

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

In the Matter of

1 BURR ROAD OPERATING COMPANY
II, LLC d/b/a WESTPORT HEALTH CARE
CENTER

Employer¹

and

NEW ENGLAND HEALTH CARE
EMPLOYEES UNION, DISTRICT 1199,
SERVICE EMPLOYEES
INTERNATIONAL UNION

Petitioner

Case 01-RC-114507

DECISION AND DIRECTION OF ELECTION

The Employer operates a 120-bed skilled nursing and long-term care facility in Westport, Connecticut (the Westport facility). The Petitioner seeks to represent a unit of about 24 full-time, regular part-time, and per diem licensed practical nurses (LPNs) at the Waterbury facility. The Employer contends that the petition must be dismissed on the ground that all of the petitioned-for LPNs function as charge nurses and, as such, are supervisors within the meaning of Section 2(11) of the Act. For the reasons set forth below, I find that the Employer has failed to satisfy its burden of establishing that the petitioned-for LPNs are supervisors with the meaning of Section 2(11) of the Act, and I shall direct an election in the petitioned-for unit.

This petition in this case was filed under Section 9(c) of the Act. The parties were provided an opportunity to present evidence on the issues raised by the petition at a hearing held before a hearing officer of the National Labor

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

Relations Board (the Board). I have the authority to hear and decide this matter on behalf of the Board under Section 3(b) of the Act. I find that the hearing officer's rulings are free from prejudicial error and are affirmed; that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction; that the Petitioner is a labor organization within the meaning of the Act; and that a question affecting commerce exists concerning the representation of certain employees of the Employer.

I. FACTS

A. Overview of Operations

The Westport facility is a nursing home that includes four nursing units: Riverside and Woodside on the building's second floor, and Fairfield and Saugatuck on the third floor. Riverside is a 30-bed unit for patients who have been discharged from the hospital and need short-term skilled rehabilitation or respite services before returning home. The remaining three units, each with 30 beds, serve residents who need long-term care.

The Westport facility, which is headed by Administrator Marion Najamy, has several departments: Nursing, Rehabilitation, Social Services, Activities, Admissions, Administration, Dietary, and Environmental Services, which provides housekeeping, laundry, and maintenance services. Each department has its own department head who reports to Najamy.

The Nursing Department is the largest department within the facility, with about 100 to 110 staff. The Department includes the 24 LPN charge nurses at issue, one MDS Coordinator who is an LPN, about 10 to 12 registered nurses (RNs), and one restorative aide. The balance of the nursing department employees are certified nursing assistants (CNAs).

The Nursing Department is headed by Director of Nursing Services (DNS) Loretta Tepper, who reports to Najamy and has been the DNS for two years. Tepper, who is an RN, oversees the facility's clinical operations. Tepper is assisted by Assistant Director of Nursing Services (ADNS) Betty Boe.² Tepper and Boe work Monday through Friday during the daytime. Both Tepper and Administrator Najamy are available on a 24/7 basis if needed.

The Nursing Department operates 24 hours a day using the three traditional nursing shifts: 7 a.m. to 3 p.m., 3 p.m. to 11 p.m., and 11 p.m. to 7 a.m. The Nursing Department employs six house supervisors, all of whom are

² The parties have stipulated, and I find, that DNS Loretta Tepper, ADNS Betty Boe, and MDS Coordinator Debbi Baker are statutory supervisors who shall be excluded from any unit found appropriate.

RNs. There is one house supervisor on duty at the facility during every shift to oversee the entire Nursing Department in the absence of the DNS and ADNS, and to provide clinical support to the charge nurses.³ On each of the three shifts, there is one charge nurse assigned to each of the four nursing units.⁴ The charge nurse may be either an LPN or an RN, and the responsibilities of the charge nurses are the same, regardless of their nursing degree.⁵ The number of CNAs assigned to each nursing unit varies according to the shift and the patient census, but there are generally three to four CNAs assigned to each unit on the day shift, two to three CNAs per unit on the evening shift, and one to two CNAs per unit on the night shift. On some shifts, a CNA may be designated as a “split,” i.e., a CNA who splits his or her time between two units. According to the job description for CNAs, they report directly to the charge nurse on their unit.

The service and maintenance employees at the Westport facility, including the CNAs, are currently unionized. The most recent collective-bargaining agreement covering the service and maintenance employees expired in 2011.

B. Assigning work to CNAs

Charge nurses play no role in assigning CNAs to their shifts, to their initial unit assignment, or to the particular functions they perform in the course of their shift. Rather, those assignments are made by Staffing Coordinator Litisha Broadus, who prepares a master schedule for the Nursing Department, as well as a daily attendance report that indicates which Nursing Department employees, including CNAs, will cover each unit during each shift. The daily attendance report also indicates which CNAs are assigned to work a “split” shift, (i.e., to split their time between two units), which CNAs will float, which CNAs are assigned to work as a “one-to-one” CNA for the shift (meaning they care exclusively for one particular resident), and which CNAs are assigned to transportation, (i.e., to accompany residents to doctors’ appointments during their shift).⁶

³ Regulations require the presence of an RN in the building 24 hours a day. On weekends and holidays, in addition to a house supervisor from the Nursing Department, the various department heads take turns being the “manager on duty” in the building.

⁴ Tepper testified that all LPNs work as charge nurses. When the census is high on the Riverside unit, two nurses are assigned to that unit, one working as the charge nurse for the unit and the other as a medication/treatment nurse who reports to the charge nurse. It does not appear that there are any LPNs who work exclusively as medication/treatment nurses and who do not also sometimes work as charge nurses.

⁵ In addition to the 24 LPNs at issue who work as charge nurses, there are 10 to 12 RNs who work as charge nurses. The Petitioner does not seek to include the RN charge nurses in the unit.

⁶ Either the scheduler, or the ADNS, or the house supervisor may designate which of the floating CNAs are assigned to perform the transportation function.

When CNAs are unable to work their scheduled shift, it is generally the staffing coordinator or house supervisor who makes calls to find a replacement, although charge nurses have done this at times. The order in which the CNAs are called is dictated by the terms of the collective-bargaining agreement covering the service and maintenance employees. Only house supervisors, and not charge nurses, have authority to permit CNAs to leave their shift early in the event of illness or other emergency.

Tepper testified that when a CNA fails to show up for work, charge nurses may notify the house supervisor, ADNS, or DNS that they need another CNA, talk to another charge nurse to inquire about getting help from another unit, redistribute the workload within their unit, or employ a combination of those options. As an example, she testified that on two occasions on the evening shift during the prior week, a charge nurse noticed that she had an extra CNA who could be better utilized on another unit, and she and the charge nurse from the other unit made the adjustment. Tepper testified about another recent instance in which she overheard charge nurse Clara Tamba on the phone with another charge nurse, Margaret, negotiating over whether CNA Marie Jean would work as a split between the Riverside and Woodside units or work full-time on Woodside. She testified that, although Tepper and the house supervisor were present during this conversation, the charge nurses did this on their own, they did not need the approval of any higher supervisors, and this happens almost every day. Tepper testified that, in the scenario when the two charge nurses were negotiating over CNA Marie Jean, the charge nurses would have considered the patient census, the acuity of the residents, and the strength or weakness of their CNAs, although she expects that every CNA in the facility has the skill and ability to perform each assignment.

Charge nurse Judith Francois testified that she has no authority to reassign CNAs to another unit without the approval of the house supervisor, DNS, or ADNS. She also testified that she witnessed the incident in which Charge Nurse Tamba called the Riverside charge nurse about CNA Marie Jean, because Francois was leaving her shift as this incident occurred. According to her version, Tamba, Tepper, House Supervisor Marie Theirsaint, and CNA Marie Jean were at the nursing station. The CNA asked the house supervisor if she would be working a split that day or staying on one unit. The house supervisor told Charge Nurse Tamba to call Riverside to see how many residents were on that unit and if they needed the half-time CNA.

With respect to the assignment of CNAs to care for particular residents, the charge nurses start each shift by completing an assignment sheet for their unit. The names of the residents are grouped into three or four columns, with each grouping of residents constituting a numbered "assignment." Although the names of the residents are pre-typed into the columns by a medical records clerk, Tepper testified that, with the exception of deleting the names of residents who have left the facility or expired, the clerk makes changes to the resident

groupings only at the direction of the charge nurses. Tepper does not need to approve the changes. Charge nurse Judith Francois testified that the resident groupings remain the same unless residents leave or pass away and that she has never asked the medical records clerk to change the pre-printed list.

The charge nurses assign each CNA to one of the resident groupings at the beginning of each shift. Francois testified that certain CNAs who are regulars on the shift get the same assignment every day that they work. As for the others, it is first come, first served.⁷ She acknowledged that some residents are more difficult to take care of than others, but testified that she can assign CNAs to any assignment, as the CNAs are all "equal." Sometimes Francois has only three CNAs instead of her full complement of three and a half CNAs. In that case, she has to change the groupings and divides the residents into groups of ten to equalize the work load.

Tepper testified that Francois' method of making assignments is not acceptable practice. She testified that charge nurses are expected to consider resident acuity and the skill set of particular CNAs when they make assignments, that all of the other charge nurses do so, and that several charge nurses have told her that they consider resident acuity levels and CNA abilities when they make assignments. For example, in a written statement supplied by a charge nurse with respect to a disciplinary matter after an argument with a CNA about her assignment, the charge nurse wrote that she made a small adjustment to the assignments by switching two residents between Assignment #2 and Assignment #3 to make it manageable for a newly-hired CNA working for the first time on the floor.

Break and lunch periods for the CNAs are listed on the assignment sheets. Tepper testified that charge nurses have authority to change the break times and that it happens every day. CNAs are to notify their charge nurses if they are unable to take their break at the predetermined time, so the charge nurses may adjust the break time in a manner that does not disrupt patient care.

C. Responsibly directing CNAs

Charge nurses provide nursing care for residents on their units by administering medications, treatments, and tube feedings; interacting with physicians, families, and hospitals; documenting care, modifying the residents' care plans, and generally overseeing the CNAs who work on their units. The CNAs provide direct care to residents, such as checking vital signs, and feeding, dressing, bathing, toileting, transferring, and weighing residents.

⁷ Francois appeared to testify, although it was not entirely clear, that the first CNA who arrives is assigned to assignment #1, and so on.

The job description for staff nurses, which applies to the LPNs, states that they direct the day-to-day function of other nurses and the CNAs. A document entitled "Charge Nurse Duties" states, *inter alia*, that the charge nurses "supervise all resident care...." and "supervise prompt response to residents' call lights."⁸ Francois testified that she sometimes asks a CNA to stop performing one task to perform another task that is more critical, and that the CNAs are supposed to follow her instruction when she does so.

Charge nurses note on the daily assignment sheets which residents in each CNA's assignment are to be weighed or showered. Francois testified that all residents must be weighed monthly between the first and fifth of the month and that, per policy, weekly weights for those residents who need them are always taken on Tuesdays. Usually the dietician or ADNS brings to the unit a list of the residents who need to be weighed that day. As for the showers, Francois takes information from a shower schedule that she does not create or change and transfers it to the assignment sheet. She changes the shower schedule only if a resident requests a shower, as it is the policy of the Nursing Department that residents are to be showered upon their request.

Residents request assistance from CNAs by using a call bell system. Pursuant to a policy at the facility, if the call bell system is not working, it is the responsibility of the charge nurse to direct the CNAs to make rounds every 15 minutes to check on the residents. Tepper testified that a charge nurse may deviate from this policy if necessary and that she has observed charge nurses use discretion to alter this policy slightly. For example, a charge nurse may direct a CNA to stay close to residents with feeding tube pumps in case of choking or aspiration, or direct one CNA to stay with residents who are more active while the other does the 15-minute checks. The call bell system malfunctioned about 14-15 times in 2011 and 2012 and never in 2013.

As evidence that the charge nurses are held accountable for the performance of the CNAs, the Employer submitted into evidence four documented "verbal notices" issued to charge nurses, two for failure to document required weights of residents and two for failure to give out evening snacks. Tepper testified that it is the charge nurses' responsibility to make sure that the CNAs perform these tasks. All four disciplinary notices were issued after the Union demanded recognition and filed the petition. The Employer also submitted into evidence a termination letter issued to probationary LPN charge nurse Cashaya Sanchez on October 4, 2012, before the demand for recognition and filing of the petition. Sanchez was terminated for numerous reasons, one of which was that she had directed a CNA to make an adjustment to a resident's tube feeding equipment, a task which, by law, may be done only by a licensed

⁸ Tepper testified that the list of charge nurse duties is handed out to new charge nurses during orientation and has also been handed out to incumbent charge nurses from time to time. Francois testified that she has never seen it.

nurse. Tepper testified that last year a nurse was disciplined for failing to properly supervise a CNA during a transfer. No documentary evidence of that discipline was submitted into evidence. Tepper testified that this was not an isolated incident, but she could recall no other examples of charge nurses disciplined for the performance of their CNAs.

Francois testified that she has never been disciplined as a result of poor performance by her CNAs, nor has she ever been informed that she could be. The annual performance evaluations of charge nurses are not tied to wage increases, and Francois has never been told that the performance of her CNAs could affect her wage increases.

D. Responsibly directing non-nursing department employees

Charge nurses give directions to some non-nursing department employees. In this regard, they call the kitchen to request that a dietary aide bring an alternate meal for a resident. They tell housekeeping employees to clean up spills or to clean a room in case of an unexpected admission or discharge. They call maintenance employees for assistance with maintenance issues on their units. They request rehabilitation aides to evaluate residents whose condition has deteriorated or to reeducate CNAs about the proper method of transferring residents. They request the medical records clerk in the administrative department to make changes in the typed assignment forms. Charge nurses do not need to check with the relevant department head before making such requests, and these employees are expected to comply with such requests. If an employee fails to comply with a charge nurse's direction, the charge nurse would bring the matter to the attention of the relevant department head.

The Westport facility maintains a policy that gives charge nurses responsibility over non-nursing department employees in the event of a staffing shortage due to an influenza pandemic. The Westport facility has also applied this policy when there have been staffing shortages caused by other types of catastrophic events, such as hurricanes or blizzards. In such situations, whoever is able to come in to work, including dietary, housekeeping, or maintenance staff, may be assigned to assist residents by performing tasks such as answering call lights, getting residents up, and feeding and toileting residents. In such situations, the charge nurses supervise the activities of these non-nursing department employees.

E. Evaluating CNAs

1. Annual written evaluations

Charge nurses perform annual written performance evaluations of the CNAs that work on their units. The evaluations include a numerical scoring

system in which the charge nurses assign a score to the CNAs that reflects their performance with respect to various criteria, and they add the scores to come up with a performance rating total. However, the evaluations have no impact on the wages of the CNAs, which are dictated by their collective-bargaining agreement, nor is there evidence that the evaluations have any other impact on the job status or working conditions of the CNAs.

2. Making recommendations regarding the retention of newly-hired CNAs

Newly hired CNAs undergo an orientation period that lasts about two weeks, during which they are assigned to work with a more experienced CNA. After orientation, there is a 60-day probationary period for full-time CNAs, and a more extended probationary period for part-time CNAs, after which Tepper and Administrator Najamy determine whether to retain the CNAs.

Tepper testified that charge nurses provide feedback about the performance of newly hired CNAs during their orientation and probationary periods to herself, ADNS Boe, and house supervisors, and that they make recommendations regarding the employment status of these new CNAs. Those recommendations carry "significant weight" because of the charge nurses' first-hand knowledge of the CNAs' performance. The more experienced CNAs who are assigned to work alongside CNA orientees also provide input about how a new hire is doing. In the case of negative feedback about a new hire during orientation, Tepper provides more help to the CNA, by working with the CNA one-on-one or by extending their orientation period for further review of the training.

Tepper testified about two instances in which charge nurses gave negative feedback about new CNAs. More than one charge nurse brought to Tepper's attention that a new can was not working out with respect to her skill set. That CNA's orientation period was extended, as was her probationary period, as she did show signs that she would eventually work out. Several charge nurses provided negative feedback about the performance of a probationary CNA, and she was not retained at the end of her probationary period.

F. Disciplining and effectively recommending discipline

Charge nurse Francois testified that, to her knowledge, she has no authority to discipline or to make recommendations for discipline.

DNS Tepper testified that charge nurses have authority to issue verbal discipline to CNAs who refuse to follow directions or fail to do what they are told. She provided no specific examples of any instance in which a charge nurse has issued verbal discipline to a CNA.

With respect to the role of the charge nurses in recommending discipline, the Employer submitted into evidence documentary evidence of two suspensions, about which Tepper testified. On May 1, 2012, Tepper suspended CNA Joan Henry, pending investigation, based solely on the report of a charge nurse that Henry had refused to give care to the residents to whom she was assigned. Tepper then completed her investigation, which included talking to Henry about the incident. The record does not reveal the outcome of Tepper's investigation, but Tepper testified that Henry never returned to work at the facility.

On July 29, 2012, Tepper suspended CNA Adeola Aragbada, because Aragbada tried to change her assignment without the involvement of her charge nurse, Del Pilar Delrosse, and was insubordinate, disrespectful, and threatening to Delrosse when Delrosse asked her about it. Charge nurse Delrosse called the house supervisor when the conflict escalated and, according to Delrosse's written account, Aragbada had made threats that made Delrosse feel she needed to contact the police. Tepper testified that, when she arrived at work that morning, she spoke with both Delrosse and Aragbada about the incident, and she sent Aragbada home. That morning, Tepper also spoke with the house supervisor who had been called in. As part of Tepper's investigation, she subsequently received written statements from both the CNA and the charge nurse involved, each of whom set forth their version of the incident, and Tepper also spoke to other employees who were witnesses to the incident. On August 3, 2012, after her investigation had been completed, Tepper issued a disciplinary notice to Aragbada in the form of a suspension without pay from July 29 to August 3, 2012.

G. Secondary indicia

DNS Tepper is a salaried employee, while the house supervisors, charge nurses and CNAs are hourly employees. LPN charge nurses start at about \$27 per hour, while CNAs start at about \$13 per hour. Charge nurses, but not CNAs, attend quarterly meetings with Tepper to talk about the facility in general and anything specific to their job. DNS Tepper and the house supervisors have offices, while the LPN charge nurses work at the nursing stations on their units.

II. ANALYSIS AND CONCLUSION

Pursuant to Section 2(11) of the Act, the term "supervisor" means 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 recommend such action, where the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. To qualify as a supervisor, it is not necessary that an individual possess all of the powers specified in Section 2(11) of the Act. Rather, possession of any one of

them is sufficient to confer supervisory status. *Chicago Metallic Corp.*, 273 NLRB 1677, 1689 (1985).

It is well-established that the burden of proof rests upon the party alleging that an individual is a supervisor. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 694 (2006); accord *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711-712 (2001). The party seeking to prove supervisory status must establish it by a preponderance of the evidence. *Oakwood Healthcare*, supra. The Board is reluctant to confer supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act. *Id.*, at 688; *Vencor Hospital – Los Angeles*, 328 NLRB 1136, 1138 (1999); *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995). The Board has found that a particular indicium of supervisory status has not been established if the evidence is in conflict or otherwise inconclusive regarding that indicium. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Mere inferences or conclusionary statements without detailed, specific evidence of independent judgment are insufficient to establish supervisory authority. *Volair Contractors, Inc.*, 341 NLRB 673, 675 (2004); *Sears Roebuck & Co.*, 304 NLRB 193 (1991). Indeed, a lack of evidence is construed against the party asserting supervisory status. *The Wackenhut Corp.*, 345 NLRB 850, 854 (2005).

There is no contention and no evidence that charge nurses have authority to hire, lay off, recall, or promote CNAs or to adjust their grievances or to effectively recommend such actions. Thus, the sole bases upon which the Employer relies in contending that the LPN charge nurses are supervisors under Section 2(11) of the Act is their purported authority to assign, responsibly direct, discipline, recommend discipline, evaluate, and recommend the retention of CNAs, and to responsibly direct non-nursing department employees, along with secondary indicia of their supervisory authority. I find that the Employer has failed to satisfy its burden of establishing that the LPN charge nurses possess such authority.

A. Assigning work

In *Oakwood Healthcare*, supra, the Board announced that, in assessing supervisory status, it construes the term “assign” to refer to “the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” *Id.* at 698. The Board held that to establish that an individual possesses supervisory authority with respect to any of the statutory functions, the individual must also exercise independent judgment in exercising that authority, which depends on the degree of discretion with which the function is exercised. “[T]o exercise independent judgment, an individual must at a minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” *Id.* at 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.* The degree of discretion exercised must rise above the “routine or clerical.” *Id.*

There is no contention by the Employer that LPN charges assign CNAs to a time, as they play no role in scheduling CNAs for their shifts or in permitting them to leave early. I find that the charge nurses’ role in rescheduling predetermined break times is too minor a function to confer supervisory status.

The Employer contends that the LPN charge nurses are statutory supervisors by virtue of their authority to assign CNAs to care for specific residents and to decide among themselves to reassign a CNA to another unit. Charge nurses clearly assign a resident grouping to CNAs at the start of each shift. However, Tepper and Francois gave differing versions of the nature of the judgment used by the LPNs in making such assignments. Francois testified that she gives the “regulars” the same assignment every day, that the remaining CNAs receive their assignments on a first-come, first-served basis, that all CNAs are “equal,” and that if she is short a CNA, she divides the residents up in a manner that equalizes the workload. The Board has held that assignments made solely to equalize the workload do not require independent judgment. *Oakwood Healthcare*, supra at 693. Tepper testified that, contrary to Francois’ testimony, charge nurses are expected to and have told her that they do consider resident acuity and the skill set of particular CNAs when they make assignments. The Employer also submitted a write-up by a charge nurse in a disciplinary matter indicating that she had made a small adjustment in assignments to make it manageable for a new-hired CNA. As noted above, the Board has found that a particular indicium of supervisory status has not been established if the evidence is in conflict or otherwise inconclusive regarding that indicium. *Phelps Community Medical Center*, supra. In light of the conflicting evidence, the Employer has failed to satisfy its burden of establishing that charge nurses exercise independent judgment in making assignments, particularly where the Employer’s evidence about the charge nurses’ actual practice consists solely of hearsay. See e.g., *Sanctuary at McAuley*, 359 NLRB No. 162, slip op. at 3-4 (2013)(disciplinary notices insufficient to establish supervisory status where the employer failed to call the individuals who signed the notices to testify and relied only on the testimony of the Director of Nursing); *G4S Regulated Security Solutions*, 358 NLRB No. 160 (2012)(same).

The evidence is similarly in conflict about the authority of the LPN charge nurses to make agreements between themselves, without approval by higher management, to reassign CNAs from one unit to another. Tepper asserted that the CNAs have such authority and described an incident in which she overheard Charge Nurse Tamba engage in such a negotiation over the phone with another charge nurse. She also testified that twice during the prior week, two charge nurses had negotiated the reassignment of a CNA from one unit to another.

Francois testified that she has no authority to do so without the approval of the house supervisor and that, during the incident described by Tepper involving Tamba, she overheard the house supervisor direct Tamba to call the other unit to see if the half-time CNA was needed there. As for the independent judgment required to make such agreements, Tepper testified that the charge nurses would consider the patient census, the acuity of the residents, and the abilities of their CNAs, although she also testified that she expects every CNA in the facility to have the skill and ability to perform each assignment. In light of the conflicting evidence, and in the absence of testimony by charge nurses who have actually negotiated such agreements about the factors they consider in doing so, the Employer has failed to satisfy its burden of establishing that the charges nurses utilize independent judgment in reassigning charges nurses from one unit to another.

B. Responsibly directing CNAs

With respect to “responsible direction,” the Board explained in *Oakwood Healthcare* that, if a person has “men under him” and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both “responsible” and carried out with independent judgment. For direction to be “responsible,” the person directing the oversight of the employee must be accountable for the performance of the task by the other. To establish accountability, it must be shown that the employer delegated to the putative supervisors authority to direct the work and to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisors if they do not take these steps. *Id.* at 689-692.

I find that the charge nurses direct CNAs, in that they delegate certain tasks to them, but the Employer has failed to adduce any evidence demonstrating that the charge nurses exercise independent judgment in delegating and overseeing those tasks. The charge nurses direct CNAs to weigh or shower residents pursuant to schedules set by others or pursuant to the facility’s policy that residents are to be showered upon request. When the call bell system fails, they direct CNAs to make rounds every 15 minutes pursuant to another facility policy, which was never even used in 2013. The Employer presented no evidence about the types of judgments that the charge nurses make in directing CNAs to feed, dress, or toilet residents, or to stop performing one task to perform another task that is more critical, and there is no evidence to suggest that any such directions are anything more than routine. *Croft Metals, Inc.*, 348 NLRB 717, 722 (2006) (lead persons do not exercise independent judgment in directing employees, where the employees generally perform the same job or repetitive tasks on a regular basis and, once trained in their positions, require minimal guidance, and the employer adduced almost no evidence regarding factors weighed or balanced by the lead person in directing employees).

Further, the Employer has failed to demonstrate that LPN charge nurses are held accountable for the work of their CNAs and face the prospect of a reward or punishment as a consequence of the manner in which CNAs on their unit perform. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). The charge nurses receive no merit increases based on their own evaluations. As evidence that the charge nurses are held accountable for the performance of the CNAs who report to them, the Employer relies on the termination of Charge Nurse Sanchez in 2012 for, among other reasons, directing a CNA to adjust a feeding tube, a task which may only be performed by a licensed nurse. This incident demonstrates only that Sanchez was held accountable for her own misconduct in issuing such a direction to a CNA, not that she was held accountable for the poor performance of the CNA. *Oakwood Healthcare*, supra at 695 (discipline of charge nurse for failing to make fair assignments is insufficient to establish responsible direction, as it shows that charge nurses are accountable for their own performance, not the performance of others). As further evidence of accountability, the Employer relies on four verbal warnings issued to charge nurses over the failure of their CNAs to weigh residents or distribute snacks. I decline to rely on discipline issued to charge nurses only after the Union demanded recognition and filed the petition in this matter, particularly in the absence of any evidence that charge nurses have ever been held accountable for the performance of the CNAs in the past.

C. Responsibly directing non-nursing department employees

I reject the Employer's contention that its charge nurses are the statutory supervisors of employees in other departments, such as the maintenance, housekeeping, dietary, and rehabilitation departments. These employees report to supervisors in their own departments but provide services to the nursing department as well as other departments. Although charge nurses clearly make requests of the maintenance and housekeeping staff to make repairs or clean a room, the charge nurses' relationship to the maintenance workers and housekeepers is more akin to that of client or a customer than a supervisor. If the Employer's contention is followed to its logical conclusion, individuals from any other department, such as the Activities, Social Services, or Dietary Department, who ask maintenance employees to make a repair, are the supervisors of those maintenance employees. Nor are the charge nurses supervisors by virtue of their role in directing these non-nursing department employees to care for residents during staffing shortages in emergency situations. There is no evidence that such emergencies occur with any frequency, nor any evidence that the charge nurses are held accountable for the performance of those employees in such situations.

D. Evaluating CNAs

1. Annual written evaluations

Authority to evaluate is not one of the Section 2(11) indicia of supervisory status. *Elmhurst Extended Care Facilities, Inc.* 329 NLRB 535, 536-537 (1999). Rather, when an evaluation does not by itself affect the wages and/or job status of the employees being evaluated, the individual preparing such an evaluation will not be found to be a statutory supervisor on the basis of the evaluation. *Franklin Home Health Agency*, 337 NLRB 826, 831 (2002); *Harborside Health Care*, 330 NLRB, 1334, 1334 (2000). The Board has held that nurses are statutory supervisors on the basis of preparing evaluations only when there is a direct correlation between the evaluations that they prepare and merit increases received by the evaluated employees. *Trevilla of Golden Valley*, 330 NLRB 1377, 1378 (2000); *Hillhaven Kona Healthcare Center*, 323 NLRB 1171 (1997). Here, the CNAs do not receive merit raises; rather, their wage increases are controlled by their collective-bargaining agreement. I conclude, therefore, that the role played by the charge nurses in evaluating CNAs does not confer supervisory status on the charge nurses.

2. Making recommendations regarding the retention of newly-hired CNAs

The Employer asserts that the charge nurses' role in providing feedback about the performance of newly-hired CNAs and making recommendations about their retention confers supervisory status. I note that there is no documentary evidence in the record of such feedback or recommendations by a charge nurse. In the two specific examples described by Tepper, she testified that charge nurses gave negative feedback about two newly-hired CNAs, but there is no evidence that the charge nurses made any specific recommendation about what should happen to either of them. Assuming that the charge nurses did make specific recommendations and that the recommendations were followed, the Employer has failed to demonstrate that Tepper relied exclusively on those recommendations, without any independent investigation, before deciding to extend the orientation and probationary periods of the CNAs in question.

E. Disciplining and effectively recommending discipline

The Employer asserts that charge nurses have authority to discipline CNAs for performance issues by means of verbal warnings and counseling. The Employer submitted no documentary evidence that CNAs have ever issued such warnings, and Tepper testified only generally that they have such authority without providing any specific example of a charge nurse who had actually done so. Assuming that such minor disciplinary authority would be sufficient to confer supervisory status, general testimony asserting that employees have supervisory

responsibilities is not sufficient to satisfy the burden of proof in the absence of specific evidence supporting the testimony. *Avante at Wilson*, 348 NLRB 1056, 1057 (2006).

The Employer asserts that the charge nurses have authority to effectively recommend discipline. It is well established that authority to “effectively recommend” an action “generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed. *DirectTV*; 357 NLRB No. 149, slip op. at 3 (2011); *Children’s Farm Home*, 324 NLRB 61, 61 (1997). In order for discipline issued by an individual to confer supervisory status, the discipline must lead to personnel action without independent investigation or review by other management personnel. *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002); *Beverly Health and Rehabilitation Services*, 335 NLRB 635,664 (2001), enfd. in pertinent part, 317 F.3d 316 (D.C. Cir. 2003).

The Employer has failed to satisfy its burden of establishing that charge nurses have the authority to effectively recommend discipline. In the two disciplinary incidents relied on by the Employer to demonstrate such authority, i.e., the suspensions of CNAs Joan Henry and Adeola Aragbada, the only record evidence is that the charge nurses involved in each incident reported the facts surrounding the CNAs’ alleged misconduct to the DNS; there is no evidence that the charge nurses recommended that the CNAs be suspended or made any particular recommendation regarding the appropriate level of discipline. The Board has declined to find supervisory status where the charge nurses’ role is merely reportorial and they make no recommendation as to what discipline, if any, should be imposed. *Loyalhanna Care Center*, 332 NLRB 933, 934 (2000); *Illinois Veterans Home*, 323 NLRB 890, 891 (1997). Further, the DNS did not rely exclusively on the charge nurses’ version of events in ultimately determining to impose suspensions, but independently investigated each incident by first talking to the CNAs and, in the case of Aragbada, to the house supervisor and other employees who witnessed the incident. *Sanctuary At Mcauley*, 359 NLRB No. 162, slip op. at 3 (2013)(heavy involvement of upper management in independently investigating corrective actions precludes a finding that unit managers have authority to discipline or effectively recommend it.

F. Secondary indicia

The Employer asserts that LPN charge nurses are statutory supervisors because they are higher paid than CNAs and attend quarterly “management” meetings with Tepper. These factors fall within the category of secondary indicia of supervisory status, which cannot confer supervisory status in the absence of evidence that the LPN charge nurses possess any of the primary indicia of supervisory status enumerated in Section 2(11) of the Act. *Golden Crest Healthcare Center*, 348 NLRB 727, 730 fn. 10 (2006); *Ken-Crest Services*, 335 NLRB 777, 779 (2001). Since there is insufficient evidence to establish that the

LPN charge nurses possess any of the primary indicia of supervisory status, there is no basis to conclude that they are supervisors based upon such secondary indicia.

Accordingly, I find that the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time, regular part-time, and per diem licensed practical nurses employed by the Employer at its Westport, Connecticut facility, but excluding all other employees, registered nurses, professional employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by **New England Health Care Employees Union, District 1199, Service Employees International Union**. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining whether there is an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **December 18, 2013**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website, www.nlr.gov,⁹ by mail, or by facsimile transmission at 617-565-6725. To file the eligibility list electronically, go to the Agency's website at www.nlr.gov, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01

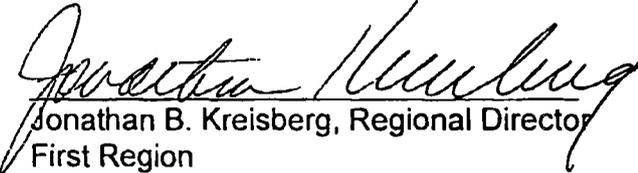
⁹ To file the eligibility list electronically, go to www.nlr.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu, and follow the detailed instructions.

a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by **December 26, 2013**. The request may be filed electronically through the Agency's website, www.nlr.gov, but may not be filed by facsimile.

DATED: December 11, 2013



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