

**Pine Manor, Inc. d/b/a Pine Manor Nursing Home¹
and Michigan Licensed Practical Nurses Associ-
ation, Petitioner. Case 30-RC-3375**

September 29, 1978

DECISION AND DIRECTION OF ELECTION

**BY CHAIRMAN FANNING AND MEMBERS PENELLO
AND TRUESDALE**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Benjamin Mandelman. Pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, and by direction of the Regional Director for Region 30, this case was transferred to the National Labor Relations Board for decision. Thereafter, the Employer and Petitioner filed briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board finds:

1. The parties stipulated that the Employer, Pine Manor, Inc. d/b/a Pine Manor Nursing Home, is a Michigan corporation engaged in providing health care services through the operation of its proprietary nursing home facility located in Kingsford, Michigan. During the past calendar year, a representative period, the Employer received at least \$100,000 in gross revenues, and it purchased and received goods valued in excess of \$50,000 directly from points located outside the State of Michigan. The Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act, as amended.

2. The labor organizations involved claim to represent certain employees of the Employer.²

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

4. Petitioner seeks to represent a unit of licensed practical nurses (LPNs), excluding all other employees employed by the Employer at its Kingsford, Michigan, facility.

The record demonstrates that the Board, pursuant

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

² At the hearing, Local #1176, Council #25, American Federation of State, County and Municipal Employees, AFL-CIO, intervened in the proceeding.

to a Stipulation for Certification Upon Consent Election Agreement entered into by the Employer and the Intervenor, conducted an election in October 1969 for all employees of the Employer excluding professional employees (including registered nurses), office clerical employees, guards, and supervisors as defined in the Act. The Intervenor received the majority of the ballots cast in that election and accordingly was certified by the board on October 15, 1969. The Employer subsequently filed a unit clarification petition on January 19, 1970 in which it sought the exclusion of licensed practical nurses (LPNs) from the bargaining unit on ground that they were supervisors as defined in the Act. A hearing was held and, on April 16, 1970, the Regional Director issued a Decision and Order Clarifying Bargaining Unit in which he determined that the LPNs were supervisors and excluded them from the unit. The LPNs have remained unrepresented since that determination. The current collective-bargaining agreement between the Employer and the Intervenor terminates on April 30, 1979.

The Petitioner asserts that the LPNs neither possess nor exercise any supervisory authority and therefore should be found by the Board to be statutory employees. The Petitioner further submits that a unit of LPNs is an appropriate unit and urges the Board to conduct a self-determination election for these employees.

The Employer and the Intervenor contend that the LPNs which the Petitioner seeks to represent are supervisors and hence no question concerning representation exists. In the alternative, they argue that should the LPNs be found to be employees, their inclusion in the existing unit is appropriate and thus the contract between the Employer and the Intervenor operates as a bar to the instant petition.

The Employer operates a skilled nursing facility which accommodates 107 patients on two stories. Each story comprises a nursing station with 67 beds on the upper story, or station, and 40 on the lower. The facility operates 24 hours a day and employs 60 to 70 persons.

The home's administrator has ultimate responsibility for its operation. His immediate subordinate is the director of nursing, who is required by state law to be a registered nurse (RN). The director of nursing is on call at the facility 24 hours per day and supervises all patient care. The facility's nursing staff consists of 3 RNs, 8 LPNs, and approximately 30 nurses aides. The nursing staff operates on a three-shift basis. The day shift is complemented by 14 nurses aides and 2 RNs or LPNs; the afternoon shift by 8 nurses aides and 2 RNs or LPNs; and the night shift by 6 nurses aides and 1 RN or LPN.

The LPNs and RN function as charge nurses. In that capacity, they oversee the operation of the nurs-

ing station and the aides assigned to it. During the day and afternoon shifts, there is one RN or LPN assigned to each station; on the night shift, one LPN or RN has charge of both floors. The charge nurses spend 6-1/2 of their 7 working hours rendering direct care to the facility's patients. They dispense medications ordered by the patients' physicians, perform various treatments, and assist the nurses aides when the situation requires. The remaining half hour is used to complete the daily report which indicates patient care tasks that the following shift must complete and to make entries on the patients' charts.

The nurses aides provide basic patient care: They bathe, dress, feed, and exercise the patients, empty their drainage bags, and otherwise minister to their needs. The directions the LPNs give to the nurses aides relate to these basic duties; the nurses aides in turn report any changes in the patients' conditions to the charge nurse so that they may be noted on the patients' charts and appropriate action can be taken.

In finding the LPNs to be supervisors, the Regional Director in his April 1970 unit clarification decision, relied heavily on the "newly redefined authority" the Employer granted the LPNs in promoting them, less than 2 months after the representation election, to the position of "nursing supervisors."

Neither the title by which he is styled nor the grant of authority, which in practice is illusory because never exercised, is sufficient to make an employee a supervisor. *Sunset Nursing Homes, Inc., d/b/a North Miami Convalescent Home*, 224 NLRB 1271, 1272 (1976). Thus, a proper determination of the LPNs status is contingent upon whether they actually perform any supervisory functions. Our review of the record leads us to conclude that the LPNs do not perform any of the requisite functions.

The Employer contends that the LPNs, as charge nurses, direct the aides assigned to their stations through verbal and written instructions. As noted above, however, the record demonstrates that the directions given the aides by the LPNs regard patient care and are routine in nature, flowing from the LPNs training as a nurse, the needs of the patient, and specific orders of a patient's physician. The LPNs who were the Petitioner's witnesses testified that the duties of the nurses aides are of a standard nature and that they require little supervision in the performance of them. The instructions the aides receive regard extra care a patient requires, such as a foot soak or more frequent turning in order to prevent bedsores, and are of themselves routine in nature. Because the aides are frequently rotated from station to station, these instructions are often written in order to insure the patient receives consistent care.

The Employer admits that the LPNs have no part in the interviewing and hiring process and that the

ultimate decision to terminate an employee is made by the director of nursing and the administrator. The Employer contends, however, that the LPNs have authority to discipline the nurses aides by warnings and suspension. The Employer further contends that the recommendations to discharge aides are initiated by the charge nurses and routinely adopted by the director of nursing.

The Petitioner's witnesses testified that their disciplinary activities were limited to occasionally admonishing the aides on minor matters. Breaches of discipline beyond the trivial, they testified, would be referred to the director of nursing. None of the LPNs testified that they recommended that the nursing director take any disciplinary action against an employee or that an employee be suspended or discharged. Nancy Bouche, who has been an LPN at the Employer's facility for 7 years, testified that the LPNs had no authority to discipline aides, and her only recourse with respect to disciplinary problems was to report them to the director of nursing. LPN Matson, a charge nurse for 9 years, testified that she had been told 7 or 8 years ago that LPNs had the authority to issue verbal or written warnings but that she felt that she would have to consult with the director of nursing prior to taking any disciplinary action. LPN Cadotte also testified that she did not have the authority to act independently in issuing oral or written warnings or in taking other disciplinary actions. Of the four warning reports issued to employees introduced into the record by the Employer, only two warnings, both oral, appear to have been given without prior consultation with the director of nursing. One of these warning reports is over 5 years old and was given by an LPN who is no longer in the Employer's service. It appears from the record then that the LPNs role in disciplinary proceedings is reportorial. The decision to warn, reprimand, or suspend is made by the director of nursing after she has independently reviewed the situation and conferred with the principals. Though the collective-bargaining agreement specifically authorizes charge nurses to reprimand, suspend, and discharge the aides, the Employer has apparently never granted the LPNs such power and they clearly do not exercise it.

The Employer also contends that the LPNs act in a supervisory capacity because they have the authority to transfer aides between stations, call aides into work in cases of staff shortages, and grant the aides time off. The record demonstrates that the administrative assistant is responsible for preparing the nursing staff's work schedules, and the director of nursing for determining upon which wing and floor the aides will work. Should an aide be unable to report to work, the charge nurse is responsible for calling in a replace-

ment.³ The LPNs use no independent judgment in selecting replacements, but are provided with a list of aides' names that they must call *seriatim*. The LPNs do not have the authority to require an employee to report on a call-in basis. Should replacements be unavailable, the charge nurse will either assign or more usually request that one of the aides present volunteer to shift from the wing or floor to which she is assigned. Such assignments are perfunctory in nature and do not require the use of independent judgment.

The Employer further maintains that supervisory indicia attaches to the LPNs because they can permit the aides to leave the premises early. The record shows, however, that the LPNs can allow an aide who has become ill to leave; otherwise, all requests for time off are referred to the nursing director. The LPNs do not grant or schedule vacation time nor do they change the aides' work schedules or grant them overtime.

Considered as a whole, the record demonstrates that the LPNs responsibilities are limited fundamentally to providing routine patient care. They do not have the authority to discipline employees or effectively recommend same, since the director of nursing apparently makes an independent investigation into complaints regarding the aides' performance. At base, the record demonstrates that the LPNs make no decision outside of the routine without consulting with the director of nursing or the administrator. Accordingly, we conclude that the LPNs are not supervisors.

Having concluded that the LPNs are not, on these facts, supervisors, we must decide whether they should be allowed a self-determination election or in the alternative be returned to the bargaining unit from which they were excluded in 1970. In our decisions in *Newington Children's Hospital*, 217 NLRB 793 (1975), and *Nathan and Miriam Barnert Memorial Hospital Association d/b/a Barnert Memorial Hospital Center*, 217 NLRB 775 (1975), we found that LPNs, because of their schooling and licensing requirements, were appropriately classified as technical employees. We further concluded that technical employees share a community of interest separate from that shared by service and maintenance employees, and, therefore, that technical employees may constitute an appropriate unit. The LPNs in the instant case, as technical employees, do share such a community of interest, and, in our opinion, do constitute an appropriate unit. This is especially true in the instant case where the LPNs, since their exclusion from the service and maintenance unit, have been unrepresented and the current labor agreement contains no language respecting their terms and conditions of employment.

On the other hand, while the LPNs share a commu-

nity of interest among themselves as technical employees, they also have a strong community of interest with the nurses aides who are part of the service and maintenance unit. As detailed *supra*, the LPNs are not supervisors and, like the aides, are engaged primarily in rendering patient care. As two of the Petitioner's witnesses testified, the LPNs consider themselves to be the aides "co-workers," and the record shows that the LPNs often assist the aides in the discharge of their duties.

Hence, we conclude that an appropriate unit for the purposes of collective bargaining in the instant case may consist either of a unit of technicals (which in the instant case would be comprised solely of LPNs)⁴ or a service and maintenance unit which would include the LPNs. Under these circumstances, we decline to follow our dissenting colleague's suggestion and order that the LPNs be returned to the service and maintenance unit. Rather, we believe that the LPNs should be granted the opportunity through the means of a self-determination election to state whether they wish to remain unrepresented or be represented by the Intervenor or the Petitioner. Accordingly, we shall direct an election in the following voting group:

All technical employees, including licensed practical nurses, employed by the Employer at its Kingsford, Michigan, facility, but excluding all other represented employees, professional employees (including registered nurses), office clerical employees, guards and supervisors as defined in the Act.

If a majority of the employees in the above-described voting group cast their ballots for the Petitioner, they will be taken to have indicated their desire to constitute a separate appropriate unit, and the Regional Director is directed to issue a certification of representative for the Michigan Licensed Practical Nurses Association for such unit. If a majority of the employees in the voting group cast their ballots for the Intervenor, they will be taken to have expressed their desire to become part of the existing unit represented by the Intervenor, and it may bargain for such employees as part of the unit. If a majority of the employees in the voting group vote for neither, they will be deemed to have expressed their desire to remain unrepresented.

[Direction of Election and *Excelsior* footnote omitted from publication.]

MEMBER PENELLO, dissenting in part:

I agree with the majority's finding in the instant case that the LPNs are not supervisors. However, for

³ This task is handled by the administrative assistant during the morning shift.

⁴ See *Sweetwater Hospital Association*, 219 NLRB 803 (1975).

the reasons set forth in the dissent in *Nathan and Miriam Barnert Memorial Hospital Association d/b/a Barnert Memorial Hospital Center*, 217 NLRB 775 (1975), my separate concurring opinion in *Mount Airy Foundation, d/b/a Mount Airy Psychiatric Center*, 217 NLRB 802 (1975), and my dissent in *Sweetwater Hos-*

pital Association, 219 NLRB 803 (1975), I disagree with the majority's finding that a technical unit is appropriate. Having determined that the LPNs in the instant case are not supervisors, I would return the LPNs to the service and maintenance unit from which they were excluded in 1970.