

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

**FAIRLANE SENIOR CARE AND REHAB CENTER**

**Employer/Petitioner<sup>1</sup>**

**and**

**Case 7-UC-643**

**SEIU HEALTHCARE MICHIGAN<sup>2</sup>**

**Union**

**APPEARANCES:**

Karen B. Berkery, Attorney, of Detroit, Michigan, for the Employer/Petitioner.  
Patrick Rorai, Attorney, of Southfield, Michigan, for the Union.

**DECISION AND ORDER**

Upon a petition filed under Section 9(b) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record<sup>3 4</sup> in this proceeding, the undersigned finds:

1. The hearing officer's rulings 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.

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<sup>1</sup> The case caption is amended to accurately designate the petitioning party in this proceeding.

<sup>2</sup> The name of the Union appears as amended at the hearing.

<sup>3</sup> Briefs were due from the parties by July 6, 2010. The Employer timely filed a brief, which was carefully considered. The Union's brief, filed July 7, was untimely and was not considered.

<sup>4</sup> Petitioner's amendment to the petition, filed May 25, 2010, was inadvertently omitted from the Board's formal papers. I hereby take administrative notice of it, receive it into the record as Board Exhibit 2, and also take administrative notice that the parties were served with the amended petition on May 26, 2010.

3. The labor organization involved claims to represent certain employees of the Employer.

### **Bargaining and Procedural History**

The Employer operates a 229-bed nursing home and long-term care facility in Detroit, Michigan. For at least 20 years, the Employer has recognized the Union as the collective bargaining representative of a bargaining unit of all full-time and regular part-time certified nursing assistants (CNAs), laundry employees, housekeeping employees, dietary employees, floor maintenance employees, and licensed practical nurses (LPNs); excluding all other employees, professional employees, office clerical employees, registered nurses (RNs), contingent employees, supervisors and guards within the meaning of the Act. There are approximately 179 employees in the bargaining unit, including 34 LPNs and 105 CNAs. The most recent collective bargaining agreement was effective May 1, 2007 through April 30, 2010.

The Employer asserts that the 34 bargaining unit LPNs, who are designated by the Employer as charge nurses, are statutory supervisors within the meaning of Section 2(11) of the Act. It seeks to clarify the bargaining unit to exclude the LPNs. The Union contends that the LPNs are not supervisors. I conclude for the reasons set forth below that the Employer has satisfied its burden of proof regarding the LPN charge nurses and that the bargaining unit should be clarified to exclude them. They exercise authority in the interest of the Employer requiring the use of independent judgment to discipline and responsibly direct employees, and thus are statutory supervisors. The record evidence additionally suggests, without being conclusive, that the LPNs make effective recommendations regarding the hiring of nursing employees.

### **Overview of Employer's Operations**

The Employer operates a 229-bed nursing care facility divided into 5 floor units, A, B, C, D, and E. Unit A is a rehab unit which cares for residents who stay "short-term," about six to eight weeks; Units B and C are nonspecialized regular units with active and alert residents; Unit D is an Alzheimer/dementia unit; and Unit E is an Alzheimer lock-down unit. The Employer operates round-the-clock with three shifts. The day shift is from 6:30 a.m. to 3:00 p.m., the afternoon shift is from 2:30 p.m. to 11:00 p.m., and the midnight shift is from 10:30 p.m. to 7:00 a.m.

The nursing department is headed by director of nursing (DON) Lauetta Brown.<sup>5</sup> The assistant director of nursing (ADON) is Sonya Floyd. Nursing management also includes five clinical care coordinators (CCCs), one per unit: Norma Lewis, Elana Barry, Michelle Graves, Tracy Gibbs, and Modupe Egbeleye; in-service director (also known as staff

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<sup>5</sup> The Employer asserts in its brief that the administrator has primary responsibility for the facility's operation. The record evidence demonstrates that DON Brown reports to the unnamed administrator.

development coordinator) Shelley Strauthers; three minimum data set (MDS) coordinators: Cheryl Spade-Williams, Kathleen Walker, and Angela Irving-Thomas; reimbursement assessment (RAI) coordinator Nicole Tucker; and wound care coordinator Lasheas Marberry.<sup>6</sup> DON Brown, ADON Floyd, and CCC Egbeleye are RNs; the remaining management staff are all LPNs. The DON, ADON, CCCs, and other acknowledged management officials generally work between 8:00 a.m. and 4:00 p.m. on weekdays, and are present for most of the day, and part of the afternoon shift.

The 34 bargaining unit LPN charge nurses and 9 non-bargaining unit RN charge nurses have the same charge nurse duties.<sup>7</sup> One or two nurses and two to five CNAs work on each unit each shift depending on patient census and the shift. Most nurses work 8-hour shifts, although some work 12-hour and 16-hour shifts. The day shift nurses report directly to the CCC on their assigned unit. The afternoon shift nurses report to a CCC only for a limited period of time. During the midnight shift, there are no supervisory personnel present at the facility. The record indicates there is a designated weekend supervisor, RN Nicole Simmons, who works on Friday through Sunday during the day shift, and an afternoon shift supervisor, RN Pamela Poindexter, who works Monday through Thursday. Additionally, the record indicates there has been a designated midnight shift supervisor position which is currently vacant. According to the Employer, these shift supervisors are responsible for overseeing all five nursing units.<sup>8</sup>

The record indicates that CCCs rotate as on-call supervisors every 10 weeks and are available to speak to charge nurses regarding any issue that arises during the hours after the day shift ends, and on the weekend. These CCCs are also on-call to come into work and perform nursing duties in the event a unit is understaffed and in need of a nurse or CNA. The DON is also on-call after hours regarding an emergency such as a resident hospitalization or death.

All charge nurses sign a job description at the time of hire. Pertinent provisions provide that a charge nurse “supervises [CNAs], recommends hiring of CNAs, makes assignments based on the shift’s needs, enforces facility policies, and administers discipline up to and including recommending discharge.” The job description additionally provides that the charge nurse “assists in training and evaluating performance of assigned personnel and disciplines as needed in accordance to facility policy.” The nurses also sign a form acknowledging that they are responsible for the overall care of the residents, immediate direction and supervision of nursing care provided to patients, and assigning responsibility to personnel for the direct nursing care of specific patients during each tour of duty.<sup>9</sup>

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<sup>6</sup> The parties stipulated and I find that all of the above named individuals are supervisors based on their authority to assign and responsibly direct employees.

<sup>7</sup> LPNs and RNs are sometimes collectively referred to as nurses for the purposes of this decision.

<sup>8</sup> The parties did not stipulate regarding the 2(11) supervisory status of the weekend, afternoon shift, or midnight shift supervisor positions, and the record is silent as to their specific job duties and responsibilities.

<sup>9</sup> This Employer-generated form states that the charge nurse responsibilities are designated under the Michigan Nurse Practice Act. The Michigan Nurse Practice Act, enacted in 1909, created the Michigan Board of Nursing. Authority over the Nurse Practice Act was transferred to the Nursing Practice Act of 1967 in 1967, and thereafter transferred again to the Michigan Public Health Code in 1978. Part 172 of the Michigan Public Health Code, Act

## 1. Assignments

### *Scheduling and Assignment of Resident Rooms, and Transfers*

The record indicates that monthly and daily schedules are prepared by a scheduling supervisor showing the CNAs' work days and shifts. However, the record is silent as to the name of the scheduling supervisor and the extent of that individual's supervisory duties and responsibilities. The record indicates that these schedules are kept at the security desk during off hours, i.e., afternoon shift, midnight shift and on the weekends, and a charge nurse may contact security during off-hours to see which CNAs are assigned to her unit. The nurses and CNAs, for the most part, once assigned to a unit remain assigned to the same unit. A 30-minute lunch and two 15-minute breaks for the CNAs are designated by their collective bargaining agreement and are routinely scheduled by the nurses. CNAs must report to a nurse that he or she is taking a scheduled break. Although the nurse can delay a break or call a CNA back early from a break, the CNA is guaranteed the full amount of break time per shift under the contract.

The charge nurses do not possess authority to change the assigned shifts of the CNAs. However, based on staff-to-patient ratio requirements, the record indicates they possess some authority to call in CNAs and/or extend CNA shifts if the shift is understaffed, and send CNAs home before the end of their shift. Regarding calling in CNAs, the collective bargaining agreement states that the Employer shall equitably distribute call-in and overtime among employees by seniority when calling in CNAs due to understaffing. However, the record is silent as to the existence or use of a seniority list for calling in CNAs. One LPN charge nurse testified that she can, and has, independently called in a CNA of her choice to staff her unit, without regard to overtime implications. Another LPN charge nurse testified that the afternoon and midnight shift nurses contact security to call in CNAs for understaffed units.

As noted, the on-call CCC can also be called in by the charge nurse to perform nursing duties when a unit is understaffed. Regarding extending CNA shifts, while there is some record evidence that nurses are authorized to require CNAs to stay past their shifts for additional coverage or to complete their work, the collective bargaining agreement provides that CNAs cannot be mandated to stay over their scheduled shifts. Regarding sending CNAs home before the end of their shift, the record demonstrates that the nurses can allow CNAs to leave early for reasons such as illness or a family emergency. The charge nurses also transfer CNAs to different units based on staffing and resident needs.

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368 of 1978 covers "Nursing," and does not specifically reference the charge nurse responsibilities noted on the form that the Employer requires the charge nurses to sign.

## 2. Responsible Direction

### *Resident Care and Direction over CNAs*

The duties of the CNAs include basic care of residents and assistance with daily living functions, such as feeding, bathing, grooming, dressing, hygiene, elimination, and walking. Resident care guides, also known as activities of daily living (ADL) sheets, document the condition of the residents regarding issues and capabilities relating to feeding, bathing, grooming, elimination, restorative, orientation, at risk issues, oral care, vision, hearing, speech, acuity, transfer skills, safety devices and splints, and the level of care that is necessary for that resident. These categories of care are pre-printed on the resident care guides and the charge nurses are responsible for assessing the residents and reviewing medical charts in order to fill in the information on the resident care guide. Additionally, the charge nurses are responsible for updating the resident care guides as resident conditions change. The nurses and CNAs regularly consult the resident care guide regarding the status of the residents. The resident care guides are kept in an ADL book at the nurses' station.

At the start of each shift, the charge nurse takes reports from the outgoing shift, does rounds in each resident room on the unit, counts medications, and verbally goes over daily assignment sheets with CNAs. Like the resident care guides, the assignment sheets contain pre-printed categories of care. The charge nurse fills in CNA names, break times, room assignments, bath/shower schedule, resident meal assignment, food acceptance, intake and output, vitals, weights, fire duty,<sup>10</sup> special needs, and special assignments. The assignment sheet, entitled "Nexcare CNA Assignment Sheet" has been in use for about two months prior to the hearing.<sup>11</sup> For the most part, CNAs remain assigned to the same residents from day to day. The charge nurse has authority to make a "one-on-one resident assignment" to a CNA in the event the resident requires close monitoring. Something like this would be noted by the charge nurse under the special assignment category of the assignment sheet. As noted, the CNAs have to report to the nurse before going on break and the nurse can delay a scheduled break or request that the CNA return from break early in the interest of patient care. For example, a charge nurse has postponed a CNA's break, and has called a CNA back from break early, in order to change a soiled resident under her care.

The CNAs generally start their shift by reviewing the assignment sheet and performing some of their regular day-to-day duties. They meet with the charge nurse regarding updates on the condition of residents and other issues relevant to individual resident care, which may or may not be written on the assignment sheet. During the shift, the charge nurses pass medications, perform treatments, complete charting, and follow up on any changes in the condition of residents. The back side of the resident care guide/ADL sheet

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<sup>10</sup> Fire duty refers to the CNA's assigned responsibility in a fire drill, such as being in charge of the fire extinguisher.

<sup>11</sup> The previous assignment sheet, called a relay sheet, came to the nurses pre-printed with pre-determined room assignments, break times, meal schedule, and CNA job assignments. The record is silent as to who placed this information on the relay sheets. The only items for the charge nurse to fill in on the relay sheet were CNA names. The relay sheets were kept in a relay book at the nurses' station.

contains pre-printed schedules relating to elimination, snacks, and showers. The CNAs are responsible for keeping track of the ADL sheet and initialing off on the various ADL categories by the end of the shift to confirm that such care was provided. The charge nurses review the CNA input on the ADL sheet at the end of the shift to ensure that all CNA duties have been completed.

The charge nurses oversee the work of the CNAs. The work of the CNAs is largely routine and does not require continuous supervision. As noted, CNA unit assignments are pre-determined, but can be changed by the charge nurse depending on staffing exigencies. The DON, ADON, and CCCs work during the day shift and there are no supervisors above the charge nurses present during a significant portion of the afternoon shift and the entire midnight shift. All charge nurses have access to the on-call CCC as well as the DON by telephone. They are expected to contact the on-call CCC in the event of any unusual situation or to discuss staffing issues. They are expected to call the DON in the event of an emergency, such as a resident hospitalization or death.

New CNAs are trained in a classroom setting and on the job. Classroom instruction is provided by the in-service director. On-the-job training is by the in-service director, CCCs, charge nurses, and other CNAs. CNAs are also required to complete 12 hours of computer training on the Silver Chair Learning System computer web-based training program required by the Employer for CNAs and charge nurses.

### **3. Discipline of CNAs**

The Employer's progressive discipline procedure is set forth in its employee handbook for all employees. There are two groups of work rule offenses in the progressive discipline procedure. These rules cover a wide variety of employee conduct, including attendance,<sup>12</sup> attitude, appearance and behavior at work, work performance, insubordination, theft, intoxication, and timecards.

If a charge nurse concludes that a CNA has violated the Employer's work rules, the charge nurse has authority and discretion to (1) do nothing; (2) verbally counsel the employee without issuing any write-up; (3) issue a "one-on-one in-service" form; or (4) issue a written reprimand on an "employee disciplinary warning record."

The one-on-one in-service forms kept at the nurses' station on each unit are not considered to be disciplinary action and are not part of the progressive discipline system. Rather, they are intended to be an educational counseling for the offending employee and state a topic, objective, and goal for improvement. The record indicates that once issued to a CNA, the one-on-one in-service form is maintained in the employee's personnel file.

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<sup>12</sup> All attendance-related violations are issued by DON Brown. Staffing coordinator Tredonna Snell keeps track of attendance write-ups. The record is unclear as to the supervisory status of Snell.

The disciplinary forms, entitled “EMPLOYEE DISCIPLINARY WARNING RECORD,” are kept at the nurses’ station on each unit. A written reprimand issued on such a form subjects the offending employee to the progressive discipline procedure. On it the charge nurse sets forth the offense, both by subject and a narrative of the facts, and decides which of the two groups the offense falls into, with different levels of possible discipline flowing from each. Group one violations result in penalties ranging from a verbal coaching to discharge. Group two violations call for suspension or discharge for a first offense. The handbook sets forth the possible discipline for each level of offense and the nurse decides the level of the offense. However, when the discipline to be imposed is a suspension or discharge, it must be approved at a higher managerial level, by the DON or ADON.

The employee disciplinary warning record contains a series of boxes indicating what type of action is being taken. The charge nurse who completes the form checks one of the following boxes: “counseling”; “1<sup>st</sup> written”; “2<sup>nd</sup> written”; “3<sup>rd</sup>/suspension”; or “termination/other.” In order to know which box to check, the charge nurse has to either personally have knowledge of the employee’s disciplinary record or have access to the employee’s personnel file. Nurses do not have access to personnel files. Thus, they call the human resources office where the files are kept to check the disciplinary history of the offending employee. At least three CNAs received multiple disciplinary write-ups from the same LPN, resulting in progressive discipline for those CNAs. Specifically, one LPN issued a second written warning to a CNA on June 26, 2009, and another second written warning to the same CNA on January 10, 2010;<sup>13</sup> the same LPN issued a counseling to another CNA on June 26, 2009, and a second written warning to the same CNA on January 22, 2010, resulting in a three-day suspension;<sup>14</sup> and another LPN issued a first written warning to a CNA on September 25, 2008, and a second written warning to the same CNA on October 24, 2008. Although DON Brown testified that LPN charge nurses have issued single employee disciplinary warning record forms to CNAs resulting in suspension and discharge, there are no such disciplines in the record.

Nurses are advised by the DON, ADON, and/or CCCs that they are subject to discipline for failing to oversee and supervise the work of the CNAs, and have been disciplined for such omissions. In that regard, the record contains four written employee disciplinary warning records issued to nurses by either a CCC or the in-service director. One write-up was for failing to supervise the break times of the CNAs to ensure proper coverage on the floor; one write-up was in connection with a CNA’s failure to re-position a resident’s Foley catheter; and two write-ups were in connection with the CNAs’ failure to properly secure alarms to residents.

After charge nurses prepare disciplinary write-ups on employee disciplinary warning records, they sign and issue them directly to the CNAs, with a union representative

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<sup>13</sup> A January 8, 2009, write-up fell off the CNA’s disciplinary history pursuant to the Employer’s progressive discipline system, in which disciplinary write-ups remain on the employee’s disciplinary record for one year. When the January 10, 2010, write-up issued, it was designated a second warning because of this system.

<sup>14</sup> The January 22, 2010, second written warning indicates there was a first written warning issued by someone else on October 13, 2009.

present. A copy is then forwarded by the nurse to the human resources office for placement in the employee's personnel file. As noted, there is no further investigation or additional signatures on the write-up unless the write-up calls for the suspension or discharge of the offending employee. When a CNA is subject to suspension or discharge, the LPN charge nurse who completed the disciplinary write-up is present at the suspension or termination meeting along with the DON or ADON.

Two LPN charge nurses testified that they have never completed an employee disciplinary warning record form. One of them testified she has never been told by the Employer that she has any supervisory authority, while the other witness acknowledged she has been advised by nursing management to use the employee disciplinary warning record forms to take disciplinary action against the CNAs. The record evidence demonstrates that 14 different LPNs completed 22 employee disciplinary warning record forms contained in the record, during the period from March 2007 to May 2010.

#### **4. Evaluations**

##### **(a) *Evaluations of LPNs***

The CCCs evaluate the nurses annually. Areas of performance that are evaluated include:

- Uses professional judgment to prepare and update resident care plans consistent with resident condition and physician treatment plan;
- Implements and/or directs other personnel in initiating resident care plans, provides guidance and demonstrates appropriate methods to promote compliance to standards of care;
- Directs nurse assistants, provides clinical oversight, enforces facility policies and work rules, administers discipline as appropriate;
- Participates in the interview and selection of nurse assistants, makes hiring recommendation;
- Assists in training and evaluating the performance of assigned personnel;

The CCC also completes a “licensed nurse competency/performance evaluation” form and rates the LPN as excellent, satisfactory, needs improvement, or unsatisfactory, in the areas of catheter care; supervision of unit and direct care staff; resident monitoring and safety; facility emergency procedures; provide teaching as needed; ability to handle problems; and customer satisfaction and public relations. The Employer maintains that this area of the evaluation rates supervisory ability. Upon completion of the evaluation, the CCC discusses it with the nurse and then returns it to the DON for further review and

placement in the nurse's personnel file. The Employer states that if an LPN applies for a CCC position, the evaluation is considered for purposes of the desired promotion.

**(b) *Evaluations of CNAs***

The Employer evaluates CNAs annually on their anniversary dates. The Employer's human resources department initiates the evaluation process by periodically providing the CCC with CNA evaluation lists. The CCC then provides an evaluation form to a nurse on that CNA's unit. Some nurses regularly provide input into the evaluations of their CNAs while others have not. The practice appears to be inconsistent at best. There is no evidence that the nurses who have not submitted evaluations have been disciplined for failing to provide input.

A nurse who is involved in the evaluation process fills out the evaluation form and submits it to the CCC. The nurses do not have access to employee personnel files when completing evaluations. Either the nurse or the CCC discusses the evaluation with the CNA. All evaluations go to the DON for independent review. In this regard, DON Brown testified that when a CNA receives a poor evaluation, she directs the CNA to return to orientation. The DON is responsible for placing evaluations in the employee personnel files. The evaluations are not used to determine whether an employee receives a raise, as the contract between the Employer and Union provides CNAs with a specific raise every 12 months. The Employer contends that evaluations completed by nurses may influence a DON's decision whether to move a CNA into another position, however, there is no evidence that this has ever happened.

Also, as part of the evaluation process the LPN completes a "CNA competency" form and rates the CNA as satisfactory or unsatisfactory in the areas of resident rights and responsibilities, standard precautions, personal care/grooming, nutrition, safety, care/treatment, and documentation.

**5. Interviewing CNAs – Effective Recommendation to Hire**

The nurses are involved in the interview process for CNA and charge nurse applicants. In this regard, a candidate obtains a job application from the front desk of the facility and upon completion of the application is directed to in-service director Struthers. If Struthers has time, she immediately conducts an interview with the candidate. If she does not have time, she requests a charge nurse to take the candidate on a tour of the facility, and then conducts her own interview later. During the tour, the charge nurse asks the candidate questions regarding his/her interest in employment with the Employer and answers any questions that he/she might have regarding the Employer and the facility. Following the tour, the charge nurse completes the last paragraph of an "interview process progress note" (IPPN) entitled "Nurse participating with process." The nurse checks off the space for either "Hire" or "Don't Hire." There is also a space for "Reason" which was left blank on all 32 of the IPPNs in the record. There is also a multi-lined space for the nurse to insert handwritten comments regarding her tour with the candidate. The IPPN form contains identical

paragraphs for “Nurse Manager participating with interview process,” “Nurse Manager participating with process,” and “C[NA]/front line staff participating with process.” However, the record evidence demonstrates that only the charge nurse and in-service director complete the IPPN.

Once the charge nurse completes the IPPN and makes a recommendation for or against hire, she discusses the interview of the candidate with the in-service director and/or the DON. According to DON Brown and an LPN witness, if the interviewing charge nurse does not recommend hiring of the candidate, the entire interview process ceases for that individual. However, there is evidence of one IPPN completed by an LPN in which the LPN did not recommend hire and the in-service coordinator did recommend hire. It is unclear as to whether the applicant in that instance was hired. Out of the 32 IPPNs in evidence, on only 2 did the LPN recommend against hiring the applicant; on one of those IPPNs the in-service director recommended that the applicant be hired, and the other one does not note any recommendation from the in-service director or any one other than the LPN. There are 30 IPPNs with a hire recommendation by an LPN and the in-service director. Nine of the applicants listed on those 30 IPPNs are currently employed by the Employer. The record does not indicate whether the other 21 applicants were hired and are no longer employed by the Employer, or were never hired. In this regard, DON Brown testified that many of the prospective CNAs are offered employment as recommended by the LPN and in-service director, but due to scheduling reasons (i.e., the prospective CNA is offered employment on a shift that is not his or her choice) the offer is declined. The Employer retains IPPNs recommending hire longer than those recommending against hire. The latter are retained for six months from the interview date.

The DON reviews all job applications at the facility and is primarily involved in the hiring of non-bargaining unit employees. Regarding the hiring of nurses and CNAs, it appears that in making her final hiring decision, the DON follows the hiring recommendations of the in-service director.

## **6. Other Factors**

Nurses do not lay off or recall employees from lay off. They have no authority to resolve CNA grievances filed under the grievance procedure set forth in the contract between the Employer and Union. LPNs attend nursing school in a licensed nursing program. The starting wage rate for CNAs is approximately \$11.75. The starting wage rate for LPNs is approximately \$23.50. CNAs and nurses sign in and out in a book located at the nurses’ station. While the record indicates that the Employer holds nurse meetings and nurse in-service meetings to provide guidance regarding new procedures, it is silent regarding the frequency of such meetings. The record is also silent as to staff meetings for CNAs and nurses, if such meetings occur at all. The record indicates that the charge nurses participated in a nurse supervisory training program sponsored by Nexcare Health Systems around 2006. Like the CNAs, the charge nurses are also required to periodically complete the Silver Chair Learning System on-line computer program which covers some supervisory issues. DON

Brown also testified that she and the in-service director discuss supervisory responsibilities with charge nurses during orientation.

## **Analysis**

Section 2(3) of the Act excludes from the definition of the term “employee” “any individual employed as a supervisor.” Section 2(11) of the Act defines a “supervisor” as:

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

Individuals are “statutory supervisors if: 1) they hold the authority to engage in any one of the 12 listed supervisory functions, 2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment, and 3) their authority is held in the interest of the employer.” *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001). Supervisory status may be shown if the putative supervisor has the authority either to perform a supervisory function or to effectively recommend the same.

The Board has reaffirmed that the burden to prove supervisory authority is on the party asserting it. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006); *NLRB v. Kentucky River*, supra, at 711-712. In addition, the Board’s long recognition that purely conclusionary evidence is not sufficient to establish supervisory status remains viable. The Board requires evidence that the individual actually possesses supervisory authority. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006); *Chevron Shipping Co.*, 317 NLRB 379, 381 fn. 6 (1995) (conclusionary statements without specific explanation are not enough).

Although the Act demands only the possession of Section 2(11) authority, not its exercise, the evidence still must be persuasive that such authority exists. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006). Job titles, job descriptions, or similar documents are not given controlling weight and will be rejected as mere paper, absent independent evidence of the possession of the described authority. *Id.*; *Golden Crest*, supra at 731, citing *Training School at Vineland*, 332 NLRB 1412, 1416 (2000).

### ***Assignment of Work***

The Board defines assigning work as “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.” *Oakwood Healthcare*, supra at 689.

### *Time*

The record establishes that the CNAs’ scheduled hours are determined by a scheduling supervisor. The nurses do not schedule CNAs’ work hours, and the nurses routinely schedule CNA breaks according to the facility practices. If the facility is understaffed due to CNAs calling off, nursing management is responsible for handling these calls on the day shift and procuring a replacement CNA. The record is inconclusive as to the practice followed in making calls for additional CNAs when no nursing managers are present at the facility, and indicates that the nurses or security department employees<sup>15</sup> make such calls. If the unit remains understaffed, the nurses and/or CNAs divide up the unassigned work. Regarding extending CNAs’ shifts, while there is some record evidence that nurses are authorized to require CNAs to stay past their shift for additional coverage or to complete their work duties, the collective bargaining agreement provides that CNAs cannot be mandated to stay over their scheduled shifts. That the nurses allow CNAs to leave early for reasons such as illness or a family emergency does not confer supervisory authority. *Lakeview Health Center*, 308 NLRB 75, 79 (1992); *Eventide South*, 239 NLRB 287, 288 (1978), citing *Pinecrest Convalescent Home*, 222 NLRB 13 (1976). The Employer has not established the possession of supervisory authority by LPNs in scheduling CNAs. See *Golden Crest*, supra, at 728-730.

### *Place and Tasks*

In *Oakwood Healthcare*, the Board found that emergency room charge nurses designated nursing staff to geographic areas within the emergency room. The Board found that this assignment of nursing staff to specific geographic locations within the emergency room fell within the definition of “assign” for purposes of Section 2(11). *Oakwood Healthcare*, supra at 695. Here, CNAs are assigned to their units by the scheduling supervisor. Although the nurses initially assign resident rooms to CNAs, for the most part, once assigned, the CNA remains assigned to the same rooms. CNAs’ daily tasks are largely defined by the pre-printed resident care guide and assignment/ADL sheets generated by management. CNAs routinely assist nurses and vice versa with various aspects of direct patient care. This may involve the nurse assigning a discrete task to a CNA. Nurses’ assignments of these “discrete task[s]” in these circumstances is closer to “ad hoc assignments” described in *Croft Metals*, 348 NLRB 717, 721 (2006), rather than the emergency room assignments discussed in *Oakwood*. In *Croft Metals*, supra at 721, the Board found that the switching of tasks by lead persons among employees assigned to their line or department was insufficient to confer supervisory status. Here, the LPNs’ assignment of discrete tasks to CNAs is insufficient to constitute supervisory status.

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<sup>15</sup> An LPN charge nurse testified that Nancy, Travis, and Tyrone are security department employees. The record is silent as to their last names, shift hours, or job duties.

Similarly, when a unit is understaffed, there is some evidence that a nurse sometimes may seek to have an additional CNA transferred to his or her hall for the shift, or approve the transfer of a CNA on his or her hall to another hall. However, the record does not establish that any nurse who may choose to transfer a CNA takes into account the CNA's abilities. Any occasional transfer due to short-staffing is nothing more than switching the tasks among employees, and does not constitute supervisory status. *Croft Metals*, supra at 722. The Employer has not established that any isolated temporary reassignment of duties by a LPN of a CNA for the balance of a shift denotes supervisory status.

### *Independent Judgment*

In *Oakwood Healthcare*, the Board, consistent with *Kentucky River*, adopted an interpretation of "independent judgment" that applies to any supervisory function at issue "without regard to whether the judgment is exercised using professional or technical expertise." The Board explained that "professional or technical judgments involving the use of independent judgment are supervisory if they involve one of the 12 supervisory functions of Section 2(11)." *Oakwood Healthcare*, supra at 692. The Board then set forth standards governing whether the exercise of the Section 2(11) criteria are carried out with independent judgment: "actions form a spectrum between the extremes of completely free actions and completely controlled ones, and the degree of independence necessary to constitute a judgment as 'independent' under the Act lies somewhere in between these extremes." Id. at 693. The Board found that the relevant test for supervisory status utilizing independent judgment is that "an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." Id. Further, the judgment must involve a degree of discretion that rises above the "routine or clerical." Id.

I now examine whether the LPNs exercise independent judgment regarding assignment of work. In *Oakwood Healthcare*, the Board found that the term "assign" encompassed a charge nurse's responsibility to assign nurses and aides to particular patients. *Oakwood Healthcare*, supra at 689. The Board found that "if the registered nurse weighs the individualized condition and needs of a patient against the skills or special training of available nursing personnel, the nurse's assignment involves the exercise of independent judgment." *Oakwood Healthcare*, supra at 693. The Board found that the charge nurses who worked outside of the emergency room used independent judgment in matching patients and nursing staff. For example, nurses who were proficient in administering dialysis were assigned to a kidney patient. The charge nurse assigned staff with skills in chemotherapy, orthopedics, or pediatrics to the patients with needs in those areas. Charge nurses also assigned the nursing personnel to the same resident to ensure continuity of care. The nurses who were assisting a patient with a blood transfusion were not assigned to other ill patients. Charge nurses determined whether a mental health nurse or an RN should be assigned a psychiatric patient. *Oakwood Healthcare*, supra at 696-697. In contrast, the Board found that the emergency room charge nurses did not "take into account patient acuity or nursing skill in making patient care assignments." The evidence did not show "discretion to choose

between meaningful choices on the part of charge nurses in the emergency room.” *Oakwood Healthcare*, supra at 698.

Here, although the nurses make the initial resident assignments for CNAs, for the most part, CNAs remain assigned to the same residents. To the extent the nurses make isolated reassignments, the Employer has not shown that they perform a detailed analysis of CNAs’ abilities and residents’ needs. Unlike the nurses who have extensive training and skills, CNAs do not possess specific training or skills in various medical areas. The record demonstrates that the CNAs’ assignments are routine in nature.

I earlier found that LPNs do not assign by appointing CNAs to a time or by giving them significant overall duties. I further conclude that, even if they do so, they do not exercise independent judgment in such assignments. Concerning the nurses’ assignments of CNAs to particular “times” of work, the Board held in *Oakwood Healthcare* that “the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices;” but that “a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policy or rules, the verbal instructions of higher authority, or in the provisions of a collective bargaining agreement.” *Oakwood Healthcare*, supra at 697-698. The initial scheduling, performed by the scheduling supervisor, involves no choice at all on the nurses’ part. In addition, the Employer’s practice does not clearly allow for choices by the nurses with regard to calling CNAs into work or requesting them to stay over their shift. Rather, these choices are limited under the contract.

As for the assignment of duties, the CNAs’ overall tasks are largely defined by the routine forms (resident care guide and assignment/ADL sheets) generated by management, not the nurses. In the spectrum set out by the Board, the nurses’ assignment of discrete tasks and the isolated temporary switching of tasks by nurses falls closer to “completely controlled” actions, rather than “free actions.” They do not involve a “degree of discretion that rises above routine or clerical.” *Oakwood Healthcare*, supra at 693. Thus, I find that the assignment of tasks by LPNs does not require the use of independent judgment.

### ***Evaluation of CNAs***

Nurses have provided input into some CNA evaluations. This input includes numerical ratings and written comments. However, the practice appears to be inconsistent. It appears that some nurses regularly provide input into the evaluations of CNAs while others have never provided input. Given the inconsistency in participating in the evaluation of CNAs, this evidence cannot be relied upon to establish supervisory authority. *Chevron Shipping*, 317 NLRB 379, 380.

The Employer contends that evaluations completed by nurses may influence a DON’s decision to move the CNA into another position such as ward clerk. This is not supported by the record. There is no showing that evaluations of CNAs affect their job tenure or status. The evaluations are not used to determine whether a CNA receives a raise, because the

contract between the Employer and Union dictates the CNAs' wage schedule, including the timing of the raises. The Employer has not established any practice of LPN involvement in the CNA evaluation process that establishes supervisory authority. Moreover, evaluating employees is not a statutory indicia of supervisory authority. The Board has consistently declined to find supervisory status based on evaluations without evidence that they constitute effective recommendations to reward, promote, discipline, or likewise affect the evaluated employee's job status. *Coventry Health Continuum*, 332 NLRB 52, 53-55 (2000); *Ten Broeck Commons*, 320 NLRB 806, 813 (1996).

### ***Responsible direction and discipline***

In *Oakwood Healthcare*, the Board interpreted the Section 2(11) 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 690-691. The Board, in agreement with several U.S. courts of appeals, held that for direction to be "responsible," the person directing the performance of a task must be accountable for its performance. *Oakwood Healthcare*, supra at 691-692. The Board defined the element of "accountability" as follows:

[T]o 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. *Oakwood Healthcare*, supra at 692.

The first question is whether the Employer has established that its nurses *direct* other employees within the meaning of Section 2(11). The record demonstrates that the nurses oversee CNAs' job performance and act to correct the CNAs when they are not providing adequate care, up to and including issuance of discipline, as described below. For example, a nurse will correct the CNA if she perceives that the CNA is not using proper procedures in lifting and transferring a resident. The record also demonstrates that the nurses will direct the CNAs to perform certain tasks when the nurse determines that such tasks are necessary. For example, the nurses will direct CNAs to apply and check residents' alarms, or to change an incontinent resident. The evidence is sufficient to establish that the nurses "direct" the CNAs within the meaning of the definition set forth in *Oakwood Healthcare*. *Golden Crest Healthcare Center*, supra at 731.

The next question is whether the Employer has established that the nurses are *accountable* for their actions in directing the CNAs. I find that the Employer has met this burden. Nurses are advised by the DON, ADON, and/or CCCs that they are subject to discipline for failing to oversee and supervise the work of the CNAs, and have been

disciplined for the conduct of CNAs. The Employer presented evidence demonstrating that the nurses are subject to discipline, and some have received discipline, if the CNAs under their direction fail to adequately perform their duties. The record contains evidence of the issuance of actual disciplinary action, four written “EMPLOYEE DISCIPLINARY WARNING RECORDS,” issued to four nurses from February 2005 to March 2009, as a result of their performance in directing CNAs. While only one of the write-ups specifically refers to the LPN’s failure to supervise a CNA, and the others were for failure to provide adequate patient care which the Employer contends was the direct responsibility of the CNAs, this is arguable evidence of actual accountability as required under *Oakwood Healthcare*. The “prospect of adverse consequences” for the nurses here is not merely speculative and is sufficient to establish accountability. Accordingly, applying the *Oakwood Healthcare* test for responsible direction, I find that the nurses possess the authority to responsibly direct the CNAs. *Croft Metals*, supra at 722; see, *Golden Crest Healthcare Center*, supra at 731.

As to their role in the disciplinary process, the charge nurses initiate discipline of the CNAs. Exercising independent judgment and discretion, nurses identify conduct that violates employee work rules or is otherwise inappropriate; complete the employee disciplinary warning record, which involves placing the conduct in one of two groups of violations, each one of which has discrete pre-assigned punishment; present the disciplinary form to the offending employee in the presence of a union representative; and transmit the disciplinary form to the human resources office for placement in the employee’s personnel file. The basis for discipline runs the gamut from break violations to patient care-related infractions to insubordination.

The Employer utilizes a progressive discipline policy. Thus, the employee disciplinary warning record, if there are repeated violations, plays a role in what could be the eventual suspension or discharge of an employee. The charge nurses are empowered to use the discipline form to enforce the Employer’s entire panoply of work rules, not just those related to patient care. See, *Wedgewood Health Care*, 267 NLRB 525, fn.4 (1983).

The authority of the charge nurses unilaterally to determine employee violations of the work rules, to determine which level of rule violation is involved, and to present the warning notice as part of the progressive system of discipline to the employee, is indicative of supervisory authority, particularly where the warning is placed in the offending employee’s personnel file without further investigation or review by higher supervisory authority. *Heartland of Beckley*, 328 NLRB 1056 (1999); *Wedgewood Health Care*, supra at 526. At least three CNAs received multiple disciplinary write-ups from the same LPN, resulting in progressive discipline for those CNAs. Specifically, one LPN issued a second written warning to a CNA on June 26, 2009, and another second written warning to the same CNA on January 10, 2010; the same LPN issued a counseling to a CNA on June 26, 2009, and a second written warning to the same CNA on January 22, 2010, resulting in a three-day suspension; and another LPN issued a first written warning to a CNA on September 25, 2008, and a second written warning to the same CNA on October 24, 2008. These are clear

examples that the employee disciplinary warning forms constitute a form of discipline because they not only affect an employee's job status, i.e., suspension or discharge, but they also lay a foundation, under the progressive discipline system, for future discipline. *Berthold Nursing Care Center*, 351 NLRB 27, 29 (2007); *Bon Harbor Nursing and Rehabilitation Center*, 348 NLRB 1062, 1064 (2006); *Promedica Health Systems, Inc.*, 343 NLRB 1351 (2004); *Wedgewood Health Care*, supra at 526; *Northwoods Manor, Inc.*, 260 NLRB 854, 855, fn.3 (1982). The employee disciplinary warning record forms themselves are an integral part of the Employer's progressive discipline system in that they are used to document each phase of the disciplinary process and routinely result in formal discipline. *Berthold Nursing Care Center*, supra at 30; *Starwood Hotels*, 350 NLRB 1114, 1115-1117 (2007).

While the Union presented two LPN charge nurses who testified they have never completed an employee disciplinary warning record form, the record evidence demonstrates that 14 different LPNs completed 22 employee disciplinary warning record forms. Significantly, the record demonstrates that disciplinary action taken by the charge nurses is not limited to only a few of them. At any rate, that some nurses choose not to exercise their disciplinary authority is not determinative as it is the possession of the authority to discipline, not the exercise of that authority, that is relevant. See *Mountaineer Park, Inc.*, 343 NLRB 1473, 1474 (2003).

Moreover, the nurses here have the discretion to write up an employee infraction on a disciplinary warning record versus a one-on-one in-service form. In this regard, the nurses alone decide whether the conduct warrants a one-on-one in-service versus written documentation. Because of this discretion, I find that the nurses are vested with the authority to exercise independent judgment in deciding whether to initiate the progressive disciplinary process against an employee. *Berthold Nursing Care Center*, supra at 29; *Oakwood Healthcare*, supra at 693. (“[t]he mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices.”) The exercise of independent judgment in initiating the disciplinary process constitutes a substantial role in the decision to discipline, and is indeed indicative of supervisory authority. *Berthold Nursing Care Center*, supra at 29; See *Progressive Transportation Services*, 340 NLRB 1044, 1046 (2003); *Mountaineer Park, Inc.*, 343 NLRB 1473, 1475 (2004).

I find that the written employee disciplinary warning records issued to CNAs by nurses as described above have the real potential to impact the CNAs' employment and that the Employer has met its burden to show that, by virtue of this activity, the nurses are statutory supervisors. *Bon Harbor Nursing and Rehabilitation Center*, supra at 1064.

### ***Interviewing CNAs – Effective Recommendation to Hire***

The Employer argues that in conducting a tour of the facility with prospective employees, interviewing prospective employees, and completing IPPNs with

recommendations to hire or not hire, the LPNs are making effective recommendations to the Employer regarding the hiring of new employees.

Once the charge nurse completes the IPPN and makes a recommendation for or against hire, she discusses the interview of the candidate with the in-service director and/or the DON. The in-service director conducts her own interview with the candidate. In making the final hiring decision, the DON follows the recommendations of the in-service director, who relies on the recommendations of the interviewing charge nurse, without independent review.

While the record suggests that the LPNs possess and exercise authority to effectively recommend hiring of employees, the record evidence is inconclusive in that regard for the following reasons. First, although 9 applicants among 30 recommended by LPNs for hire are currently employed by the Employer, it is unknown whether the other 21 applicants were hired and are no longer employed by the Employer, or were never hired. Second, while the Employer argues that the entire interview process ceases for a prospective employee if the interviewing LPN does not recommend hire, there is evidence of one IPPN completed by an LPN noting a recommendation against hire but the in-service coordinator recommended the candidate be hired. There is also another IPPN indicating that the LPN recommended against hire, and there is no notation from the in-service director or anyone else on the IPPN. This evidence merely indicates that the LPN recommended that the applicant not be hired, but does not conclusively establish anything else. Thus, although the record testimony arguably suggests that the LPNs effectively recommend job applicants be hired, it is not conclusive.

### ***Secondary Indicia***

Further support for the finding of supervisory status is certain secondary indicia of supervisory status. The existence of secondary indicia, such as title and higher pay, standing alone, is insufficient to demonstrate supervisory status. *Shen Automotive Dealership Group*, 321 NLRB 586, 594 (1996); *Billows Electric Supply*, 311 NLRB 878 fn.2 (1993). However, they can be a factor and here they are significant. The LPNs hourly wage is almost double that of the CNAs and other bargaining unit employees. They are required to have extensive schooling and a state mandated license. The job descriptions of the nurses note their asserted supervisory authority. *Wedgewood Health Care*, 267 NLRB 525, 526, fn. 11 (1983). For substantial periods on the afternoon and midnight shifts, and during the weekend, they are the highest ranking employees at the facility. *St. Francis Medical Center-West*, 323 NLRB 1046, 1047-1048 (1997).

### **Conclusion**

Based on the foregoing and the record as a whole, I conclude that the LPNs are statutory supervisors and are excluded from the bargaining unit.

**IT IS ORDERED** that the Employer's petition to clarify the bargaining unit to exclude the licensed practical nurses is granted.

Dated at Detroit, Michigan, this 23rd day of July 2010.

(SEAL)

*/s/ Stephen M. Glasser*

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Stephen M. Glasser, Regional Director  
National Labor Relations Board, Region 7  
Patrick V. McNamara Federal Building  
477 Michigan Avenue, Room 300  
Detroit, Michigan 48226

### **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 August 6, 2010**. The request may be filed electronically through **E-Gov** on the Board's website, **www.nlr.gov**,<sup>16</sup> but may **not** be filed by facsimile.

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<sup>16</sup> To file the request for review electronically, go to **www.nlr.gov** and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Board/Office of the Executive Secretary** and click on the **File Documents** button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, the user must check the box next to the statement indicating that the user has read and accepts the E-Filing terms and then click the **Accept** button. Then complete the E-Filing form, attach the document containing the request for review, and click the **Submit Form** button. Guidance for E-Filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under **E-Gov** on the Board's web site, **www.nlr.gov**.

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

**FAIRLANE SENIOR CARE AND REHAB CENTER**

**Employer/Petitioner**

**and**

**SEIU HEALTHCARE MICHIGAN**

**Union**

**CASE 7-UC-643**

**Date of Mailing: July 23, 2010**

**CERTIFICATE OF SERVICE OF: DECISION AND ORDER**

I, the undersigned employee of the National Labor Relations Board, certify that on the date indicated above I caused the above-entitled document to be served by regular mail, by placing copies into the U.S. Mail, postage paid, addressed to the following persons at the following addresses:

**REGULAR MAIL:**

Kitch Drutchas Wagner Valitutti & Sherbrook  
Attn: Karen B. Berkery, Esq.  
One Woodward Avenue, Suite 2400  
Detroit, MI 48226-5485

Klimist, McKnight, Sale, McClow & Canzano, PC  
Attn: Patrick Rorai, Esq.  
400 Galleria Officentre, Suite 117  
Southfield, MI 48034

SEIU Healthcare Michigan  
Attn: Brenda D. Robinson, Esq.  
2680 Vulcan Street  
Muskegon, MI 49444

Fairlane Senior Care and Rehab Center  
Attn: Karen B. Berkery, Esq.  
15750 Joy Road  
Detroit, MI 48228

Local 79, SEIU Healthcare Michigan  
2604 Fourth Street  
Detroit, MI 48201

*/s/ J. Moore*

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J. Moore, DRA Secretary

Date: 7/23/10