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

In the Matter of	:	
	:	
THE MANOR AND PAVILION AT ST. LUKE'S VILLAGE,	:	
	:	
Employer,	:	
	:	
and	:	**Case No. 4-RC-101711**
	:	
AFSCME DISTRICT COUNCIL 87,	:	
	:	
Petitioner.	:	
	:	

AFSCME DISTRICT COUNCIL 87'S BRIEF IN OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW OF DECISION AND DIRECTION OF ELECTION AND REQUEST TO STAY ELECTION

Submitted by:

ALAINE S. WILLIAMS, ESQUIRE
JOHN R. BIELSKI, ESQUIRE
Willig, Williams & Davidson
1845 Walnut Street, 24th Floor
Philadelphia, Pennsylvania 19103
Telephone: (215) 656-3600
Fax: (215) 561-5135

Attorneys for Petitioner AFSCME

I. INTRODUCTION AND PROCEDURAL HISTORY

On or about March 18, 2013, the American Federation of State, County and Municipal Employees, District Council 87 ("AFSCME" or "Union") filed a Representation Petition with Region 4 of the National Labor Relations Board. On April 1, 2013, the Union withdrew its Petition and refiled another. The Petition sought to represent a unit of Licensed Practical Nurses ("LPNs") working at the Manor and Pavilion of St. Luke's Village ("Employer"), a nursing and rehabilitation center located in Hazleton, PA. The Employer consists of two corporate entities: The Manor at St. Luke's Village Facility Operations, LLC, d/b/a the Manor at St. Luke's Village, and the Pavilion at St. Luke's Village Facility Operations, LLC, d/b/a The Pavilion at St. Luke's Village. (Petitioner Exhibit ("P. Ex.) 2.). These two corporate entities are owned by Consulate Healthcare, which purchased the facility from a company called Tandem Healthcare sometime in 2007. (Transcript ("T.") 14). Prior to Tandem's ownership, the facility was operated by Diakon Lutheran Social Ministries. (T. 12-13, 532).

The Employer objected to both the original and refiled Petition contending that the Licensed Practical Nurses ("LPNs") at its nursing home are supervisors within the meaning of § 2(11) of the Act and that two of the LPNS who work as MDS Coordinators are confidential employees within the meaning of § 2(2) of the Act. Two days of hearing were conducted before a Hearing Officer of the Board on April 16th and 17th, 2013, and the parties filed post-hearing briefs. On May 16, the Regional Director issued a Decision in which he found that the LPNs are not statutory supervisors and the MDS coordinators have a community of interest with the other LPNs. The Decision

directs an election in the unit, which was later scheduled for June 13, 2012. On June 3, 2013, the Employer filed a Request for Review of Decision and Direction of Election and Request to Stay Election ("Request for Review"). AFSCME now files this Brief in Opposition to the Employer's Request for Review.

II. STATEMENT OF FACTS

A. The Campus and Its Operation

The Employer operates a nursing and rehabilitation center in Pennsylvania. (Board Exhibit ("B. Ex.") 2; T. 5). There are approximately 260 beds in the facility. (T. 21). The residents reside in two buildings, known as the Manor and the Pavilion, located respectively at 1000 Stacey Drive and 1711 East Broad Street, Hazleton, PA. (T.11). The Pavilion is a two story building which houses 60 residents each on the second and third floors (for a total of 120 persons) when it is at full capacity. (T. 21). The Manor is a one story building which houses approximately 140 residents when it is at full capacity. (T. 21, 257). Both floors at the Pavilion and the sole floor at the Manor have four wings. (T. 94, 257). The Pavilion and the Manor are housed on a five acre campus that includes an auditorium, a garage, and an independent living facility. (T. 72, 94).

Organizationally, the Manor and Pavilion have two distinct, but similar administrative structures. Each facility has its own Executive Director, Director of Nursing, ("DON"), and Assistant Director of Nursing, also known as Assistant Director of Clinical Services. (T. 79-80). The facilities also have a Director of Clinical Education, a

Director of Activities, a Manager of Environmental Services, a Director of Social Services, a Business Office Manager, and a Scheduler. (T. 79-83, 91-92). Each facility has various departments including nursing, admissions, dietary, therapy, physical therapy, and occupational therapy. (T. at 22). The head of the nursing department is the Director of Nursing ("DON"), a position under the Administrator. (T. 80). Immediately under the DON is the position of Assistant Director of Clinical Services ("ADCS"), also known as the Assistant Director of Nursing. (T. 80).

Both the Manor and the Pavilion have Unit Managers and RN Supervisors, all of whom are RNs. (T. 96, 98, 101). The Pavilion employs two Unit Managers and six RN Supervisors most of whom are full-time but some of whom work pool or as a PRN RN Supervisor. (P. Ex. 1; T. 100). The Manor employs one Unit Manager and six RN Supervisors most of whom are full-time but some of whom work pool or as a PRN RN Supervisor. (P. Ex. 1; T. 361). At all times, there is at least one RN Supervisor or Unit Manager assigned to both buildings. (T. 101). The parties stipulated that the Unit Managers, RN Supervisors, and PRN RNs are supervisors within the meaning of the Act. (T. 304). Job descriptions for the Unit Manager and RN Supervisor positions were introduced by the Union. (P. Ex. 1; P. Ex. 2; T. 27, 28). Both contain the statement that the Unit Managers and RN Supervisors "supervise Nurse Techs/Clinical Nurse I & II, and participate in their evaluations." (P. Ex. 1; P. Ex. 2; T. 27, 28). The Employer refers to its Certified Nursing Assistants ("CNAs") as "Nurse Techs." (Employer Exhibit ("ER Ex.") 1).

Below the RN Supervisors on the organizational hierarchy are LPNs, then CNAs. (T. 21-22). There are approximately 42 LPNs and 102 CNAs in total at the two facilities. (T. 373-74). Approximately 11 of those LPNs are PRN LPNs or pool LPNs, and 30 of those CNAs are PRN CNAs or pool CNAs. (ER Ex. 3; T. 171). The full-time Scheduler makes out the schedules for the LPNs and CNAs. (T. 181-82). The LPNs and CNAs at St. Luke's work three shifts: first shift is 6:45 am to 3:15 pm, second shift is 2:45 pm to 11:15 pm, and third shift is 10:45 pm to 7:15 am. (T. 94, 97, 101, 257-60). The vast majority of these employees have permanent assignments in either the Manor or Pavilion as well as the floor and shift on which they work. (T. 341, 364). Some of the 11 LPNs and 30 CNAs who work pool and float between the buildings. (T. 49).

In the Pavilion on first shift, there are two Unit Managers, four LPNs, and approximately 13 to 14 CNAs. (T. 95). On each floor at the Pavilion for first shift, there is one Unit Manager, two LPNs, and five to seven CNAs with one or more of those CNAs acting as floaters between floors. (T. 96-97). On second shift at the Pavilion, there are two RN Supervisors, four LPNs, and 10 to 11 CNA. (T. 97-98). On each floor at the Pavilion for second shift, there is one RN Supervisor, two LPNs, and approximately five CNAs. (T. 99). On third shift at the Pavilion, there is one RN Supervisor for the entire building, one LPN for each floor, and seven to eight CNAs for both floors, or approximately three to four CNAs per floor. (T. 101).

On first shift at the Manor, there are two Unit Managers, four LPNs, and eight CNAs. (T. 257). On second shift at the Manor, there are one or two Unit Mangers, four LPNs, and eight CNAs. (T. 258). On third shift at the Manor, there is one Unit Manager, two LPNs, and five or six CNAs. (T. 259).

The CNAs who work these shifts are represented by AFSCME District Council 87. (T. 11). In 2006, AFSCME became the certified representative of "all full-time and regular part-time restorative aides, activity aides, beauticians and CNAs, including service and maintenance pool CNAs who average 12 hours or more per week employed by the Employer at [St. Luke's]." (T. 11). A collective bargaining agreement is in place between Petitioner and the Employer with respect to this unit. (T. 11). Its term is from August 23, 2011 through August 22, 2014. (T. 11). There also is a bargaining unit of employees represented by AFSCME who work at the facility but for another employer, Healthcare Services Group, which has a contract with Consulate Healthcare to provide maintenance, custodial, and dietary operations. (T. 13). This bargaining unit arose from a stipulated election in 2010. (T. 12).

Unit Managers are responsible for running their units. They supervise the patient care activities performed by all nursing staff, including the nursing assistants. (P. Ex. 2). RN Supervisors are responsible for what happens in their areas of supervision when the Unit Managers are not on duty. They have the responsibility to supervise patient care activity performance by the nursing staff, including the CNAs. (P. Ex. 3).

CNAs have standard and routine job duties which involve assisting the residents with the activities of daily living. (ER Ex. 2; T. 349, 458, 642-45). They basically feed the residents, wash them, get them dressed, shower them, assist them to the bathroom, transport them, get them ready for appointments, take them to physical therapy, to the dining room, and to various activities that are offered in the facility. (T. 349, 458, 642-45). They also weigh patients, check safety devices and alarms, and assist LPNs who need help with residents. (T. 642, 643). CNAs are assigned to the Manor or the Pavilion, a floor of the Pavilion (if they are assigned there), and a wing. (T. 638). These assignments are permanent. (T. 638). They perform their assignments with the patients located in their wing, but also assist other CNAs in other wings when necessary. (T. 643, 644).

First and foremost, the LPNs have direct patient care responsibility. (ER Ex. 1). At the beginning of their shifts, each LPN counts medications, fills her med cart, and takes reports from the LPNs they are relieving. (T. 449-50). Afterwards, the LPNs begin their first round of passing medications from their med cart, which generally takes around two to three hours. (T. 450-51). They then provide any other treatments for the residents, such as inhalers, breathing treatments, nebulizers, and administering lotions and ointments. (T. 450). If there is a meal provided to the residents during their shift, they take those residents to the dining area and assist in feeding them and monitoring their consumption. (T. 452). They then perform a second medication round. (T. 456). The remainder of their time is spent charting the residents under their care and other

general responsibilities for the direct care of the residents. (T. 456-57). The LPNs report to either the Unit Manager or the RN Supervisor, at least one of whom is on duty at all times in the Manor and the Pavilion. (T. 46, 593).

B. The LPN Position is Not Supervisory

In an attempt to avoid the conclusion that the LPNs are not supervisors, the Employer relies heavily on its contention that the LPNs serve in a supervisory capacity when they are designated as Charge Nurses. An LPN acts as a Charge Nurse when she is assigned to fill in for her Unit Manager or RN Supervisor who is absent due to sickness or vacation. (T. 343). As Charge Nurse, the LPN calls doctors, answer phones, assist with the work of other LPNs and CNAs, and staff the nurse's station on the floor in which they are assigned. (T. 427). ADCS Wilkinson testified that a LPN cannot act as a Charge Nurse if he or she is still tasked with the duty of dispensing medication and treatments and that one would only be a Charge Nurse if relieved of all of their normal duties. (T. 111-12).

The testimony in this matter demonstrates that LPNs rarely act as Charge Nurses. LPN Susan Smith, an Employer witness, testified that she acted as Charge Nurse only once the last six months. (T. 239). LPN Renee Merola, another Employer witness, testified that it is uncommon for her to serve as Charge Nurse, and she only does so once a month. (T. 266). LPN Corinna Garcia testified that she had acted as Charge Nurse one time in the last seven years. (T. 426). LPN Lindsay Borchick testified that she was assigned as a Charge Nurse once or twice about six or seven

years ago (T. 485). LPN Pat Clement testified that she never worked as a Charge Nurse. (T. 599).

Furthermore, based on the testimony of ADCS Wilkinson, LPN Kelly Meade Cepil and LPN Esther Haupt never worked as a Charge Nurse. Both work the third shift, 10:45 pm to 7:15 am, in the Pavilion. (T. 509, 554). LPN Meade Cepil works on the third floor, and LPN Haupt works on the second. (T. 509, 554). Because there is only one LPN per floor on third shift and only one RN Supervisor for the entire building, both LPN Meade Cepil and LPN Haupt must dispense medication and treatments for all the residents on their assigned floor. (T. 512, 556). Thus, they are not Charge Nurses per the testimony of ADCS Wilkinson.

Only LPN Jean Jennings, who works in the Manor on the 6:45 am to 3:15 pm shift, testified that she worked as a Charge Nurse more often than once a month. (T. 323, 328). She claimed that she regularly works as Charge Nurse three times over a two week period-- once during the first week and twice the next week. (T. 328). However, the Assignment Sheets for a period covering January 2013 through March 2013, which the Employer provided to the Union in response to a subpoena request, only appears to list her name on seven occasions. (ER Ex. 28). Given this evidence and the testimony of all the other LPNs, the Regional Director was correct to conclude that LPNs work as Charge Nurses on only a sporadic and infrequent manner.

More importantly, there is absolutely no evidence in the record that a LPN when acting as a Charge Nurse engages in hiring, firing, promoting, transferring, assigning, or responsibly directing the CNAs. For example, LPN Jennings admitted that (1) she has not performed an evaluation of a CNA in long time (T. 325), (2) RNs adjust the schedule if a CNA calls out from work (T. 327), (3) LPNs did not assign a specific patient or responsibility to CNAs (T. 333), (4) CNAs have permanent assignments and that they know their job responsibilities (T. 341), (5) the Scheduler assigns the facility in which the CNAs will work (T. 368), (6) RNs schedule the CNAs breaks and the CNAs know when those breaks occur (T. 367), and (7) LPNs have no authority to transfer CNAs from one facility to another (T. 368). Nor did she offer any testimony on what, if any, supervisory authority she exercised when she worked as a Charge Nurse.

The evidence demonstrates that LPNs are not acting as Charge Nurses do not schedule or assign, responsibly direct, evaluate, discipline, or otherwise act as supervisors. Thus, the Regional Director was correct in finding the evidence demonstrates that LPNs are not supervisors.

1. Scheduling and Assignments

The scheduling of CNAs is done by the Scheduler, Unit Managers, or RN Supervisors, not the LPNs. (T. 255, 368, 369, 422, 423, 638, 646). The Scheduler assigns the CNAs to the shift, the building, the floor (if they work in the Pavilion), and the wing. (T. 646). The Scheduler, Unit Supervisor, or RN Supervisor even assigns the CNAs two 15-minute breaks and half-hour lunch period each day. (T. 351, 366). When

CNAs arrive to their designated building, they generally inform the Unit Manager or RN Supervisor of their presence. (T. 296, 638-39). Any changes to these assignments are made by the Scheduler, Unit Manager, or RN Supervisor. (T. 327). Even when CNAs have permanent assignments, they still must check in with the RN before the shift begins. (T. 638). LPNs do not have the authority to make such changes. (T. 327, 646). If a CNA needs to call off from work, he or she must notify the Scheduler, the Unit Manager, or the RN Supervisor. (T. 181, 463, 484, 520, 616, 647). The Scheduler, the Unit Manager, or the RN Supervisor must find the replacement for that CNA. (T. 463, 484). The same holds true if a CNA needs to leave work early for personal or medical reasons. (T. 425, 426). In sum, all scheduling issues with respect to the CNA are done by the RN Supervisor, Unit Managers or higher administration. LPNs play no role.

The assignment of CNAs to particular patients is ultimately determined when the Scheduler, Unit Manager, or RN Supervisor assigns the CNA to a shift, building, floor, and wing. (T. 368, 369, 422, 423, 638, 646). The LPNs play, at best, a minor role, and generally no role. Basically, all witnesses agreed that, in one form or another, the CNAs are assigned permanent shifts in the Manor or Pavilion, permanent floors (if they work in the Pavilion), and permanent wings of the floor or the building in which they work. (T. 341, 364, 368, 622, 638, 646). This method of assignment ensures a continuity of care for the residents. (T. 116, 215, 516). Only pool CNAs experience changes in their assignment and these assignment changes are made by the Scheduler, the Unit Manager or the RN Supervisor. (T. 49, 100, 368, 369, 422, 423, 439, 638, 646, 649).

2. Responsibly direct

Since the CNAs generally have preset assignments, there is little or no need to determine which patients are under their care or direct those CNAs in the performance of their duties. (T. 215, 245, 252, 325). The LPNs, even those whom the Employer called as witnesses, agreed that the CNAs generally know their jobs and perform them with minimal or no direction. (T. 215, 245, 252, 325). Furthermore, the tasks performed by the CNAs are routine and repetitive, making assignment of work unnecessary. (T. 349, 458, 642-45). For example, there is a schedule when the residents are showered, sheets are changed, or for other regular tasks that are done on a daily or semi weekly basis. (T. 349, 458, 642). Only in rare cases must an LPN direct a CNA to do something during the course of his or her shift. Those instances occur, for example, when an LPN needs assistance with lifting a patient or there is a need for a stool or urine sample. (T. 515). More often than not, it is the CNA who needs assistance from a LPN, such as to boost a patient up in his or her bed. (T. 644).

Notwithstanding this, the Employer claimed that the LPNs have supervisory authority with regard to assigning CNAs to particular floors and wings or directing the activities of the CNAs. But the evidence in this regard was sparse, at best, and involved very minor tasks. The Employer hypothesized that there were times when (1) a CNA might ask for assistance or guidance from an LPN, (2) a LPN may direct a CNA to perform a particular task, (3) a LPN may direct the time when a CNA would take one of his or her scheduled breaks within the 15 minute leeway provided for those breaks; or (4) a LPN would inform a CNA of his or her failure to perform an assigned

task. While some of the LPNs agreed that these situations occasionally occurred, at best, they were very infrequent and limited. The bulk of the evidence demonstrated that CNAs perform their functions with little to no direction from the LPNs.

Even if the LPN may give direction to a CNA, there is no evidence that the LPN has authority to require action. Thus, while some LPNs were asked whether they might direct the CNAs to perform certain tasks or offer guidance in the performance of their job duties, there was no evidence as to what the LPN could do to enforce that so-called directive, other than reporting it to their own Unit Manager or RN Supervisor. It seems the most that a LPN can do in these situations is to provide informal guidance or a reminder to the CNA. (T. 547, 582). This limited authority over CNAs is further reflected in the fact, discussed below, that LPNs have no authority to discipline a CNA.

Furthermore, while some LPNs testified that it was their understanding that they could be disciplined as a result of the CNAs' deficiencies (T. 287, 246), there was no evidence presented that <u>any</u> LPN ever was disciplined for a failure to supervise the CNAs on their floor or for a CNA's failure to perform his or her job duties. The Employer failed to produce any discipline imposed on an LPN as a result of a CNA failing to do his or her job. Nor were any Performance Evaluations of LPNs admitted into the record to establish the existence of a duty to supervise CNAs. This is particularly remarkable given the fact that RNs are specifically evaluated concerning their ability to supervise the LPNs and CNAs. (P. Ex. 4). The third item on the evaluation reads: "Supervises Nurse Techs/Clinical Nurses 1 & II and participate in

their evaluations." (P. Ex. 4). In fact, the testimony revealed that LPNs had not been evaluated for at least two years if not longer. (T. 420-21).

The only CNA who testified, Beverly Hyde, denied that CNAs were, in fact, their supervisors or that LPNs were perceived as such. Rather, she stated that the RN Supervisors were the CNAs immediate supervisors. (T. 646-47). This testimony is consistent with those LPNs who testified that the Unit Managers or RN Supervisors, not themselves, are the CNAs' supervisors. (T. 494). Because the Employer failed to offer any contrary testimony from other CNAs or LPNs on this issue, it was never rebutted.

For all these reasons, the Employer failed to demonstrate that LPNs are supervisors on the grounds that they responsibly direct the CNAs.

3. Evaluations

The Employer claimed that LPNs, as part of their job duties, are responsible for evaluating CNAs. The evidence does not support that claim. The Employer only admitted into the record eight Performance Evaluations of CNAs filled out by LPNs. (ER Ex. 48-55). All were completed in the last two months, with five completed in April, 2013. (ER Ex. 48-55). LPN Lindsay Borchick filled out three. (ER Ex. 51, 53, 54). LPN Ester Haupt filled out two. (ER Ex. 48, 55). LPN Pat Clement, LPN Susan Smith, and LPN Dianne Devandoski each filled out one. (ER Ex. 49, 50, 52). Of these five LPNs, only one did <u>not</u> testify--LPN Diane Devandoski. The Union admitted into the record an additional two Performance Evaluations of CNAs filled out

by LPNs Borchick and Haupt several years ago as well as testimony that both of these LPNs have filled out evaluations several years ago. (P. Ex. 6, 7; 475, 528).

LPN Borchick testified that she completed the Performance Evaluation of CNA Melissa Espinal sometime in January, 2008. (P. Ex. 6; T. 472; P. Ex. 6). Her name at the time was Lindsay Wright. (T. 473). Her only involvement in filling out the form was checking the various boxes rating particular skills of the CNA. (T. 474). The remaining writing on the form, including the written comments, is that of ADCS Susan Wilkinson. (T. 473). Counsel for the Union also indicated on the record that LPN Borchick filled out three other Performance Evaluations—two in 2007 and another in 2008. (T. 475).

The next time that LPN Borchick completed a Performance Evaluation of a CNA occurred when she filled out three separate evaluations beginning in February, 2013. (ER Ex. 51, 53, 54; T. 476, 479, 480). In all cases, LPN Borchick received the forms from ADCS Wilkinson. (T. 476, 479, 480). She later returned the forms for ADCS Wilkinson's review. (T. 479, 480). The Performance Evaluation of CNA Mary DeFuso occurred with the aid of her Unit Manager. (T. 476; ER Ex. 51). The last two LPN Borchick received were due back on April 15, 2013. (T. 479, 480). After ADCS Wilkinson's review, LPN Borchick presented the evaluations to the two CNAs on April 15th and April 16th, respectively. (T. 479, 480).

LPN Esther Haupt testified that she filled out a Performance Evaluation for CNA Shaheen Patterson in 1998, when the facility was owned by a different company. (P. Ex. 7; T. 532). She also testified that she filled out one in 1998, another in 1999, one 2006, and two more in 2013. (T. 528). The two in 2013 are dated March 10, 2013 and April 16, 2013, respectively. (ER Ex. 48, 55). ADCS Wilkinson delivered two evaluation forms to LPN Haupt, but one of them was for a CNA with whom she did not work. (T. 527-28). Her Unit Manager took that form and gave her one for Ann Gross, who is a CNA that does work with LPN Haupt. (T. 528). LPN Haupt filled them out. (T. 529, 530). She had her Unit Manager review the first and DON King review the second, before she presented them to the CNAs. (T. 529, 531).

Three weeks before the hearing in this matter, LPN Pat Clement received a Performance Evaluation form for CNA Stacy Perez from ADCS Wilkinson. (T. 612). Prior to receiving the form, she had never performed an evaluation of a CNA. (T. 612). LPN Clement filled out the form, returned it to ADCS Wilkinson who reviewed it. (T. 612). Later, ADCS Wilkinson returned the form to LPN Clement with a note indicating that she can present it to the CNA, which she did. (T. 612-13).

Employer witness LPN Susan Smith testified that the LPNs had once done evaluations about five or more years ago, but the practice stopped. (T. 231, 232). Then, about three or four weeks before the hearing in this matter, ADCS Wilkinson sent her an evaluation form for CNA Anna Sullivan. (T. 235). LPN Smith filled out the form,

returned it to ADCS Wilkinson. (ER Ex. 52; T. 237). ADCS Wilkinson reviewed it and returned it back to her for presentation to the CNA. (T. 237).

LPN Dianne Levandoski appears to have filled out a Performance Evaluation for CNA Patricia Stoffa on or about February 10, 2013. (ER Ex. 50). However, LPN Levandoski never testified at the hearing so there is no evidence as to the circumstances of her receipt of this form, who filled it out, and whether anyone assisted her in the effort. Nor was there testimony about LPN Levandoski filling out other Performance Evaluations of CNAs.

Finally, CNA Beverly Hyde testified that she had never been evaluated by an LPN and that all of her evaluations were performed by an RN Supervisor. (T. 648). She also confirmed that the evaluation had no bearing on a CNAs wages which were controlled by the CBA. (T. 648).

4. Discipline

There were a total of 35 Employee Corrective Action forms admitted into the record. (ER Ex. 9-26, 31-34, 36-37, 40-47, 56, 57; P. Ex. 8). Thirty-four of those were admitted into the record through the testimony of Employer witnesses ADCS Wilkinson and Kevin Stump, the Regional Director of Human Resources. (ER Ex. 9-26, 31-34, 36-37, 40-47, 56, 57). The Union admitted into the record one additional Employee Corrective Action Form which was signed by LPN Pat Clement and dated December 5, 2012. (P. Ex. 8).

Presumably, the Employer relies upon those 34 Employee Corrective Action forms to support its assertion that LPNs discipline CNAs. But the Employer's reliance is mistaken. ADCS Wilkinson and Mr. Stump had no personal knowledge of any of those disciplinary actions, including one which ADCS Wilkinson signed. (ER Ex. 18; T. 140-61, 385-88). So they could not identify the circumstances of how these forms were filled out and by whom, who authorized the discipline, or the underlying circumstances that led to the discipline. More importantly, 27 of those Employee Corrective Actions forms involved incidents that had occurred more than one year ago, with some dating as far back as 2008. (ER Ex. 9-26, 31-34, 42-43, 45-47).

The remaining eight Corrective Action Forms admitted into the record were within the last year, and one was in August, 2011. (ER Ex. 36-37, 40-41, 44, 56, 57; P. Ex. 8). But the testimony of Union witnesses regarding those eight forms demonstrated that the LPNs, in some cases, did not write out the form, and, in all cases, did not authorize the discipline or the severity of the discipline detailed on the form. (T. 603-09, 414-16, 467-70, 575-78).

LPN Pat Clement testified about an incident in which a resident was upset and crying because she had not received her dinner. (T. 603). The resident informed her that a CNA had not provided the dinner that she had requested. (T. 603). LPN Clement notified the RN Supervisor about the CNA's failure to provide the requested meal. (ER Ex. 36; T. 604). The RN Supervisor wrote up the Employee Corrective Action Form and signed it. (T. 604). The RN directed LPN Clement to fill out a witness

statement for herself and another CNA. (ER Ex. 36; T. 605). LPN Clement did not recommend or select the nature of the discipline imposed on the CNA. (T. 605).

Similarly, LPN Pat Clement testified that she told her RN Supervisor about a CNA who cursed loudly on her floor. (T. 607). The RN Supervisor spoke to DON King who told the RN Supervisor that a corrective action form should be filled out and dictated what it should say. (T. 608). LPN Clement filled out the form but the words describing the infraction came from DON King. (P. Ex. 8; T. 608). Someone other than LPN Clement determined the nature of the discipline for the CNA, and the RN Supervisor and she presented it to the employee. (T. 609).

LPN Corrina Garcia testified that she was approached by a CNA who told her that she and another CNA had used an improper transfer technique on a patient. (T. 414). LPN Garcia took the issue up the chain of command to ADCS Wilkinson, ADCS and then to DON King. (T. 414-15). The DON ordered LPN Garcia to write up an Employee Corrective Action Form on both employees, and guided her in doing so. (T. 416). LPN Garcia filled out the form, but the DON determined the nature of the discipline for both employees. (ER Ex. 40, 41; T. 416). Prior to this incident, LPN Garcia had never filled out an Employee Corrective Action Form in the nine years working at the facility. (T. 410, 416).

LPN Lindsey Borchick was involved in two Employee Corrective Action Forms. The first involved a complaint from a resident's husband that his wife did not

have her safety device in her room. (T. 467). LPN Borchick's Unit Manager wrote up an Employee Corrective Action Form against the CNA, and LPN Borchick signed the form as a witness. (ER Ex. 56; T. 466-68). The second involved a failure of the CNA to take her break at the appropriate time. (T. 468-69). Other CNAs complained to the Unit Manager on her floor who directed her to fill out the form. (T. 469). The Unit Manager wrote up the form, and LPN Borchick signed it. (ER Ex. 37; T. 469). These were the only disciplinary actions of CNAs that she was involved in. (T. 470).

LPN Kelly Meade Cepil testified that she discovered that a resident who was incontinent was lying in a soaked bed and that this occurred during a previous shift. (T. 575). She notified her RN Supervisor who told her to fill out an Employee Corrective Action Form against a CNA and give it to the DON. (T. 575-76). LPN Meade Cepil wrote out the form, but did not choose the level of discipline. (ER Ex. 44; T. 576). She filled out the form, and submitted it to the DON, who apparently chose the level of discipline. (T. 575). Other than acting as a witness to the issuance of discipline, she had no other involvement with disciplinary actions against CNAs in her nine years at the facility. (T. 552, 578).

LPN Esther Haupt testified about an Employee Corrective Action that involved an incident over one year ago. (ER Ex. 57; T. 521). The incident involved a failure of a CNA to complete mandatory 15-minute checkups for a new resident. LPN Haupt was informed of the incident by the Unit Manager, who told her that she needed to do a corrective action against the CNA. (T. 524). The form was completed by the

Unit Supervisor. (T. 522-23). LPN Haupt wrote out a statement at the bottom of the first page, but she did not fill out the level of discipline. (T. 525). Nor was she disciplined for the failure of the CNA. (T. 525).

This evidence demonstrates that CNAs do not have authority to discipline CNAs. Instead, LPNs only fill out an Employee Corrective Action Form when directed by a Unit Manager or RN Supervisor to do so. Significantly, the Employer offered no evidence to refute the testimony of the LPNs. Nor did the Employer proffer any evidence that any LPN had been disciplined for a failure to supervise or discipline a CNA.

Because the evidence demonstrates that the LPNs only filled out Employee Corrective Action Forms when authorized by a Unit Manager or a RN Supervisor, and never determined whether, or the extent of, discipline imposed, the Employer has failed to demonstrate that LPNs are supervisors under the Act based on the assertion that LPNs discipline CNAs.

5. Other Indicia of Supervisory Status

There is no evidence that LPNs interview, hire, fire, transfer, or promote CNAs. Employer witness Susan Smith denied that LPNs perform any of these functions. (T. 230-31). Employer witness ADCS Susan Wilkinson denied that LPNs hire, interview, promote, or transfer CNAs. (T. 192-94). The Employer offered no alternative testimony to challenge this testimony. Nor did the Employer offer any

testimony to support the notion that LPNs may adjust grievances filed by the Union on behalf of CNAs. Thus, the Employer bases its case on its assertion that LPNs assign, responsibly direct, evaluate, and discipline CNAs, but yet it presented no competent evidence to support any of those assertions.

Based on all the above, the Regional Director correctly concluded that the LPNs were not supervisors under the Act. First, LPNs do not schedule the CNAs. Those tasks are performed the Scheduler, Nurse Coordinators, or RNs. Second, LPNs do not responsibly direct the CNAs. CNAs generally know their jobs and need little or any assistance in performing them. Third, LPNs filled out few Employee Evaluations for CNAs and many of those they did complete were done after AFSCME filed its original election petition. Fourth, LPNs do not discipline CNAs. Instead, they have been directed on occasion to fill out an Employee Corrective Action form, but did so under the direction of a supervisor who determined the level of discipline, if any, the CNA would receive. Fifth and finally, there was no evidence that LPNs interview, hire, fire, transfer, or promote CNAs. Thus, the Regional Director correctly concluded that LPNs are not supervisors under the Act.

C. MDS Coordinators Share a Community of Interest

Prior to and at the hearing, the Employer took the position that MDS Coordinators are confidential employers and, therefore, cannot be included in a bargaining unit with other LPNs. However, the Employer presented minimal evidence on the alleged confidential nature of the two MDS Coordinators, Michelle Alexander and

Marla Furlani, it seeks to exclude from the proposed bargaining unit. (ER Ex. 3; T. 44). ADSC Wilkinson had no knowledge of the job duties and responsibilities of the MDS Coordinators. (T. 22-23). Mr. Stump briefly testified that in their position they "have access to see how much money, what our profit is per se, per resident based on our budgetary, if we're above or below budget." (T. 376). Mr. Stump admitted that the MDS Coordinators have no access to employee files or labor relations documents prepared by the Employer. (T. 379).

When filing its Post-Hearing Brief, the Employer took the position that the MDS Coordinators should not be included in the bargaining unit on the grounds that they lack a community of interest with the other LPNs. However, the Employer presented little or no evidence about the alleged lack of community of interest between the MDS Coordinators and the other LPNs. In fact, the Employer did not present testimony from either of the MDS Coordinators at the hearing. In reaching his Decision, the Regional Director noted that the MDS Coordinators share the same educational background of other LPNS. Further, he determined that the MDS Coordinators develop care plans for residents which are employed by the other LPNs. In light of those finds, there was sufficient evidence to conclude that MDS Coordinators share a community of interest with other LPNs.

III. ARGUMENT

With regard to the legal principles at issue in this case, we commend to the Board to the decisions in *Mountain City Nursing and Rehabilitation Center*, DDE in

Case 4-RC-21675 (May 7, 2010), *Aristacare at Meadow Springs*, DDE in Cases 4-RC-21641 and 4-RC-21642 (March 1, 2010), and the Regional Director's Decision in this case. These Decisions accurately describe the relevant factors that, when applied to the facts of this case, clearly demonstrate that the Regional Director correctly concluded that the LPNs are not supervisors under the Act. Furthermore, the Union directs the Board to long standing precedent demonstrating that the two MDS Coordinators are not confidential employees under the Act. *See, e.g., Waste Management de Puerto Rico*, 339 NLRB 262 (2003); *B.F. Goodrich Co.*, 115 NLRB 722, 724 (1956).

As found by the Regional Director, the burden of proving the supervisory status rests on the party asserting that such status exists and the assertion must be established by a preponderance of the evidence. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711 (2001); *Shaw Inc.,* 340 NLRB 354, 355 (2007); *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006); *Oakwood Healthcare, Inc.*, 348 NLRB 686, 694 (2006). This is a significant and substantial evidentiary burden. Purely conclusory evidence is not sufficient to establish supervisory status; rather, a party must present evidence that the employee actually possesses Section 2(11) authority. A "paper showing" alone – such as job titles, job descriptions or evaluation forms – is insufficient. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006); *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006). Similarly, testimony merely asserting as a general matter that individuals exercise particular supervisory duties is insufficient. To meet the burden of proof, testimony must include specific details or circumstances making clear that the claimed supervisory authority exists. *See, e.g.*, *Avante*, 348 NLRB at 1057.

Furthermore, employees will not be found to have such authority if they were not told that they possess it or if they exercise it only sporadically. *Golden Crest*, 348 NLRB at 731; *Avante*, 348 NLRB at 1057.

These principles are critical here in that the Employer has largely, if not totally, relied upon evidence in the form of documents. The Employer relied heavily upon the written job description for the LPNs, indicating that one of the 20 duties and responsibilities of these employees is to "[s]upervise Nurse Techs [and] [p]articipate in Nurse Tech evaluations." (ER Ex. 1). However, the testimony from its own witnesses as well as those of the Union demolished the notion that the job description is accurate with respect to the alleged supervisory duties of LPNs. As discussed in greater detail below, the LPNs who testified, including those called by the Employer, admitted that LPNs do <u>not</u> hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline employees.

The Employer also relied upon the paper evidence of performance appraisals of CNAs by LPNs[1]. However, the testimony demonstrates that LPNs had not evaluated CNAs for at least five years, and only in the last two months were LPNs directed to conduct evaluations of those employees. (P. Ex. 6 ,7; T. 320, 472, 475, 528, 532). With the exception of one performance evaluation completed in 1999 by LPN Esther Haupt and another completed by LPN Lindsay Borchick, all the evaluations admitted into the record had been completed in the last two months. (ER Ex. 48-55; U.

[1] The Employer failed to put into the record any performance evaluations of LPNs. Nor did the Employer elicit any testimony from the witnesses regarding the performance evaluations of LPNs. In fact, several LPNs testified that they had not been evaluated over the last two or three years.

Ex. 6, 7; T. 527-31). In fact, some of the LPNs were directed to complete the evaluations by April 15, 2013, the day before the hearing in this matter. (T. 479-80). LPNs testified that either they did not know whether the evaluations had any effect on the wages or bonuses of CNAs or denied that they did so because the CNAs have a collective bargaining agreement that determines their wages and other terms and conditions of employment. (T. 319, 498, 532). This is in direct contrast with a time when the CNAs were not organized and the evaluation determined a CNA's wage increase. (*See* P. Ex. 7; T. 471, 533-34). Pursuant to *Pacific Coast M.S. Industries*, Co., 355 NLRB 1422, 1423 fn. 13 (2010) and *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000), where the completion of evaluations do not directly affect the wages or job status of other employees, completion of performance evaluations will not be considered in evaluating whether the employee is a supervisor.

The Employer also relied upon thirty-four Employee Corrective Action Forms it admitted into the record in an attempt to establish the supervisory status of LPNs. (ER Ex. 9-26, 31-34, 36-37, 40-47). However, the testimony of those witnesses with personal knowledge of the Employee Corrective Action Forms, the LPNs themselves, demonstrated that they were completed under the direction of an RN Supervisor or other management employee. (T. 416, 467-522-23, 604, 608). The LPNs either did not write the disciplinary action or did not select the wording on the form. (T. 416, 467, 469, 522-23, 604, 608). Nor did the LPNs choose whether discipline would be imposed or the level of discipline. (T. 416, 469, 525, 576, 605, 609). Additionally, the Employer's LPN witnesses were unable to present any testimony about discipline

which they imposed on DNAs with the exception of one incident which happened five years ago. Nor did the Employer offer any evidence to rebut union witnesses who testified that they did not have the authority to independently impose discipline. In fact, with the exception of one of the Employee Corrective Action Forms admitted by the Employer, ADCS Wilkinson and Kevin Stump had no personal knowledge of the incidents referred to on those forms. (T. 153; ER Ex. 18). Finally, the bulk of those disciplinary forms admitted into the record involved actions that occurred anywhere from one to five years ago. (ER Ex. 9-26, 31-34, 42-43, 45-47).

Similarly, the Employer admitted into the record two In-Service Training Handouts for an In-Service Training Meeting with some of the LPNs which occurred on December 1st and 2nd, 2011. Both handouts include the same agenda in which the second item states: "Delegation: Supervisors are to delegate tasks—this may change on a daily basis due to needs and requirements of the residents—the Team is necessary to accomplish all that needs to be done in a day." (ER Ex. 4, 5). Both handouts also include a list of Daily Nursing Tasks which includes, under LPNs, "Supervision of CNAs." (ER Ex. 4, 5). The Employer offered no testimony explaining whether the agenda accurately reflects what was discussed at the meeting or, if it had been discussed, what was the nature of the training on this issue. In fact, there was no testimony providing any details about this particular In-Service Training, and, based on the Sign-In Sheets, only 16 LPNs attended the meeting. (ER Ex. 4, 5). Furthermore, the Employer failed to bring the person responsible for In-Service Training to testify about training LPNs, including the monthly In-Service Training conducted or the topics

included in those monthly trainings. In fact, one LPN testified that she was never trained on supervising CNAs. (T. 577).

Similarly, the Employer sought to prove much of its case through generalized or conclusory testimony. The Employer's principal witness, Susan Wilkinson, the Director of Clinical Services at the Pavilion, only offered vague and conclusory testimony concerning the alleged supervisory status of the LPNs, without any details or specific examples. She offered no testimony of specific examples in which a LPN disciplined, evaluated, assigned, or directed a CNA. Instead, she relied upon one item in the job description for LPNs, the Performance Evaluations, the Employee Corrective Action Forms, and the two In-Service Training Sheets in an attempt to establish the LPNs have supervisory authority over the LPNs. (T. 172-174).

At times, even her testimony supported the position of the Union that the LPNs were not supervisors. She admitted that LPNs do not have the authority over CNAs to hire, schedule, lay off, furlough, promote, release them from duty, or assign them to go home. (T. 192-92). She further testified that (1) the daily schedule for CNAs is created by the Scheduler (T. 177); (2) CNAs must call the Scheduler, not the LPNs, if they are going to call out from work (T. 181); (3) the Scheduler or the RN Supervisor, not the LPN, finds a replacement (T. 182); (4) the RN Supervisor assigns the breaks for the CNAs (T. 184); and (5) only the DON has the authority to allow a CNA or an LPN to stay beyond his or her shift. (T. 187).

Ultimately, the bulk of the Employer's case appears to rely upon its assertion that LPNs serve as "Charge Nurses" on those occasions when one of the floors of the Pavilion or the Manor lack a Unit Manager or RN Supervisor. The testimony demonstrates that, with the exception of LPN Jean Jennings, LPNs rarely acted as the Charge Nurse. (T. 239, 266, 426, 485, 599). The vast majority of the testimony demonstrates that LPNs either acted as a Charge Nurse once a month or less. (T. 239, 266, 426, 485, 599). One LPN, Pat Clement, never served as a Charge Nurse. (T. 599). Jean Jennings testified that she regularly acted as Charge Nurse three days every two weeks (T. 323, 328), but the Staff Assignment Sheets presented by the Employer only shows her listed, at best, seven times in a three month period. (ER Ex. 27).[2]

Additionally, the Employer made clear that when the facility needs an LPN to act as Charge Nurse, that LPN is relieved of her normal duties, which consist of administering medications and treatment. Only an LPN relieved of her duties may serve as a Charge Nurse. (T. 111, 112). When asked what are the duties of a Charge Nurse, she stated that "[t]hey would be answering the phone for doctors, calling, taking off orders." (T. 111). She agreed that "if you are serving as a charge LPN you're not on a med cart." (T. 112). Based on ADCS Wilkinson's testimony, only those LPNs who were relieved of their medication and treatment duties can be considered Charge Nurses. At best, the testimony suggests that only Susan Smith and Renee Merola were relieved of their medication and treatment duties when assigned to serve as Charge Nurses. (T.

[2] The handwriting is difficult to read, but it appears that in 2013 she acted as Charge Nurse on January 4th, 8th, 11th, 18th, February 1st, 11th, 15th, and March 15th. (ER. Ex. 28).

239, 266). There is no other testimony that any other LPNs were relieved from the medication and treatment duties such that they could act as Charge Nurse. To the extent that the Employer argues that LPNs Esther Haupt and Kelly Meade Cepil acted as Charge Nurses on the third shift of the Pavilion, they are mistaken. Both LPN Haupt and LPN Meade Cepil testified that they dispense medications and treatments while working the third shift (11 pm to 7 pm) at the Pavilion. (T. 512, 556).

In fact, since *Oakwood*, the Board has, in a number of cases, held that LPN charge nurses in nursing homes are not supervisors. See, e.g., *Golden Crest Healthcare Center*, 348 NLRB 727 (2006); *I.H.S.* Acquisition No. 114, Inc., 350 NLRB 489 (2007); *Avante at Wilson, Inc.*, 348 NLRB 1056 (2006); *Loyalhanna Healthcare Assoc.*, 352 NLRB 863 (2008); *Bryant Health Center, Inc.*, 353 NLRB No. 80 (2009). In addition, Regional Directors have come to the same conclusion because of the employer failing to meet its burden of proof. *See, e.g., Aristacare*, supra; *Springfield Terrace Ltd.*, Regional Director's Decision and Direction of Election in Case 33-RC-5132 (October 15, 2009). These cases establish the legal principles which, when applied to the facts of this case, demonstrate that the LPNs are not supervisors.

A. LPNs Are Not Supervisors Under the Act.

In its Petition for Review, the Employer again contends that the LPNs exercise independent judgment in assigning, directing, disciplining, and evaluating CNAs to establish that they are supervisors within the meaning of the Act. However, as the facts at the hearing in this matter demonstrated, the Employer has not met its

burden of proof on any of these contentions. By and large, the Employer has relied upon either documents such as job descriptions, evaluation forms, and corrective action forms. It has also relied upon conclusory testimony of ADCS Wilkinson who asserted that LPNs exercise supervisory duties. Furthermore, in each area, not only was the Employer's evidence insufficient to meet its burden of proof, but there was overwhelming evidence to the contrary presented either through cross examination or the presentation of Union witnesses. The conflicted evidence demonstrates the Employer has not met its evidentiary burden. *Dole Fresh Vegetables, Inc.*, 339 NLRB 785, 972 (2003); *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Thus, the Regional Director correctly concluded that the LPNs are not supervisors.

1. Assignment of work.

Oakwood Healthcare, Inc., 348 NLRB 686 (2006) establishes that one-time directives, for example doing a specific task for a specific patient, is not an assignment of work as it is not the giving of significant overall duties. 348 NLRB at 689. In order to possess supervisory authority with regard to assignments, the alleged supervisor must have the ability to require that the action be taken; requests are not sufficient. *Golden Crest Healthcare Center*, *supra*. Moreover, even if the employee has authority to require action by another, if the consequences for failing to comply are *de minimis*, then there is no supervisory authority. 348 NLRB at 729.

Finally, even if there is authority to make assignments, making routine assignments or reassignments of a CNA are not sufficient to establish supervisory

authority. Rather, record evidence is necessary that the supervisor actually makes assignments using independent judgment. *Oakwood*, 348 NLRB at 692 supra; *I.H.S. Acquisition*, 350 NLRB at 490 *supra*. But to show independent judgment in the hospital or nursing home setting, there needs to be a preponderance of evidence regarding the factors considered or weighted by the nurses in determining staffing needs. Specifically, the record must show that the nurses make assignments that are both tailored to patient conditions and needs and to particular CNA skill sets and a fair distribution based upon an assessment of the probable amount of CNA time each assigned patient will require on a given shift. *Oakwood Healthcare*, *supra* at 697; *IHS Acquisition* at 490. If the assignment or reassignment of a CNA is based upon the mere equalization of workloads, that does not require the exercise of independent judgment. *Oakwood Healthcare*, supra at 693-694, 697. Where there is insufficient evidence that nurses exercise judgment that involves a degree of discretion that arises above the "routine or clerical," there is no supervisory authority. *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006).

In this matter, the Employer's assertions are woefully deficient in several respects. First, notwithstanding some references in paper documents, the Employer has not produced a preponderance of evidence that LPNs actually assign CNAs. There is unrefuted testimony that for most CNAs their schedule is determined by permanent assignments assigned by the Scheduler, a Unit Manager, or a RN Supervisor. (T. 215, 245, 252, 325). Those permanent assignments include the times for taking breaks. (T. 351, 366). Thus, the mere fact that handwriting on some of the assignment sheets is

the handwriting of an LPN does not establish that LPNs were actually making assignments given the testimony that LPNs, to the extent that they filled out an assignment sheet, based that information on the permanent schedules of the CNAs. In short, the Regional Director correctly concluded that the evidence does not support the finding that LPNs assign CNAs.

To the extent that the there is evidence that LPNs assigned CNA, there was no evidence that the LPNs considered either the skills of the individual CNAs or the acuity of a particular patient. Instead, in this case, each time a witness was questioned about reassigning a CNA, the person agreed that it was done to equalize the work. (T. 118, 207, 311). That does not require independent judgment. *Golden Crest*, 348 NLRB at 730, fn. 9. The fact that CNAs must obtain any change to his assignment from the Scheduler, Unit Manager, or RN Supervisor and the fact that a CNA could make minor changes in his or her break schedule without the involvement of the LPN further confirms that LPNs do not exercise independent judgment when it comes to the assignment of CNAs. See *Golden Crest*, 349 NLRB at 729.

2. Direction of work

As defined by the Board, direction of work involves deciding which employee should perform which task in which order, determining the manner in which work is performed and having the authority to take corrective action if the work is not done properly. *Oakwood, supra*, at 691; *Golden Crest, supra*, at 730.

Here the Regional Director correctly concluded that the evidence shows that CNAs perform routine and repetitive duties for the residents. (T. 349, 458). Generally, then, there is no direction that is required once the assignments are made. (T. 215, 245, 252, 325). For example, which resident gets showered on which day is determined by a preexisting schedule. (T. 349, 642-45). There is little evidence to show that the LPNs direct CNAs.

Moreover, there is no evidence that the LPNs have the authority to take corrective action if work is not done properly. Again, the most that the LPN could do would be to talk to the CNA and report problems to the Unit Manager.

The independent judgment requirement applies to the direction of work indicia. *Oakwood, supra,* at 691; *Golden Crest,* supra*,* at 730. There was no evidence, however, that the direction of work that might be given by an LPN to a CNA involved the exercise of independent judgment. Routine and reoccurring tasks are involved. (T. 349, 458, 642-45). If an aide is directed to weigh a resident or collect a urine or stool sample, that direction would be given to the aide who had been assigned to that resident's room. (T. 515, 644). There is no evidence that the LPN determines which aide would be best suited to collecting a stool or urine sample or taking the weight of a particular resident. Thus, independent judgment is not required. *Loyalhanna*, 325 NLRB at 864; *Barstow Community Hospital*, 352 NLRB 1052 (2008). Similarly, if there are decisions made by the LPN with regard to lunch and break times, it is solely to insure that there are enough CNAs remaining on the floor for coverage. (T. 366). If

there was any evidence of an LPN rearranging when a CNA took a break, that would be a simple and routine task, not requiring the exercise of independent judgment. *See Croft Metals*, 348 NLRB at 722; *Azusa Ranch Market*, 321 NLRB 811, 812 (1996); *Ten Broeck Commons*, 320 NLRB 806, 811 (1996).

Finally, supervisory status will only be found if the direction of work is "responsible." *Oakwood, supra,* at 691; *Golden Crest, supra,* at 730. For it to be responsible, the person performing the oversight must be accountable for the performance by others of the task. To be held accountable means that there are adverse consequences that befall the one providing oversight, such as a denial of bonus or discipline. Or the consequences could be positive in the form of a bonus or promotion. Accountability must be more than something shown on paper. If accountability is reflected in the evaluation of the alleged supervisor, that evaluation must affect the supervisor's terms and conditions of employment. *Golden Crest, supra; I.H.S. Acquisition, supra*. It is important to note that the consequences must flow from the other employees' performance failures, not the purported supervisors' own performance in their direction. Thus, discipline of an LPN for failing to make fair assignments merely shows that the nurses are accountable for their own performance or lack thereof. Only if the nurse is accountable for the performance of others is responsible direction established. *Oakwood,* 348 NLRB at 692; *Barstow Community Hospital*, 352 NLRB 1052, 1053 (2008); *I.H.S. Acquisition*, 350 NLRB at 496. Similarly, purported supervisors are not engaged in responsible direction when they undertake to

perform tasks for which they are responsible, for example, providing statistical information to other staff, checking the med cart, etc. *Oakwood,* 348 NLRB at 695.

Here, the evidence was insufficient to show that LPNs direct other employees according to these standards. Other than conclusory statements that LPNs were responsible, little direct, detailed and specific evidence was adduced by the Employer. Unless an Employer can establish that a purported supervisor is held accountable on more than a couple of occasions for the conduct of subordinates, it cannot establish supervisory status with such evidence. *Volair Contractors*, 341 NLRB 673, 675 (2004); *Dole Fresh Vegetables*, 339 NLRB 785, 786 (2003). In this case, there is no evidence that a LPN suffered any adverse consequences for the failure of a CNA to perform his or her job duties. There were no disciplinary notices admitted into the record directed against LPNs for failure to supervise CNAs or performance evaluations of LPNs who were rated poorly on their ability to supervise. The mere fact that LPNs believed that they could be disciplined for the failure of CNAs to perform their job duties is insufficient to demonstrate that they have supervisory authority over CNAs. This is particularly true in light of the fact that "the corporate goals at Consulate for their residents is that the primary focus of everyone in the facility is to make sure that the residents are cared for in an appropriate fashion. . . ." (T. 339).

Furthermore, there is no evidence that LPNs were evaluated for their alleged supervision of CNAs. The Employer presented no Performance Evaluations of a particular LPN or even a blank performance evaluation for a LPN. In fact, the

evidence demonstrates that LPNs have not been evaluated for at least the last two years. (T. 420-21). Even if such performance evaluations existed, alleged negative comments on isolated performance appraisals do not constitute holding an LPN responsible or accountable. Quite frankly, there is no evidence that even if evaluations were conducted of LPNs that those evaluations would have any impact, positive or negative, on the LPN.

Finally, while some of the LPNs testified that they were responsible for the failure of CNAs to perform their job duties, there was simply no evidence that this is the case. There is no evidence that LPNs were disciplined for the failure of a CNA to perform his or her job duties. There is no evidence that LPNs received a poorer evaluation for their alleged failure to supervise a CNA. Nor is there any evidence that LPNs were provided training on the proper methods for supervising CNAs, evaluating CNAs, disciplining CNAs, or assigning or directing CNAs. The law requires that a purported supervisor must have been informed that they will experience material consequences as a result of deficiencies by the alleged subordinates. *Golden Crest*, *supra.* Here, there is no evidence that LPNs were provided with supervisory instruction generally and specifically or ever informed that they would be rewarded or punished if the CNAs on the shift failed to perform their duties.

Accordingly, the Regional Director correctly concluded that the Employer failed to meet its burden of proof with regard to responsible direction of work.

3. Evaluations

While the Employer contends that LPNs exercised supervisory authority by doing evaluations of CNAs, evaluation in and of itself is not an indicia of supervisory authority. *Elmhurst Extended Care Facilities*, *Inc.*, 329 NLRB 535 (1999). Only where there is a direct correlation between the evaluation prepared by the purported supervisors and merit increases received by the evaluated employees has the Board found that nurses are statutory supervisors on the basis of preparing evaluations. *See, e.g., Trevilla of Golden Valley*, 330 NLRB 1377, 1378 (2000); *Hillhaven Kona Healthcare Center*, 323 NLRB 1171 (1997).

Here, the overwhelming evidence was that LPNs simply have not prepared evaluations of CNAs for several years until after the Union filed its Representation Petition. (T. 232). Furthermore, evaluations of CNAs do not affect the wages or job status of the CNAs. (T. 648). There was a time awhile ago when evaluations were a factor in determining wage increases for CNAs, but that was in 1999, two owners ago and before the CNAs were organized. (P. Ex. 7; 532). Now, the wages of the CNAs are determined by a collective bargaining agreement, not by merit increases based on evaluations. (T. 648). Nor is there any evidence that a bad evaluation has led to the discipline of the CNA. Thus, reliance on evaluations of CNAs is misplaced, and the Regional Director correctly concluded that the evidence on LPNs performance of evaluations does not support that these employees are supervisors.

4. Discipline

The Regional Director correctly concluded that the Employer's contention that LPNs have the authority to discipline CNAs. In making that contention, the Employer relies upon conclusory testimony. Conclusory statements such as those made by the Employer's witnesses, without detailed, specific evidence are insufficient to establish supervisory authority. *Golden Crest*, 348 NLRB at 731; *Avante*, 348 NLRB at 1057; *G4S Regulated Security Solutions*, 358 NLRB No. 160 (September 28, 2012) (although employees wrote disciplinary notices, the notices were issued pursuant to the employer's detailed attendance and progressive discipline policies and that no evidence was presented that they exercised independent judgment in writing them). Nor does the job description of the LPNs or the two In-Service Training Handouts support the Employer's allegation that these employees may discipline CNAs. (ER Ex. 1, 4, 5). The Regional Director

In fact, there is no evidence supporting the claim that LPNs issued discipline to a CNA on their own authority. Nor is there any specific evidence of an LPN recommending discipline of a CNA. Instead, the record demonstrates that when confronted with an issue concerning a CNA, the LPN addressed the matter with his or her supervisor, whether a Unit Manager or RN Supervisor, who then directed what action the LPN should take. (T. 414-15, 467-69, 575-76, 604, 607). The only other involvement by an LPN in discipline is where the LPN acted solely as a witness to an event and was asked to provide a "witness" statement. (T. 552, 578). Simply acting as a witness concerning alleged substandard performance without making a

recommendation is not evidence of supervisory authority. *See Regal Health and Rehab Center, Inc.*, 354 NLRB No. 71, Slip Op. at 13 (2009).

Additionally, the Employer suggests that offering guidance or counseling to a CNA in the performance of his or her job constitutes discipline. However, making suggestions or reminding a CNA of procedures does not establish the authority to discipline. *Regal Health and Rehab Center*, *supra*, Slip op. at 8.

Finally, an LPN's role in reporting patient neglect or abuse is not discretionary, as all nursing home employees are required by law and by the Employer's own rules to report any evidence of patient neglect and abuse. The Employer has made clear its policy that patient care comes first. Thus, reporting such obvious violations of the Employer's rules does not require the exercise of independent judgment. *See Regal Health and Rehab Center, supra,* Slip Op. at 15-16; *Allied Mechanical, Inc.*, 343 NLRB 631, 643 (2004); *Michigan Masonic Home*, 332 NLRB 1409, 1411 fn. 5 (2000).

Furthermore, a review of the forms for which there was testimony based on personal knowledge demonstrates that the LPNs only completed Employee Corrective Action Forms when directed to do so by a supervisory employee. This indicates that an LPN does not have supervisory status. *See Franklin Home Health Agency,* 337 NLRB 826, 830 (2002) ("To confer 2(11) status, the exercise of disciplinary authority must lead to personnel action, without the independent investigation or review

of other management personnel."); *Williamette Industries*, 336 NLRB 743, 744 (2001) (same). The overwhelming evidence demonstrates that LPNs do not have the authority to discipline CNAs and were not informed that they possessed such authority.

Finally, this case is unlike the decision of the Board in *Bon Harbor Nursing and Rehabilitation Center*, 348 NLRB No. 70 (2006). In that case, the LPNs actually issued disciplinary action reports without review by higher authority. Clearly, that is not the case here, where the LPNs only fill out Employee Correction Action Forms when directed to do so by their supervisors. *See Bryant Health Center, Inc.*, 353 NLRB No. 80 (2009) (LPNs held not to be supervisors despite having the authority to prepare personnel action forms). In sum, the Employer's contention that LPNs discipline or effectively recommend the discipline of CNAs is without any basis in law or fact.

5. Charge Nurse

The Board recognizes that employees who spend a substantial amount of worktime acting as supervisors are excluded from the bargaining unit*. Benchmark Mechanical Contractors, Inc.*, 327 NLRB 829 (1999); *U.S. Radium Corp.*, 122 NLRB 468 (1958). However, when an employee's only exercises sporadic or limited supervisory functions, they are not excluded. *Frenchtown Acquisitions d/b/a Fountain View of Monroe v. NLRB*, 683 F.3d 298 (6th Cir. 2012), *enforcing 356 NLRB No. 94* (2011) (rejecting employer's claims that charge nurses had authority to discipline where one nurse had once given an aide a verbal warning, that nurses could send aides home for egregious misconduct, and that they could correct aides' mistakes by conducting

one-on-one in-services that could lead to discipline by a manager); *Latas de Alumino Reynolds*, 276 NLRB 551 (1962). This remains true in situations in which an otherwise rank-and-file employee substitutes for a supervisor. *Id*. In determining whether an employee substituting for a supervisor is excluded, the Board considers whether the employee spent "a regular and substantial" portion of his time performing supervisory duties, or whether such substitution was sporadic and insignificant. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 694 (2006) (holding that an employee who "spends a regular and substantial portion of his/her worktime performing supervisory functions" is a supervisor); *Carlisle Engineered Products*, 330 NLRB 1359 (2000); *Aladdin Hotel*, 270 NLRB 838 (1984). While the Board has refused to quantify the amount of time necessary to be found a supervisor, it has suggested that 10 to 15 percent of total worktime is sufficient. *Oakwood Healthcare, Inc.*, 348 NLRB at 694. Covering for a supervisory employee who is out sick or on vacation is insufficient. *Id*.

In this case, the overwhelming evidence demonstrates that none of the LPNs spend a regular and substantial amount of their time acting as Charge Nurses. With the exception of LPN Jean Jennings, the most any of the other LPNs performed the role of Charge Nurse was once a month, and a few had not done it in years. LPN Jennings indicated that she worked as a Charge Nurse three days every two weeks, but her testimony is undermined by the Assignment Sheet for the Manor where she works.

Additionally, there is no evidence that during the rare time that a LPN may have acted as Charge Nurse that they were engaged in supervising CNAs. Apart from

conclusory testimony suggesting that they were, there was no testimony that a Charge Nurse hired, fired, transferred, promoted, assigned, or responsibly directed the CNAs while serving as the Charge Nurse. Instead, a LPN serving as a Charge Nurse staffed the nurse's station, took calls from doctors and other medical providers, performed charting, and assisted the CNAs and LPNs in the performance of their job duties. (T. 427). Even assuming that Charge Nurses on occasion performed supervisory functions, which the Union denies, there is no evidence that such duties constituted a regular and substantial portion of their time while serving as a Charge Nurse.

For these reasons, the Regional Director correctly concluded that the LPNs are not supervisors based on the fact that they sporadically act as Charge Nurses.

B. The MDS Coordinators Share a Community of Interest with the Other LPNs.

Initially, the Employer alleged that the MDS Coordinators should be excluded from the bargaining on the grounds that they are confidential employees. Following the hearing in this matter, the Employer now alleges that the MDS Coordinators should be excluded from the bargaining unit on the grounds that they do not share a community of interests with the other LPNs. In support of its position, the Employer erroneously claims that the MDS Coordinators handle confidential information and, therefore, do not share a community of interest with the other LPNs. The Regional Director correctly concluded that the MDS Coordinators share a community of interest

because they have the same educational background and create care plans for the residents which the other LPNs employ.

As an initial matter, the Act only requires that a petitioner seek an appropriate unit, not that it be the most appropriate unit. *Specialty Healthcare and Rehabilitation Center of Mobile,* 357 N LRB No. 83, slip op. at 8-11 *(2011); Overnite Transportation Co.* 322 NLRB 723 (1996). Community-of-interest standards govern in determining the appropriateness of the unit. Factors considered include functional integration, common supervision, skills and job is functions, contact and interchange, and similarities in wages and other terms of employment. See *Specialty Healthcare, supra*, slip op. at 9; *Bartlett Collins Co.,* 334 NLRB 484, 484 (2001); *Home Depot USA,* 331 NLRB 1289, 1290 (2000). The party seeking to exclude particular employees from a unit has the burden of proof. *The Kroger Company,* 342 N LRB 202, 203 *(2004); Queen Kapiolani Hotel,* 316 NLRB 655, 664-665 (1995).

In this case, the Regional Director correctly concluded that the MDS Coordinators share a community of interest with the other LPNs. The evidence demonstrated that the MDS Coordinators share the same educational background as the other LPNs. Additionally, the evidence demonstrated that the MDS Coordinators created care plans for the residents which are implemented by the LPNs. Thus, the MDS Coordinators job functions are integrated with the other LPNs. For these reasons, the Regional Director correctly found that the MDS Coordinators share a community of

interest with the other LPNs, and, therefore, should not be excluded from the bargaining unit.[3]

C. The Board Has the Authority to Decide This Case and Otherwise Process the Petition.

The Employer erroneously argues that the decisions in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), and *NLRB v. New Vista Nursing and Rehabilitation*, _____ F.3d _____, Nos. 11-3444-, 12-1027, 12-1936 (3d Cir. May 16, 2013) requires that the Regional Director not issue a decision in this matter. Specifically, the Employer argues that since the Board is without a quorum, the Regional Director, selected by the Board, lacked authority to handle this matter.

As the Employer is well aware, the Board has appealed the decision in *Noel Canning* to the Supreme Court. Thus, the Supreme Court will determine the validity of the decision by the U.S. Court of Appeals. In fact, since the *Noel Canning* decision, the Board has continued to process election petitions and addressed

[3] To the extent that the Employer contends that the MDS Coordinators are confidential employees, it is incorrect. The Board has long understood that "confidential employees" are those individuals who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies with regard to labor relations or regularly substitute for employees having such duties. Due to this knowledge, they are excluded from a bargaining unit. *See e.g., Waste Management de Puerto Rico*, 339 NLRB 262 (2003); *Ladisch Co.*, 178 NLRB 90 (1969); *Chrysler Corp.*, 173 NLRB 1046 (1969); *Eastern Camera Corp.*, 140 NLRB 569, 574 (1963). Mere knowledge of the financial status of an employer alone does not confer confidential status on the employee. *Brodart, Inc.*, 257 NLRB 380, 384 n. 1 (1981).

In this case, the Employer lacked evidence to support its initial claim that the two MDS Coordinators are "confidential employees." The only support for that assertion is testimony from Mr. Stump that they have access to financial information about the income each resident generates. No evidence was presented that these employees have any access to personnel records or labor management information. Thus, the Employer has not met its burden to exclude the MDS Coordinators on the grounds that they are "confidential employees."

employer's arguments similar to those of St. Luke's. *STG International, Inc. v. Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 542*, Case No. 21-RC-097525 (Board Order Denying Petition for Review, April 25, 2013). In STB International Inc., the Board stated:

> The Employer contends that the Board lacks a quorum because the President's recess appointments are constitutionally invalid. We reject this argument. We recognize that the United States Court of Appeals for the District of Columbia Circuit has concluded that the President's recess appointments were not valid. *See Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). However, as the court itself acknowledged, its decision conflicts with the rulings of at least three other courts of appeals. *See Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), *cert. denied*, 544 U.S. 942 (2005); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *U.S. v. Allocco*, 305 F.2d 704 (2d Cir. 1962). This question remains in litigation, and pending a definitive resolution, the Board is charged to fulfill its responsibilities under the Act. *See Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. 1, fn. 1 (2013). For the same reason, we reject the Employer's contention that the Board's appointment of the Regional Director for Region 21 was invalid.
>
> We likewise reject the Employer's related contention that the Regional Director would lack authority to process representation petitions if the Board lacked a quorum. The Board's delegation of its decisional authority in representation cases to Regional Directors dates back to 1961 and has never been withdrawn. See 26 Fed. Reg. 3889 (May 4, 1961). Consistent with the 1961 Delegation, NLRB Regional Directors remain vested with the authority to conduct elections and certify their results, regardless of the Board's composition at any given moment. Furthermore, in New Process Steel, the Supreme Court expressly started that such delegations were not affected by its decision, and, following that decision, no fewer than three courts of appeals have upheld the principle that Board delegations of authority to non-members remain valid during the loss of a quorum by the Board. *See New Process Steel L.P. v. NLRB*, 130 S.Ct. 2645, 2643 n.4 (2010); *Frankl v. HTH Corp.*, 650 F.3d 1334, 1354 (9th Cir. 2011); *Osthus v. Whitesell Corp.*, 639 F.3d 841, 844 (8th Cir. 2011); *Overstreet v. El Paso Disposal*, LP 625 F.3d 844, 853 (5th Cir. 2010).

Id., fn. 1. The Board's decision is particularly sound in light of the fact than any other decision would result in Regional Director (and the Board) never processing election petitions and unfair labor practice charges. Given the authority recognized by the U.S. Courts of Appeal for the Regional Director to process election petitions even when a quorum does not exist, the Board should find that it has the authority to process the election petition of AFSCME.

D. The Board Should Not Stay Further Processing of the Union's Petition or Postpone the Election.

The Employer effectively argues that since it disagrees with the Decision of the Regional Director and has filed a Request for Review, the Board should stay the election in this matter currently scheduled for June 13, 2013. In support of its position, the Employer cites *Piscataway Assoc.*, 220 NLRB 730 (1975) and *Angelica Healthcare Servs. Group*, 315 NLRB 1320 (1995). In both cases, the Board did in fact stay an election pending disposition of a Request for Review of a Regional Director's Decision. In both cases, the Board did not explain its reasoning for issuing the stay, but ultimately, it found problems with the Decision of the Regional Director or the processing of an election petition. *Id*. In this case, there is no doubt about the accuracy of the Regional Director's Decision or the fact that it is supported by substantial evidence. Thus, there is no need to stay the election in this case. To the extent that the Employer argues that *Noel Canning* requires a stay of this matter, including the election, the Board should not grant such a stay for reasons stated in Section III.C *supra*.

E. The Regional Director's Denial of the Employer's Special Appeal from the Hearing Officer's Decision to Quash the Employer's Subpoena Was Not an Error That Unduly Prejudiced the Employer's Case.

The Employer complains that the Regional Director denied its special appeal from the Hearing Officer's decision to quash the Employer's subpoena of Matt Balas, Staff Representative of AFSCME District Council, who services a bargaining unit of CNAs who work for the Employer. However, the Hearing Officer and the Regional Director were correct in quashing that subpoena. The Employer indicated that it sought the testimony of Mr. Balas because he allegedly made certain statements about the CNAs at labor-management meetings and had evidence on the alleged supervisory status of the LPN. Such testimony is wholly unnecessary and irrelevant as the question about the supervisory status of the LPNs must be based on the actual job duties of those employees. Mr. Balas alleged understanding, even if supportive of the Employer's position, which AFSCME denies, does not constitute evidence of those job duties. In fact, the Employer had the opportunity to have CNAs themselves testify about their job duties and whether LPNs supervise them but chose not to call any of those employees. The only CNA who did testify was the called by AFSCME and she testified that LPNs are not their supervisors. For these reasons, the Hearing Officer and the Regional Director were correct to quash the Employer's subpoena.

VI. CONCLUSION

For the reasons set forth above, the Board should dismiss the Employer's Request for Review the Regional Director's Decision and Stay the Election. First, the Regional Director's Decision that the LPNs are not supervisors is supported by

substantial evidence. Second, the Regional Director is not precluded from processing the election petition; including directing an election for June 13, 2013, while the Supreme Court reviews the decision in *Noel Canning*. Third and finally, the Regional Director should reject the Employer's request to stay the election. Therefore, AFSCME requests that the Board dismiss the Employer's Petition for Review and allow the election to proceed.

Respectfully submitted,

WILLIG, WILLIAMS & DAVIDSON

BY: /s/ Alaine S. Williams
/s/ John R. Bielski

ALAINE S. WILLIAMS, ESQUIRE
JOHN R. BIELSKI, ESQUIRE
1845 Walnut Street, 24th Floor
Philadelphia, PA 19103
(215) 656-3600

Dated: June 10, 2013

CERTIFICATE OF SERVICE

I, John R. Bielski, Esquire hereby certify that on May 1, 2013, I caused to be served a true and correct copy of the **AFSCME'S BRIEF IN OPPOSITION TO EMPLOYER'S PETITION FOR REVIEW**, in the manner and addresses described below:

Jedd Mendelson, Esquire
Littler Mendelson, P.C.
One Newark Center, 8th Floor
Newark, NJ 07102
Tele: (973) 848-4758
Attorneys for the Employer
(Via Overnight Delivery)

/s/ John R. Bielski

JOHN R. BIELSKI, ESQUIRE
Willig, Williams and Davidson
1845 Walnut Street, 24th Floor
Philadelphia, PA 19103
(215) 656-3600

DATE: June 10, 2013