

Trinity Continuing Care Services d/b/a Sanctuary at McAuley and SEIU Healthcare Michigan, Service Employees International Union, CTW.
Cases 07–RC–023402 and 07–RC–023403

July 10, 2013

DECISION ON REVIEW AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

The issue presented in this case is whether the Regional Director properly determined that unit managers' issuance of corrective action notices to certified nursing assistants did not constitute the exercise of disciplinary authority within the meaning of Section 2(11) of the Act, and therefore that the unit managers are not statutory supervisors. As explained below, we affirm the Regional Director.

On March 4, 2011, the Regional Director for Region 7 issued a Decision and Direction of Election, finding that the unit managers are employees, not statutory supervisors, and that they therefore constitute an appropriate unit for collective bargaining.

In accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Employer filed a timely request for review of the Regional Director's Decision and Direction of Election (pertinent parts are attached as an appendix). The Employer maintained that the unit managers are statutory supervisors based on their role in the discipline, assignment, responsible direction, and evaluation and promotion of certified nursing assistants. The Petitioner filed an opposition brief.

The Board granted the Employer's request for review on April 8, 2011, solely with regard to the Regional Director's finding that the unit managers are not statutory supervisors based on their role in discipline. Thereafter, the Employer and the Petitioner filed briefs on review.

We have carefully considered the entire record in this case, including the briefs on review. We agree with the Regional Director's finding that the Employer failed to adduce sufficient evidence to prove that, based on their role in issuing verbal and written corrective action notices, the unit managers have the authority to discipline or to effectively recommend it. We rely in particular on (1) the paucity of evidence with respect to the circumstances surrounding the unit managers' issuance of most of the corrective action forms (including the extent of involvement of upper management and/or human resources); (2) the record evidence of upper management's involvement in some recent corrective actions; and (3) the Employer's

failure to apply a progressive disciplinary system consistently, so that it cannot be concluded that the corrective action forms would likely have future consequences for the employees receiving them. Thus, we affirm the Regional Director's Decision and Direction of Election.¹

I. BACKGROUND

The Employer operates a skilled nursing home in Muskegon, Michigan. An interim administrator heads the Employer's overall operations and a director of nursing reports to the interim administrator. Three clinical care coordinators (CCCs), each in charge of a hall, report to the director of nursing, and the 14 unit managers at issue—2 registered nurses (RNs) and 12 licensed practical nurses (LPNs)—report to the CCCs.² The Employer employs 54 certified nursing assistants (CNAs), who are subordinate in rank to the unit managers. The Employer and the Petitioner are parties to a collective-bargaining agreement that covers the Employer's service and maintenance employees, including the CNAs.

The Employer purports to maintain a progressive disciplinary policy, set forth in a document entitled, "Employee Counseling and Corrective Action." The document describes a system with four levels of corrective action: verbal counseling, written counseling, final written warning, and termination. The Employer issues forms to employees, called, "Corrective Action Notices," to memorialize corrective action. They are subject to the grievance process.³ The "Employee Counseling and

¹ We deny the Employer's motions to reopen the record, by which it sought to present allegedly newly discovered evidence bearing on the unit managers' disciplinary authority. The Employer has not shown that Unit Manager Carolyn Clanton's averments in her posthearing affidavit were newly discovered and/or previously unavailable or that, if credited, the averments would require a different result. Although the Employer asserted in its initial motion that Clanton was not available to either party to testify at the hearing because she was on maternity leave, the Employer made a contradictory contention in its brief on review, arguing that the Petitioner could have called Clanton as a witness, but failed to do so. Regardless, the Employer states no reason why it could not have called Clanton to testify, notwithstanding her maternity leave. The Employer also proffered two posthearing corrective actions issued by Unit Manager Rachel Jones, but they are of limited probative value, at best, and would not, even if credited, require a different result. Accordingly, the Employer has not shown the requisite "extraordinary circumstances" required under Sec. 102.65(e) of the Board's Rules and Regulations to reopen the record. See *Brevard Achievement Center*, 342 NLRB 982, 982 fn. 1 (2004); *A & J Cartage*, 309 NLRB 319, 319 fn. 2 (1992).

² It is undisputed that the RN and LPN unit managers perform essentially the same functions.

³ At the top of the form, the possible corrective actions are listed (verbal counseling, written counseling, final written warning, and termination) and the appropriate action is to be checked. Sec. 1 contains the employee's name, the date of the infraction, the department, the job

Corrective Action” document states that the policy applies to “all employees,” but also states, without further explanation, “Employees who operate under a Collective Bargaining Agreement (CBA) should refer to their CBA.” There is no evidence with respect to the extent to which the policy or document may have been disseminated to unit managers or other employees, if at all.

The Employer’s policy on its face builds in a certain amount of disciplinary discretion. For example, the policy states, “If, in the judgment of the supervisor and Human Resources, the nature of the problem and/or employee’s work record warrant, corrective action may be initiated at Step 2, 3, or 4 of the process, or steps may be skipped. [The Employer] reserves the right to suspend an employee pending investigation of the circumstances of an alleged act.” The policy further states that it “is not intended to create an enforceable right on the part of the employees that progressive discipline will be followed in all circumstances.” It also sets forth examples of behaviors that may result in immediate discharge without resort to progressive corrective measures.

The service and maintenance employees’ collective-bargaining agreement refers to “corrective action” options, but it makes no mention of progressive discipline or the “Employee Counseling and Corrective Action” document, and it uses somewhat different terminology for the various actions. Section 11.3 of the agreement states that “[t]he type of reasonable penalty imposed in any instance depends on the nature and seriousness of the offense involved,” and then simply lists “four written types”: (1) oral warning, (2) written warning, (3) final written warning or suspension, and (4) discharge. Unlike the “Employee Counseling and Corrective Action” document, the collective-bargaining agreement states, at article 11.7, that “the Employer shall not consider any offenses committed by the employee prior to twelve (12) months from the date of the present offense.”

The Employer’s human resources department maintains personnel files that include the most recent corrective action issued to each CNA. The interim administrator testified that when a unit manager intends to issue a corrective action notice to a CNA but is not aware of the CNAs prior corrective actions, she will obtain that information from human resources. The director of nursing testified that Unit Manager Carolyn Clanton asked the human resources director “on a couple of occasions”

for personnel files of CNAs she wanted to write up, but no specifics were provided. As discussed below, the current director of nursing was not employed by the Employer when Unit Manager Clanton issued four of her five corrective actions.

II. REGIONAL DIRECTOR’S DECISION

The Regional Director stated that, at first glance, the record’s 22 corrective action notices signed by unit managers and issued to CNAs appeared to be ample evidence of the unit managers’ authority to discipline, thereby requiring him to find that the unit managers are supervisors. Upon closer scrutiny, however, the Regional Director stated that “the circumstances behind recent disciplines raise doubt whether the unit managers’ authority to effectively recommend discipline truly exists,” because of evidence demonstrating management’s involvement in investigating, reviewing, and overriding the severity of the corrective action.

The Regional Director further took account of the fact that unit managers were never included by management in the investigation of misconduct or in the grievance procedure, except as fact witnesses. Corrective action notices dating back to 2001—including several involving attendance issues, a function that was turned over to payroll and human resources in 2007⁴—were considered by the Regional Director, but were deemed lacking in probative value because the Employer offered no evidence regarding how the corrective action notices came to be written, whether they were prompted by management, and whether the level of corrective action reflected the input of management.

The Regional Director also found that although unit managers have issued counselings or warnings to CNAs, the unit managers’ role in doing so appears to have been “circumscribed by both the DON [director of nursing] and human resources department, and there is little evidence that their recommendations are followed.” He also noted the absence of evidence showing that the unit managers are routinely informed when CNAs receive corrective action notices. The Regional Director further observed that all of the corrective actions purportedly issued by unit managers involved verbal or written warnings, and the record contained no examples of unit managers suspending or terminating CNAs or recommending either of those actions. Based on the foregoing considerations, the Regional Director determined that the unit managers’ involvement in the corrective action process

title, the business unit, and the name of the “supervisor.” Sec. 2 has two subsections. The first subsection is for describing the nature of the infraction and the second subsection is for specifying the specific date and nature of any previous, relevant counseling. Sec. 3 is for employee comments and Sec. 4 is for an “improvement plan” and stating possible consequences if expectations are not met.

⁴ The Employer acknowledges that upper management writes all attendance-related disciplinary notices, even when they are signed by unit managers.

did not amount to disciplinary authority within the meaning of Section 2(11) of the Act.

III. ANALYSIS

We find, in agreement with the Regional Director, that the evidence submitted by the Employer does not satisfy the Employer's burden of proving disciplinary authority. Evidence concerning recent corrective actions—the only ones for which any context was offered—shows that management was involved to an extent that precludes a finding of supervisory status. In light of that evidence, we, like the Regional Director, decline to read the older corrective action notices, offered into evidence without any supporting testimony, as evidence of disciplinary authority. We also find that the Employer failed to establish that it actually applied a progressive disciplinary system, or that one corrective action could likely lead to a more severe corrective action in the future.

The “burden of proving supervisory status rests on the party asserting that such status exists.” *Oakwood Healthcare, Inc.*, 348 NLRB 686, 694 (2006) (quoting *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003)). The party seeking to prove supervisory status must establish it by a preponderance of the evidence. *Id.* Such evidence must be specific and not merely conclusory. *Brusco Tug & Barge, Inc.*, 359 NLRB No. 43, slip op. at 5 (2012); *G4S Regulated Security Solutions*, 358 NLRB 486, slip op. at 486, 487 (2012) (senior manager's testimony discounted as conclusory and nonspecific); *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 305 (6th Cir. 2012) (“[g]eneral testimony asserting that employees have supervisory responsibilities is not sufficient to satisfy the burden of proof when there is no specific evidence supporting the testimony” (citations omitted)); *Avante at Wilson*, 348 NLRB 1056, 1057 (2006).

In the present case, the record evidence with respect to most of the corrective action notices submitted by the Employer was slim to nonexistent. The Employer did not call any unit manager to testify about corrective action in which she was involved. Sixteen of the 22 corrective action notices submitted by the Employer were issued prior to either the DON's or interim administrator's assuming their positions, so those officials were unable to testify about the circumstances of the notices' issuance.

Significantly, some of the more recent corrective actions—the only ones supported by testimony—indicate substantial involvement by higher management and that such involvement was not atypical. For example, although Unit Manager Rachel Jones initiated corrective actions for two different CNAs for their failure to record vital signs in December 2010, the director of nursing

played a central role in issuing the corrective actions in both instances. With respect to the first action, the director of nursing conducted an additional investigation,⁵ examined the CNA's personnel file to determine the appropriate level of discipline, consulted with human resources without Jones' participation or input, superceded Jones' recommendation to issue a verbal counseling by substituting a written counseling, filled in parts of the notice herself, and presented the notice to the CNA without Jones. This sequence of events was largely repeated with the second corrective action, although in that instance the director of nursing directed Jones to present the notice to the CNA.

The Employer attempts to explain away this evidence. It contends that the director of nursing became involved in those corrective actions in order to train Jones, a relatively new unit manager, regarding her exercise of authority. But the evidence shows that the director of nursing took charge and actually excluded Jones from much of the process; there is no persuasive evidence that the director of nursing used the situations as training opportunities. Other than accompanying the director of nursing to check the automatic blood pressure machine that records the vitals and to verify that the vitals were not written down on one of the sheets—Jones did not have any further involvement with the first corrective action. The only evidence of training was that the director of nursing instructed Jones to ask the CNA who was the subject of the second corrective action if she wanted a union representative present when Jones gave her the corrective action notice. According to Jones, although the director of nursing went to human resources to determine what level of corrective action to impose, she said nothing to Jones about how to handle similar situations in the future.

Thus, the evidence shows that at least some of the recent corrective action notices ostensibly issued by unit managers have been independently reinvestigated and reevaluated by other officials, and that upper management was heavily involved in some of that corrective action. In light of that evidence, we cannot conclude that the unit managers exercised independent judgment, the statutory sine qua non of supervisory authority, in issuing the notices.

Further, the older corrective action notices submitted by the Employer are unsupported by any testimony at all,

⁵ Although the director of nursing testified that she did not conduct an independent investigation, Jones' testimony established that the director of nursing, in Jones' presence, checked the automatic blood pressure machine that records vital signs and verified that the vital signs were not written on one of the other sheets where the information would normally be entered.

and we are unwilling to infer supervisory authority from the bare corrective action notices themselves, particularly given the record evidence of higher management involvement just discussed.⁶ The Employer, of course, could have called the unit managers who signed those older notices to testify concerning the circumstances of their issuance, but it did not. The notices themselves are not evidence of who initiated them, whether management independently investigated the alleged infractions, who determined the level of corrective action, and whether that decision was related to prior corrective action notices issued to the affected employee. Without such evidence, the notices are insufficient to establish supervisory authority. See *G4S Regulated Security Solutions*, supra, 358 NLRB No. 160, slip op. at 2 (disciplinary notices insufficient to establish supervisory status where the employer failed to call the individuals who signed the notices to testify concerning the circumstances surrounding their issuance; without such testimony, the employer failed to show that the individuals exercised independent judgment).

The Employer nevertheless asserts that over the 15-month period between May 25, 2009, and August 22, 2010, Unit Manager Carolyn Clanton issued five corrective action notices to CNAs without any management involvement, and that those actions alone are sufficient to establish supervisory authority. The Employer did not, however, call Clanton to testify at the hearing. Instead, the Employer relies on the testimony of Director of Nursing Heather Hartman that she was not involved in any of Clanton's corrective actions. We note, however, that four out of five of the corrective action notices issued by Clanton occurred in 2009, before Hartman assumed her post, so the fact that Hartman was not involved in those actions proves nothing. Interim Administrator Portfleet was not serving at the time of any of those corrective actions either, and the Employer did not call her predecessor to testify. Nor did the Employer offer testimony from any of the CCCs concerning those four corrective actions. Thus, the evidence regarding those four 2009 corrective actions is limited to the corrective action forms themselves, and they are as lacking in probative value as the older ones in the record.⁷

⁶ Moreover, those older corrective forms that address attendance issues lack probative value as payroll and human resources have had responsibility for attendance issues since 2007.

⁷ The fifth corrective action notice signed by Clanton, the only one about which there was testimony, memorialized a verbal counseling issued over a weekend to a CNA for failing to change a resident with saturated clothing and soiled sheets. Both the director of nursing and the unit manager's CCC testified that they were not involved in the issuance of the notice; the CCC only learned of the corrective action notice on Monday morning, when the CNA complained to her about it,

Equally important, we also find that the corrective action notices in the record are insufficient to establish the unit managers' supervisory status because none of the actions was more serious than a written warning, and the Employer has not shown that those warnings would have future disciplinary consequences. The issuance of reprimands or warnings—which themselves carry no consequences in terms of loss of hours or pay—are not, without more, evidence of supervisory authority; to be so, they must be the basis of later personnel action *without independent investigation or review*. See *DIRECTV*, 357 NLRB 1747, slip op. at 1749 (2011) (citing *Jochims v. NLRB*, 480 F.3d 1161 (D.C. Cir. 2007)). Although an employer can satisfy that standard by showing that it adheres to a progressive disciplinary system where warnings lay a foundation for future discipline,⁸ the mere existence of such a system on paper is insufficient. See, e.g., *DIRECTV*, supra; see also *Ken-Crest Services*, 335 NLRB 777, 778 (2001) (no showing of “actual consequences” flowing from issuance of warnings).⁹ In short, the authority to issue a warning, in and of itself, does not establish authority to discipline within the meaning of the Act.

Here, although the Employer introduced evidence of a progressive disciplinary system, the evidence failed to establish that the corrective action notices submitted into evidence amounted to a disciplinary step under that system. As stated above, the Employer's progressive disciplinary policy states that the policy applies to all employees, but further states that employees covered by a collective-bargaining agreement should refer to their agreement. The CNAs' collective-bargaining agreement—and all of the relevant corrective action forms in evidence were issued to CNAs—does not set forth a progressive disciplinary system. Cf. *Frenchtown Acquisition Co.*, supra, 683 F.3d at 306 (progressive discipline contrary to a collective-bargaining agreement cannot establish supervisory status).

and the CCC told her to speak with the director of nursing. But the director of nursing testified that assistance from human resources was not always available at night and on weekends, and that human resources would review corrective action notices issued at those times to determine whether to reduce the level of corrective action. Under the circumstances, we decline to find that this one instance of a unit manager's issuing a verbal counseling established supervisory authority. See, e.g., *Frenchtown Acquisition Co.*, supra, 683 F.3d at 306 (A single instance of discipline does not support a finding of supervisory status.).

⁸ *Oak Park Nursing Care Center*, 351 NLRB 27, 28 (2007).

⁹ In *Ken-Crest*, the Board found no “clear connection of any kind to other disciplinary measures,” where there was “no automatic progression from a verbal warning to a written warning, and no written warnings were placed into evidence that even referred to previously documented verbal warnings.” 335 NLRB at 778.

But even assuming that the Employer's progressive disciplinary system applies to the corrective action notices issued by unit managers to CNAs, the Employer has not established that it actually applies the system as written. In fact, the system was not consistently applied. Interim Administrator Lori Portfleet testified that, under the policy, no particular offense is subject to a specifically defined penalty or action. Director of Nursing Hartman similarly testified that the Employer's progressive discipline process is merely "a guideline." Moreover, the corrective action notices in the record do not show even a single instance where a CNA received a corrective action and later received a higher-level corrective action, much less one expressly relying on the issuance of a prior corrective action. In fact, as to none of the notices memorializing a written warning, the second level of corrective action, is there any evidence of a first level verbal counseling notice having preceded it. The only notice of a final warning, the third level, was issued for a first offense.¹⁰ No notice of a discharge, the fourth level, was offered. On this record, we cannot conclude that the Employer utilized progressive discipline in dealing with the CNAs, and, in particular, that a CNA's receipt of a corrective action notice had any "real potential to lead to an impact on employment." *Progressive Transportation Service*, 340 NLRB 1044, 1046 (2003). Here, as in *Ken-Crest*, supra, there is "no clear connection of any kind" between the corrective action notice and "other disciplinary measures." 335 NLRB at 778. See *Jochims*, supra, 480 F.3d at 1170 ("writeup" that "created the 'possibility' of discipline, nothing more" was insufficient to establish supervisory status).

IV. CONCLUSION

We find, for the reasons set forth by the Regional Director and as discussed above, that the Employer has not satisfied its burden to establish that the unit managers are statutory supervisors based on their role in issuing corrective action notices. Accordingly, we affirm the Regional Director's finding that the unit managers are not supervisors within the meaning of Section 2(11) of the Act.

ORDER

IT IS ORDERED that the Regional Director's Decision and Direction of Election is affirmed, and that this matter

¹⁰ Although the record contains general testimony from the director of nursing and the interim administrator that the unit managers may determine on their own whether to skip a step, there are no specific examples showing that any unit manager has unilaterally done so, and the interim administrator's testimony showed that human resources and the director of nursing would be consulted prior to a final determination.

is remanded to the Regional Director for further appropriate action.

APPENDIX

DECISION AND DIRECTION OF ELECTION

Discipline of CNAs

The Employer maintains a progressive disciplinary policy consisting of a verbal counseling, a written counseling, a final written warning, and a termination, as set forth in the CNAs' collective-bargaining agreement at article 11.3. The Employer reserves the right to skip steps and proceed with immediate termination as it determines appropriate; however, this is not routinely done. The disciplines are entitled "Corrective Action Notices" and contain a section for describing the nature of the infraction, employee comments, and an "improvement plan," and possible consequences if expectations are not met.

As a preliminary matter, there is no evidence that unit managers have recommended suspending CNAs. One unit manager indicated on a corrective action notice that she wanted to suspend a CNA, but she did not do so. Also, the Employer's human resources department and the DON play a determinative role with respect to CNA terminations. There is no evidence of unit managers recommending the termination of CNAs.

While unit managers have issued some disciplines to CNAs, their role in doing so appears to be circumscribed by both the DON and human resources department, and there is little evidence that their recommendations are followed, although disciplines administered by unit managers are placed in the employee's personnel file. Unit managers do not participate in steps 2 or 3 of the grievance procedure, and there is limited and inconclusive testimony of their participation at step 1 and a pre-grievance step.

The human resources department maintains information about a CNA's current level of discipline. Unit managers must go through the human resources department as the keeper of the records to secure this information, and there is some evidence that unit managers are not aware of this procedure.

There are approximately 20 verbal and written disciplines in evidence wherein unit managers played some role. Most of the disciplines were not accompanied by testimony elucidating their circumstances. DON Hartman testified with respect to a July 2, 2010, written counseling issued to a CNA on July 2, 2010. Allegedly, the CNA refused to help a resident who had requested to get out of bed early. The Unit Manager Melissa Tyler described the situation to the DON, who recommended that the unit manager write up the CNA. Indicating that the issuance of discipline was not an ordinary event, the unit manager raised concerns with the DON because the CNA had a strong personality, and Tyler was worried about the possible repercussions. The DON told her that she would "support her and be with her through the process." The writeup was a final written warning, and the DON was present when the unit manager gave the discipline to the CNA.

On December 12, 2010, Unit Manager Rachel Jones reported to the DON that a CNA had not recorded the taking of residents' vital signs or weights on the assignment sheet. The DON asked Jones if the vital signs information might be found

in the machine or written somewhere other than on the assignment sheet (there are a few different sheets for documenting vital signs). The DON and the unit manager checked the machine and reviewed the sheets to verify. Jones told the DON that this CNA had failed to record weights two or three times. The DON told Jones to write up the CNA. Jones told the DON that she did not know what level of discipline to mark at the top of the disciplinary form, but marked verbal warning. Jones filled out the first two sections of the “Corrective Action Notice,” recording the CNA’s name and that she had not completed her vital signs on the shift, then gave the discipline to the DON because she was not sure what to do with it. The DON said she would take care of it and wrote under the “improvement plan” that the next steps were final warning and termination, and signed the bottom. In the meantime, the CNA had gone home for the day, so the DON told Jones that she—the DON—would talk to human resources, and learn if there were previous disciplinary occurrences.¹ When Jones saw the form at the hearing, she noted that the DON must have crossed out her recommendation for verbal warning because written warning was added instead, with the DON’s initials. The discipline was ultimately signed by the DON, and on December 14, 2010, the DON met with the CNA to give her the disciplinary action.

On December 17, 2010, Unit Manager Jones completed the top sections of a discipline for another CNA, who assertedly did not do vital signs. Again, Jones went to the DON who asked if she was sure that the CNA did not do them, and if she was sure it was not still in the automatic blood pressure machine that records the vital signs. The DON instructed Jones to check whether the CNA might have recorded the vital signs and whether they were still in the machine. The DON looked and could not find them, and then asked Jones if she wanted to write the CNA up, or wait. Jones agreed to let it go.

The next day the CNA did not record vital signs again. Jones told the DON, and after checking the machine, the DON told Jones to write her up if she wanted. Jones again filled out the first sections of the discipline, and the DON then added a line indicating “the specific date and nature” of the offense and also recorded the information as to what the next disciplinary steps would be. The DON told the unit manager to ask if the CNA wanted union representation. Then the DON told Jones to give the discipline to the CNA. Jones presented it to the CNA, and the CNA signed it. The DON testified that she wanted to use the opportunity to show Jones that she needed to make sure that everything is filled out on a corrective action notice, and not leave blank sections. Jones herself testified that she was never told the procedure to follow if a CNA failed to take the vital signs, or failed to do something required. No one had ever told her she had the authority to issue a write-up; this is why she did not know how to do it.²

¹ According to the DON, Jones left a voice mail that she was going on vacation and asked the DON to deliver the action. The DON found the writeup slip underneath her door.

² The only other time that Jones was involved in an employee discipline was when she tried to discipline a CCC for signing that someone was in the building when they were not, after Jones herself had been disciplined for similar conduct. The discipline was thrown out.

Another example of a discipline issued by a unit manager that was subsequently investigated and altered by the DON was one initially issued by Unit Manager Lauren Hill to a CNA for the failure to perform job duties and insubordination, on July 2, 2010. In a July 15, 2010 letter denying the grievance, the Employer’s human resources director wrote that the DON “Heather Hartman investigated the write-up, she spoke with the Unit Manager again; other CENA’s [sic] working that day and reviewed your previous corrective action notice.” In resolution of the grievance, the Employer agreed to remove the “failure to provide job duties” from the corrective action.

Unit Manager Jenn Zoern issued a “Corrective Action Notice” to a CNA on January 20, 2010, for failure to perform duties “according to established standards.” In answering the related grievance, then Administrator Gail Ranville wrote: “I investigated the write-up, as well as the . . . [relevant rule] . . .” and, that she agreed to reduce the corrective action from a written warning to a verbal counseling.

There are other disciplines of CNAs in the record dating back to 2001 which I have considered. However, without information about how the discipline came to be written, whether it was prompted by upper management, whether the level of discipline was ultimately reduced by upper management, and whether upper management conducted an independent investigation, they are not probative of the issue before me.

Some of the disciplines concern absenteeism and attendance. However, the Employer’s interim administrator, Portfleet, testified that unit managers have not written attendance disciplines for 4 years since the function has been turned over to the payroll and human resources managers to ensure it was timely fulfilled, and the unit managers no longer play any role in such disciplines. Among the attendance disciplines in the record there are four instances—November 3, 2006, and February 23, April 12, and April 24, 2009—where three different unit managers signed corrective action forms that appear to have been written by someone else.

ANALYSIS

SUPERVISORY STATUS OF UNIT MANAGERS

DISCIPLINE AND SUSPENSION

The Employer argues that unit managers have the authority effectively to recommend discipline, including suspension. To prevail, the Employer must prove that: (i) unit managers submit actual recommendations, and not merely anecdotal reports, (ii) their recommendations are followed on a regular basis, (iii) the triggering disciplinary incidents are not independently investigated by superiors, and (iv) the recommendations result from the unit managers’ own independent judgment. *Id.* (reportorial function is not supervisory); *Ohio Masonic Home, Inc.*, 295 NLRB 390, 394 (1989) (same); *ITT Lighting Fixtures*, 265 NLRB 1480, 1481 (1982), *enf. denied* on other grounds 712 F.2d 40 (2d Cir. 1983), *cert. denied* 466 U.S. 978 (1984) (to be effective, a recommendation must be both followed and not independently investigated). A showing that recommendations are usually or even always followed is not enough. The party alleging supervisory status must show that the recommended action is taken with no independent investigation by upper

management. *Family Healthcare*, 354 NLRB 254, 258 (2009); *American Directional Boring, Inc.*, 353 NLRB 166 (2008).

I find that the Employer has not presented sufficient evidence to satisfy its burden to establish that (ii), (iii), and (iv) above apply.

As a preliminary matter, cases cited by the Employer are inapposite. *Promedica Health Systems*, 343 NLRB 1351 (2004), did not involve a representation case and the only dispute was whether coachings amounted to a step in the disciplinary procedure. Similarly, in *Oak Park Nursing Care Center*, 351 NLRB 27 (2007), which was a representation case, the Board's decision did not address the employer conduct at issue herein, that is, conducting additional investigation of a discipline, changing the level of disciplines, or directing purported supervisors to discipline employees.

At first glance, with the record containing some 20 verbal and written warnings signed by unit managers dating back to 2001, it might seem that there is sufficient evidence of the unit managers' authority to discipline under Section 2(11). However, upon closer scrutiny, the circumstances behind recent disciplines raise doubt whether the unit managers' authority to recommend discipline truly exists. For example, the DON testified that she was the one to instruct Unit Manager Melissa Tyler to write up a CNA, demonstrating that the recommendation for discipline did not result from Tyler's own independent judgment. Unit Manager Jones' testimony about the disciplines she wrote on December 12 and 17, 2010, reveals the following: After Jones reported a problem with the CNA failing to complete assigned tasks, the DON conducted an additional investigation by checking machines to see if the CNA had, in fact, recorded vital signs. It was the DON who looked at the CNA's personnel file to determine the appropriate level of discipline. The DON spoke with the human resources department about the discipline without Jones' participation or input. The DON superseded Jones' recommendation to issue a verbal warning and issued the CNA a written warning. Jones filled out only the description sections of the discipline without recommending future action. It was the DON who had the meeting with the CNA and gave her the discipline and determined what the future action would be. This sequence of events was largely re-

peated with the second discipline signed by Jones, although the DON required that Jones be the one to present the discipline to the CNA. Again, the DON conducted her own investigation.

The DON independently investigated the circumstances of other disciplines. With respect to the discipline issued by Unit Manager Lauren Hill to a CNA for failure to perform job duties and insubordination, the record shows that the DON independently investigated the discipline by speaking with Hill and other CNAs working that day and by reviewing the CNA's previous corrective actions.

The Employer's former administrator wrote in a step 2 response to a grievance, that she had investigated a discipline issued by Unit Manager Jenn Zoern, whose discipline recommendation for a written warning was reduced to a verbal warning.

Unit managers are not included in upper management's investigations of misconduct or in the grievance procedure (after the grievance is written), except when they are interviewed as witnesses. The Employer acknowledges that upper management writes *all* attendance disciplines, even when they are signed by unit managers. There is no showing that the unit managers are routinely informed when CNAs receive disciplines, and there is no regular mechanism, as far as the record reveals, to advise them of the outcome. Other disciplines are presented by the Employer without context. With respect to the disciplines discussed above, the Employer has not satisfied its burden that upper management conducts no additional investigation, that the disciplines result from the unit managers' independent judgment, or that the unit managers' recommendations are routinely followed.

Finally, the record contains no examples of unit managers independently suspending CNAs. All disciplines presented by the Employer purportedly issued by unit managers involved verbal or written warnings. The fact that one unit manager mused, in writing on a corrective action form, that she wanted to suspend a CNA is insufficient to confer supervisory authority. The Employer's policy requires CNAs to leave the facility if they are accused of abuse; however, the record indicates that the DON would be contacted before a CNA would be suspended.