

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 6**

BLOOMSBURG CARE AND REHABILITATION CENTER

Employer

and

Case 06-RC-241173

RETAIL WHOLESALE AND DEPARTMENT STORE UNION (RWDSU)

Petitioner

DECISION AND DIRECTION OF ELECTION

I. INTRODUCTION

On May 9, 2019, the Retail, Wholesale, and Department Store Union (“the Petitioner”) filed a petition (“the Petition”) in this case under Section 9(c) of the National Labor Relations Act, as amended (“the Act”), seeking to represent all regular full-time and regular part-time Licensed Practical Nurses (“LPNs”)¹ employees of Bloomsburg Care and Rehabilitation Center (“the Employer”) at its facility located at 211 E. 1st Street, Bloomsburg, Pennsylvania (“the Employer’s facility” or “the facility”), the only facility involved herein.

As evidenced at the hearing and in the briefs, the parties disagree on the supervisory status of the LPNs.² The Employer argues that the Petition should be dismissed because the

¹ Specifically, the petitioned for unit is all regular full-time and regular part-time LPNs, all flex time LPNs, super flex time LPNs, per diem LPNs, and PRN LPNs.

² It is unclear whether the Employer is taking the position that the Flex Time LPNs, the Super Flex Time LPNs, the Per Diem LPNs, and the PRN LPNs possess supervisory authority. Consistent with my determination as to the supervisory status of the LPNs, all classifications of the LPNs as defined in the petitioned-for unit also fail to possess supervisory authority. Accordingly, all Flex Time LPNs, Super

LPNs, also known as the “Charge Nurses” or “LPN Supervisors” are statutory supervisors under Section 2(11) of the Act based on their authority to discipline and effectively recommend discipline of the CNAs, their authority to manage their staff through educational consults, and their authority to assign and responsibly direct the CNAs work. The Employer also asserts that the LPNs possess all the supervisory authority that is described in their job description. The unit sought by the Petitioner currently has approximately 24 employees.

I have carefully reviewed and considered the record evidence, the arguments of the parties, and relevant Board Law. For the reasons that follow, I find that the Employer did not meet its burden of establishing that the LPNs are statutory supervisors under the Act and that the Petition should therefore be processed. To provide a context for my discussion of the issues, I will first provide an overview of the Employer’s operations. Then, I will present in detail the facts and reasoning that supports each of my conclusions on the issues.

II. FINDINGS OF FACT

1. Overview of Operations

The Employer, a Pennsylvania corporation, operates a nursing home and rehabilitation facility in Bloomsburg, Pennsylvania. The Employer took ownership of the facility in March of 2018. The facility consists of four floors, which houses five units, one of which is currently closed. The record indicates that, on average, there is around 30 residents per unit, and about a total of 149 beds in the facility.

Flex Time LPNs, Per Diem LPNs, and PRN LPNs would be included in the unit found appropriate herein if they were otherwise eligible to vote based on the number of hours worked in the applicable period.

The record indicates that the managers can supervise everybody that is below them in the managerial hierarchy. The upper management of the facility is comprised of an Administrator/CEO, the Director of Nursing (“DON”), and the Assistant Director(s) of Nursing (“ADON”). The Administrator/CEO reports directly to the owners of the facility. The DON reports directly to the Administrator/CEO and the ADON(s) reports directly to the DON. Reporting to the ADON are the Registered Nurse supervisors (“RN supervisors”).

The RN supervisors are undisputedly supervisors over the LPNs and CNAs.³ The RN supervisors’ job duties include accepting calls for call-offs, obtaining staffing as needed, walking the facility two to three times during a shift to ensure that everyone has done their work, taking reports from LPNs on the unit about what the residents have done overnight to convey it to the next supervisor coming in, and conveying medical information about residents to the physicians. RN supervisors are also called onto the unit to assist when something problematic occurs, like a resident fall or a significant medical change to a resident. The record indicates that RNs are also called to assist when CNAs are not getting along well during their shift.

The record demonstrates that Nurses’ Aid Team Lead (also referred to on the record as a “lead” CNA) (herein, “lead CNA”) are also employed in the facility. These lead CNAs orient and train new CNAs, keep peace among the CNAs, and assist with any issues that may arise among the CNAs.⁴ There is insufficient evidence in the record about the supervisory authority of the lead CNAs.

³ The prior owner of the facility employed unit managers, and that the Employer eliminated this position when it took over ownership of the facility in 2018.

⁴ The record indicates that a few of these CNA leads have resigned or left their employ recently, but that the Employer is seeking to replace them.

The RN supervisors, the LPNs and all the CNAs all work directly on the units in three shifts: 7:00am to 3:00pm (also referred to in the record as the first shift), 3:00pm to 11:00pm (also referred to in the record as the second shift), and 11:00pm to 7:00am (also referred to in the record as the third shift or the night shift).

The record indicates that staffing is determined by the size of the unit and the shift. The night shift is generally staffed with only one LPN and one CNA per unit. However, the first and second shifts are usually staffed with one LPN and two to three CNAs per unit. There are always at least one to two RN supervisors on each shift, as well as one CNA lead on every floor during each shift.

2. The Employer's Disciplinary Procedures

Since about January of 2019, the Employer distributed and has maintained an Employee Manual ("Manual") that "provide[s] the Supervisory Staff with tools to monitor the standards of care and behavior." The Manual makes special mention that, "LPNs, as supervisors, shall discipline CNAs pursuant to the Facility's Progressive Discipline Policy."

The Manual provides that supervisors are to follow the progressive discipline procedure as it is described therein. Infractions are divided into four categories, with extensive lists of prohibited conduct that would fall under each category. The Manual explains that supervisors shall issue verbal warnings for first offenses involving Group I Violations and supervisors shall issue written warnings for a second offense involving a Group I or a first offense involving a Group II violation. This procedure states that the Administrator or Department Head shall issue suspensions, disciplinary probation periods, or terminations for conduct falling under the Group III infractions, Group IV infractions, or repeat infractions.

3. Duties of the LPNs

The testimonial evidence indicates that the LPN job duties revolve around the delivery of care to a group of residents in a nursing unit, including administering medication and treatments, completing related paperwork and reports, assisting with toileting and feeding, and administering nursing care. LPNs are required to follow a resident's plan of care, which is a compilation of care instructions provided by the resident's physician, nutritionists, and other healthcare providers. LPNs may convey information from this plan of care or from a healthcare professional to a CNA to ensure that a resident's needs are met.

The record establishes that the LPNs had no prior training on their responsibilities to supervise CNAs until the Employer's attorney, Brandon S. Williams ("Williams"), conducted a training session entitled, "RN and LPN Management Training- Supervising the Disciplinary and Performance Process" with LPNs on April 18, 2019, in which he gave LPNs a handout ("training handout") explaining their authority as supervisors. The LPNs who attended the meeting testified that they did not understand the Employer to be giving them new or additional authority to discipline CNAs. The Employer's administrator testified that this training took place in response to his telling the owners of the LPN's union drive.

It should be noted that the record demonstrates that LPNs were also given updated job descriptions and badges to wear at work around the time of this training. Prior to this training, LPNs wore name badges with the state title, "Licensed Practical Nurse." After this training, LPNs were given name badges that the stated title, "LPN/LPN Supervisor."

Up until April of 2019, the LPN's job description made no mention of the LPNs' authority to supervise or discipline CNAs. However, on April 25, 2019, following Williams' LPN supervisory staff training, a new LPN job description ("recent job description") was distributed to the LPNs, which states that the "primary purpose" of their "position is to provide direct nursing care to residents, and to supervise the day-to-day nursing activities performed by CNAs and other nursing personnel." Some of the LPNs testified that this recent job description accurately reflects their job duties and responsibilities.

a. The Authority to Discipline

As noted above, one of the Employer's bases for contending that the LPNs are supervisors within the meaning of the Act are that LPNs have the authority to discipline employees and effectively recommend discipline. Specifically, the Employer contends that LPNs have the authority to complete written warning forms to convey these warnings. It is undisputed that the LPNs do not have the authority to issue final warnings, suspensions, or terminations.

The Manual provides that LPNs are considered part of the facility's "management team," and as such, have the "responsibility to issue discipline (oral and written warnings) to nursing assistants when they believe it is warranted." The LPN's recent job description also outlines the LPNs' authority over the CNAs to ensure that they comply with work rules, policies, and procedures, and to issue verbal and written disciplinary warnings to CNAs for violations of such workplace rules, policies, procedures, or poor performance.

The training handout emphasizes that LPNs have the authority to exercise their "independent judgment" in deciding to issue discipline to CNAs, but they must consult the Manual every time prior to issuing such discipline. Specifically, the training handout explains

that LPNs must complete a Notice of Disciplinary Action Form (“warning form”)⁵ and then “recommend discipline to the Director of Nursing based on the Progressive Discipline System” as set forth in the Manual. The record indicates that the warning form was updated recently sometime in 2019.

The warning form contains a “Type of Warning” section, in which First Warning, Second Warning, or Final Warning may be ticked. The record is clear that the LPNs do not have access to employee personnel files to know what type of warning it should be or whether the offending employee has had previous infractions; rather, LPNs contact HR to determine which box to tick under this portion of the warning form.

The warning form also contains boxes to be ticked off in a section entitled, “Type of Offense.” The Manual sets forth extensive lists of prohibited conduct in the work place and the category in which this conduct falls under, and the record shows that LPNs determine the category of the offense based on what they have observed. One LPN testified that she contacted Human Resources (“HR”) when she was unsure which Type of Offense to categorize the infraction pursuant to the Manual, and the training handout states that LPNs should check with HR if they are unsure.

Finally, the warning form provides lines at the bottom for the employee’s, manager’s and witness’ signatures. The testimony was varied among the LPNs as to whether they signed on the manager’s signature line of the form. The evidence establishes that LPNs are to give completed warning forms to the DON. LPNs’ testimony was speculative about what happened to the

⁵ The record shows that these warning forms are stored and made available to the LPNs at the nurses’ stations.

offending employee being issued this warning form in terms of discipline after they turned the warning form into upper management.

Although any instructions to the LPN staff regarding their authority to complete warning forms appear recent and the warning forms that are utilized at present also appear to be new, the record suggests that LPNs have always had this authority, and this authority is exercised occasionally. Further, the record suggests that LPNs do not have to consult with any superiors prior to completing a warning form.

The record contains a few instances in which LPNs completed warning forms. For example, about a week prior to the hearing, an LPN completed the warning form when she observed a CNA watching YouTube on a work computer. The record testimony established that the LPN consulted the Manual to determine the type of the offense, and then called HR to confirm the category of the infraction. HR also directed this LPN as to the type of the warning (i.e., first warning, second, etc.) because LPNs do not have access to employees' personnel files. This LPN testified that she also made the administrator aware that she was completing a warning form because the DON was not there that day. The LPN discussed the matter with the involved CNA, explaining to her that her conduct violated workplace rules. The record is devoid of any evidence regarding whether this warning form resulted in personnel action or discipline for this CNA that did or could eventually impact job status.

Another LPN testified that she completed a warning form sometime around April of 2019 after a resident's family complained that a CNA had been rude to them. The LPN testified that she had observed this CNA being rude in the past and previously discussed this with her (without filling in any paperwork). In this instance, the LPN did not consult with the chain of command

prior to completing the warning form, but she turned the completed warning form into her supervisor. The LPN stated that she did not sign on the manager line of the form because she is not the CNA's manager. This same LPN completed warning forms in the same manner in March of 2019 in another situation in which a resident complained that a different CNA had been rude. When the facility was under different ownership, this LPN had also completed warning forms for CNAs for falling asleep while on duty (after consulting with a manager) and for using profanity in the workplace. Again, there is no evidence in the record demonstrating that any of these warning forms went on to result in any kind of personnel action or impact on job status.

In addition, in February 2019, an LPN completed a warning form because two CNAs were not passing out morning snacks to the residents and their blood sugars were low. Before completing the form, the LPN spoke with her RN Supervisor about the CNAs' conduct and asked for permission to complete a warning form. After completing the warning form, the LPN then turned it into the DON. The LPN testified that her RN Supervisor later told her that the CNAs were given a warning.

The testimonial evidence was inconsistent among the LPNs regarding their belief as to whether they have the authority to issue or recommend discipline to the CNAs. While some of the LPNs testified that they had completed warning forms in the past and these warning forms constituted discipline, others testified that they never did this and/or never had the need to complete a warning form. Moreover, some LPNs testified that they do not have the authority to discipline the CNAs and they are not the CNAs' supervisors. There was no evidence entered into the record demonstrating that a warning form completed by an LPN was linked to disciplinary action affecting job status. Overall, the record suggests that the LPNs' authority to complete

warnings forms is a reporting function to bring substandard performance or safety hazards to management's attention.

b. Authority to Manage through Educational Consults

The Employer contends that the LPNs' authority to conduct Educational Consults and do so with their own independent judgment is another basis in which they are supervisors within the meaning of the Act.

The record demonstrates that LPNs have Educational Consult Forms available to them. The training handout explains that Educational Consult Forms may be utilized by LPNs and RN Supervisors to "manage their staff effectively" when disciplinary action is not necessary, but, "an employee needs to be educated on a procedure or alerted to a process." The record testimony on these forms was quite limited; some LPNs had never seen the Educational Consult Forms before and did not know what they were.

The record contains one instance in which an LPN completed Educational Consult Forms. An LPN testified that in March of 2019, she observed that the CNAs on her unit were not putting the proper slipper socks on residents to prevent falls. Without prior permission or consultation from any superior, this LPN then "gave an education" to all the CNAs on the unit that day about residents wearing the proper slippers with grip on the bottom to prevent this safety hazard, and completed Educational Consult Forms, which were then signed and dated by the CNAs. There was no discipline to the CNAs resulting from these Educational Consult Forms. There is no evidence in the record about whether these Educational Consult Forms were recorded in employees' personnel files for purposes of the progressive disciplinary procedure or documented for any further purpose at all.

c. Authority to Assign Work and Responsibly Direct Work

The Employer contends that the LPNs are supervisors within the meaning of the Act because they have the authority to assign the work and responsibly direct the work to nursing personnel. It is undisputed that the LPNs do not set the CNAs' schedules, nor is there any evidence that the LPNs can change the unit or shift in which a CNA is assigned.

The Manual states that the CNAs' first line supervisor is the LPN, and that, as such, CNAs are directly responsible to the LPN. The Manual also provides that employees are to, "work by prearranged assignment based on the activity of each shift" and, more specifically, "CNA work assignments shall be administered by LPNs acting in a supervisory capacity." The recent LPN job description also provides that the LPNs complete the following duties:

Develop work assignments and/or assist in completing and performing such assignments.
Reassign assigned CNAs based upon skills and qualifications.

Make daily rounds of your unit/shift to ensure that assigned CNAs are performing their work assignments in accordance with acceptable nursing standards

Along these lines, the training handout also provides that LPNs are to meet with their "assigned nursing personnel, including CNAs, as well as support personnel, in planning the shifts' services, programs, and activities." Although this language seems to indicate that the LPNs can assign work to other employees, the only nursing personnel discussed on the record as having any involvement with the LPNs is the CNAs.

It should be noted that no CNAs testified in the hearing to paint a picture of how their work is assigned to them. However, the record evidence clearly establishes that the CNA's provide basic resident care and their job duties are routine in nature. CNAs perform the

following tasks daily: bathing/showering of the residents, dressing the residents, keeping the resident mobile, completing documentation on the residents' outputs and intakes, answering call bells, supervising or assisting with resident meals, and completing residents' electronic charts.

Moreover, the record establishes that CNAs do their duties in accordance with their own understanding of what they are supposed to do and when. For instance, CNAs come to learn when each resident prefers to get out of bed in the morning, and they accommodate them accordingly without specific instruction from the LPNs.

The record suggests that CNA assignment lists are routinely used to designate the CNAs' work. LPNs do not create these assignment lists; rather, these assignment lists were created under the previous ownership of the facility and continue to be used today. The record is clear that a resident's needs may change in some manner that is not already communicated in an assignment list, and the LPN will assist in communicating this change to the CNA so that the resident's needs are met. For instance, the record shows that LPNs write the residents' therapy appointments and other medical appointments that are scheduled on these lists to make sure that the CNAs assist with getting the residents to these appointments on time. Another example provided on the record is when a nutritionist has made a change to a resident's intake plan, the LPN will communicate this change to the CNA. The record shows that the LPNs generally do not independently make these changes to the CNAs' assignment lists or decide what this change is; rather, the LPN's role in these circumstances is to ensure that the CNA knows about the change.

Several LPNs testified about how additional work is distributed when a CNA fails to report to work.⁶ The record shows that if no one had prior notice that a CNA is not reporting to work and the LPN is the first to observe that a CNA has failed to report to work, the LPN calls the RN supervisor and the RN supervisor will attempt to call a CNA from another unit to come and assist. If another CNA is not available to assist, then other floors of the facility will share a CNA to cover for that missing CNA. Along these lines, the training manual states that LPNs are to inform the DON and/or the unit manager when assigned personnel fail to report to work.

The record shows that when there is an increase of work due to a CNA's absence, the CNAs generally work together to handle the imbalance in assignments without the involvement of the LPN. To use an LPN's own words on the matter,

In truth[ful], the aids actually would be the ones splitting that up to say, "All right. I got this one. You get this one. We will do this together." I back them up as much as I can with helping as much as I can between med passes.

The record contained one instance in which an LPN had been asked for her input because the CNAs could not decide how to divide up the work amongst themselves; however, in this situation, the LPN was asked to provide her opinion, not to make the assignment.

A couple of LPNs testified that they took it upon themselves to split up the extra work among the CNAs on duty that day to cover for the absent CNA without consulting with upper management. The LPNs who did this testified that they merely took into consideration the tasks that needed to be done and the time frame in which they needed to be done; the LPNs did not make these assignments based on any assessment of the CNAs' skills and abilities.

⁶ CNAs do not call their LPN counterpart when they are planning to be absent from work; rather, CNAs report their call-offs to the facility.

The record contains one situation in which an LPN switched the CNAs' assignments when he first started working in a unit to make the work distribution more equal and did so without prior approval from a superior. This LPN testified that, in switching up the CNAs' assignments, he took into consideration the work that needed to be done, the time that it needed to be done, and the availability of the CNAs. There is some testimony on the record of LPNs dividing up resident showers among the CNAs also in a similar fashion. One LPN testified that she has divided up the number of resident showers among the CNAs based on the availability of the CNAs, considering how many showers each resident requires per day/week.

Overall, the record shows that, rather than having a supervisor-subordinate relationship, the CNAs and LPNs work together as a team in ensuring that a resident's needs are met. The CNAs appear to be self-sufficient in carrying out their job duties based on their own understanding of the residents' needs and their roles in providing resident care.

d. Supervisory Indicia in the Documentary Evidence

The Employer asserts that the LPNs possess all the supervisory authority as described in the documentary evidence entered into the record. The documents entered into evidence list that the LPNs have the authority to evaluate the CNAs' work and recommend overtime for CNAs. The testimonial evidence on these functions was limited or nonexistent.

The training handout sets forth that the LPNs have the authority to evaluate the job performance of CNAs through their annual performance evaluations. Specifically, the training handout provides that the LPNs will be given a list of the CNAs' job duties and will utilize a competency scale in evaluating the CNAs' job performance by assigning a number to each duty "based upon fact-based observations made through working with the CNA." One LPN testified

in a conclusory manner that the LPNs are to evaluate the CNAs. However, there was no elaboration on this in the record, no documentary evidence showing that LPNs had completed performance evaluations for the CNAs, and no additional testimony provided on this function.

Similarly, the training manual provides that LPNs are to recommend overtime for CNAs and other nursing personnel to upper management to ensure that residents' needs are met.

However, there is no testimonial evidence on this function.

III. SUPERVISORY STATUS OF THE LPNS

As previously stated, the Employer contends that the LPNs at the Employer's facility are supervisors within the meaning of Section 2(11) of the Act. In so asserting, the Employer contends that the LPNs have the authority to discipline and effectively recommend discipline of CNAs, to manage their CNA staff through educational consultations, and assign work to the CNAs. Further, the Employer broadly asserts that the LPNs have the supervisory authority as set forth in their job description. The Petitioner asserts that the LPNs are not supervisors within the meaning of the Act.

Section 2(11) of the Act defines the term supervisor as:

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

To meet the definition of supervisor in Section 2(11) of the Act, a person needs to possess only one of the 12 specific criteria listed, or the authority to effectively recommend such action. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949). The

exercise of that authority, however, must involve the use of independent judgment. *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000).

The Board and the courts have observed that the Act sets forth a three-pronged test for determining whether an individual is a supervisor within the meaning of the Act.

Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,” and (3) their authority is held “in the interest of the employer.”

Franklin Home Health Agency, 337 NLRB 826, 829 (2002), citing *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001). The exercise of "some supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner," or through giving "some instructions or minor orders to other employees" does not confer supervisory status. *Franklin Home Health Agency*, supra at 829, citing *Chicago Metallic Corp.*, 273 NLRB 1677, 1689 (1985) enfd. 794 F.2d 527 (9th Cir. 1986).

It is well established that the burden of proving supervisory status rests on the party alleging that such status exists. *Transdev Services, Inc.*, 363 NLRB No. 188, 7 (2016) citing, *Oakwood Healthcare*, 348 NLRB 686, 694 (2006). Lack of evidence is construed against the party asserting supervisory status. *Michigan Masonic Home*, 332 NLRB 1409, 1409 (2000).

As shown below, I find that the Employer has not met its burden of establishing that the LPNs are supervisors within the meaning of the Act, and therefore, I shall include them in the unit found appropriate herein.

1. Supervisor in Title and Job Description

In support of its case, the Employer entered into evidence the LPNs’ recent job description, employee badges, the Manual, and training handout all as evidence of the LPNs’

supervisory authority. The Employer asserts in its brief that various LPN witnesses testified that these documents accurately reflect their job duties, evidencing their supervisory authority. These documents make specific and repeated mention that the LPNs are the CNAs' supervisors, with the authority to discipline, the authority to assign work, and the authority to evaluate work. In this regard, some of the Employer's witnesses broadly testified that the job description accurately reflects their job duties and responsibilities.

The Board has found that an individual's job title is not determinative of supervisory, status in the absence of any of the requisite statutory duties. *Dole Fresh Vegetables, Inc.*, 339 NLRB 785 (2003); citing *T.K Harvin & Sons, Inc.*, 316 NLRB 510, 530 (1995). An employee cannot become a supervisor by the mere paper vesting of title or enumerated functions. The grant of authority on paper which is illusory in practice is not determinative of supervisory status. *Lakeview Health Center*, 308 NLRB 75, 78 (1992); see also *Community Education Centers, Inc.*, 360 NLRB 85, 94 (2014); *Avante at Wilson*, 348 NLRB 1056, 1057 (2006); *Pine Manor Nursing Home, Inc.*, 238 NLRB 1654, 1655 (1978). Thus, although the Employer has construed the LPNs to be supervisors in title and by documented enumerated duties, this is not dispositive of their supervisory status.

The Employer contends that LPNs possess supervisory authority based on some of their testimony that the job description and Manual accurately reflected their duties. However, conclusory evidence, in the absence of specific examples of the exercise of supervisory authority, does not satisfy the burden of establishing supervisory status. See, e.g., *Lynwood Manor*, 350 NLRB 489, 490-491 (2007); *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). Therefore, this broad testimony fails to prove that the LPNs possess the supervisory authority enumerated in these documents.

2. Authority to Discipline

The Employer's main argument is that the LPNs are supervisors within the meaning of Section 2(11) of the Act because they have the authority to discipline CNAs by issuing them written and verbal warnings. The Employer relies on *GGNSC Springfield LLC v. N.L.R.B.*, 721 F.3d 403, 408 (6th Cir. 2013) in its brief to support its assertion that employees can be statutory supervisors if they have the authority to effectively recommend discipline. Indeed, this legal premise is true; however, for the reasons discussed below, I find that the Employer has not met its burden of establishing that the LPNs possess the authority to discipline.

The Board has held that, to confer supervisory status based on the authority to discipline, "the exercise of disciplinary authority must lead to personnel action without the independent investigation or review of other management personnel." *Lucky Cab Co.*, 360 NLRB 271, 272 (2014) (quoting *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002)). Warnings that simply bring substandard performance to the employer's attention without recommendations for future discipline serve nothing more than a reporting function, and are not evidence of supervisory authority. See *Williamette Industries, Inc.*, 336 NLRB 743, 744 (2001); *Loyalhanna Health Care Associates*, 332 NLRB 933, 934 (2000) (warning merely reportorial where it simply described incident, did not recommend disposition, and higher authority determined what, if any, discipline was warranted); *Ten Broeck Commons*, 320 NLRB 806, 812 (1996) (written warnings that are merely reportorial and not linked to disciplinary action affecting job status are not evidence of supervisory authority). Similarly, authority to issue verbal reprimands is, without more, too minor a disciplinary function to constitute supervisory authority. See *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1139 (1999); *Ohio Masonic Home, Inc.*, 295 NLRB 390, 394

(1989). Moreover, the Board has found that putative supervisors do not possess disciplinary authority where counselings, warnings, or reports do not constitute an initial step in a progressive disciplinary system, and thus do not impact job status. See, e.g., *Vencor Hospital-Los Angeles*, 328 NLRB at 1139; *Jochims v. NLRB*, 480 F.3d 1161, 1170 (D.C. Cir. 2007) (write-ups documenting infractions merely represented the possibility of discipline, given lack of evidence they were prerequisite to discipline or routinely resulted in discipline).

The Employer asserts that LPNs have the authority to discipline and effectively recommend discipline of employees because the LPNs have the authority to complete warning forms concerning the behavior of CNAs. However, it is undisputed that the LPNs do not have access to employees' personnel files. Therefore, although LPNs can report an incident or advise a CNA that he or she has engaged in misconduct, they cannot determine the appropriate penalty for any infraction. No discipline can be imposed without the involvement of upper management.

There is also insufficient evidence to find that the LPNs are even able to complete warning forms independently. The record is clear that the LPNs are to check with the Manual or HR before completing a warning form to see if the conduct is prohibited and, if so, how the infraction should be categorized. There is very little independent judgment involved; rather, the LPNs merely have a reporting function.

Further, the Employer failed to establish that the warning forms issued by the LPNs prove the existence of a progressive discipline system. In its brief, the Employer relies on *Oak Park Nursing Care Center*, 351 NLRB 27, 30 (2007) to support its conclusion that the LPNs in the instant case have, "the authority to initiate disciplinary action as part of a progressive discipline system." However, the Employer's reliance on this case is misplaced. In *Oak Park Nursing Care Center*, the Board found that employee counseling forms are disciplinary in nature

where each form corresponded to a step in the employer's progressive disciplinary process and “routinely result[ed] in actual discipline,” including suspension and termination. *Oak Park Nursing Care Center* 351 NLRB at 30. Here, the Employer did not provide evidence that the warning forms ‘automatically’ or ‘routinely’ lead to job-affecting discipline, by operation of a defined progressive disciplinary system, and thereby fail to qualify as disciplinary within the meaning of Section 2(11). *The Republican Co.*, 361 NLRB 93, 99 (2014); see also *Ohio Masonic Home*, 295 NLRB at 393-394 (finding warnings not disciplinary, where employer had failed to establish that it had a “defined progressive disciplinary scheme” under which the warnings would “automatically affect job status or tenure”)

It is the Employer's burden to prove the existence of such a system, as well as the role warnings issued by putative supervisors play within it. *The Republican Co.*, 361 NLRB at 99. If an ostensibly progressive system is not consistently applied, progressive discipline has not been established. See, e.g., *Ken-Crest Services*, 335 NLRB 777, 777-778 (2001) (verbal warnings not disciplinary, notwithstanding purported progressive discipline system, because employees could receive numerous counselings and verbal warnings without further discipline); *The Republican Co.*, supra, at 100 fn. 8 (progressive discipline not established where, inter alia, testimony indicated employees had been suspended without prior warning, but other employees received multiple verbal warnings without any escalation); *Ten Broeck Commons*, 320 NLRB at 809 (warnings not disciplinary where no showing of “premeditated discipline based solely on the receipt of a certain, set number of warnings”). Here, after completing the warning forms, the LPNs turn them into the DON or administrator. It is unclear if the DON or administrator even review these warning forms to determine what discipline, if any, should be issued. Record testimony on what happened to these warning forms after their completion by the LPNs was

purely speculative. As such, the record fails to show that the warning forms completed by the LPNs automatically or routinely result in job-affecting discipline.

The Board has expressly recognized that cases involving the same facts as the instant matter are common:

[T]he authority to give employees oral warnings and also to write up warnings on forms retained in the employee's personnel file is typical in cases involving nursing-home charge nurses.

Nymed, Inc., 320 NLRB 806, 812 (1996); citing *Northcrest Nursing Home*, 313 NLRB 491, 497 fn. 29 (1993). The Board has stated that, usually, the DON or some other manager or supervisor investigates and decides what, if any, discipline is warranted. "Where this has occurred, the Board has found that the charge nurses are not supervisors either because their warnings do not result in any personnel action, or, if they do, such action is not taken without independent investigation or review by others." *Id.*

For these reasons, I conclude that with respect to the discipline of the CNAs, the LPNs recount incidents and serve a reportorial function, which is insufficient to confer supervisory status. All of the warning forms discussed on the record failed to indicate whether any discipline was later imposed, and do not, by their nature, lay a foundation for future discipline. Therefore, the record fails to establish that the LPNs have authority to issue discipline that independently results in adverse action to the CNAs without further review by higher authority. *Washington Nursing Home*, 321 NLRB 366, fn. 4 (1996).

3. Authority to Assign Work

The Employer contends that the LPNs are supervisors because they have the authority to exercise their independent judgment to assign work to the CNAs working under them. The authority to assign is one of the indicia of supervisory authority under Section 2(11) of the Act.

To meet its burden, the Employer must show that the LPNs hold the authority to assign and, their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment"; and their authority is held "in the interest of the employer." *NLRB v. Kentucky River Community Care*, 532 U.S. at 713; see also *Lynwood Manor*, 350 NLRB at 490.

The Board more fully explained in *Oakwood Healthcare, Inc.* that the authority to "assign" refers to "the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant over-all duties, i.e., tasks, to an employee. In sum, to 'assign' for purposes of Section 2(11) refers to the designation of significant overall duties to an employee, not to the ad hoc instruction that the employee perform a discrete task." *Oakwood Healthcare, Inc.*, 348 NLRB at 689. The Board also explained that the authority to affect an assignment must be free of the control of others and must involve a judgment that requires that forming of an opinion or evaluation by discerning and comparing data. *Id.*, at 693.

Here, the record wholly fails to demonstrate any evidence that the LPNs exercise independent judgment to assign work to the CNAs. The record reflects that most of the time, the CNAs are responsible for a set of rooms in a specific unit. The record demonstrates that, on occasion, LPNs have asked CNAs to cover the work of an absent CNA or have adjusted assignments so that the CNAs' work is more evenly divided. The established pattern of attempting to make the division of work equal among the CNAs underscores the routine nature of these assignments. See, *Lakeview Health Ctr.*, 308 NLRB at 79; citing *Ohio Masonic Home*, 295 NLRB at 391. Moreover, the record here does not show that the LPNs do any kind of assessment of the CNAs' credentials or otherwise in determining how to divide the extra work on their unit. Further, the record shows that CNAs can ultimately decide amongst themselves

how to divide up the extra work when another CNA is absent, disregarding the LPN's input. In light of the fact that the LPNs appear to just assist in dividing work simply based on making the work equal among those available and do not evaluate the skill level of CNAs in determining who they will ask to help, the LPNs' authority to assign does not rise to the level of supervisory authority. See, *Regal Health & Rehab Ctr. Inc.*, 354 NLRB 466 (2009).

Moreover, the CNAs who come to assist the LPNs continue to work their already scheduled shift, and there is no evidence that the LPNs approve the CNA's overtime or otherwise determine their schedules to confer any other indicia of supervisory authority under Section 2(11).

Finally, even if it can be found that the LPNs do exercise any kind of independent judgment in assigning a CNA to cover work on their unit, their authority is still insufficient to confer supervisory status. At most, LPNs ask CNAs to help cover for absent CNAs or reassign the CNAs work on occasion. There is no evidence in the record that this happens routinely. Isolated or sporadic exercise of supervisory authority is insufficient to predicate a supervisory finding. *California Beverage Co.*, 283 NLRB 328 (1987); citing *George C. Foss Co.*, 270 NLRB 232 (1984); *Teamsters Local 574*, 259 NLRB 344 (1981). The sporadic exercise of this authority is simply not a major part of the LPNs' job duties, and therefore, fails to establish supervisory authority. See *Peacock Prods. of NBC Universal Media, LLC*, 364 NLRB No. 104, slip op., at 5 (2016).

4. Authority to Responsibly Direct and Conduct Educational Consults

The Board has defined the authority to direct as the authority to tell another employee "what job shall be undertaken next or who shall do it," and that such direction is both

"responsible" and carried out with independent-judgment. *Oakwood Healthcare*, 348 NLRB at 691. Specifically, a putative supervisor has the authority to responsibly direct if that individual is "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 performed by the employee are not performed properly." *Id.* at 692. The party asserting supervisory status based on possession of authority to responsibly direct must show that the putative supervisor has the "authority to take corrective action" and can potentially receive adverse consequences for the performance errors of other employees. *Id.*; see also *Community Education Centers, Inc.*, 360 NLRB at 94.

In this regard, the Employer asserts that the LPNs have the authority to conduct non-disciplinary educational consults with the CNAs to correct their performance issues. Only one LPN testified that she has actually done this before, and in this instance, it appeared that she was informing the CNAs of how to avoid a safety hazard by using the proper slippers on residents.

Overall, the record demonstrated that the CNAs understand what their job duties are and perform them with little to no instruction from the LPNs. However, the Employer asserts that the LPNs responsibly direct the work of the CNAs by giving them instructions on how to carry out a resident's care plan. Along these lines, some of the LPNs testified that they give the CNAs specific instructions about a resident if a doctor or nutritionist, for example, had ordered some special treatment or changed a resident's care plan. There is also testimony that LPNs inform the CNAs about any kind of therapy or medical appointments that the residents have so that the CNAs will assist in getting the residents to these appointments. Further, one LPN testified that she has instructed CNAs to take a resident's vitals when the resident suddenly appears swollen. This is the type of assignment that the Board has found to be routine direction in connection with the treatment of patients to ensure that quality care is provided to all residents in their care

unit. *Lakeview Health Ctr.*, 308 NLRB at 79; citing *Waverly-Cedar Falls*, 297 NLRB 390, 393 (1989).

The facts of this case are similar to the facts of *Riverchase Health Care Ctr.*, where LPNs communicated particular resident care requirements to the CNAs responsible for performing the work, asked periodically how things were going, asked for specific information, and reviewed the CNAs' paperwork *Riverchase Health Care Ctr.*, 304 NLRB 861 (1991). LPNs answered CNAs' questions and if LPNs observed the CNAs doing something wrong, showed them the correct way. If an LPN saw that a patient needed attention, the LPN called the need to the attention of the CNAs. The Board concluded that the LPNs exercised only routine authority and were not supervisors within the meaning of Section 2(11) of the Act. *Id.*

The Employer has failed to show that the LPNs responsibly direct the CNAs work through educational consults or by informing them of changes to a resident's care because the activity does not constitute the "designation of significant overall duties." *Oakwood Healthcare*, 348 NLRB at 689-690. Moreover, there is almost no evidence regarding the factors weighed or balanced by the LPNs in making the decisions to give the CNAs these tasks. Thus, it cannot be concluded that the degree of discretion involved in this activity rises above the routine or clerical. See *In Re Croft Metals, Inc.*, 348 NLRB 717, 722 (2006).

Furthermore, missing here is evidence that the LPNs have ever been held accountable for the CNAs improperly performing their duties. Without such evidence, it cannot be found that the LPNs responsibly direct the CNAs' work.

IV. FINDINGS AND CONCLUSIONS

Based on the entire record in this matter, the parties' arguments, and in accordance with the discussion above, I find and conclude as followings:

1. The Hearing Officer's rulings are free from prejudicial error and are hereby affirmed.

2. The Employer is a Pennsylvania corporation with an office and place of business located at 211 E. 1st Street, Bloomsburg, Pennsylvania ("the Employer's facility"), and only facility involved herein. The Employer is engaged in the business of operating a nursing home and rehabilitation facility. During the past twelve-month period, the Employer has derived gross revenue in excess of \$250,000 from the operation of its business. During the same period, the Employer purchased and received goods and services valued in excess of \$5,000 directly from points outside the Commonwealth of Pennsylvania. Accordingly, I find that the Employer is an employer as defined in Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this matter.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

5. The LPNs are not supervisors under the Act and are properly included in the petitioned-for unit.

6. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

INCLUDED: All regular full-time and regular part-time LPNs, all flex time LPNs, super flex time LPNs, per diem LPNs, and PRN LPNs.

EXCLUDED: All office clerical employees, and guards, professional employees and supervisors as defined in the Act, and other employees.

V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the Retail, Wholesale, and Department Store Union.

A. Election Details

The election will be held on a date will be July 11, 2019. The time and place of the election will be from 6:00 AM to 8:00 AM and 2:00 PM to 4:00 PM in the 2 North Lounge at the Employer's facility located at 211 East 1st Street, Bloomsburg, PA.

B. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending on Saturday, June 22, 2019, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3)

employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(1) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by Monday, July 1, 2019. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the

website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the following of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: June 27, 2019



Nancy Wilson, Regional Director
National Labor Relations Board
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