

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

**FAIRLANE SENIOR CARE AND REHAB CENTER
Employer/Petitioner**

and

Case 7-UC-643

**SEIUHEALTHCARE MICHIGAN
Union**

REQUEST FOR REVIEW

Pursuant to Section 102.67(c)(2) of the Rules and Regulations of the National Labor Relations Board, SEIU Healthcare Michigan (hereafter “Union”) hereby requests review of the Decision and Order (hereafter “D&O”) issued by the Regional Director for Region Seven of the Board (sometimes hereafter referred to as the RD) on July 23, 2010. In particular, the Union requests review with regard to the Regional Director’s decision that Fairlane Senior Care and Rehab Center’s (hereafter “Employer”) LPN charge nurses are supervisors within the meaning of the Act and that as a result the existing collective bargaining unit should be clarified to exclude them from the unit. The Union asserts that the Regional Director’s decision on this substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of the Union.

I. BACKGROUND

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 in the following bargaining unit: 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 about 179 employees in the unit, including 34 bargaining unit LPNs and 105 CNAs. The most recent collective bargaining agreement between the parties was effective May 1, 2007, through April 30, 2010.

The petition in this matter, filed and later amended by the Employer on May 25, 2010, seeks to exclude LPNs¹ from the bargaining unit on the basis that they are supervisors within the meaning of Section 2(11) of the Act. The Union asserts that they are not supervisors and should remain in the unit.

A hearing was held before Hearing Officer Maria Casenas-Gascon on June 1, June 2 and June 7, 2010, at the offices of Region 7 of the Board in Detroit, MI. On July 23, 2010, the RD issued a D&O and stated:

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 [the LPNs] 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.² (emphasis added)

With regard to the issue of disciplining employees, the RD stated:

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

¹ The Employer's RNs and LPNs are referred to by the Employer as either their nurses or charge nurses.

² The Union notes that the RD did not make a finding that LPNs make effective recommendations to hire employees. That issue is not, therefore, a subject of this Request for Review. The Union notes, however, that there is no basis for a finding that the LPNs make effective recommendations to hire. The record establishes that the LPNs have very limited input in the hiring process. See **J.C. Penney Corp.**, 347 NLRB 127, 129 (2006) and **Wake Electric Membership Corp.**, 338 NLRB 298 (2002).

this activity, the nurses are statutory supervisors. *Bon Harbor Nursing and Rehabilitation Center*, supra at 1064. (D&O, p.17)

With regard to the issue of responsibly directing employees, the RD stated:

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. 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 the CNAs...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. (D&O, p.15)³

II. ARGUMENT: THE LPNs ARE NOT SUPERVISORS

There are several factors that lead to the conclusion that the LPNs are not supervisors within the meaning of the Act.

A. LPNs do not have the authority to responsibly direct employees

In *Oakwood Healthcare Inc.*, the Board defined "responsibly direct" under Section 2(11) and held "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 . . . are not performed properly." 348 NLRB 686, 692 (2006). Here, the record fails to establish that the

³ At page 2 of the D&O, the RD stated, "They [LPNs] exercise authority in the interest of the Employer **requiring the use of independent judgment** to discipline and responsibly direct employee." (emphasis added) In the Analysis section of the D&O, at pages 11-18, however, there is no detailed discussion as to how this conclusion was reached.

Employer holds its LPNs accountable for the performance of the CNAs. Further the LPNs do not use independent judgment in directing the CNAs. For these reasons, the record does not establish that the LPNs responsibly direct employees within the meaning of the Act.

1. The Employer does not hold LPNs accountable.

It has long been held that the burden of proving supervisory status lies with the party asserting that such status exists. *NLRB v. Kentucky River Community Care, Inc.*, 121 S.Ct. 1861, 1866 (2001), 167 LRRM 2164. Lack of evidence is construed against the party asserting supervisory status. *Michigan Masonic Home*, 332 NLRB 1409 (2000); *Elmhurst Extended Care Facilities*, 329 NLRB 535 fn. 8 (1999). Several post *Oakwood* decisions have made the point that supervisory status must be proven and that conclusory evidence without detailed, specific facts will not satisfy the burden of proof. See *Lynwood Manor*, 350 NLRB 489, 490 (2007); *Austal USA, L.L.C.*, 349 NLRB 561 fn. 6 (2007); and *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006). Here, the testimony of the above witnesses lacks the specificity needed to establish that the LPNs are accountable for the performance of CNAs.

Several witnesses testified with regard to the issue of accountability. LPN Tominique Miller (Tr. 48/18)⁴ and LPN Takisha Fagin (Tr. 199/10; 208/17; 215/8) testified that they were told that LPNs would be disciplined if CNAs did not perform their job. LPN Kelly Fields testified that she could be written up if her unit was not run properly. (Tr. 368/2). Based upon the conclusory testimony of Miller, Fagin and Fields, it cannot be concluded that the Employer holds its LPNs accountable for the performance of the CNAs. Few, if any, details were provided as to exactly who told them, what they were told, when, where or why.

The RD also relied upon the following reprimand notices issued to four LPNs in concluding that LPNs are accountable for CNA job performance:

⁴ This is in reference to the page and line number of the transcript.

- (1) On March 10, 2005, LPN Faye Moton was issued a first written warning due to lack of supervision of employee break times.
- (2) On March 17, 2005, LPN Erica Lindsay was issued a first written warning for failing to ensure the proper care of a resident as a result of the improper positioning of a catheter.
- (3) On March 5, 2008, LPN Crystal Williams was issued a second written warning because of a variety of problems that occurred with residents under her care.
- (4) On March 30, 2009, LPN Mattie Washington was issued a second written warning. It appears that she was held responsible because a resident had been found on the floor with the alarm not sounding. (Er. Ex. 63)

These four reprimands do not establish that the Employer had a practice of holding LPNs accountable for CNA job performance. While it is clear that discipline was issued against the LPNs, the record is woefully unclear how any of these reprimands demonstrate a lack of supervision. The reprimands do not explain how the LPNs failed to fulfill their supervisory duties or include specifics regarding what CNA job failures instigated the need to discipline the LPN. The supervisors who issued these disciplines did not testify to provide any light to the circumstances that lead to the reprimands. DON Lauetta Brown was similarly unable to provide any detail as to the facts surrounding these disciplines. (Tr. 418/5; 419/10; 420/2; 421/12, 21).

The other striking fact about these LPN reprimands is that in the 63 months from March 10, 2005 (when the first of the four reprimand notices issued) through June 1, 2010 (the first day of the hearing in this matter), only *four* reprimand notices issued – less than 1 per year.⁵ Two were issued more than 5 years prior to the hearing. No reprimands were issued in the 14-month period prior to the opening of the hearing.

The Board has consistently held that scant and sporadic evidence of supervisory authority does not meet an Employer's burden of establishing supervisory status. See *Avante supra* at 1057; *Golden Crest Healthcare*, 348 NLRB No. 39, slip. op at 5 (2006). Merriam-Webster's Dictionary defines sporadic as "occurring occasionally, singly, or in irregular or random

⁵ The Union subpoenaed disciplinary records going back 5 years. The Employer provided disciplinary records going back to March 2005 – 63 months.

instances.” Clearly, these reprimand notices are both scant and sporadic and do not establish that LPNs are accountable for CNA job performance.

2. LPNs lack independent judgment.

Under the standard set forth in *Oakwood Healthcare*, the Union does not contest the fact that LPNs direct the work of the CNAs. However, in doing so, the LPNs do not exercise independent judgment. During the course of a daily shift or work week, the CNAs repeatedly and routinely perform dozens of discrete tasks. (E. Ex. 1, CNA Job Description & Tr. 523-527)

As a result of the nature of these tasks and because of their training and experience, the record establishes that the CNAs do not require detailed instructions from the LPNs.⁶ As to the routine nature of the work, the testimony of CNA Cheryll Wideman is noteworthy. When asked how she knew what tasks needed to be completed on a given day, she stated:

I’m working with residents every day, the same residents, so I know exactly what they need. I have to go to the ADL [assignment] book, check out what is written there, so basically if you’re working with them every day you know exactly what to do. (Tr. 520/2).

It is clear from a review of the CNAs’ tasks that their work is routine. The RD acknowledged this fact: “The work of the CNAs is largely routine and does not require continuous supervision.” (D&O, p. 6)

In *Croft Metals Inc.*, 348 NLRB 717, 722 (2006), the Board noted:

The remaining question is whether the Employer has carried its burden of proving that the lead persons’ responsible direction of employees is exercised with independent judgment and involves a degree of discretion that rises above the “routine or clerical.” The short answer is no.....the Employer’s evidence regarding the production and maintenance employees indicates that such ***employees generally perform the same job or repetitive tasks on a regular basis*** and, once trained in their positions, ***require minimal guidance***. Thus, ***we cannot conclude that the degree of discretion involved in these activities rises above the routine or clerical.*** (emphasis added)

⁶ See Tr. 478/6; 478/13; 486/22; 485/24; 486/15; 508/25; 509/5; 521/13; 522/9; 523/12; 524/22; 525/18; 526/8; 527/10; 531/18; 577/2; 594/20; 595/10; 600/7

Here, as in *Croft Metals*, the CNAs routinely perform the same job tasks with minimal guidance. In essence, the CNAs know their job duties and are not responsibly directed in these routine tasks by LPNs. There is no evidence any specific CNA job tasks requiring LPN direction. Therefore, CNAs do not receive responsible direction from the LPNs. The fact that LPNs occasionally remind CNAs to perform the routine tasks does not meet the statutory definition of supervisory authority. The RD erroneously concluded that the Employer satisfied its burden of proving that LPNs responsibly direct CNAs under the meaning of Section 2(11).

B. LPNs do not have the authority to discipline employees.

LPNs have participated in the Employer's disciplinary process, but only in a manner which is routine, clerical, perfunctory, isolated and sporadic. Their role in this disciplinary process is mandated by the Employer's rules and regulations and requires a routine application of these rules which does not involve the use of independent judgment. The Board has consistently rejected such limited authority as proof of supervisory status under the Act. See *Volair Contractors, Inc.*, 341 NLRB 673, 675 (2004), and cases cited therein; *Bowne of Houston, Inc.*, 280 NLRB 1222-1225 (1986); *Commercial Fleet Wash*, 190 NLRB 326 (1971)

The record reflects that LPNs have written out reprimand notices (Employee Disciplinary Warning Record) that have resulted in discipline.⁷ The following is a summary of those reprimands:

⁷ At page 7 of his D&O, the RD admits that "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 RD made no finding that the LPNs have the authority to discharge or suspend within the meaning of Section 2(11) of the Act.

Exhibit	Employee	Date	Occurance	By
Er. #5.	Marilyn Marshall	6/26/09	2 nd Written	LPN Miller.
#7	Elizabeth Freeman	6/26/09	Counseling	Miller
#8	Marilyn Richardson	6/26/09	Counseling	Miller
#9	Elizabeth Freeman	1/22/10	2 nd Written	Miller
#10	DeShawn Rembert	1/4/09	Counseling	Miller
#11	Marilyn Marshall	1/22/10	Counseling	Miller ⁸
#25	Chanta Gantz	5/10/10	Termination	LPNBray
#26	Alice Dobbs	5/12/10	Suspension	Bray
#41	Sean Hawkins	4/21/09	Counseling	LPN Wallace-Carbin
#45	M. Richardson	4/15/10	Suspension	Wallace-Carbin
#47	Georgia Spivey	11/12/08	1 st Written	LPN Fields

#62 This exhibit consists of reprimands issued to employees by LPNs who did not testify during the hearing.

1	Darnell Simmons	2/19/08	Suspension	P. Adams
2	Stuart Paretha	5/21/10	Counseling	Not clear
3	Talina Goree	7/16/09	1 st Written	ADON Floyd ⁹
4	Hawkins	3/12/07	2 nd Written	Not clear
5	Terry Lyndon	1/25/08	1 st Written	Not clear
6	Alice Dobbs	11/24/08	1 st Written	Not clear
7	Terry Lyndon	10/24/08	2 nd Written	Not clear
8	D. Simmons	3/5/09	Not clear	Not clear
9	Cheryll Wideman	9/17/08	1 st Written	Not clear ¹⁰
10	Ray Donita	9/17/08	Suspension	Not clear
11	Ruby McBride	1/16/09	1 st Written	Not clear
12	Marilyn Greer	2/2/10	1 st Written	LPN M. Washington ¹¹

LPNs Miller, Fagin and Wallace-Carbin claimed that they issued reprimands that were not entered into the record. However these witnesses provided no facts about these purported

⁸ This reprimand notice may have been written in error and possibly should have been a second written warning. (Tr. 95/5)

⁹ Based upon the testimony of DON Brown (Tr. 383/3), it appears that this reprimand should not have been counted because it was issued by ADON Sondra Floyd.

¹⁰ Wideman testified that she recalled that the reprimand notice was issued by the midnight supervisor and not by one of the LPNs who are the subject of this proceeding. (Tr. 552)

¹¹ When the Employer introduced Employer Exhibit 62, DON Brown testified that included in the exhibit were 14 reprimands that were issued by LPNs who had not testified during the hearing. Rather than 14 reprimands being part of Employer Exhibit #62, the Union notes that a more accurate count is about 10. As noted in footnotes 8 and 9, it appears that the Wideman and Goree reprimands should not have counted. In addition, it appears that included in the 14 reprimands referred to by the Employer were duplicate reprimands for employees Simmons and Lyndon.

reprimands. The fact that they were not in writing mitigates against a conclusion that they were, in fact, disciplines.

Therefore, the evidence shows that over a 5 year period approximately 21 CNA reprimands were issued by purported supervisors. The Employer admits that these reprimands represent all CNA reprimands issued by LPNs during this time period. (Tr. 417-18). 10 of these reprimands were issued by unidentified employees and submitted with no supporting evidence as to their authenticity or veracity and are entirely unreliable. (E. Ex. 62) In essence, the record reliably establishes that only 11 LPNs completed reprimand forms over the 5-year period preceding the hearing. In response to the Union's subpoena, the Employer produced all reprimands (approximately 250) issued at its facility by any supervisor during these 5 years (Tr. 410 & 414) This means that LPNs were involved in only 4% of all the Employer's disciplinary actions during this time period. Even under the Employer's best case scenario, LPNs were involved in only 8% of all disciplines. Moreover, the record shows the identities of only 4 (out of 34) active LPNs who completed reprimand notices. This sparse and sporadic evidence of discipline is insufficient to establish supervisory authority.

1. LPNs perform clerical (not supervisory) functions when filling out reprimand forms.

In issuing a reprimand, LPNs perform a clerical function of writing down what they perceived to be a work rule violation. Miller stated that all that she was required to do was "write down a description of the occurrence." (Tr. 88/24) Wallace-Carbin gave similar testimony:

Q. So your requirement is to do nothing more than write down a description of the occurrence. Is that correct?

A. We write down the description and then we have to call HR to find out what step they're at... and then we check the box for that step.

Q. You don't do anything else after that?

A. Sign it and issue it. (Tr. 261)

The Employer's witnesses presented no testimony that LPNs made the ultimate decision to issue discipline or that they did anything more than simply describe the offense on a form. In fact, the reprimand forms contain a section entitled "Disposition of This Warning," permitting the supervisor to document whether the reprimand was "Issued," or "Rescinded." Only 4 of the 11 reprimands issued by the LPN witnesses show that the discipline was actually issued.¹² All 4 of these reprimands involved discipline issued by the DON or ADON (not the LPN). Therefore, none of the reprimands completed by the Employer's witnesses show that the LPN made the ultimate decision with respect to the disposition of the discipline.

2. LPNs have limited authority under Employer's rules.

The Regional Director acknowledged that if employees are subject to suspension or discharge, the decision must be approved by the DON or the ADON. (D&O p. 7) This effectively means that the LPNs are not involved in the final decision making process with regard to serious Group II rule infractions. The authority of LPNs is limited to Group I rules which deal with relatively minor rule infractions. (See Employer's Ex. 6, pgs. 26-27)

3. LPNs exercise no independent judgment when issuing reprimands.

The *Oakwood* Board majority defined "independent judgment" to be "at a minimum" the authority to "act or effectively recommend action, free of the control of others" and to "form an opinion or evaluation by discerning and comparing data." The Board further stated, "that a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth *in company policies or rules*, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement and that independent judgment contrasts with actions that are "of a routine or merely clerical nature." Testifying in general terms that occasions exist, *but omitting any details as to the charge nurses' precise role or how they*

¹² See Employer's Exs. 9, 25, 26 & 45. The section entitled "Disposition Of This Warning" was left blank.

arrived at any judgments, wholly precludes a finding that their authority in such areas is exercised independently. *Loyalhanna Health Care*, 352 NLRB 863, 864 (2008). [emphasis added]

In issuing reprimands, LPNs are merely acting in accordance with their job description given to them by the Employer or at the direction of the statutory supervisors. In fact, Wallace-Carbin (Tr. 239/24; 258/10), Evans (Tr. 570/22; 572/14; 573/9) and Thomas (Tr. 468/13; 507/4) testified that they were told that they could be written up or disciplined if they, themselves, refused to discipline CNAs. LPNs are not exercising independent judgment when they complete the reprimand forms; they are simply following orders. If they see an incident that is a violation of the Employer's rules, they fill out a form given to them by the Employer. The record contains very little detail as to how the LPNs arrived at any decision with respect to issuing reprimands. The reprimand forms on record contain no information regarding the LPNs' precise role in the disciplinary process other than reporting the facts surrounding an alleged rule violation.

The RD relied upon four "one-on-one in-service" reports issued by only two LPNs (from January 2010 through April 2010) as proof that all LPNs exercise independent judgment in deciding whether to initiate the progressive disciplinary process against a CNA.¹³ The Employer's witnesses admitted that these in-service proceedings are educational (not disciplinary) in nature and, therefore, are not a part of the progressive disciplinary process. (Tr. 84-85) According to DON Brown, the only criteria that the LPNs consider when deciding between in-service and discipline is whether or not the incident at issue posed a risk to resident care. (Tr. 397). However, any rule violation at the Employer's facility could arguably pose a risk to resident care. Three of the four in-service reports contradict this purported discretionary

¹³ See Employer's Exs. 12, 13, 14 & 35

criteria as they directly cite rule violations effecting resident care.¹⁴ The record is devoid of any specific reasoning why the two LPNs decided to issue in-services to the CNAs (in lieu of discipline). The in-service reports, themselves, were written in a haphazard manner and include little, or no, information about how the LPN educated the CNA or the means by which the CNA could improve job performance. Finally, the fact that two LPNs issued four total in-service reports, during a four-month period, is insufficient evidence that LPNs exercise independent judgment in the disciplinary process.

4. LPNs have no disciplinary authority under Employer's progressive disciplinary process.

When issuing a reprimand notice, LPNs have no authority to decide what step of the progressive discipline will apply to an employee. The level of discipline is entirely dependent upon whether there is any prior discipline on the record of an employee and whether the infraction is a Group I violation, which starts with a written counseling, or a Group II violation, which results in a step three suspension or step four discharge. (Tr. 98/6; 130/15)

5. LPNs do not know how to properly discipline under Employer's progressive disciplinary process.

The LPNs have very little information concerning the Employer's progressive discipline system. When LPNs write out a reprimand notice, they do not know at that time whether it will be considered a step one, two, three or four reprimand. Bray testified that in two instances, she did not even know that an employee was at the suspension or discharge stage of the progressive discipline procedure until a meeting was held with the employee and the Union steward. (Tr. 174/10; 175/7) LPNs do not have access to the personnel file of employees and do not know what, if any, prior discipline is on the record of the employees. They have to contact the HR

¹⁴ See E. Ex. #13 (CNA in-service for failing to get residents out of bed in a timely manner); see also E. Ex. #14 (failure to provide water to resident) and E. Ex. #35 (failure to check resident bed alarms).

department (Tr. 21/2; 86/20; 87/5; 128/20; 145/2; 241/11; 261/9; 273/1), the DON (Tr. 163/13) or one of the CCCs (Tr. 241/20; 304/15; 336/20) to find out what level of discipline will be applied as a result of the issuance of a reprimand notice.

Those few LPNs who have actually filled out reprimand forms merely checked a box corresponding to a purported step in the disciplinary process. However, not a single LPN could explain with any specificity how they administered discipline through a verbal coaching (Step 1), a formal counseling (Step 2) or a written warning (Step 3)¹⁵ There is no record evidence of how supervisors (or LPNs) properly issue discipline and corrective action under any of these steps.¹⁶ The only evidence is that a few LPNs described alleged rule violations and checked a few boxes on a form. What is evident is that the LPNs lacked even basic knowledge about the Employer's progressive disciplinary process and their role in this process was merely reportorial; not supervisory. *Passavant Health Center*, 284 NLRB 887, 890-891 (1987)

6. The reprimands issued by the LPNs have been sparse and sporadic.

The Board has routinely declined to find supervisory status where the exercise of supervision was sporadic and infrequent. *Volair Contractors, Inc.* 341 NLRB 673, 675 (2004); *Carlisle Engineered Products*, 330 NLRB 1359, 1361(2000). As stated above, only 4%-8% of all disciplines issued by the Employer during the five years preceding the hearing were issued by LPNs while the remainder issued by undisputed supervisors in upper management.

The limited number of reprimands produced by the Employer, covering a 5-year period, clearly shows that the LPNs spend an insubstantial portion of their working time disciplining CNAs. The Union notes that the earliest reprimand produced by the Employer issued in March

¹⁵ See Transcript pgs. 19, 23, 26, 28, 30, 32, 79, 80, 94, 97, 99, 129,144, 145, 164, 165, 175, 240, 242, 256, 278, 303, 331 & 347.

¹⁶ The Employer's progressive disciplinary procedure requires supervisors to document a Step 2 Formal Counseling on a "corrective action form." (E. Ex. 6, pg 26). Although it appears as if some of the identified LPNs issued a Step 2 discipline, no such corrective action form was submitted into evidence.

2007. During the 39 month period from that date through the opening of the hearing, there were 25 months where none issued, only 14 months where at least one reprimand issued, and only five months where more than one issued.

On an individual LPN basis, the lack of reprimands issued is also noteworthy. 7 LPNs testified during the hearing. The record establishes that they have issued the following number of reprimands.

LPN	Years employed as LPN	Number of reprimands
Tominique Miller (Tr. 138/2)	Almost two years	7
Ebonie Bray (Tr. 147/2)	Less than 10 months	2
Takisha Fagin (Tr. 194/25)	6 years	1
E. Wallace-Carbin (Tr. 244/7)	More than 3 years	More than 2
Kelly Fields (Tr. 305/15)	Continuously 2 years	1
Brenda Thomas (Tr. 470/13)	1.5 years	0
Alice Evans (Tr. 571/11)	About 7 years	0

In his D&O, the RD concluded that the evidence established that at least 14 LPNs had issued reprimand notices. While the exact number is not known,¹⁷ it is noted that well more than a majority of the Employer’s current LPNs have never issued a reprimand notice. The sporadic and infrequent exercise of LPN supervisory authority with respect to discipline is persuasive evidence against a finding of supervisory status under the Act.

C. If LPNs are supervisors, the ratio of supervisors to unit employees is out of balance.

The RD noted that in the existing bargaining unit, there are 34 unit LPNs, 105 CNAs, and 40 other bargaining unit employees. (D&O p. 2) The RD also found that “One or two nurses and two to five CNAs work on each unit each shift depending on patient census and the shift.” (Id. at p. 3)

¹⁷ The signatures cannot be clearly read on several of the reprimands that are part of Employer Exhibit #62.

If the LPNs are excluded from the unit as supervisors, the remaining 145 employees will be supervised by at least 59 supervisors. The ratio of supervisors to employees further increases when the routine staffing levels on each unit of the facility are taken into account. During both the day and afternoon shift, there would be just as many, if not, more supervisors in any of the five nursing units than there would be employees. (Tr. 404) While it is not itself statutory indicia, the ratio of supervisors to rank-and-file employees is often a factor in considering supervisory status. See *Harborside Healthcare, Inc.*, 330 NLRB 1334, 1336 (2000) where the Board noted,

“Further, we note that if the nurses were found to be statutory supervisors, the resulting supervisor-to-employee ratio of 38 supervisors to 35 employees would be impracticable and unreasonable. See *North Miami Convalescent Home*, 224 NLRB 1271, 1272 (1976).” Also see *U.S. Gypsum Co.*, 178 NLRB 85, 86 (1969), *Welsh Farms Ice Cream*, 161 NLRB 748, 751 (1966) and *West Virginia Pulp & Paper Co.*, 122 NLRB 738, 755 fn. 22 (1958).

If LPNs are, in fact, supervisors, there will be no non-supervisory employees who will be providing any guidance or direction to the CNAs. In enacting Section 2(11) of the Act, Congress sought to distinguish between truly supervisory personnel, who are vested with “genuine management prerogatives” and other employees, such as “straw bosses, leadmen, and set-up men” who enjoy the Act’s protections even though they perform “minor supervisory duties.” *NLRB V. Bell Aerospace Co.*, 416 U.S. 267, 280-281 (1974). Accepting the RD’s conclusion would mean that every other employee at the Employer’s facility is a supervisor; a conclusion contrary to the intent of Congress.

III. CONCLUSION

For the reasons discussed above, the Union asserts that the Employer's LPNs are not supervisors within the meaning of Section 2(11) of the Act and that the Board should grant the Union's Request for Review.

Respectively submitted,

KLIMIST, McKNIGHT, SALE,
McCLOW & CANZANO, P.C.

By: /s/ David R. Radtke
Samuel C. McKnight (P23096)
David R. Radtke (P47016)
Attorneys for the Union
400 Galleria Officentre, Suite 117
Southfield, MI 48034
(248) 354-9650

Dated: August 20, 2010

CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2010, I electronically filed the foregoing document with the National Labor Relations Board in Washington, D.C. using the NLRB's e-filing system and electronically mailed a copy to the Employer's attorney, Karen Berkery, Esq., at karen.berkery@kitch.com

Respectively submitted,

KLIMIST, McKNIGHT, SALE,
McCLOW & CANZANO, P.C.

By: /s/ David R. Radtke
Samuel C. McKnight (P23096)
David R. Radtke (P47016)
Attorneys for the Union
400 Galleria Officentre, Suite 117
Southfield, MI 48034
(248) 354-9650