

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 18

MATHER HEALTH CARE LLC¹

Employer

And

SEIU HEALTHCARE MICHIGAN,
SERVICE EMPLOYEES
INTERNATIONAL UNION, CHANGE
TO WIN²

Petitioner

Cases 18-RC-114444
18-RC-114445

DECISION AND ORDER

Petitioner seeks to represent in two separate units all full-time and regular part-time licensed practical nurses (LPNs) (Case 18-RC-114444) and all full-time and regular part-time registered nurses (RNs) (Case 18-RC-114445) employed by the Employer at its nursing home facility in Ishpeming, Michigan. The Employer contends the petitions should be dismissed because the petitioned-for LPNs and RNs are statutory supervisors within the meaning of Section 2(11) of the Act.

As explained more fully below, I find the Employer has met its burden of proving supervisory status by establishing that the LPNs and the RNs have the authority to

¹ The Employer's name appears as amended at the hearing.

² The Petitioner's name appears as amended at the hearing.

discipline employees as well as the authority to responsibly direct employees, using independent judgment.³

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Based on the record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.⁴

3. Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. I begin this decision by summarizing the relevant facts. This summary includes an overview of the Employer's operation and staff, highlighting the management structure within the nursing department; the responsibilities of employees in the job classifications at issue; and separate sections reviewing the facts related to

³ While the record establishes that the Employer's LPNs and RNs have different skills and responsibilities in caring for the residents, they possess and exercise the same supervisory authority.

⁴ The Employer, Mather Health Care LLC, a limited liability company with a facility located at 435 Stoneville Road, Ishpeming, Michigan, is engaged in the business of providing nursing and other services for the elderly and other individuals. During the past 12 months, a representative period, the Employer derived gross annual revenues in excess of \$100,000, and purchased and received at its Ishpeming facility, products, supplies and materials valued in excess of \$5,000 directly from points located outside the State of Michigan. The Employer also is a health care institution within the meaning of Section 2(14) of the Act.

the alleged supervisory authority and responsibilities of the LPNs and RNs, including record evidence related to how the LPNs and RNs exercise that authority and perform their responsibilities. I end the decision applying relevant case law to the facts and explain how I reached my conclusion that the individuals in dispute are 2(11) supervisors.

FACTS

The Employer's Business Operations

The Employer operates a nursing home facility located at 435 Stoneville Road in Ishpeming, Michigan, where it provides both long-term and short-term residential care. The facility is divided into several departments. Among the departments are nursing, therapy, dietary, material data set (MDS), maintenance, laundry and housekeeping, and human resources and administration.

Petitioner already represents a unit consisting of certified nursing assistants (CNAs), housekeepers, dietary aides, laundry employees, and activity aides. There is no history of collective bargaining with regard to the employees sought by Petitioner in these cases.

The Employer's Executive Director is Jim Cross. He is responsible for the overall operations of the facility. Among the individuals reporting to Cross is the Director of Clinical Services, Peggy Pessalier. Pessalier heads the nursing department and has done so since March 2013. Reporting to Pessalier are two Unit Managers. The two Unit Managers oversee the Charge Nurses. Both were formerly Charge Nurses. One was promoted in April 2012, and the other was promoted in August 2013. The Director

of Clinical Services and the Unit Managers usually work until 5:00 p.m. Monday through Friday. At least one Unit Manager is on-call during the weekend.

Under the Unit Managers are the RNs and LPNs (herein Charge Nurses). The record does not reveal how many RNS and LPNs are employed by the Employer.⁵ Also considered a Charge Nurse is the Wound Care Nurse. The Charge Nurses are responsible for overseeing the CNAs to ensure that they are performing their duties. In addition to overseeing the CNAs, the Charge Nurses administer medications, provide certain treatments, review charts and monitor changes in the conditions of residents, and they work with the doctors to make sure residents receive proper care. The Wound Care Nurse performs all dressing changes and ensures that resident treatment plans are updated and accurate. The Charge Nurses are all licensed by the State of Michigan.

The CNAs provide direct care to the residents. They are responsible for passing meal trays, helping residents with toileting, bathing and oral care, turning and repositioning bedridden residents, aiding with ambulation, assisting in getting residents to therapy and activities, and keeping the residents' rooms tidy. CNAs review and follow the residents' individual care plans. They also document residents' activities and care during the shifts they work.

The Employer's facility is divided into four hallways (the 100 hall, the 200 hall, the 300 hall, and the 400 hall), with a total of 122 beds. The census varies from 75 to 105 residents. Each hallway has a nursing desk. The Employer keeps certain patient records at the nursing desks including residents' care plans and the activity of daily

⁵ The representation petitions state that the proposed bargaining units consist of 10 employees each.

living (ADL) sheets. The ADL sheets are used by CNAs to document residents' activities during the CNAs' shifts, including how much residents eat and the activities residents participate in. The ADL sheets are assessment tools allowing CNAs and nurses to know what residents can and cannot do for themselves.

The Employer operates three shifts. They are the day shift (6:30 a.m. to 2:30 p.m.), the afternoon shift (2:30 p.m. to 10:30 p.m.), and the night shift (10:30 p.m. to 6:30 p.m.). The State of Michigan regulates the required staff-to-resident ratios for each shift. The regulations require one nurse per eight residents during the day shift, one nurse per twelve residents during the afternoon shift, and one nurse per fifteen residents on night shift. Each of the four hallways described above has one Charge Nurse (either an RN or an LPN) and two or three CNAs, depending upon the shift.

Job Descriptions

The job descriptions for the Charge LPNs and Charge RNs are distinct, but both make clear that the primary purpose of both positions is to “provide direct nursing care to the residents, and to supervise the day-to-day nursing activities performed by nursing assistants.” Such supervision “must be in accordance with current federal, state, and local standards, guidelines, and regulations that govern our facility, and as may be required by the Director of Nursing Services or Unit Manager to ensure that the highest degree of quality care is maintained at all times.”

Among the responsibilities of both positions, according to the job descriptions are the following:

- Direct the day-to-day functions of the nursing assistants in accordance with current rules, regulations, and guidelines that govern the long-term care facility.

- Discipline/coach nursing assistants or other ancillary staff as needed to insure (sic) the highest level of customer service and resident satisfaction. This includes the ability to suspend or terminate employees the Charge Nurse determines to have violated policies and procedures which warrant such action.
- In cases where disciplinary action is warranted, the Charge Nurse Supervisor is responsible for gathering the documentation/statements, leading/conducting the investigation, speaking to the employee in question and witnesses, coming to a conclusion as to give discipline or recommend termination.
- Evaluate the performance of CNA staff under your direction to insure (sic) they develop the best practices in customer service/resident care and achieve their goals.
- Assign staff to work the areas you feel best suit the needs of the residents and other staff you have in your charge.
- Ensure that all assigned nursing personnel comply with the written policies and procedures established by the facility.
- Ensure that all nursing service personnel are in compliance with their respective job descriptions.

Both sets of job descriptions also state that the Charge LPNs and Charge RNs

perform the following:

- Participate in Employee performance evaluations, determining your shift's staffing requirements, and making recommendations to the Nurse Supervisor concerning Employee dismissals, transfers, etc.
- Inform the Nurse Supervisor of the staffing needs when assigned personnel fail to report to work.
- Report absentee call-ins to the Nurse Supervisor.
- Review and evaluate your department's work force and make recommendations the Nurse Supervisor.
- Develop work assignments and/or assist in completing and performing such assignments.

- Provide leadership to nursing personnel assigned to your unit/shift.
- Make daily rounds of your unit/shift to ensure that nursing service personnel are performing their work assignments in accordance with acceptable nursing standards. Report problem areas to the Nurse Supervisor.
- Meet with your shift's nursing personnel, on a regularly scheduled basis, to assist in indentifying and correcting problem areas, and/or to improve services.

Direction of Work

Record testimony confirms that Charge Nurses are responsible for ensuring that the CNAs perform their duties in accordance with established rules and regulations. At the start of their shifts, the incoming Charge Nurses meet with the outgoing Charge Nurses to review what occurred during the prior shift. The incoming Charge Nurses then give report to the CNAs and discuss the status of the residents and expectations regarding what the CNAs need to do for the residents during their shifts. The Charge Nurses also complete "shift sheets" at the beginning of the shift. These shift sheets have the CNAs' names and duties to perform during the shifts. For example, among the duties might be treatments, repositioning, and cleaning. These tasks typically do not change from one day to the next day.

After report and completion of shift sheets Charge Nurses perform rounds to check on the residents, administer medications, and verify that that the CNAs are performing the chores or tasks assigned to them. One Charge Nurse testified that she performs rounds at least twice a shift to check up on the residents and make sure that the CNAs perform necessary tasks. She further testified that if she found that work had not been done, she would tell the CNA to go back and do it. Another Charge Nurse

refused to work with a particular CNA because he believed that the CNA performed poorly, and he did not want to jeopardize his license by having that CNA provide care for the residents on his hall during his shift. The Employer honored this request and did not assign that particular CNA to work with that particular Charge Nurse.

The Charge Nurses receive annual evaluations. Both of the Unit Managers confirmed that Charge Nurses are evaluated based on how they “supervise their CNAs.” One of the Unit Managers testified that she looks to see, “If they hold them (the CNAs) accountable for their lack of work or their wrongdoings. If they’re there for them and helping them out. Just being a good leader for them and being an example.”

The record contains examples of annual evaluations Unit Managers completed for three Charge Nurses in the year 2013. One of the approximate 17 factors contained in the evaluations is “Managerial skills (sets clear expectations, encouraging, accountable).” In evaluating the “Managerial Skills,” Unit Managers appear to decide whether a Charge Nurse’s performance demonstrates a “Strength” or an “Opportunity.” In the “Development Feedback” section of the evaluation form, the Unit Managers can write an “Action Plan” to address any issues. In one evaluation, the Unit Manager commented as follows about a Charge Nurse: “You are ultimately responsible for your [CNAs.] You need to know where your [CNAs] are and take charge--make sure things are getting done on your hall.” In another evaluation of a Charge Nurse, the Unit Manager wrote: “You are the charge nurse for your hall--you are responsible for knowing who and where your [CNAs] are. If they are not doing their job—you are not doing your job. Make sure our [residents] are getting what they need and being treated [with] respect.” In both evaluations, the “Managerial skills” for the Charge Nurses being

evaluated was checked as an “Opportunity.” The Unit Manager who completed these evaluations testified that she made these comments because “all too often the CNAs’ work was not being done,” and she “wanted to remind and make clear that the Charge Nurses are ultimately responsible for their work and making sure their CNAs’ work is done.” This Unit Manager further testified that she recently conducted in-service training to remind Charge Nurses that they are responsible for making sure their CNAs’ work is completed, including all charting of the residents’ daily care and activities and that a failure to do so violated the Employer’s policies.

The record is not clear, however, whether Charge Nurses receive annual wage increases or bonuses based upon their annual evaluations. A Charge Nurse testified that she received a raise after her recent evaluation, but the evaluation was not introduced into the record and there is no evidence as to why she received the raise.

The current and former Charge Nurses who testified also stated that Charge Nurses could be disciplined if they failed to supervise their CNAs, although the record contains no examples of discipline issued to a Charge Nurse for failing to direct the work of a CNA.

Coaching, Discipline, and Suspensions

The job descriptions of the Charge Nurses state that they are responsible for disciplining or coaching CNAs. The Charge Nurses who testified confirmed that they have a role in discipline. They usually initially have a one-on-one counseling session with the CNA(s) involved in a matter where discipline might be warranted. They inform the CNA(s) about the potential problem, counsel the CNA(s) on how to deal with the situation, and warn the CNA(s) that if the issue or violation occurs again the CNA(s) will

be issued a Level 1 written warning (further described below). The Charge Nurse who completes a Level 1 written warning is also responsible for conveying it to the CNA. The Charge Nurse then typically gives the Level 1 warning to the Director of Clinical Services, who takes it to the Executive Director for him to sign and have placed in the CNA's personnel file. These written disciplines are maintained in the human resources/administration offices. Charge Nurses do not monitor or track how many Level 1 written warnings a particular CNA has received, and therefore are not responsible for deciding whether a CNA should be terminated.

Under the "Employee Coaching Program," employees are expected to meet and abide by the Employer's standards regarding customer service and quality care. The expectations are broken down into two levels of customer service standards—Level 1 and Level 2. Examples of Level 1 Customer Service Standards include (but are not limited to) showing up to work as scheduled and on time (applies to tardiness and unexcused absences), following clocking in and out procedures, obtaining advanced approval for unscheduled work, completing assignments, performing required documentation and recordkeeping, knowing and respecting residents rights, following policies, procedures and standards of practice, attending required in-service training, knowing and following safety rules, and avoiding disruptive actions or conduct. The Employee Coaching Program states that when a Level 1 infraction occurs the supervisor and the employee are to develop a plan to assist the employee in meeting expected customer service standards. In general, coaching plans are active for twelve months from the date of issuance, but are to be permanently filed in the employee's personnel file. Coaching plans not satisfactorily completed remain active regardless of

the date of issue. An employee who is issued a coaching plan which he/she does not satisfactorily complete by the required deadline will then be issued another coaching plan. According to the handbook, employees who receive four Level 1 coaching plans in one year are subject to termination. Employees who are in their 90-day introductory period may be terminated for one Level 1 coaching plan.

The Employer introduced dozens of Level 1 written warnings from 2010 through 2013. Each was issued by a Charge Nurse. There is no dispute that the Charge Nurses have the authority and discretion to issue these written warnings without anyone else's approval. Furthermore, one of the Unit Managers testified that when she was a Charge Nurse, she could decide whether to skip the one-on-one counseling and go directly to issuing a CNA a written warning, without seeking anyone else's approval. She testified, "If I feel there's something not right, I will write that person up." She stated that, "If there's any risk for our resident, I am going to write that person up.... They're under my license when they're working, at that time."

One of the Unit Managers testified about a situation in the spring 2013 when she was still a Charge Nurse. She warned and threatened to suspend a CNA for "loud and inappropriate behavior" in one of the resident hallways. The incident occurred during the day shift, in the 400 hall. She observed the CNA being loud and inappropriate, asked the CNA to follow her into an empty room, and told the CNA to stop her behavior before she went back out on the floor or she would not be able to continue working. Thereafter, she issued the CNA a written warning. The record is not clear if it was a Level 1 or Level 2 warning. The Unit Manager testified that she issued the warning without consulting (or needing to consult) anyone else.

This same Unit Manager testified about another situation that occurred in mid-May 2013, while she was still a Charge Nurse. She verbally counseled a CNA about a violation and later issued her a Level 1 written warning when she continued the offending conduct. The specifics of the incident are that she observed a CNA using her cell phone while on the floor, which is not permitted. She verbally warned the CNA to put her phone away. Later in the shift, she again saw the CNA using her cell phone, and she issued the CNA a Level 1 written warning. Once again, she did so without consulting (or needing to consult) anyone else.

Finally, this same Unit Manager testified about a third situation that occurred in July 2012, almost a year before her promotion. She testified about a situation in which a CNA was assisting a resident getting up from the toilet and back into a wheelchair. The resident's care plan stated that such transfers were to be done with the use of the sit-to-stand machine. The CNA failed to use the machine, and the resident fell during the transfer. The Unit Manager (who was a Charge Nurse at the time) issued the CNA a Level 1 written warning for failing to follow protocol and failing to review the resident's care plan for instructions on handling the lift. Again, she did so without consulting (or needing to consult) anyone else.

The record establishes that the Employer might investigate certain situations where Charge Nurses issue CNAs Level 1 written warnings. However, that investigation (if it occurs) takes place after the disciplinary warning has issued. The Director of Clinical Services testified that after the Level 1 warning is issued, she might speak to the individuals involved to make sure that residents are receiving proper care, including meeting with the CNA(s) involved to find out what happened. If the CNA who

received the discipline disagreed with what the Charge Nurse claimed had happened, or if the CNA had some defense, the Director of Clinical Services allows that CNA to prepare a written statement. The Director of Clinical Services then staples the statement to the Level 1 warning, and both are placed in the CNA's personnel file. However, the Director of Clinical Services' testimony that the Level 1 warning remains in the file, and that it continues to count as discipline even if a CNA disputes the discipline, was not contested at the hearing. Thus, there is no evidence that the Employer invalidates or removes Level 1 warnings issued by Charge Nurses.

With regard to the other form of discipline--Level 2 warnings--according to the Employee Coaching Program these involve physical or verbal abuse or neglect of a resident, patient, visitor, or other employee; sexual or other harassing of any resident patient, visitor, or other employee in the course of employment; stealing, fighting, or possessing weapons while at facility; refusing to perform job assignments; violating the Employer's drug and alcohol policy; sleeping on the job; intentionally falsifying facility records; willfully violating safety, health, and security rules; willfully violating any licensure, certification, or other professional standards of practice; and any other conduct that the facility deems to be serious. Employees who violate a Level 2 Customer Service Standard are immediately suspended. During the suspension, the Employer's management conducts an investigation, including a discussion with the alleged-offending employee. If following the investigation the employee is found to have been in violation of any Level 2 Standard, the employee is released from employment or returned to work subject to immediate termination if any additional Level 1 or 2 warnings occur in a rolling twelve-month period. There is nothing in the record as to whether the

Charge Nurses have any role in the Level 2 investigation, although they may be the sources of the initial suspensions.

The record contains an example of a Charge Nurse suspending a CNA for conduct constituting a Level 2 violation. A resident reported that a CNA was intoxicated or under the influence while at work. The Charge Nurse sent the CNA home immediately. There is no further evidence in the record regarding how the Employer handled the incident.

The Employer also has strict policies regarding abuse. Under these policies, if an employee is accused or suspected of mentally or physically abusing a resident, he or she is immediately suspended pending an investigation. There is no discretion involved; it is automatic. There are references in the record to this occurring, but there are no specific details.

Finally, a Charge Nurse has been disciplined, and then discharged, for failing to discipline CNAs. The Director of Clinical Services testified about a recent situation where a Charge Nurse refused to issue written warnings to CNAs in spite of the fact that the Charge Nurse believed disciplines were warranted. The Charge Nurse at issue discovered that one or more CNA(s) on her hall had failed to turn a resident, leaving the resident in his bed saturated in his own urine. The Charge Nurse called and reported the situation to the Director of Clinical Services. Later, at the end of the shift, the Charge Nurse gathered all the information necessary to prepare a write-up regarding the incident and left it under the Director of Clinical Services' office door for her to complete and issue, because she was uncertain about what to do. The following day the Director of Clinical Services contacted the Charge Nurse and told her that it was the

Charge Nurse's responsibility to complete and present the disciplinary warning(s) to the CNA(s) involved in the incident. The Charge Nurse refused. The Director of Clinical Services discharged the Charge Nurse for insubordination in refusing to complete the discipline. The Charge Nurse involved in this incident testified at the hearing and confirmed the testimony of the Director of Clinical Services. The Charge Nurse also confirmed that she understood that she had the authority and discretion to issue the discipline.

Assignment of Work and Transfers

The Employer has a scheduler who is responsible for preparing the biweekly work schedule for the nursing department. As previously stated, there also are daily assignment sheets that list the CNAs working and the tasks to be performed. One of the witnesses testified that on their wing, one of the more experienced CNAs fills out the assignment sheets. There is no evidence in the record as to how it is decided which tasks are assigned to which CNA.

The Charge Nurses are not involved in scheduling vacations or days off. If a CNA calls in or is a no call/no show, the Charge Nurse is responsible for filling the shift. The Charge Nurse telephones other CNAs to see if someone is willing to come in and work. If no one is willing to come in, the Charge Nurse has the ability to mandate that a CNA already at work stays and covers a portion of the following shift. This procedure is contained in the collective-bargaining agreement covering CNAs' employment. There are examples in the record where CNAs were disciplined for failing or refusing to work a mandated shift. But there is no substantive testimony about how those decisions were made.

The record is unclear how meals and breaks are scheduled, except that the Employer must comply with State regulations regarding staffing levels. CNAs are required to notify their Charge Nurses if they are going to be leaving the floor to take breaks. Charge Nurses have the ability to delay or reschedule CNAs' meal and break times based on the needs of the residents on their wing.

The record contains examples of situations where a Charge Nurse reassigned or transferred a CNA from one wing to another wing. However, the examples usually were because residents requested that different CNAs care for them. For example, if a male CNA is assigned to a wing of female residents, the Charge Nurse could reassign the male CNA to a male wing, and have a female CNA assigned to care for the wing of female residents. There also are emergency situations, such as when a resident falls, where the Charge Nurse can instruct a CNA to drop what they are doing and to assist with the situation.

Charge Nurses' Role in CNA Evaluations

The Employer performs evaluations of CNAs after their 90-day probationary periods and on an annual basis thereafter. The Charge Nurses perform these evaluations of the CNAs working on their shifts. The Charge Nurses testified that they also meet with the CNAs and discuss the particular CNAs strengths and weaknesses. The Charge Nurses also testified that these evaluations are important in ensuring that residents receive proper care. However, there is no evidence as to what happens as a result of these evaluations. Thus, the record does not reflect that CNAs are either rewarded or disciplined based on the content of the evaluations.

ANALYSIS

Overview of Board Law Related to Supervisory Status

Section 2(11) of the Act defines a “supervisor” as:

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

To establish supervisory status, the evidence must establish: (1) that the individual(s) held authority to engage in any one of the twelve enumerated supervisory functions listed above; (2) that the “exercise of such authority [was] not of a merely routine or clerical nature, but require[d] the use of independent judgment”; and (3) that their authority was held “in the interest of the employer.” See, e.g., *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 710–713 (2001); *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). To exercise “independent judgment” an individual must “at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” *Oakwood Healthcare, Inc.*, 348 NLRB at 692–693. A “judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” *Id.* at 693.

The party that alleges an individual(s) is a statutory supervisor has the burden of proof. *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1048 (2003). The burden is met by fulfilling the preponderance of the evidence standard. *Id.* at 1047; *Oakwood Healthcare, Inc.*, 348 NLRB at 694. The burden is not met where the record evidence is

inconclusive or otherwise in conflict. See, e.g., *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Likewise, “mere inferences or conclusionary statements, without detailed, specific evidence, are insufficient to establish supervisory authority.” *Alternate Concepts, Inc.*, 358 NLRB No. 38, slip op. at 3 (2012); see also *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006); *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006).

The Employer contends that the petitioned-for LPNs and RNs always work as Charge Nurses and are statutory supervisors because they possess the authority to discipline, suspend, responsibly direct, assign, transfer, and evaluate the CNAs working at the facility, using their independent judgment. In analyzing these contentions I note that Employer counsel frequently used leading questions during direct examination of Employer witnesses in order to elicit testimony supporting the contention that Charge Nurses are 2(11) supervisors. I have given little weight to the record evidence resulting from the leading questions on direct examination, as it has minimal probative value. *Greystone Bakery, Inc.*, 327 NLRB 433, 440 fn. 12 (1999). Instead, my analysis relies on testimony offered in response to non-leading questions as well as documentary evidence.

The Authority to Discipline/Suspend

The Employer has met its burden of establishing that the Charge Nurses have the authority to discipline the CNAs using their independent judgment. Charge Nurses are responsible for addressing problems with CNA performance through the counseling and coaching process contained in the Employer’s employee handbook. There is no dispute that the Level 1 written warnings issued by Charge Nurses constitute the first

step in the Employer's progressive disciplinary system. The Board has held the authority to issue counseling or coaching forms to employees constitutes discipline under Section 2(11) of the Act if they constitute discipline or if they lay the foundation for future discipline under the employer's progressive disciplinary system. *Oak Park Nursing Care Center*, 351 NLRB 27 (2007).

The facts in *Oak Park Nursing Care Center* are identical to the facts in this case. In *Oak Park* the licensed practical nurses were responsible for overseeing the nursing assistants. If a nurse had an issue with the quality of the care provided to a resident, the nurse could verbally counsel the assistant, and/or issue a written counseling. Moreover, the nurse in *Oak Park* had the authority to issue the discipline without the approval of anyone in higher management. Once the nurse completed the counseling form, the nurse gave it to the director of nursing or the assistant director of nursing, who in turn presented the document to the nursing assistant to sign, including giving the nursing assistant the option of writing a comment on the form. The director or assistant director of nursing then imposed the appropriate discipline and placed the counseling form in the employee's personnel file.

In *Oak Park* the Board concluded that the counseling forms completed by the licensed practical nurses were disciplinary because they laid a foundation for future discipline under the employer's progressive disciplinary system. Also important to the Board was the fact that the licensed practical nurses had discretion in deciding whether to document conduct as a verbal counseling or a written warning. Therefore, they had the authority to exercise independent judgment in deciding whether to initiate the progressive disciplinary process against an employee. *Id.* at 29.

Although there was evidence in *Oak Park* that the progressive disciplinary process eventually resulted in the suspension of one nursing assistant and the discharge of another, the Board indicated that evidence of actual progressive discipline (i.e., evidence that the employee receiving the counseling later was suspended or discharged) is not required. *Id.* at 28-29. What is required is that the counseling forms lay the foundation and the necessary precursor for any heightened discipline for similar conduct that may occur in the future. *Id.* at 29-30.

In its post-hearing brief, Petitioner points out that the Employer introduced several Level 1 written warnings into the record, and that such evidence alone is insufficient to meet its burden, citing *Sanctuary at Mcauley*, 359 NLRB No. 162 (July 10, 2013) and *G4S Regulated Security Solutions*, 358 NLRB No. 160 (2012). In both cases the Board found that introducing corrective action forms signed by the purported supervisors, without specific testimony regarding the circumstances that led to the issuance of the discipline, is insufficient to establish supervisory authority. However, in this case, the Employer did more than simply introduce disciplinary documents. Rather, the Employer provided evidence of specific situations where Charge Nurses exercised their authority and their discretion in deciding whether to verbally counsel or issue Level 1 written warnings. In addition, the Employer clearly established that it treats Level 1 warnings as the first step in the Employer's progressive discipline system. Thus, the cases cited by the Petitioner are inapposite to the facts present here. The fact that there is no evidence that any employee has or has not been terminated as a result of receiving multiple Level 1 written warnings does not alter the fact that they constitute

written discipline and lay the foundation for future discipline under the Employer's progressive disciplinary system.

My conclusion is not altered by the fact that the Director of Clinical Services investigates situations in which a Charge Nurse issues a Level 1 written warning to a CNA. Her investigation is not to determine whether the written warning is warranted. Moreover, the Level 1 written warning is never removed or invalidated as a result of this investigation. Thus, the evidence does not suggest that any manager above the Charge Nurses independently investigates the Charge Nurses' disciplinary decisions. Cf. *Sanctuary at Mcauley, supra*, slip op. at 2 (Board found LPNs did not have authority to discipline based in part, on the evidence demonstrating management's involvement in investigating, reviewing, and overriding severity of the corrective action). I am further persuaded by evidence that the Employer suspended and later discharged a Charge Nurse because she refused to issue Level 1 written warnings. It is clear that the Employer holds Charge Nurses accountable for disciplining CNAs.

Based on this evidence, I find that the Employer has met its burden of establishing that the Charge Nurses have the authority to discipline, using independent judgment, within the meaning of the Act.

On the other hand, I find the evidence does not establish that Charge Nurses suspend CNAs using independent judgment. While Charge Nurses have indeed suspended CNAs, they have done so in accordance with the Employer's established guidelines with regard to when to suspend. Thus, the Employee Coaching Plan makes clear that if an employee commits a Level 2 violation (which is clearly defined), the employee must be immediately suspended, pending an investigation. There is no

evidence that the Charge Nurses exercise discretion in deciding whether to suspend an employee, or in deciding under which circumstances to suspend an employee.

The Authority to Responsibly Direct

In *Oakwood Healthcare* the Board set forth the standard to be used in determining whether a putative supervisor has the authority to “responsibly to direct.” 348 NLRB at 691–692. Responsible direction means the individual must have employees “under” him/her and have the authority to direct those employees on what work to perform, and that individual must be “responsible” for the performance of this work by the employees. *Id.* at 691. To establish that the putative supervisor is “responsible,” the employer must establish that he/she is held accountable for the performance of the employees. *Id.* at 691–692. To establish accountability for purposes of responsible direction, it must be shown that the employer “delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.” *Id.* at 692. Finally, the putative supervisor must also exercise independent judgment in responsibly directing the work of the employees under him/her. Where tasks are highly regulated, repetitive, and well-known to the employees, the degree of independent judgment is reduced with directing employees in such tasks. *Id.* at 693.

Clearly Charge Nurses at the Employer are responsible for overseeing the CNAs working on their wings, making sure that they are doing the work properly, and taking corrective action under the Employee Coaching Program in response to performance issues or infractions. Moreover, it appears that the Charge Nurses use independent

judgment in assessing the work performance of the CNAs. While the work performed by CNAs may generally be well known to them, it varies from resident to resident depending on their needs. Moreover, each resident has an individual care plan. The critical factor, therefore, is whether the Charge Nurses are held accountable and face the prospect of adverse consequences if they fail to properly direct the CNAs.

I find there is sufficient evidence that the Employer holds the Charge Nurses accountable for directing the CNAs in the performance of their duties and responsibilities. First, the Employer holds them accountable by including their direction of work as one of the factors in their annual evaluations. The record is clear that Charge Nurses are evaluated based upon how they manage and direct the CNAs assigned to them. The record also contains testimony from the Director of Clinical Services, the Unit Managers as well as one of the Charge Nurses that Charge Nurses understand that they can be disciplined if they failed to properly oversee and direct the CNAs assigned to them. Cf. *Rockspring Development, Inc.*, 353 NLRB 1041, 1042 (2009) (Board declined to find accountability where the putative supervisor was never informed of the prospect of adverse consequences for the poor performance of their subordinates). Based on the foregoing, I find that the Employer has met its burden of establishing that the Charge Nurses responsibly direct the CNAs.

The Authority to Assign or Transfer

In *Oakwood Healthcare, Inc.*, the Board explains that assignment means designating an employee to a place (such as location, department, or wing), appointing an individual to a time (such as a shift or overtime period), or giving significant overall duties as opposed to discrete tasks. *Supra* at 689. The authority to make an

assignment does not by itself confer supervisory status—the putative supervisor must also use independent judgment when making such assignments. *Id.* at 692–693. This means that the individual must exercise authority that is free from the control of others, and make a judgment that requires forming an opinion or evaluation by discerning and comparing data. *Id.* Additionally, the judgment must “rise above the merely routine or clerical” for it to be truly supervisory, even if it is made free of control of others and involves forming an opinion by discerning and comparing data. *Id.*

There is no evidence that the Charge Nurses assign CNAs to particular shifts or times of work. Nor do Charge Nurses determine the number of CNAs who will work on each shift or in each hallway. Charge Nurses also do not approve requests by the CNAs to change or switch their shifts. There is no evidence that Charge Nurses can approve sick leave or vacation. They do not excuse absences or tardiness, nor is there any evidence that they monitor absenteeism.

The Employer contends that the Charge Nurses have the authority to let employees leave early. However, it appears that any decision made to allow employees to leave early is based on staffing levels. Under these circumstances, the record fails to establish that Charge Nurses use independent judgment when they allow CNAs to leave early. The Employer also contends that the Charge Nurses assign times for the CNAs to take breaks and lunches. However, the record reflects that the Employer has established the number of breaks for the CNAs and the length of their lunch periods, which apparently is set forth in the CNA’s collective-bargaining agreement. Moreover, not just Charge Nurses but also the Employer, are bound by the State’s staff-to-resident ratios, so any decisions with regard to break times would be

based on ensuring that those requirements are met. Therefore, even if the evidence clearly established that the Charge Nurses assigned breaks and lunch periods (and the record does not clearly establish this), such assignments are routine and do not require the use of independent judgment and, therefore, are insufficient to constitute assignment of work. *Springfield Terrace Ltd.*, 355 NLRB 937 (2010); *Los Angeles Water & Power Employees' Assn.*, 340 NLRB 1232, 1234 (2003).

The Employer also argues that, in the event of an unscheduled absence, the Charge Nurses have the authority to call available CNAs to see if they are willing to come into work. Calling in employees or randomly seeking volunteers in order to fill shift vacancies, without the authority to compel an employee to come to work, does not confer supervisory status on the individual. *Springfield Terrace Ltd.*, 355 NLRB 945-46. While Charge Nurses can mandate that CNAs work past their shifts if there is an absence, the record evidence does not make clear whether any independent judgment is needed in mandating employees to work beyond their shift ending times. The record does not establish the procedure the Charge Nurse follow in deciding who to mandate.

The Employer also argues that Charge Nurses are responsible for preparing the daily assignment sheets setting forth the specific tasks that the CNAs are to perform. There is no evidence regarding exactly how Charge Nurses prepare these sheets; therefore, there is insufficient evidence that it requires the use of independent judgment.

In addition to assignments, the Employer contends that the Charge Nurses have the supervisory authority to transfer CNAs. The record contains situations in which a male CNA was assigned to care for female residents, and when the female residents objected, and the Charge Nurse reassigned or transferred the CNA to the male wing to

care for male residents. Similarly, there were situations in which a resident did not want a particular CNA, or the CNA and the resident did not get along, and the CNA was reassigned. The Board has held that assignments based on expressed preferences, without regard to individualized assessments of the CNAs' skills in relation to the needs of the residents, are routine and do not require independent judgment. *Oakwood Healthcare, Inc.*, supra at 693; *Children's Farm House*, 324 NLRB 61, 64 (1997).

Based on the foregoing, I conclude that the Employer has failed to establish that the Charge Nurses possess the authority to assign or transfer CNAs, using their independent judgment.

The Authority to Evaluate CNAs

The Employer asserts that the Charge Nurses have the authority and responsibility to evaluate CNAs. Evaluating employees is not one of the twelve supervisory functions listed in Section 2(11) of the Act. Under Board law, an evaluation is evidence of supervisory status only if the evaluation affects terms or conditions of employment. *Pacific Coast M.S. Industries*, 355 NLRB 1422, 1423 fn. 13 (2010); *Extendicare Health Facilities, Inc.*, 330 NLRB 1377 (2000); *Cape Cod Nursing and Retirement Home*, 329 NLRB 233 (1999); *Bayou Manor Health Center*, 311 NLRB 955 (1993). There is no evidence the evaluations the Charge Nurses complete for the CNAs affect the CNAs' wages, hours, or other terms and conditions of employment. There is also no evidence that the Charge Nurses can reward a CNA for a positive review, or discharge a CNA for a poor review. There is also insufficient evidence to establish that their involvement in conducting the CNAs' 90-day probationary evaluations confers supervisory status.

Secondary Indicia

The Employer also presented secondary indicia of supervisory status. Evidence of secondary indicia alone is insufficient to confer supervisory status. *Springfield Terrace Ltd.*, 355 NLRB 937 (2010). On the other hand, there is evidence of secondary indicia that supports a conclusion that the Charge Nurses are statutory supervisors. It appears that Charge Nurses speak on behalf of management when they conduct periodic evaluations of the CNAs they oversee, particularly because they not only complete the evaluations, but also because they meet with the CNAs to discuss their strengths and weaknesses. A second factor that the Employer raises is that the Charge Nurses are the highest-ranking employees at the facility in the evenings after the Director of Clinical Services and the Unit Managers leave for the day until the following morning when they return. While not indicative of supervisory status by itself, the fact that Charge Nurses are the highest ranking employees for over half of each work day (and perhaps 24 hours/day on weekends) further supports finding them to be supervisors.

Conclusion

I conclude that the Employer has met its burden of proving that the petitioned-for units of LPNs and RNs are supervisors within the meaning of Section 2(11) of the Act based on their authority to discipline CNAs as well as their authority to responsibly direct, using their independent judgment. Because the petitioned-for units consist solely of supervisors, I order that the petitions both be dismissed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the National Labor Relations Board's Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001. The request for review must contain a complete statement of the facts and reasons on which it is based.

Procedures for Filing Request for Review: A request for review must be received by the Executive Secretary of the Board in Washington, D.C., by close of business **(5:00 p.m. Eastern Time)** on November 29, 2013, unless filed electronically. If filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Standard Time** on November 29, 2013. **Consistent with the Agency's E-Government initiative, parties are encouraged, but not required, to file a request for review electronically.** Section 102.114 of the Board's Rules do not permit a request for review to be filed by facsimile transmission. A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the Efiling system on the Agency's website at www.nlrb.gov. Once the website is accessed, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review will not be excused on the basis that the transmission could not be accomplished because the

Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Upon good cause shown, the Board may grant special permission for a longer period within which to file a request for review. A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of the time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

Signed at Milwaukee, Wisconsin this 15th day of November 2013.

/s/Marlin O. Osthus

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