

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

WEST LIBERTY NURSING & REHABILITATION CENTER ^{1/}

Employer

and

Case 9-RC-120950

UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL SERVICE WORKERS
INTERNATIONAL UNION

Petitioner

REGIONAL DIRECTOR'S DECISION
AND
DIRECTION OF ELECTION

I. INTRODUCTION

The Employer, a corporation, is engaged in the operation of a long-term care nursing home in West Liberty, Kentucky. The Petitioner filed a petition with the National Labor Relations Board (Board) under Section 9(a) of the National Labor Relations Act (the Act) seeking to represent a bargaining unit consisting of all full-time and part-time RNs, PRNs, LPNs, Aides, CNAs and Dietary employees, excluding all guards and supervisors as defined in the Act. At the hearing of this matter, the parties stipulated that the Activities Aide should be included in the unit. The Employer, contrary to the Petitioner, contends that the LPNs and RNs are supervisors as that term is defined by Section 2(11) of the Act and should be excluded from any appropriate unit found. An additional issue is whether Brian Hampton, the Employer's maintenance manager, should be included in the unit. The Employer contends that the maintenance manager should be excluded from the unit because he is a supervisor within the meaning of Section 2(11) of the Act or because he lacks a sufficient community of interest with the employees in the unit.

For the reasons stated more fully below, I conclude that the record evidence does not establish that the LPNs and RNs are supervisors within the meaning of the Act. Further, I conclude that the evidence does not establish that the maintenance manager is a supervisor within the meaning of the Act. As shown below, the LPNS, RNs and maintenance manager share a sufficient community of interest with the other employees in the unit found appropriate to warrant their inclusion. In explaining how I came to my determination on these issues, I will describe the Employer's operations, discuss the duties of the employees in the unit found

^{1/} The name of the Employer appears as amended at the hearing.

appropriate, set out the applicable legal precedent, and then analyze the issues in relation to that precedent. There are approximately 50-60 employees in the bargaining unit that I have found to be appropriate. The record reflects that there is no history of collective bargaining for these employees.

II. FACTUAL OVERVIEW

A. The Employer's Operations:

The Employer's facility has a two story building with approximately 50 beds for residents. The building has four ends with 12 to 13 residents per end. Half of the building is designated as a skilled care area and the other half is unskilled. The highest ranking official on site is Administrator Pam Burton. Under Burton is the DON, Sandra McGuire, Maintenance Manager, Brian Hampton, Bookkeeper, Darlene Taulbee, Office Business Manager, Beverly Stamper, and Medical Records Staff, Angela Fannin. Ordinarily, there is a RN supervisor under the DON. The position was vacant at the time of the hearing. When there is a RN supervisor, the DON and RN Supervisor oversees the entire nursing staff, which consists of a mix of 8-10 RNs and LPNs, who are collectively referred to as floor nurses, and 25-30 CNAs.

The DON usually works Monday through Friday from 9:00 a.m. to 5:30 p.m. The DON, RN Supervisor, Activities Director, MDS Coordinator, Dietary Manager, Social Worker, Office Manager, Medical Records Manager, and Bookkeeper rotate the duty of being the "manager on duty." The manager on duty serves from 5:00 p.m. until 7:00 p.m. on weekdays and for 4 hours each on Saturdays and Sundays. The primary function of the manager on duty is to deal with family members who raise concerns during off hours. During night and evening hours a manager is always available by phone in the event of an emergency or even a non-routine issue.

The RN and LPN floor nurses work 12-hour shifts which run from 6:30 a.m. to 7:00 p.m. and from 6:30 p.m. to 7:00 a.m. The CNAs work 8-hour shifts. The day shift for CNAs is from 6:30 a.m. to 2:30 p.m.; the evening shift is from 2:30 p.m. to 10:30 p.m.; and the night shift is from 10:30 p.m. to 6:30 a.m. The day shift is ordinarily staffed by 2 floor nurses and 7 CNAs (including 2 bath aides and 1 restorative aide). The evening shift is ordinarily staffed by 2 floor nurses and 4 CNAs. The night shift is ordinarily staffed by 1 floor nurse and 2 CNAs. The Employer has two certified medical techs (CMTs)^{2/}, one of whom comes on duty between 2:30 p.m. and 3:30 p.m. each day. There are 8-10 dietary employees who work exclusively in the dining room and the kitchen, preparing and serving meals for the residents.

B. Job Duties of the RNs, LPNs and CNAs:

It is undisputed that the Employer's RNs and LPNs (who are collectively referred to herein as floor nurses) essentially perform the same work, although there are some treatments and medications that RNs are licensed to administer that LPNs are not, e.g. accessing a resident's port to administer medications. Regulations require that a RN be on duty 8 hours out of the day, but the presence of any RN, including the DON, can satisfy this requirement. The floor nurses

^{2/} The parties agree that the CMTs should be included in any unit I find to be appropriate.

provide medication, treatments to residents, and consult with an outside nurse practitioner and physician who visit the Employer's facility weekly and bi-weekly, respectively. When there was an RN supervisor, she accompanied the nurse practitioner or physician as they made their rounds. This duty is presently performed by a floor nurse because of the vacancy in the RN supervisor position. The floor nurses also spend part of their shift at a nurses' station. CNAs assist the residents with activities of daily living, walk the residents to the dining room and stay with them in the dining room.

Patricia Gilbert, an RN floor nurse who usually works the day shift, testified at the hearing of this matter about a typical shift. When Gilbert comes to work, she reviews a shift report from the night shift nurse. Gilbert then administers medication to residents from 7:00 a.m. to 9:00 a.m. and she charts from 9:00 a.m. to 10:00 a.m. The Employer's managers, including the DON, the administrator, the activities director and the social services manager, have a meeting every morning.^{3/} Following the meeting, a form with any concerns that came up in the meeting, such as notifying a resident's family about an issue or incident, is generated and given to the nurses. The floor nurses spend about an hour addressing the issues on this form. Following this, the nurses make additional medication passes and finish their charting. Gilbert makes 4 medication passes per shift. The floor nurses use a small computer called a Toughbook to check off various tasks such as administering the required medications to the patients as they go about their duties. If the family of a resident makes a complaint after 5:00 p.m., Gilbert will bring the situation up to the manager on duty if she is still there or call the DON or RN Supervisor if the manager on duty has left for the day.

Sandi Stephens, a LPN floor nurse who typically works the night shift, also testified about a typical shift. Stephens testified that a typical shift begins with reviewing a shift report from the prior shift, spending 2 hours administering medication and finger sticks to check glucose levels and the rest of her shift is spent checking on residents and doing treatments such as changing bandages. She also stocks medicine carts, changes oxygen tanks and counts narcotics. Stephens testified that she is unsupervised on the night shift, but that a manager is available by phone if she needs assistance or guidance. Stephens testified that as she goes about her duties, the CNAs report the residents' vital signs to her and inform her if there are any issues with the residents. Stephens assists CNAs by helping them turn the residents in bed and giving medication to residents who have become combative.

Sandra Barker, a dayshift CNA, also testified about a typical shift working for the Employer. Barker testified that she starts her day by getting patients out of bed for breakfast, dressing them, taking vital signs, passing breakfast trays and picking up the trays when breakfast is over. CNAs record the patients' vital signs on a sheet at the nurses' station. After breakfast, CNAs assist with showers. After this, they start taking 30 minute scheduled lunch breaks in rotation. After they have had lunch, the CNAs distribute lunch trays to the residents and then pick them up when lunch is over. Following lunch service, CNAs lay down the residents who need rest and escort residents to the restrooms or change residents who are incontinent. As they perform their duties, CNAs use a kiosk in the hallway to check off their duties for each resident and to enter information such as whether a resident took a bath and how much food they consumed.

^{3/} The floor nurses do not attend this meeting.

Assignment of Work to and Responsible Direction of CNAs

CNAs have regular assignments and are responsible for certain wings of the facility every day. McGuire testified in summary fashion that the floor nurses could re-assign CNAs to different wings, but RN Gilbert and CNA Barker testified that if these assignments are changed for some reason, the decision is made by the DON or RN Supervisor – not the floor nurses. CNA Barker has worked for the Employer since June 2012 and testified that she has never had her area of responsibility changed by a floor nurse. According to Gilbert, the RN Supervisor and the DON direct the floor nurses and the CNAs on day shift and inform them if a patient's care plan changes. Barker testified that there is no policy regarding who the CNAs go to if they have questions or need help and that, as a practical matter, they may go to the DON or the floor nurses for assistance with issues such as a resident with a skin infection. According to Barker, she does not rely on any direction from the floor nurses in performing her day-to-day duties. If a resident has a medical problem, Barker informs a floor nurse. If a problem arises with a co-worker, Barker goes to the RN Supervisor or the DON. Gilbert testified that she may ask a CNA to get the vital signs on a sick patient prior to performing other duties. DON McGuire testified that the floor nurses enter e-care plans (individualized plans of care for each resident) into a computer at the nurses' station and CNAs refer to touch screen tablets at the CNA kiosks to check off their performance of these duties. Barker testified, however, that the kiosks are used to check routine tasks such as noting the amount of food consumed by residents or whether a patient was bathed.

Floor nurses Stephens and Gilbert and CNA Barker all testified unequivocally that floor nurses are not held accountable for the failure of CNAs to properly perform their duties. DON McGuire testified that if a CNA has failed to perform a required task, she will either tell the CNA to fix the issue herself or notify a floor nurse so that the floor nurse can instruct the CNA to fix the issue. There was no evidence that the floor nurse is held accountable if the CNA fails to correct the issue. Gilbert testified that when the manager on duty is present, the manager inspects the facility with a checklist, checking for things such as call lights, water pitchers, straws, bed rails and the height of the beds. According to Gilbert, if the manager on duty notices that something is incorrect, she goes directly to the CNA who is responsible for the area in question to fix the issue.

The testimony of the floor nurses and CNA Barker about their actual experience contrasts with the job descriptions for their positions. In this regard Barker's job description states that CNAs report to the charge nurse.^{4/} Gilbert signed a job description which refers to her role as that of a charge nurse. Gilbert testified, however, that no one actually refers to her by this title and that she is commonly called a floor nurse. The LPN job description notes that the incumbent is to assist in planning, supervising and instructing CNTs^{5/}, to assign daily work assignments and to coach, counsel and discipline CNTs and ensure that personnel policies are followed. Additionally, certain directives have been issued suggesting that the floor nurses have some responsibility for the CNAs. On December 2, 2013, DON McGuire conducted an in-service where her notes reflect that she informed nurses that they are responsible for monitoring CNAs' work and that the nurses are to address issues that arise at the time. The in-service notes go on to state that if the nurse does not address the issue, it will be addressed with the nurse. McGuire did

^{4/} Barker testified that she interprets the charge nurse to be the RN Supervisor or the DON.

^{5/} CNTs are a subspecialty of CNAs.

not testify about this and neither Stephens nor Gilbert recalled it. According to McGuire's notes, which Stephens did verify, McGuire also told the nurses at the in-service that CNAs were not to be sitting at the nurses' station and that nurses were to police this. On September 25, 2013, Administrator Burton issued orders to all nurses to check residents' alarms for proper placement and function and to take appropriate action with the aide if an alarm was not turned on or in place.

Scheduling, Absence Reports and Adjustment of Time

Stephens testified that a CNA on light duty presently does the scheduling of nurses and CNAs for the Employer. The RN supervisor did the scheduling prior to the light duty CNA taking over this function. The DON decides whether to grant leave requests. Gilbert testified that CNAs have approached her wanting to leave early, but that she always directs them to the RN Supervisor or the DON to make this decision.

If CNAs call off work, they call in to the floor nurse on duty. Blank "absence reports" are kept at the nursing station. Every time a nurse or CNA calls in, a report is filled out by the floor nurse on duty and placed in the DON's office. The DON then puts them in the employee's personnel file. The absence report notes how the absence was reported (e.g. by phone) and the reason for the absence. There is no place on the form to recommend what, if any, kind of action should be taken about the absence. The DON tracks the time of the employees and if an employee calls off work more than 3 times in a 90-day period, she receives a write up.

McGuire testified that the floor nurse on duty is responsible for finding coverage for absences by calling to see if someone will come in. According to McGuire, if no one can come in, the floor nurse can determine to use a bath aide or restorative aide to cover or can require someone from prior shift stay over. In contrast, Gilbert testified that if a CNA or floor nurse calls off, she reports this to the DON or RN Supervisor, who decides what to do about the situation. Gilbert further testified that she has no authority to mandate overtime or to call in another employee. LPN Stephens testified that when a CNA calls off, she calls the RN Supervisor, who directs her to call in another employee or have the bath aide or restorative aide cover the absence. When a floor nurse calls off, the RN Supervisor directs the floor nurse on duty to call someone from the "call in list" or use someone else to cover the absence. According to Stephens, only the RN Supervisor, DON or Administrator can assign overtime. Barker's testimony corroborates that of Gilbert and Stephens. She testified that the RN Supervisor and DON are the only personnel who have ever required her to work overtime.

The Employer's time clock automatically deducts 30 minutes for lunch, but CNAs can fill out a form called a time worked adjustment form if they work part or all of their lunch and this form must be signed by a floor nurse. Adjustments can also be made for issues such as working prior to scheduled shift, not clocking out properly, etc. According to DON McGuire, it is the floor nurse's responsibility to ensure that the CNA requesting an adjustment actually works the time. A CNA who works through lunch is not required to seek prior approval. Nurses are empowered to adjust their own time and submit the adjustment directly to the business manager. LPN Stephens testified that when CNAs come to her asking for their time to be adjusted, she simply takes them at their word and fills out the form. In answer to a hypothetical question, Stephens said that if an employee asked for a time adjustment and Stephens had knowledge that the adjustment was inaccurate, she would probably sign the form and then inform Stamper of the

situation because the forms are turned in to her. Gilbert also testified that she fills out and signs the time clock adjustment forms as a matter of course, without any independent investigation. Barker corroborated the testimony of Stephens and Gilbert, testifying that if her time needs to be adjusted, the floor nurse signs the form without performing any investigation.

Discipline

DON McGuire testified that if a floor nurse becomes aware of an issue of concern with a CNA, she is empowered to fill out an "Employee Corrective Action Report" (known as a "write up"), discuss the issue with the CNA in the presence of a witness (another nurse or a manager), have the CNA sign the report and then turn the report into the DON. Blank Employee Corrective Action Reports are kept in a file cabinet at the nurses' station. The Employer introduced 20 Employee Corrective Action Reports into evidence. Only 3 of these forms were from 2013, the rest were from earlier years. The reports reflect issues such as, failure to empty urinals, leaving lunch trays in the residents' rooms, smoking in improper areas, and failing to change residents' undergarments. The reports do not contain any recommendation for discipline. According to McGuire, as DON, upon receiving a copy of a write up, she performs no additional investigation, of the incident, but reviews the CNA's file to determine what discipline is already on record. Based on this, the DON decides what level of discipline to issue and informs the CNA. The Employer has a progressive discipline policy which specifies different disciplinary progressions for different offenses. Group 1 offenses, such as patient abuse, fighting, etc. ordinarily result in termination on a first offense. Group 2 offenses, such as leaving the work area without permission, failing to report a workplace injury to a supervisor, etc. ordinarily lead to a 1-day unpaid suspension followed by termination. Group 3 offenses such as disruptive behavior while on duty or failure to obtain authorization prior to working overtime ordinarily lead to a verbal warning, followed by a written warning, then a 1 day unpaid suspension and then termination. The steps in the disciplinary process are not automatic, however, e.g. termination does not always follow suspension. The DON and Administrator exercise discretion in deciding what level of discipline to impose.

Floor nurses Stephens and Gilbert testified that they are not empowered to discipline fellow floor nurses or CNAs, but that they do report incidents of which they become aware. Stephens testified that if she has an issue with a CNA or a fellow floor nurse, she goes to the RN Supervisor or the DON to address the situation. Stephens testified that she has been asked to give a witness account when unusual incidents occur, such as a time when a television was missing. Stephens testified about an issue where a CNA complained to her that she had reported that a resident had a skin tear to another floor nurse and that the floor nurse would not take care of the skin tear. Stephens cared for the patient's skin tear and then reported the incident to the DON, but made no recommendation as to how it should be addressed. Similarly, Gilbert has written witness accounts of incidents occurring at work, such as a time that a CNA was accused of using profanity around a resident, but she made no recommendation as to what should be done about the situation. Stephens filled out a "First Report of Injury or Illness" when employee Crystal Helphenstine injured her wrist at work. Stephens filled out the report by reading the questions to Crystal and taking her answers at face value. Stephens signed on a line marked "supervisor's signature."

Although LPN floor nurse Monica Holbrook did not testify at the hearing of this matter, the Employer introduced her performance appraisal dated February 24, 2013, which noted that

she is unwilling to maintain consistent enforcement of rules and demonstrates little leadership over the staff. It is not clear from the record what rules Holbrook was supposed to enforce or how she was expected to go about enforcing them. It is likewise unclear what the reference to leadership is about.

Evaluations

The Employer uses a pre-printed evaluation form to evaluate both floor nurses and CNAs. The forms consist of various criteria for which the employee is rated as: “exceeds expectations, meets expectations or not meeting expectations” There is a small area for comments next to each criterion. Additional space is provided for the reviewer to address more open ended issues such as the employee’s strongest and weakest traits. Evaluations are used in deciding such matters as whether to give raises or employee promotions. However, raises and promotions are not specifically recommended on the evaluation. Additionally, it does not appear from the record that there is any particular formula that is used in determining rewards or consequences for an employee’s positive or negative evaluation. Poor performance evaluations can lead to the discharge of probationary employees, but this is the decision of the DON and Administrator. Floor nurses are evaluated by the RN Supervisor or the DON. The floor nurses occasionally write performance evaluations of CNAs. Gilbert testified that on one occasion, the DON told her to complete two evaluations of CNAs at a time when the Employer was short-staffed. These are the only evaluations that she has performed in her approximately 4 years at the facility. Gilbert filled out the evaluation forms, but made no recommendation as to whether any personnel actions should be taken based on the evaluations. The RN Supervisor once asked Stephens to evaluate a CNA because the RN Supervisor was behind and did not have time to do it herself. The RN Supervisor told Stephens to record her observations of the kind of job that the CNA had done when they worked together. Stephens was not asked to make any recommendations for personnel actions based on the evaluation. After floor nurses perform evaluations, they give them to DON, who does no additional independent evaluation. The DON then reviews the performance evaluation with the CNA.

Training

The floor nurses conduct in-services with CNAs periodically as issues arise. The purpose of these is to review established policies and procedures. In-services typically last 1 or 2 minutes and pertain to general issues such as CNAs offering drinks to residents when they make their rounds or to issues with specific patients, e.g. that a particular resident needed a snack before bed or that another resident needed to wear certain undergarments at night. After the in-service, the CNAs sign sheets about the in-service topic and the sheets are posted at the facility for about a week and then given to the DON. LPN Stephens estimates that she has performed about five in-services since September 2013.

Wages and Conditions of Employment

All nurses and CNAs are paid hourly and use a time clock. The starting pay rate for RNs is \$20.50 per hour. The starting pay rate for LPNs is \$16.25 per hour. The starting pay rate for CNAs is \$10.50 per hour. RNs, LPNs and CNAs all wear scrubs, of various colors. The various job classifications are not required to wear any particular color of scrubs.

C. Job Duties of the Maintenance Manager

Brian Hampton is the Employer's maintenance manager. He has an office on the Employer's lower level and goes to various locations in the building performing maintenance duties such as repairing malfunctioning showers and working on the elevators. He reports directly to Administrator Burton. According to DON McGuire, he does not "supervise" any of the Employer's employees. According to Gilbert, Hampton comes onto the floor multiple times per day to visit the residents and ask the nurses if anything needs to be repaired. The uncontradicted testimony was that Hampton performs repairs, but never assigns other employees to fix anything.

III. LEGAL ANALYSIS

The Legal Framework:

A. *The Supervisory Status of Floor Nurses*

Supervisors are specifically excluded from the Act's definition of "employee" by Section 2(11) of the Act which defines a "supervisor" as:

any individual having the authority, in the interest of the employer, to hire, transfer, suspend, layoff, 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 meet the definition of a supervisor set forth in Section 2(11) of the Act, a person needs to possess only one of the 12 specific criteria listed, or the authority to effectively recommend such action. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), cert. denied, 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000). Thus, the exercise of "supervisory authority" in merely a routine, clerical, perfunctory or sporadic manner does not confer supervisory status. *Chrome Deposit Corp.*, 323 NLRB 961, 963 (1997); *Feralloy West Corp. and Pohng Steel America*, 277 NLRB 1083, 1084 (1985).

Possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory status, even if this authority has not yet been exercised. See, e.g., *Pepsi-Cola Co.*, 327 NLRB 1062, 1063 (1999); *Fred Meyer Alaska*, 334 NLRB 646, 649 at fn. 8 (2001). The absence of evidence that such authority has been exercised may, however, be probative of whether such authority exists. See, *Michigan Masonic Home*, 332 NLRB 1409, 1410 (2000); *Chevron U.S.A.*, 308 NLRB 59, 61 (1992).

In considering whether the putative supervisors involved here possess any of the supervisory authority set forth in Section 2(11) of the Act, I am mindful that in enacting this section of the Act, Congress emphasized its intention that only supervisory personnel vested with "genuine management prerogatives" should be considered supervisors, and not "straw bosses,

leadmen, set-up men and other minor supervisory employees.” *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985). Thus, the ability to give “some instructions or minor orders to other employees” does not confer supervisory status. *Id.* at 1689. Such “minor supervisory duties” do not deprive such individuals of the benefits of the Act. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-281 (1974), quoting Sen. Rep. No. 105, 80th Cong. 1st Sess., at 4. In this regard, the Board has frequently warned against construing supervisory status too broadly because an individual deemed to be a supervisor loses the protection of the Act. See, e.g., *Oakwood Healthcare, Inc.*, 348 NLRB 686, 688 (2006); *Vencor Hospital – Los Angeles*, 328 NLRB 1136, 1138 (1999); *Bozeman Deaconess Hospital*, 322 NLRB 1107, 1114 (1997).

Proving supervisory status is the burden of the party asserting that such status exists. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-712 (2001); *Arlington Masonry Supply*, 339 NLRB 817, 818 (2003); *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003). As a general matter, I note that for a party to satisfy the burden of proving supervisory status, it must do so by “a preponderance of the credible evidence.” *Dean & Deluca*, supra at 1047; *Star Trek: The Experience*, 334 NLRB 246, 251 (2001). The preponderance of the evidence standard requires the trier of fact “to believe that the existence of a fact is more probable than its non-existence before [he] may find in favor of the party who has the burden to persuade the [trier] of the fact’s existence.” *In re Winship*, 397 U.S. 358, 371-372 (1970). Accordingly, any lack of evidence in the record is construed against the party asserting supervisory status. See, *Williamette Industries, Inc.*, 336 NLRB 743 (2001); *Michigan Masonic Home*, 332 NLRB at 1409. Moreover, “[w]henver the evidence is in conflict or otherwise inconclusive on a particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Consequently, mere inferences or conclusionary statements without detailed specific evidence of independent judgment are insufficient to establish supervisory status. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991).

The Board revisited the issue of supervisory status in *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), in light of the Supreme Court’s finding in *Kentucky River*. See also, *Croft Metals, Inc.*, 348 NLRB 717 (2006) and *Goldencrest Healthcare Center*, 348 NLRB 727 (2006), issued at the same time as *Oakwood*. In *Oakwood*, the Board addressed the Supreme Court’s rejection of the Board’s interpretation of Section 2(11) in the healthcare industry as being overly narrow and adopted “definitions for the term ‘assign,’ ‘responsibly to direct,’ and ‘independent judgment’ as those terms are used in Section 2(11) of the Act.” *Oakwood*, supra, at 687.

With regard to the Section 2(11) criterion “assign,” the Board considered whether this factor shared with other Section 2(11) criteria the “common trait of affecting a term or condition of employment” and determined to construe 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 688. The Board reasoned that, “It follows that the decision or effective recommendation to affect one of these – place, time, or overall tasks – can be a supervisory function.” *Id.* The Board clarified that, “. . . choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers) would not be indicative of exercising the authority to ‘assign.’” *Id.*

In *Oakwood*, the Board explained that, “responsible direction,” in contrast to “assignment,” can involve the delegation of discrete tasks as opposed to overall duties. 348 NLRB at 688-90. The Board reasoned, however that “for direction to be ‘responsible,’ the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employees are not performed properly.” In clarifying the accountability element for “responsibly to direct” the Board noted that, “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 also 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 slip op. 7.

Assignment or responsible direction will, as noted above, produce a finding of supervisory status only if the exercise of independent judgment is involved. Independent judgment will be found where the alleged supervisor acts free from the control of others, is required to form an opinion by discerning and comparing data, and makes a decision not dictated by circumstances or company policy. *Id.* at 690-91. Independent judgment requires that the decision “rise above the merely routine or clerical.” *Ibid.*

Based on the record evidence, for the reasons that I explain below, I find that the Employer has failed to carry its burden of establishing that the floor nurses are statutory supervisors.

Assignment and Responsible Direction

There is insufficient evidence that floor nurses exercise independent judgment in assigning work to CNAs or that they responsibly direct CNAs. CNAs are regularly assigned to particular wings of the Employer’s facility. Although DON McGuire testified in summary fashion that the floor nurses could re-assign a CNA to a different wing, Gilbert testified that she did not have this power and Barker testified that no floor nurse has ever altered the wing to which she was assigned. The nurses and CNA testified that the only personnel who are empowered to alter these assignments are the DON and the RN Supervisor. McGuire’s summary testimony does not overcome that of the other witnesses on an issue where the Employer bears the burden of proof. The CNAs’ work is routine in nature and they perform the same basic tasks every day. For example, if a CNA has questions or concerns about patient care issues such as a patient developing a skin condition, she will go to a floor nurse. However, this merely reflects the superior qualifications of a floor nurse to address medical issues. Floor nurses may input e-care plans for residents into the Employer’s computer system so that CNAs’ can check them off, but these appear to be routine matters such as indicating whether a resident has bathed and do not appear to require the exercise of any independent judgment on the part of the floor nurse. Also, floor nurses ask CNAs to obtain vital signs from sick patients prior to performing their other duties, but this does not reflect supervisory authority inasmuch as the CNAs routinely get the vital signs of residents and this would merely constitute an instruction to perform a discrete task prior to performing other routine tasks, i.e. simply changing the order in which a CNA performs her daily duties. The Board has held that designating a nursing staff person to regularly administer medications to a patient or group of patients would constitute assignment of a significant overall task, suggestive of supervisory authority, but that a one time directive to give medication to a specific patient would not be “assignment.” *Oakwood Healthcare, Inc.*, *supra* at

689. The record reflects that the authority of the floor nurses at issue here to take the vital signs of an ailing resident is more in the nature of a one time directive. The record is clear that floor nurses do not schedule employees for work. While DON McGuire testified that floor nurses are empowered to mandate overtime to cover for an absence, there was no testimony that such mandation has, in fact, occurred. In contrast, the floor nurses and CNA testified that only the RN Supervisor or DON can mandate overtime. Further, the record does not reflect what consequence would befall a CNA who refused a floor nurse's instructions to come in to work. Thus, it is unclear from the record whether there is a genuine requirement that CNAs on off-duty status report to work if a floor nurse tells them to do so. *Goldencrest Healthcare Ctr.*, 348 NLRB 727, 729 (2006).

In *Oakwood Healthcare*, the Board interpreted the phrase "responsibly to direct" as follows: "If a person on the shop floor 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' (as explained below) and carried out with independent judgment." *Oakwood Healthcare*, supra, at 691 (internal quotations omitted). The Board then held that for direction to be "responsible," the person directing the performance of a task must be accountable for its performance. *Id.* at 690. Further, the Board held that to establish accountability, "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 also be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps." *Id.* at 690. Although DON McGuire may ask a floor nurse to instruct a CNA to complete a certain task the record evidence is inadequate to establish that any direction issued to the CNA is "responsible," since it is unclear what, if any, consequence would befall the floor nurse if the CNA failed to carry out the instruction. The record is similarly vague as to whether DON McGuire actually informed floor nurses during an in-service that it was their responsibility to address "issues" with CNAs and that if they failed to do so, the issues would be addressed with the nurses. In this regard, although McGuire's notes from the in-service indicate that such a statement was made, McGuire did not testify about making the statement and the floor nurses who testified at the hearing did not recall McGuire making the statement. Even if McGuire made the statement, there is no evidence that floor nurses have actually been held accountable for the work performance of CNAs. Likewise, the record is unclear how floor nurses prevent CNAs from "sitting" at the nurses' station and what, if any, authority they had if a CNA refused a nurse's request to leave the nurses' station. Further, the directive from Administrator Burton to floor nurses to check residents' alarms for placement and function and to take appropriate action with the aides if an alarm was not turned on or in place, is not probative as to 2(11) status because the record does not reflect what the range of "appropriate action" included and how this directive is effectuated. The record does not show how the floor nurse is held accountable if the CNA fails to perform a particular task.

The testimonial evidence adduced at the hearing conflicts with the job descriptions for the floor nurses and CNAs which appear to give floor nurses responsibility for assigning work to and directing the CNAs. These job descriptions are conclusory statements and are contradicted by the testimony evidence at the hearing. Accordingly, I have given very little probative weight to the job descriptions where they lack corroboration and are contradicted by relevant testimony evidence.

Discipline

My conclusion that the Employer does not hold the floor nurses accountable for the CNAs' job performance is reflected by the floor nurses' lack of any real disciplinary authority. Although some of the floor nurses occasionally fill out Employee Corrective Action Reports or "write ups" about incidents that they become aware of at work, these appear to be more in the nature of a report rather than an imposition of discipline. The ability to report misconduct to superiors is not tantamount to disciplinary authority. *Los Angeles Water and Power Employees Assoc.*, 340 NLRB 1232, 1234 (2003). The record is clear that although a floor nurse documents the incident in question on the form and discusses the incident with the CNA, the DON decides what, if any, level of discipline to impose by reviewing the CNA's disciplinary history and consulting the guidelines for imposition of discipline set forth in the Employer's handbook. Unlike the situation in *Oak Park Nursing Care Ctr.*, 351 NLRB 27 (2007), the floor nurses do not decide what level of discipline to impose. See *G4S Regulated Security Solutions*, 358 NLRB No. 160 at fn. 5 (2012). The record is clear that discipline is not automatic and that the DON exercises discretion in this regard after consulting with the administrator and other high level managers. Although LPN Monica Holbrook's evaluation reflects that she was unwilling to maintain consistent enforcement of the rules or to demonstrate leadership, the record does not reflect how or whether she is empowered to perform these tasks. Under these circumstances, the record does not show that the floor nurses exercised independent judgment in the issuance of "write ups." *Trinity Continuing Care Services*, 360 NLRB No. 4 at 5 (July 10, 2013). Further the record reflects that if a CNA has a problem with a fellow CNA or a floor nurse, she ordinarily takes these issues to the DON or the RN Supervisor. In addition, the record reflects that if the CNA reports an issue with a fellow CNA or floor nurse to a floor nurse, the floor nurse relays the issue to the DON or RN Supervisor to address it, rather than issuing discipline.

The floor nurses' role in recording absences appears to be merely a reporting function as well. When employees call off work, the nurse on duty records the name of the employee who called off and the time and the reason for the call off, but makes no recommendation as to what, if any, personnel actions should take place in response to the call off. The floor nurse simply turns the report in to the DON who places it in the employee's personnel file and tracks the employee's total absences. Discipline is automatic, based on the number of absences accumulated in a certain time frame. Similar to their role with absence reports, the record demonstrates that floor nurses' function in adjusting the time of CNAs whose time clocks do not accurately reflect their time worked appears to be routine and lacking the exercise of independent judgment. The floor nurses uniformly testified that they take the CNAs at their word if they report that their time needs to be adjusted and the floor nurses fill out the appropriate time worked adjustment form accordingly.

Evaluations

Although floor nurses occasionally evaluate CNAs, they do not change or effectively recommend changes to the CNAs' terms and conditions of employment. The record reflects that floor nurses sporadically evaluate CNAs, especially at times when the RN Supervisor or DON are busy with other tasks. The evaluations consist of completing paperwork which sets out various criteria of job performance. There is no place on the form for recommendation of rewards or adverse consequences based on the evaluation such as a pay raise or discipline. Although the evaluations may later be used in determining pay raises, promotions or whether to

retain a probationary employee, this is clearly a decision made by the DON and the managerial staff – not the floor nurse who conducted the evaluation. For example, the record reflects that evaluation scores or performances do not automatically lead to pay increases. Thus, although evaluations may ultimately play some role in whether employees are rewarded or disciplined, this is a decision made independently by higher level managers and the floor nurses neither effectuate, nor effectively recommend these actions.

Training and Secondary Indicia

Although training is not one of the statutory supervisory indicia, there is evidence that floor nurses periodically conduct in-services at the Employer's facilities to train staff how to care for residents. While CNAs are required to sign that they received the training in question, there is no evidence introduced that the floor nurses are held responsible if the CNAs fail to perform as trained or that floor nurses are empowered to discipline CNAs who fail to adhere to the training. Likewise, secondary indicia of supervisory status such as difference in wages are insufficient to establish that floor nurses are supervisors as that term is defined by the Act. *Training School of Vineland*, 332 NLRB 1412 (2000); *Carlisle Engineered Products*, 330 NLRB 1359 (2000). Although RNs earn more money than LPNs, who earn more money than CNAs, this simply reflects the superior qualifications and training of the RNs and LPNs. The fact that the floor nurses and CNAs all wear various colors of scrubs without any regard to job classification emphasizes that they are of equal rank in the eyes of the employer. Additionally, floor nurses do not attend the daily meetings of managers which take place at the Employer's facility.

For the forgoing reasons and based on the record as a whole, I conclude that the Employer has failed to meet its burden of proving that floor nurses are supervisors within the meaning of Section 2(11) of the Act.

B. Whether the Maintenance Manager Should Be Included in the Unit

There is no evidence in the record to suggest that Maintenance Manager, Brian Hampton, is a supervisor as that term is defined by Section 2(11) of the Act. Indeed, the uncontradicted testimony is that he does not supervise any of the Employer's employees. Were the floor nurses, LPNs, CNAs and dietary aides to vote to be represented by the Petitioner, Hampton would be left in a residual unit consisting of one person. Since a unit of one is inappropriate for purposes of collective bargaining, he must be included in the bargaining unit. E.g. *Roman Catholic Orphan Asylum*, 229 NLRB 251 (1977). Additionally, the parties stipulated that Activities Staff Employee Stacie Lewis should be included in the unit.

IV. EXCLUSIONS

The parties stipulated, the record establishes, and I find that the following individuals are supervisors within the meaning of Section 2(11) of the Act: Pam Burton, Administrator; Sandy McGuire, Director of Nursing; Anita Vest, Activities Supervisor; Beverly Stamper, Office Business Manager; Robin Cassity, Dietary Supervisor; Regina Vance, Nursing MDS Coordinator; Tonya Coffey, Social Services Manager. Accordingly, I will exclude them from the unit found appropriate.

The parties stipulated and the record reflects that Darlene Taulbee, Bookkeeper and Angela Fannin, Medical Records Staff are office clerical employees that should be excluded from the unit. The parties also stipulated and the record reflects that Tiffany Bradley, Rehabilitation Director/Occupational Therapist; Monica Whitt, Physical Therapist; Jacob Fritz, Speech Therapist; and Shelly (last name unknown), Occupational Therapy Assistant are not employees of the Employer and should be excluded from the unit on that basis. Accordingly, I have excluded all of the aforementioned individuals from the unit found appropriate herein.

V. CONCLUSIONS AND FINDINGS

Based on the entire record in this matter and in accordance with the above-referenced narrative, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
4. The Petitioner claims to represent certain employees of the Employer.
5. 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.

VI. DIRECTION OF ELECTION

Because RNs are traditionally viewed as professional employees under Board law, they must be provided with an opportunity to vote as to whether they desire to be included in a bargaining unit with the nonprofessional employees or whether they wish to remain unrepresented.^{6/} E.g. *American Medical Response*, 344 NLRB 1406 (2005). The National Labor Relations Board will conduct a secret ballot election among the employees in the following voting groups:

VOTING GROUP - UNIT A (PROFESSIONAL UNIT):

All full-time and regular part-time RN floor nurses employed by the Employer at its West Liberty, Kentucky facility excluding all other employees, guards and supervisors as defined in the Act.

^{6/} There is no indication in the record that the Petitioner would be unwilling to represent the RNs separately, if they vote for separate representation. However, if the Petitioner does not desire to represent the RNs in a separate unit even if those employees vote for such representation, the Union may notify the Regional Director to that effect within ten (10) days of the date of this Decision and Direction of Election.

VOTING GROUP - UNIT B (NONPROFESSIONAL UNIT):

All full-time and regular part-time LPN floor nurses, CNAs, CMTs, dietary employees, the activities staff employee and the maintenance manager employed by the Employer at its West Liberty, Kentucky facility excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

The professional employees in Unit A will be asked two questions on their ballot to which the answer will be “Yes” or “No.”

- (1) Do you wish to be included with nonprofessional employees in a unit for the purposes of collective bargaining?
- (2) Do you wish to be represented for the purposes of collective bargaining by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial Service Workers International Union?

If a majority of the professional employees voting in Unit A vote “Yes” to the first question, indicating their desire to be included in a unit with nonprofessional employees, they will be so included, and their votes on the second question will be counted together with the votes of the nonprofessional employees in Unit B to decide the question concerning representation for the overall unit consisting of the employees in Units A and B. If on the other hand, a majority of the professional employees voting in Unit A do not vote “Yes” to the first question, their ballots will be counted separately to decide the question concerning representation in a separate Unit A.

The Unit determination is, therefore, based in part upon the results of the election among the RNs. Nevertheless, I make the following findings with respect to the appropriate unit:

1. Should a majority of the professional employees vote for inclusion in the overall unit, I find that the following employees constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time RN floor nurses and LPN floor nurses, CNAs, CMTs, dietary employees, the activities staff employee and the maintenance manager employed by the Employer at its West Liberty, Kentucky facility excluding all office clerical employees, guards and supervisors as defined in the Act.

2. If a majority of the professional employees vote against inclusion in the overall unit, I find that the following employees constitute two units appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

- (1) All full-time and regular part-time RN floor nurses employed by the Employer at its West Liberty, Kentucky facility excluding all other employees, guards and supervisors as defined in the Act.

(2) All full-time and regular part-time LPN floor nurses, CNAs, CMTs, dietary employees, the activities staff employee and the maintenance manager employed by the Employer at its West Liberty, Kentucky facility excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

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.

VII. 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.

VIII. 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). This 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 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 **February 27, 2014**. 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,^{7/} by mail, or by facsimile transmission at (513) 684-3946. 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.

IX. 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 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.

X. 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, D.C. 20570-0001. This request must be received by the Board in Washington by **March 6, 2014**. *The request may be filed electronically through the Agency's website, www.nlr.gov,^{8/} but may not be filed by facsimile.*

Dated at Cincinnati, Ohio this 20th day of February 2014.


Gary W. Muffley, Regional Director
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

^{7/} 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.

^{8/} To file the request for review electronically, go to www.nlr.gov, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.