

GLADSTEIN, REIF & MEGINNISS, LLP
ATTORNEYS AT LAW

AMY GLADSTEIN
JAMES REIF
WALTER M. MEGINNISS, JR.
KENT Y. HIROZAWA
BETH M. MARGOLIS
WILLIAM S. MASSEY *
AMELIA K. TUMINARO
KATHERINE H. HANSEN *

817 BROADWAY • 6TH FLOOR
NEW YORK, NEW YORK 10003
(212) 228-7727
FAX: (212) 228-7654

ROBERT MOLOFSKY *
YVONNE BROWN
JUDITH I. PADOW
Of Counsel

* ALSO ADMITTED IN
WASHINGTON, D.C.

JESSICA E. HARRIS

* ALSO ADMITTED IN NJ

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VIA ELECTRONIC FILING

Office of the Executive Secretary
Gary Shinnars, Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

**Re: New Vista Nursing and Rehabilitation
Case 22-CA-29988**

Dear Mr. Shinnars:

This firm represents Charging Party, 1199 SEIU United Healthcare Workers East (“the Union”), in the above-referenced case and we submit this position letter to address the issues raised by the Third Circuit’s remand.

On remand, the Third Circuit instructed the Board to analyze this case in the manner set forth by the court in *NLRB v. Attleboro Assocs., Ltd.*, 176 F.3d 154, 165 (3d Cir. 1999). As is explained herein, whether under Third Circuit law or Board law, the Board should again find that New Vista Nursing and Rehabilitation (“New Vista”) violated §§ 8(a)(5) and (1) of the National Labor Relations Act by refusing to recognize and bargain with the Union regarding the unit of licensed practical nurses (“LPNs”).

I. BACKGROUND

A. Procedural History

In February 2011, following the filing of the Union's RC petition, a three-day hearing was held regarding whether the LPNs at New Vista were statutory supervisors. In a March 9, 2011 decision, Regional Director J. Michael Lightner rejected New Vista's contention that the LPNs were supervisors under the Act. *See* Decision & Direction of Election, 22-RC-13204 (Mar. 9, 2011). An election was subsequently held on April 8, 2011, in which the LPNs voted to be represented by the Union by a vote of 26 to 7. *See NLRB v. New Vista Nursing & Rehab.*, No. 11-3440, slip op. at 9 (3d Cir. 2017). After the Board denied New Vista's request for review of Director Lightner's decision and direction of election, *id.* at 9, the Union was certified on April 18, 2011 as the exclusive collective bargaining representative of a unit of all full-time and part-time LPNs employed by New Vista, *New Vista Nursing & Rehab., LLC*, 357 NLRB No. 69, slip op. at 3 (2011).

On May 13, 2011, the Union requested that New Vista recognize and bargain with it; by email the same date, New Vista refused to do so. *Id.* at 1. Since May 13, 2011, New Vista has continued to refuse to bargain with the Union regarding the LPN unit. On May 19, 2011, the Acting General Counsel issued a complaint alleging that New Vista violated §§ 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union. *Id.* The Board granted the Acting General Counsel's motion for summary judgment. *Id.* at 3.

Subsequently, in September 2011, the Board sought enforcement of its August 26, 2011 order in the Third Circuit. *New Vista Nursing & Rehab.*, No. 11-3440, slip op. at 13. Following five motions for reconsideration by New Vista, six years of argument, a hearing en banc, and a remand to the Board, on August 29, 2017, the Third Circuit issued its decision upholding the

Board's denial of New Vista's motions for reconsideration but vacating and remanding the Board's August 26, 2011 order on the grounds that the Board applied the wrong legal test. *See id.* at 22–57.

The court explained:

In the case before us, the Board relied on a four-part test . . . derived . . . from an NLRB opinion (later vacated) to determine whether the nurses here were statutory supervisors: “To prevail, the Employer must prove that: (a) LPNs submit actual recommendations, and not merely anecdotal reports, (b) their recommendations are followed on a regular basis, (c) the triggering disciplinary incidents are not independently investigated by superiors, and (d) the recommendations result from the LPNs' own independent judgment.”

Id. at 48. The court held that the Board's reliance on “evidence that management independently investigated the LPNs' written complaints and that few LPNs apparently submitted written complaints” was “inappropriate,” and remanded to the Board for application of the Third Circuit's test. *Id.* at 41.

B. Factual Background

Over the course of the three-day hearing regarding New Vista's claim that the LPNs are supervisors, the hearing officer heard the testimony of Director of Nursing (“DON”) Victoria Alfeche, LPN/Unit Manager Grace Tumamak, and LPNs Abosede Adekanmbi, Wendy Thompson, Agnes Ramirez, Simon Ramirez, and Marisol Roldan. In addition, New Vista put into evidence 33 disciplinary notices, several Resident Concern forms, and a number of Investigative Report forms. (*See* ER Exs. 4, 11, 17, and 18.)

DON Alfeche testified that disciplinary actions of CNAs are initiated with the filing of a Notice of Corrective Action or Employee Warning Notice (collectively, “disciplinary action form”) by a Unit Manager or RN, or occasionally, an LPN. (Alfeche Test., Hrg. Tr. at 125, 136.) However, when an LPN fills out a disciplinary action form, her role is limited to reporting the

facts of what happened; she does not complete the part of the form that states the level of discipline (if any) being imposed, she is not involved in the investigation of the incident, and she does not participate in issuing the discipline to the CNA. (Alfeche Test., Hrg. Tr. at 131–35, 148, 156; Roldan Test., Hrg. Tr. at 168, 175; S. Ramirez Test., Hrg. Tr. at 205; Tumamak Test., Hrg. Tr. at 241; Adekanmbi Test., Hrg. Tr. at 293–94.)

Of the five¹ LPNs who testified at the hearing, three—Adekanmbi, Roldan, and Simon Ramirez—testified that they had completed part of a disciplinary action form on one or two occasions over the course of their careers as LPNs at New Vista. (Adekanmbi Test., Hrg. Tr. at 293–98; Roldan Test., Hrg. Tr. at 164, 167; S. Ramirez Test., Hrg. Tr. at 204–05, 217.) The relevant portions of their testimony are summarized briefly below.

1. Adekanmbi

Adekanmbi testified that in the 11 years she has been an LPN at New Vista, she has reported CNA misconduct on a disciplinary action form once, and she did so at the direction of Unit Manager Tumamak. (Adekanmbi Test., Hrg. Tr. at 287, 291–97.) Adekanmbi explained that she had contacted Tumamak after receiving a complaint from a resident's daughter regarding a CNA, and Tumamak instructed her to write a statement. (*Id.* at 293.) When she arrived the next

¹ This number excludes Unit Manager Tumamak, who, as the Unit Manager, has greater authority than LPNs. (Tumamak Test., Hrg. Tr. at 237–38.) Although until December 2009, Tumamak sometimes worked as an LPN, there is no way to determine, based on the record evidence, which of the disciplinary action forms she signed as an LPN, as opposed to as a Unit Manager. Even forms that are labeled as having been completed at a time Tumamak worked as an LPN were often signed by Tumamak in her capacity as Unit Manager. (*See, e.g.*, ER Ex. 4, at 33; Tumamak Test., Hrg. Tr. at 244–45; ER Ex. 4, at 83; Tumamak Test., Hrg. Tr. at 247–48; ER Ex. 4, at 106; Tumamak Test., Hrg. Tr. at 250.) For this reason, the Board correctly disregarded the notices signed by Tumamak in its prior decision and briefs. *See* Decision & Direction of Election, at 24; NLRB Br. on App. for Enforcement, Oct. 25, 2012, at 16; NLRB Br. Panel Rehearing of App. for Enforcement, Nov. 25, 2014, at 19.

morning, Tumamak handed her a Notice of Corrective Action to fill out. (*Id.* at 294.) She completed only the portion of the form that asked her to describe what had happened; she did not recommend or select the disciplinary action taken, did not issue the discipline, and did not even know if the report resulted in discipline. (*Id.* at 293–94.) Adekanmbi further testified that she had never recommended or issued discipline, she was not aware of any other LPNs who had done so, and the Unit Manager had never told her that she was responsible for issuing disciplines. (*Id.* at 297–98, 310.)

2. *Roldan*

Roldan testified that she has reported CNA misconduct on disciplinary action forms twice during her fifteen-year career: “One was for insubordination and another one was for forgetting to do care or repositioning.” (Roldan Test., Hrg. Tr. at 164.) New Vista did not produce the disciplinary action form for the insubordination discipline, nor any evidence of it aside from Roldan’s testimony. (*See* Hrg. Tr. at 172.) Roldan, for her part, stated that the incident had taken place ten to fifteen years prior, under a different management company, and while she claimed to recall that she ordered the CNA off the floor and recommended that he be terminated, she could not remember his name, what occurred, or the date (or even year) of the incident. (Roldan Test., Hrg. Tr. at 168–69, 193–94.)

With respect to the repositioning discipline—the only disciplinary action form Roldan filled out that New Vista produced (*see* ER Ex. 4, at 4)—Roldan testified that she completed only the top portion of the form (a description of the CNA’s alleged misconduct) (Roldan Test., Hrg. Tr. at 167–68); the bottom portion of the form, which describes the disciplinary action to be taken, was completed and signed by the DON (*see id.*; Alfeche Test., Hrg. Tr. at 63). Roldan neither selected nor suggested the type of discipline to be issued, nor did she issue the discipline

to the employee. (Roldan Test., Hrg. Tr. at 168.) Indeed, it is not apparent that the employee even was disciplined as a result of Roldan's report. Rather, under the portion of the form entitled "Action to be Taken," the DON wrote: "Next offense is suspension *or as the case maybe* [sic]." (ER Ex. 4, at 4 (emphasis added).)

3. *Simon Ramirez*

Simon Ramirez testified that he has filled out disciplinary action forms for two CNAs: one in 2007, and one in 2008 or 2009. New Vista, however, produced only one disciplinary action form completed by Simon Ramirez. (*See* ER Ex. 11.) Ramirez testified that he only completed the top portion of the form, in which he described the CNA's misconduct; he did not select the appropriate disciplinary action. (S. Ramirez Test., Hrg. Tr. at 204–05.) In fact, the form does not indicate that any disciplinary action was taken as a result of the report. (*See* ER Ex. 11.) No corrective action is checked off; instead, there is a notation: "As per DON's discretion." (*Id.*)

With respect to the discipline Ramirez claimed to have initiated in 2008 or 2009, Ramirez initially testified that CNA Darlene Williams "was – every one hour she went for a smoking outside from the facility. She take 15 minutes, 30 minutes, and she come back. Then I gave her a disciplinary action and I spoke verbally with my supervisor for termination." (S. Ramirez Test., Hrg. Tr. at 211.) A moment later, Ramirez testified "it was because of these excessive breaks and plus because of insubordination, too." (*Id.* at 212.) He offered no details of the alleged insubordination. (*See id.*) When asked to identify which of the disciplinary action forms he used to initiate the disciplinary action against Williams, Ramirez initially stated that he utilized the Employee Warning Notice (ER Ex. 9), which, according to DON Alfeche and New Vista's counsel, did not exist at the time Ramirez claimed to have disciplined Williams (DON Test.,

Hrg. Tr. at 39; Richards Stmt., Hrg. Tr. at 218). On redirect, Ramirez reversed himself, claiming that in fact he had used the Notice of Corrective Action. (Ramirez Test., Hrg. Tr. at 223.) New Vista produced neither the form Ramirez used for his alleged discipline of Williams, nor any other testimony or evidence to support his claim that he disciplined her and recommended her termination, or even any evidence that she was in fact terminated.

4. Agnes Ramirez and Thompson

The only other LPNs to testify—New Vista witness Agnes Ramirez, and Wendy Thompson—averred that they had never utilized either of the disciplinary action forms or participated in the disciplining of any CNA in any manner. (A. Ramirez Test., Hrg. Tr. at 230; Thompson Test., Hrg. Tr. at 267–69, 282.)

Ramirez, who has been an LPN at New Vista for 25 years, initially represented that she had written someone up before, but then clarified that the form she had completed was an Investigation Report, not a disciplinary action form. (A. Ramirez Test., Hrg. Tr. at 225, 228–30.) Thompson, too, testified that although she had completed Investigation Reports (none of which are in evidence) and a Resident Concern form, she had never filled out a disciplinary action form, recommended discipline, or issued discipline, and in fact had never even seen an Employee Warning Notice. (Thompson Test., Hrg. Tr. at 266–68.) She explained that if she has a concern about the care a resident is getting, she talks to Unit Manager Tumamak, who “handle[s] it.” (*Id.* at 267.) She was not aware of any LPN issuing or recommending the issuance of discipline. (*Id.*)

It is not disputed that Resident Concern forms and Investigation Reports can be completed by any employee and may or may not lead to discipline. (*See* Alfeche Test., Hrg. Tr. at 45–46, 84–85; Thompson Test., Hrg. Tr. at 265–67; Roldan Test., Hrg. Tr. at 176–77.)

II. ARGUMENT

There is no dispute that New Vista refused to bargain with the Union regarding the LPN unit. New Vista argues, however, that it was not obligated to bargain because the LPNs are supervisors. As the party asserting supervisory status, New Vista had the burden to prove, with direct evidence, that the LPNs are in fact supervisors. *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 712 (2001); *Dean & Deluca New York, Inc.*, 338 NLRB 1046 (2003). Under either Board law or Third Circuit law, New Vista has failed to do so.²

The burden of proving supervisory status is a heavy one. *Franklin Home Health Agency*, 337 NLRB 826, 829 (2002). Purely conclusory evidence does not satisfy this burden; rather, the party asserting supervisory status must present specific details or circumstances demonstrating the actual authority of the putative supervisors. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006). A party cannot satisfy its burden of proving supervisory status where “the evidence is in conflict or otherwise inconclusive.” *Phelps Cmty. Med. Ctr.*, 295 NLRB 486, 490 (1989). Similarly, any lack of evidence in the record is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 n.8 (1999).

Section 2(11) of the Act defines a supervisor as “any individual having authority, in the interests of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly direct them, or adjust their grievances, or effectively to recommend such action, if . . . the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.”

² Indeed, the Third Circuit found as much when it stated: “[T]he record does not permit us to conclude that New Vista has proved the nurses are statutory supervisors.” *New Vista Nursing & Rehab.*, No. 11-3440, slip op. at 54.

“To exercise ‘independent judgment’ 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.” *Oakwood Healthcare, Inc.*, 348 NLRB 686, 692–93 (2006). That “judgment must involve a degree of discretion that rises above the ‘routine or clerical.’” *Id.* Thus, “the exercise of some supervisory authority in a merely routine, clerical, perfunctory or sporadic manner does not confer supervisory status on an employee.” *Somerset Welding & Steel, Inc.*, 291 NLRB 913, 913 (1988) (internal quotation marks omitted). Further, job descriptions and job titles are only paper authority and are not given any controlling weight by the Board. *Training Sch. at Vineland*, 332 NLRB 1412, 1416 (2000).

Where, as here, an employer relies upon discipline to prove supervisory status, the Third Circuit examines three factors “that together may show an employee is a statutory supervisor:” whether

(1) the employee has the discretion to take different actions, including verbally counseling the misbehaving employee or taking more formal action, *see Attleboro*, 176 F.3d at 165 (“Attleboro’s LPN charge nurses make a decision to counsel an offending CNA directly, or initiate a progressive disciplinary process”); (2) the employee’s actions ‘initiate’ the disciplinary process, *see id.* (“The circumstances clearly are different here inasmuch as Attleboro’s charge nurse initiate a progressive disciplinary process. . . .”); and (3) the employee’s action functions like discipline because it increases severity of the consequences of a future rule violation, *see id.* (“[T]heir decisions to write up a CNA become a part of the CNA’s personnel file and could lead to the CNA’s termination.”).

New Vista Nursing & Rehab., No. 11-3440, slip op. at 46. New Vista has failed to prove any of these factors here, and the Board should therefore reaffirm its decision that the LPNs are not statutory supervisors.³

³ This conclusion holds even if the Board were to apply the test proposed by then-Member Miscimarra in his dissent in *LakeWood Health Center*, 365 NLRB No. 10 (2016) (and prior cases). Under Miscimarra’s proposed test, the Board “should take into account the

A. New Vista Has Not Demonstrated that LPNs Have Discretion to Take Different Actions

New Vista has not proved that LPNs have discretion to take different actions, including verbally counseling the misbehaving employee or taking more formal action. Fully half of the LPNs who testified averred that they lacked the authority to fill out a disciplinary action form without being instructed to do so by the Unit Manager. (Adukanmbi Test., Hrg. Tr. at 293–94; Thompson Test., Hrg. Tr. at 275–77.) And even in the few instances in which an LPN testified to having reported CNA misconduct on a disciplinary action form,⁴ the LPN admitted that—in contrast to the LPN charge nurses whose status was at issue in *Attleboro*—he or she did not select or recommend the level of discipline, or issue the discipline to the CNA. (S. Ramirez Test., Hrg. Tr. at 204–05; Roldan Test., Hrg. Tr. at 167–68); *see Attleboro*, 176 F.3d at 165 (“[T]he record shows that disciplinary notices were . . . in some instances signed by LPN charge nurses and that some of these notices contained recommended corrective action” (internal quotation marks and brackets omitted)).

following considerations: (i) the nature of the employer’s operations, (ii) the work performed by undisputed statutory employees, and (iii) whether it is plausible to conclude that all supervisory authority is vested in persons other than those whose supervisory status is in dispute.” *Id.* at 3–4 (Miscimarra, dissenting). First, the nature of New Vista’s operations do not suggest LPNs are supervisors. Unlike LakeWood Health Center, New Vista does not operate an acute care hospital or a 24/7 emergency department, frequently charged with making on-the-spot life-or-death decisions. Nor does the work performed by undisputed statutory employees (here, CNAs) support the conclusion that LPNs are supervisors. Unlike in *LakeWood*, the record reveals that there is always a nursing supervisor, unit manager, or DON present at the facility “to assign and direct” subordinates. (Alfeche Test., Tr. at 11–12, 17–19.) Finally, because the LPNs are never the highest-level officials at the facility (*see id.*), the third factor (whether it is plausible to conclude that all supervisory authority is vested in persons other than those whose supervisory status is in dispute) also favors a finding that the LPNs are not statutory supervisors.

⁴ Notably, even the witnesses who claimed to have discretion could prove only one instance each (in their collective 19 years of service) in which they had supposedly exercised that discretion. (S. Ramirez Test., Hrg. Tr. at 204–05, 211–12; Roldan Test., Hrg. Tr. at 164, 167–69, 171–72; ER Ex. 4, at 4; ER Ex. 11.)

Moreover, in light of the testimony by LPNs Aduknambi and Thompson that they were instructed to fill out disciplinary action forms, the 11 disciplinary action forms New Vista alleges were written by LPNs who did not testify at the hearing are entitled to no weight. Even if the Board were inclined to credit the DON's incredible testimony that she could identify the handwriting of every nurse who wrote a disciplinary action form (Alfeche Test., Hrg. Tr. at 40–61), it cannot be assumed (and New Vista offered no evidence to prove) that the LPNs completed the forms at their own initiative.

The Board should, consistent with its prior decision, also disregard the 19 disciplinary action notices written by Unit Manager Tumamak. *See* Decision & Direction of Election, at 24; NLRB Br. on App. for Enforcement, Oct. 25, 2012, at 16; NLRB Br. Panel Rehearing of App. for Enforcement, Nov. 25, 2014, at 19. Because Unit Managers have greater authority than other LPNs (*see* Tumamak Test., Hrg. Tr. at 237–38), and New Vista failed to prove that Tumamak wrote any of the disciplinary action notices in her capacity as an LPN, rather than as a Unit Manager,⁵ Tumamak's disciplinary action forms provide no support for New Vista's claim that the LPNs are supervisors.

Further, because the majority of disciplinary action forms that are issued to CNAs are written by someone other than an LPN (Alfeche Test., Hrg. Tr. at 135), even if an LPN were to decide *not* to report a particular instance of CNA misconduct, that decision could be overridden by an RN, Unit Manager, or other supervisor. *See Jochims v. NLRB*, 480 F.3d 1161, 1170 (D.C. Cir. 2007) (finding that the putative supervisor lacked discretion to take different disciplinary

⁵ *See* n.1, *supra*.

actions because “an employee could be disciplined by management whether or not [the putative supervisor] had submitted a writeup”).

Nor is New Vista’s case strengthened by DON Alfeche’s conclusory testimony that LPNs have the authority to decide whether to report CNA misconduct on a disciplinary action form. (Alfeche Test., Hrg. Tr. at 47–48.) “The statute requires ‘evidence of actual supervisory authority visibly demonstrated by tangible examples to establish the existence of such authority.’” *NLRB v. Sub Acute Rehab. Ctr. at Kearny, LLC*, 675 Fed. App’x 173, 178 (3d Cir. 2017) (quoting *Bldg. Contractors Ass’n*, 364 NLRB No. 74, slip op. at 12 (2016)).

Because the record evidence is, at best, “in conflict or otherwise inconclusive,” *Phelps Cmty. Med. Ctr.*, 295 NLRB at 490, New Vista has fallen short of proving that LPNs have the discretion to take different actions, including verbally counseling the misbehaving employee or taking more formal action, and the Board should so find.

B. New Vista Has Not Proved that LPNs’ Actions Initiate the Disciplinary Process

New Vista has also failed to prove that LPNs’ actions initiate the disciplinary process. Although DON Alfeche testified that if an LPN fills out a disciplinary action notice, the subject CNA is always disciplined (Alfeche Test., Hrg. Tr. at 86) and that LPN reports of CNA misconduct initiate the progressive disciplinary process (*id.* at 27, 150), her testimony is belied by the record evidence.

The record contains only three disciplinary action forms written by LPNs who testified at the hearing. As noted above, one of these three forms was, according to the nurse who completed it, written at the *direction* of the Unit Manager. (Adukanmbi Test., Hrg. Tr. at 294.) The other two led to no discipline. (*See* ER Ex. 4 at 4 (stating that the next offense could lead to

suspension, or not, depending on the circumstances); ER Ex. 11 (failing to complete the “corrective action” section, but for the notation, “As per DON’s discretion”).)

Further, there is no credible evidence that LPN reports of CNA misconduct initiate a progressive disciplinary process. Among the 33 disciplinary action forms New Vista submitted into evidence, the following CNAs’ names appear more than once: Risikat Lawall, Dana Grubbs, Roberta Drayton, and Mimose Noril. Not one of their disciplinary histories reveals a policy of progressive discipline. Risikat Lawall, for example, was issued disciplinary notices on September 1, 2009, January 6, 2010, January 18, 2010, and April 23, 2010. (*See* ER Ex. 4, at 2, 104–06.) Although the September 2009 disciplinary notice led to a verbal warning, none of the following three notices led to any disciplinary action at all, let alone more severe action. (*See id.*) Dana Grubbs was disciplined on June 30, 2008, August 21, 2009, and May 27, 2010. (*See id.* at 5, 66, 68, 73.) For the first offense, she received a second written warning; for the second offense, she received a verbal warning; and for the third offense, she was suspended. (*See id.*) Roberta Drayton received disciplinary notices on June 21, 2010 and August 2, 2010. (*See id.* at 22, 25.) For the first offense, she received a verbal warning; for the second offense, no disciplinary action was taken. (*See id.*) Finally, Mimose Noril was disciplined twice: on May 4, 2009, she was suspended for two days; on August 21, 2009, she received a verbal warning. (*See id.* at 95; ER Ex. 17 at 1.)

Thus, unlike in *Glenmark Associates, Inc. v. NLRB*, 147 F.3d 333 (4th Cir. 1998) (upon which the Third Circuit heavily relied in *Attleboro*), where a first offense automatically led to a “verbal counseling documented by a verbal correction report,” a second offense “directed the LPN to issue a written warning,” a “third [offense] was suspension without pay, and the final step, discharge,” *Attleboro*, 176 F.3d at 165 (citing *Glenmark*, 147 F.3d at 337), here, there is no

defined progression of discipline that an LPN's report initiates. *See The Republican Co.*, 361 NLRB No. 15, slip op, at 11 (2014); *Ken-Crest Servs.*, 335 NLRB 777 (2001).

Rather, like the nurses whose supervisory status was at issue in *NLRB v. Sub Acute Rehab. Ctr. at Kearny, LLC*, LPNs at New Vista “only communicate [an] incident to their superiors, who then determine what course of action to take.” 675 Fed. App'x 173, 178 (3d Cir. 2017); *see also Jochims*, 480 F.3d at 1170 (“There is no evidence in this case that petitioner's authority to write up an employee was a prerequisite to discipline, or that it routinely resulted in discipline against an employee, or that it inevitably resulted in the initiation of discipline. A writeup created the ‘possibility’ of discipline, nothing more. Under established case law, this is not enough to show supervisory status.” (citing *Franklin Home Health Agency*, 337 NLRB at 830)); *Progressive Trans. Servs., Inc.*, 340 NLRB 1044, 1045 (2003)).

C. New Vista Has Not Proved that the LPNs' Action Functions Like Discipline Because it Increases the Severity of the Consequences of a Future Rule Violation

Finally, New Vista failed to prove that the LPNs' action functions like discipline because it increases the severity of the consequences of a future rule violation. As shown above, there is a complete absence of record evidence demonstrating that LPN reports of CNA misconduct cause CNAs to be punished more severely for subsequent offenses. Further, although every disciplinary action notice has a section where prior disciplinary actions are supposed to be noted, of the 33 disciplinary action notices in evidence, only *three* actually indicate whether the CNA had previously been disciplined. (*See* ER Ex. 4, at 62, 92; ER Ex. 18.) On the remaining 30 forms, the DON either left the prior disciplinary action section blank or wrote only: “?” casting serious doubt on any claim that the DON considers LPNs' prior reports of CNA misconduct in

determining the level of discipline to impose for any given offense. (*See* ER Ex. 4, at 1–61, 63–91, 93–11; ER Exs. 11, 17.)

Indeed, even the policy upon which the DON purports to rely in issuing discipline gives her the discretion to deviate from progressive discipline.⁶ Thus, the policy states that “[w]henver an employee commits an offense warranting disciplinary action, his supervisor may begin disciplinary action in any the steps listed below” (verbal warning, written warning, suspension, suspension pending discharge). (ER Ex. 7 at 42.) The policy further acknowledges: “Clearly, there will be instances of such a grave nature that the formal disciplinary procedures cannot be followed.” (*Id.*)

Where, as here, the record shows that “the Employer reserves the right to deviate from progressive discipline based on the severity of the violation, and there are no examples of the Employer relying on prior discipline to impose a higher level of progressive discipline,” the Employer has failed to meet its burden. *WSI Savannah River Site*, 363 NLRB No. 113, slip op. at 4 (2016); *see Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 4 (2014) (holding that the authority to report violations is insufficient to prove supervisory status where the employer has the power to “exercise its discretion” in applying progressive discipline). The Board should thus conclude that New Vista has failed to prove that the LPNs’ action functions like discipline because it increases the severity of the consequences of a future rule violation.

III. CONCLUSION

Because New Vista failed to prove that: LPNs have the discretion to take different actions, including verbally counseling the misbehaving employee or taking more formal action;

⁶ The policy is, in any event, not binding to the extent it conflicts with the parties’ collective bargaining agreement (“CBA”), and New Vista did not put the CBA into evidence.

LPNs' actions initiate the disciplinary process; or that the LPNs' action functions like discipline because it increases severity of the consequences of a future rule violation, the Board should, consistent with its prior decision, find that the LPNs are not statutory supervisors, and as such, that New Vista violated §§ 8(a)(5) and (1) of the Act.

Very truly yours,



Jessica E. Harris
William S. Massey