer's job descriptions and training materials (Decision at 10), the Employee Guidebook makes clear that the Employer intended to ensure the integrity of the disciplinary process by providing not only that a supervisor would impose and present discipline but that a supervisor would witness its imposition as well. Regardless of whether the Regional Director or, for that matter, anyone takes issue with the wisdom of that premise and approach, the essential point is that the Employer established a guideline that only members of management should be involved in the disciplinary process in all respects. Accordingly, to the extent the Decision minimizes the import of the fact that LPNs witnessed discipline, it fails to account for the Employer's decision to confine responsibility in the discipline sphere solely to supervisors and managers. It follows that the Regional Director erred in failing to weigh the LPNs' involvement in the disciplinary process, even as witnesses, as evidence of supervisory authority.

Although the Decision credited the testimony of the Union witnesses who testified that they did not exercise independent judgment in connection with disciplinary notices that bear their names, the record also contains testimony of LPNs who confirmed that they have authority to impose discipline (Decision at 8-9, 12-14). While the Decision does not afford that testimony weight because these witnesses either had not imposed discipline in years or could not recall

when they had done so, the Regional Director clearly erred in disregarding that testimony since neither the Union nor Hearing Officer showed these witnesses to have speculated or engaged in conjecture. Their conviction that they were authorized to impose discipline, in contrast to the LPN witnesses called by the Union who contended that they did not have such authority, underscores that on this record (Employer Exs. 1 and 4-5) certain LPNs recognize that complete and proper execution of their responsibilities necessarily means that they must have certain supervisory authority to command the respect of the CNAs who report to them. While only some LPNs acknowledged this, all were equally empowered (Employer Ex. 1).

The Decision also rejected the Employer's position insofar as certain disciplinary notices indicated that the coaching that was undertaken was educative and Wilkinson acknowledged that nowhere in the "Corrective Action" section of the Employee Guidebook was there any indication that educational coaching was disciplinary. However, it is well-settled that such educative coaching is, at worst, a prelude to discipline, *cf. Lakeland Health Care Associates*, 696 F.3d at 1341, and therefore the Regional Director's failure to deem such record evidence as indicative of the supervisory authority of LPNs was also prejudicial error.

C. The Regional Director's Denial Of The Employer's Special Appeal From The Hearing Officer's Decision To Quash The Employer's Subpoena Was An Error That Unduly Prejudiced The Employer's Case

Prior to the hearing, the Employer subpoenaed Matt Balas, a Union representative who has handled grievances and arbitrations and attended labor-management meetings on behalf of the Union at St Luke in connection with the existing bargaining unit. The Employer sought documents and testimony that would establish that Balas has previously acknowledged, on behalf of the Union, that the LPNs are supervisors. The Employer believes that in several instances, in representing CNAs, Balas made such statements.

The Union filed a petition to quash the Employer's subpoena. The Hearing Officer granted that petition, stating nothing more than that the subpoena was "overly broad and not relevant" (Tr. 121:14-17). The Employer then took a special appeal from the Hearing Officer's ruling that the Regional Director, without explanation, denied. The Decision states that the Regional Director denied the special appeal because "supervisory status is determined based on the actual duties and responsibilities of the asserted supervisors, and positions the [Union's] representatives may have taken in other proceedings have no probative value" (Decision at 20). The Decision also states that in the absence of Balas, the Employer could have presented its own witnesses to recount what they recalled Balas having previously stated on behalf of the Union (Decision at 20). The Decision then remarks that the Employer's failure to put on such evidence as it purported to have indicates that the Employer knew that the evidence it expected to adduce from Balas was not meaningful or that the subpoena was a mere fishing expedition (Decision at 20).

The rationale behind denial of the special appeal, as set forth in the Decision, is specious. Balas was an experienced Union representative who had appeared on the Union's behalf in addressing disputes with the Employer. Any remarks he had made in representing CNAs, which bore directly upon the role of LPNs involved in such matters, constituted statements that were made on behalf of the Union on the basis of such facts and arguments as the Union developed in the ordinary course of its representative duties. The Union cannot distance itself from such remarks now, pretending that they were just idle statements. Insofar as Balas deemed LPNs to have acted in a supervisory capacity on behalf of the Employer, those admissions are probative. Even assuming, *arguendo*, that such remarks are not dispositive substantively, they certainly go

to the credibility of the LPNs who testified on the Union's case and the Regional Director necessarily should have considered such testimony in that regard.

The Regional Director's further explanation relating to the Employer's failure to adduce any testimony of its own regarding Balas' remarks is equally deficient. The Employer should not have had to rely upon its witnesses' memories regarding Balas' statements. Balas knows what he said and is indisputably the best witness for adducing such testimony. There was no reason for the Employer to have to adduce testimony that might have been inaccurate or, alternatively, less compelling than Balas himself would have provided as the source of the admissions that the Employer believes the Union made. Under the circumstances, with the Union having commenced this proceeding with the filing of the petition, it was incumbent upon it to produce a single witness the Employer identified as an important source of information. Its refusal to do so and the Regional Director's condonation of that refusal unduly prejudiced the Employer and necessitates the grant of this request for review with, ultimately, a remand compelling the production of subpoenaed documents and testimony of Balas pursuant to the Employer's subpoena.

D. The Regional Director's Conclusion That The MDS Coordinators Have A Community Of Interest With The LPN Nurses Is Clearly Erroneous

The Decision concludes that the MDS coordinators, who are LPNs but do not provide direct patient care and are not on the floor with the other LPNs with any regularity, have a community of interest with the other LPNs and are part of the election unit. This conclusion is clearly erroneous. The MDS coordinators, one of whom works at the Pavilion and one of whom works at the Manor, work out of offices and participate in daily meetings otherwise attended solely by department heads to which no treatment or charge LPNs are invited. They do not have

regular daily contact with residents. They report to the DCS rather than RNs and work traditional office hours rather than those worked by the LPNs.

Inclusion of these two positions in the election unit also gives rise to a conflict of interest insofar as the MDS coordinators collect and analyze confidential Employer financial information. In the event the Union becomes collective bargaining representative, the MDS coordinators would be part of a bargaining unit at the same time they have knowledge of confidential Employer financial information to which the Union is not entitled.

The Decision states that despite certain distinct differences between the MDS coordinators and the other LPNs, their common educational backgrounds, occasional contact, and functional integration militate in favor of inclusion in the election unit (Decision at 19). That conclusion is misguided both because of the difference between the MDS coordinators and the other LPNs as well as the MDS coordinators' custody and access to sensitive Employer financial information. The Board needs to reverse the Regional Director's conclusion as a matter of practicality and common sense and, to the extent there is such a need, utilize this Request for Review as an opportunity to make case law providing for exclusion from an LPN bargaining unit of employees who happen to be LPNs but perform functions that do not involve direct resident care.

E. The Board Should Stay Further Processing Of The Petition And Postpone The Election Until, First, It Grants The Employer's Request For Review And Determines That The Decision Was Erroneous And, Second, There Is A Dispositive Ruling On The Question Whether The Regional Director And Board Have The Power To Proceed With This Petition Constitutionally

The Employer submits, respectfully, that ultimately there will be a determination that the Decision under review wrongly and mistakenly concluded that the LPNs are employees when they are actually supervisors. Accordingly, it is imperative that the Board stay further processing of the petition and postpone the election, currently scheduled for June 13, until the Board grants

this Request for Review. A stay would prevent the waste of time and money of both the Union and Employer until this issue is resolved. The Board stays petitions and elections in such circumstances. *Piscataway Associates*, 220 NLRB 730 (1975)(Board stayed election pending decision on request for review in case involving just 6 building superintendents); *Angelica Healthcare Servs. Group*, 315 NLRB 1320 (1995).

The Board should also stay the petition and postpone the election since the DC Circuit and Third Circuit have held that Board action in circumstances no different than here is unlawful and invalid. Indeed, the Regional Director who issued the Decision under review here was appointed to his position after *Noel Canning* was decided, highlighting the likelihood under *Noel Canning* and *New Vista* that the instant Decision is *ultra vires*.

For these reasons, the Board should stay the processing of the petition and postpone the June 13 election.

CONCLUSION

For the reasons set forth, the Board should grant this Request for Review and stay the election.

Respectfully submitted

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