

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

FAIRLANE SENIOR CARE & REHAB
CENTER

Petitioner,

And

SEIU HEALTHCARE MICHIGAN,

Union.

Case 7-UC-000643

**PETITIONER, FAIRLANE SENIOR CARE & REHAB CENTER'S BRIEF
IN OPPOSITION**

The Petitioner, FAIRLANE SENIOR CARE AND REHAB CENTER (hereinafter "Fairlane"), hereby opposes the request for review of the Regional Director's Decision and Order filed by SEIU Healthcare Michigan and urges the Board to deny the request and affirm the Regional Director's Decision and Order (hereinafter "D & O") issued by the Regional Director for Region 7 of the Board (hereinafter referred to as the "RD") on July 23, 2010 which found that the LPNs are statutory supervisors and are excluded from the bargaining unit. Fairlane submits that the RD's decision was factually supported by the evidence and that the Union has failed to establish that the RD's decision was clearly erroneous and as such there was no error that prejudicially affected the rights of the Union.

BACKGROUND

Fairlane filed an Amended Petition on May 25, 2010 seeking to clarify the bargaining unit on the basis that the charge nurses who were currently in the bargaining

unit are statutory supervisors and therefore must be excluded under Section 2(11) of the National Labor Relations Act. Three days of hearings were held before Hearing Officer Maria Casenas-Gascon on June 1, 2 and 7, 2010 at the offices of Region 7 of the Board in Detroit, Michigan. The RD issued a D & O on July 23, 2010 finding that the LPN charge nurses direct other employees within the meaning of Section 2(11). The record demonstrated that the nurses oversee the CENAs job performance and act to correct CENAs when they are not providing adequate care, up to and including issuance of discipline. The RD further found that the evidence established that the nurses were held accountable for their actions in directing the CENAs as they are advised that they will be disciplined and have in fact been subject to discipline for failing to oversee and supervise the work of CENAs.

ARGUMENT

I. LPN CHARGE NURSES ARE SUPERVISORS WITHIN THE MEANING OF SECTION 2(11) OF THE ACT.

To be deemed a supervisor under the NLRA, the Supreme Court has developed a three-part test. *Kentucky River Community v NLRB*, 530 US 1304, 121 S Ct 27 (2001). The first prong requires that the employees have the authority to exercise one of the twelve supervisory functions listed under 29 USCS §1512 (11): hiring, transferring, suspending, laying off, recalling, promoting, discharging, assigning, rewarding, disciplining other employees, responsibly directing them, adjusting their grievances, or effectively recommending such action. 29 USC §152 (11). The second prong dictates that when the employee exercises such authority it must be in the interest of the employer. *Kentucky River, supra*. Lastly, the supervisory functions must

require the use of independent judgment and not be merely routine or clerical in nature.
Id.

In deciding these types of cases “there are no hard and fast rules; instead, each case turns on its own particular facts.” *Providence Hospital*, 320 NLRB 717 (1996). Consequently, the Board analyzes each case in order to differentiate between the exercise of independent judgment and the giving of routine instructions, between effective recommendation and forceful suggestion, and between the appearance of supervision and supervision in fact. *McCullough Environmental Services*, 306 NLRB 565 (1992) enf. denied 5 F3d 923 (5th Cir 1993).

II. LPNS HAVE THE AUTHORITY TO RESPONSIBLY DIRECT AND DISCIPLINE CENAS.

In *Oakwood Health Care, Inc.*, the Board defined “responsibly direct” to mean 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). The RD found that the record demonstrated that the nurses oversee the CENAs job performance and act to correct the CENAs when they are not providing adequate care, up to and including issuance of discipline. The record clearly established that Fairlane held the charge nurses accountable for the performance of the CENAs. The LPNs who testified at the hearing consistently testified that they were told they would be disciplined if the CENAs did not perform their jobs: LPN Tominique Miller (Tr. 48/18); LPN Takisha Fagin (Tr. 199/10; 208/17; 215/8); LPN Kelly Fields (Tr. 368/2); and LPN Elizabeth Wallace-Carbin (Tr. 239/22). Even Union witness LPN Brenda Thomas testified that she was told in a

nurses meeting that she could be disciplined if she did not supervise or discipline the CENAs. (Tr. 506/204). The statements were not conclusory in nature, rather, the nurses and the Director of Nursing, Lauetta Brown, testified that they were told at nurses meetings that they would be disciplined if they did not supervise the CENAs. (Tr. 372/3) This testimony was supported by the fact that Fairlane admitted into evidence four written disciplines of LPNs who failed to supervise or discipline the CENAs under their supervision. Ex. 63. The fact that there were not numerous other written disciplines of the nurses for failing to discipline their CENAs shows that they are in fact supervising them or, when appropriate choosing to educate the CENAs rather than discipline them.

There was additional testimony that each and every one of the LPNs has an annual evaluation and is evaluated on their ability to supervise. Union witness LPN Brenda Thomas was evaluated on December 7, 2009, and the evaluation form specifically contains the category of supervision of unit and direct care. Ex. 66. Ms. Thomas was evaluated as a “needs improvement” in the category of supervision of her unit (Ex. 63) and she testified that she did not agree with her evaluation because she thought she was already supervising the CENAs very well. (Tr. 505/15)

The job description for the licensed practical nurse specifically states: supervises nurse assistants, recommends hiring of CENAs, makes assignments based on shift needs, enforces facility policies and administers discipline up to and including recommending discipline. Ex. 2. Each of the nurses sign off on the job description which specifically states that they will supervise the CENAs. They are evaluated annually specifically on their ability to supervise and can in fact be disciplined for failing to discipline CENAs. The Union makes much of the fact that there were four disciplines

submitted into evidence of LPNs who failed to discipline CENAs; however, the Union fails to point out that there was testimony by the Director of Nursing that the records that were reviewed and submitted into evidence were those of the open files and they did not review all of the closed files (meaning those of discharged nurses) prior to the hearing. (Tr. 413/9; 417/6) Clearly, the evidence supported the RD's conclusion that the LPNs are held accountable as a supervisor.

III. THE EVIDENCE ESTABLISHED THAT THE CHARGE NURSES DIRECT THE EMPLOYEES WITHIN THE MEANING OF SECTION 2(11) USING INDEPENDENT JUDGMENT.

The RD concluded that the record demonstrated that the nurses oversee the CENAs' job performance and act to correct the CENAs when they are not providing adequate care, up to and including the issuance of discipline. Incredibly, the Union argues that the LPNs do not have the authority to discipline employees which flies in the face of the evidence presented at hearing. The Employer submitted evidence of at least 23 disciplines prepared and issued by LPNs to CENAs.¹ This was a review only of the open files and not those of terminated or closed files.

Independent judgment in Section 2(11) deals with the degree of independence; independent is commonly defined as "not subject to control by others." Webster's Ninth New Collegiate Dictionary (1988). Meaning can the charge nurse make a decision without obtaining approval from another; if so, it is supervisory. Here the nurses testified they do not have to get prior approval to issue discipline or do an educational inservice. The Union argues that the LPNs are only performing clerical functions when they complete the disciplinary forms. This is contradicted by the record. The nurses write up the discipline without anyone telling them to do so, they decide whether the

¹ Exs. 5, 7, 8, 9, 10, 11, 25, 26, 41, 45, 47, 62.

subordinate will receive a discipline or education, they issue the discipline to the affected employee with a union steward present.

The evidence established that the charge nurses initiate the discipline of the CENAs, they exercise independent judgment and discretion identifying the conduct that violates the employee work rule, write up the disciplinary warning record, present the disciplinary form to the CENA in the presence of a union representative and then submits it to the human resources office for placement in the employee's personnel file.

Fairlane has a progressive discipline policy. Ex. 6. There was testimony when the nurses observe an infraction they have the discretion to write it up and determine the rule violation. (Tr. 143/18; 241/14; 243/14; 24/5) The testimony was that they must assess the situation and use their independent judgment to determine the appropriate rule violation. These LPNs then meet with the employee and the union steward and issue the discipline. It is placed in the employee's file without any further investigation by a higher level authority figure. (Tr. 125/13).

The Union argues that there was only sparse and sporadic issuance of discipline however, the Union fails to even address the fact that the LPNs have the opportunity to determine whether or not, in their discretion, discipline should be issued or, rather, a non-disciplinary educational counseling should be conducted.² LPN Tominique Miller testified that she does educational counseling and has the discretion to issue a one-on-one inservice versus a discipline. Exs. 12, 13, 14. Tr. 33/20. LPN Miller testified she uses her discretion issuing a discipline versus a one-on-one inservice and gave an example where she issued an education to a CENA as opposed to a discipline because

² Exhibits 12, 13, 14, 35, and 42 are educational counselings issued by LPN charge nurses to subordinates.

the CENA used inappropriate language but did not use foul language and she felt that warranted an educational opportunity as opposed to a discipline. (Tr. 121/14) The Director of Nursing, Ms. Brown, testified she recommended Ms. Miller discipline the offending employee; however, Ms. Miller chose not to do so and Ms. Brown testified that was Ms. Miller's right as she was the nurse on the unit. (Tr. 339/13)

Ms. Miller also testified that she uses her discretion in issuing an education versus a discipline if there is no actual harm to a resident. (Tr. 124/11) She does not go to her supervisor or managers before deciding to write up a CENA. (Tr. 125/16)

LPN Takesha Fagin testified that she decided to give a CENA a one-on-one inservice versus a discipline because she was a good worker and had never encountered any problems with her in the past. (Tr. 194/15; Ex. 35) She also testified she issued a discipline to a CENA for insubordination, because she told her no when she gave her a direct order. (Tr. 194/22) The charge nurses are also empowered to use discipline to enforce all of the Employer's work rules not just those related to patient care. *See Wedgeworth Care*, 267 NLRB 525, fn 4 (1983).

The D & O determined that the nurses have the discretion to write up employee infractions versus issuing one-on-one educational and non-disciplinary forms the RD determined given this evidence that the nurses were vested with the authority to exercise independent judgment in deciding whether to initiate the progressive disciplinary process. The RD properly relied on *Berthold Nursing Care Center*, 351 NLRB 27, 29 (2007) and determined that this was indeed indicative of supervisory authority.

Thus there was testimony to additional disciplinary actions in addition to those written documents entered into evidence. LPN Elizabeth Wallace-Carbin testified to

another instance of discipline that was issued in which the document itself was not entered into evidence but she specifically testified that she wrote up CENA Meredith Richardson for leaving a resident soiled and issued him a suspension which she presented to him. (Tr. 243/10) Ms. Wallace-Carbin additionally testified that she uses her discretion whether to educate a CENA as opposed to issue discipline. (Tr. 245/17) She gave an example where she inserviced a CENA, Ms. Anders, who was not following policy because Ms. Wallace-Carbin believed that it was a matter of her not actually understanding as opposed to her purposely not doing something. Id.

The placement of disciplinary write-ups by the charge nurses in the personnel files of the CENAs has significant consequences to the disciplined employee. If a CENA received four level 1 warnings in a 12-month span, that employee will be discharged. Ex. 6. Three level 2 offenses in a 12-month period require termination of the employee. Id. If an employee commits even one level 3 offence, he or she can be terminated. Id. The fact that no higher level authority completes a follow-up investigation on the reported incident increases the significance of the discretion authorized to the LPN charge nurses. While the DON signs off on suspensions or terminations, the DON relies upon the judgment of the charge nurses in signing her name to the disciplinary form which is done as a formality to assure contract compliance in the cases of termination or suspension.

The evidence established that the charge nurses actually make a determination to discipline and issue the discipline to the offending employee. They are not a conduit by merely reporting the misbehavior to a higher level authority. Rather, their role is to exercise their disciplinary authority in the interest of Fairlane by using their independent judgment to decide the appropriate level of discipline, whether it is a verbal warning or a

termination or whether or not it should not even be discipline but rather an education. The Sixth Circuit Court of Appeals has held that the authority to write up employees who do not cooperate with staffing assignments demonstrates independent judgment. *Kentucky River Community v NLRB*, 193 F3d 444 (6th Cir 1999). However, clearly the evidence established that not only do these LPNs “write up employees” but they have actually issued suspensions and terminations. Thus impacting the CENA’s employment.

LPN Eboni Bray is a charge nurse who testified that when she was hired in it was explained to her she would be supervising the CENAs. (Tr. 142/7) She has issued disciplines to CENAs which actually resulted in termination of CENA Chanta Gantz. (Tr. 144/23) Ms. Bray testified she met with Ms. Gantz and her union steward when she advised Ms. Gantz she was being terminated. She also testified that she issued discipline to CENA Alice Dobbs which resulted in a three day suspension. (Tr. 146/5; Ex. 26) Thus, the evidence established that not only are the LPNs issuing disciplines, they are issuing disciplines that caused a suspension or discharge of employees. Thus the Union’s argument that the LPNs only have limited authority and cannot issue discipline that results in discharge is not supported by the record. Director of Nursing Brown testified she is made aware of the termination but the charge nurse issues it and presents it to the employee. (Tr. 452/12)

The Union’s argument that not all of the nurses have issued discipline is not indicative of the fact that they do not have the authority to do so. The fact that some nurses choose not to exercise disciplinary authority is not determinative as it is the possession of the authority to discipline not the exercise of the authority that is relevant. *See Mountaineer Park, Inc.*, 343 NLRB 1473, 1474 (2003).

There is no evidence whatsoever that the RD's decision was clearly erroneous based on the record rather, the record clearly supports the LPNs are functioning as statutory supervisors.

IV. RELEVANT SECONDARY INDICIA OF SUPERVISOR STATUS

The Union further ignores the fact that the RD also found that there was existence of secondary indicia such as title and higher pay that was significant. The RD found that the LPNs' hourly wage is almost double that of the CENAs and the other bargaining unit employees and that they are further required to have extensive schooling and state mandated licenses which is not required of the CENAs.

Furthermore, there was evidence that substantial periods of time in the afternoon and midnight shifts and during the weekend they are the highest ranking employees in the facility. (Tr. 371/18) Finally, while not relied upon by the RD there was testimony by Union witness CENA Cheryll Wideman (who is also a union steward) that she reports directly to the charge nurse and that she cannot leave the unit without telling the charge nurse. She admitted that the charge nurse is the highest level of management on the midnight shift. (Tr. 553/11; 554/6; 556/18) Secondary indicia of perception of supervisory status by other workers can be relied upon. *U. Mont. Health Care Ctr v NLRB*, 178 F3d 1089, 1096 n 6 (9th Cir 1999); *NLRB v Attleboro Assoc Ltd*, 176 F3d 154, 163 n 5 (3rd Cir 1999).

CONCLUSION

For all of the foregoing reasons the Petitioner Fairlane respectfully requests that the Board deny the Union's request for review.

Respectfully submitted,

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Dated: September 10, 2010

CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2010, I electronically filed the foregoing document with Region 7 of the NLRB using the NLRB's E-Filing System and served the following parties via electronic mail:

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