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July 11, 2019

Executive Secretary
National Labor Relations Board
Washington, DC

E-FILED

RE: REQUEST FOR BOARD REVIEW
CASE 06-RC-241173
Decision of Region Director of June 27, 2019
29 CFR § 102.67(c)
Our Matter No. 316-19

Dear Members of the National Labor Relations Board:

Pursuant to 29 CFR § 102.67(c), the Employer, Bloomsburg Care and Rehabilitation Center, by its attorneys (“Bloomsburg”), requests the Board’s review of the Regional Director’s June 27, 2019 Decision and Direction of Election for a unit of LPN employees (copy attached hereto) for this Pennsylvania nursing facility. Where, as here, the Regional Director’s Decision as to the LPNs’ supervisory status is incorrect, the Board dismisses the representational petition encompassing them. *Oak Park Nursing Care Center*, 351 NLRB No. 9, at 28 (2007).

Bloomsburg submits that there are compelling reasons supporting Board review as required under 29 CFR § 102.67(d)(1) (the absence of or a departure from officially reported Board precedent) and (d)(4) (reconsideration of important Board rule or policy):

The Board has refrained from using rulemaking to deal with issues relating to nursing homes, *Park Manor Care Center*, 305 NLRB 872, 874-874 (1991), recognizing that it lacks sufficient information to deal with the great differences nursing homes have in organization, regulations, and staffing patterns (including evidence that regulations with respect to staffing patterns vary widely from State to State) as well as that the nursing home industry is in a period of rapid transition requiring different staffing needs. The Regional Director's Decision does not dispute that, under Pennsylvania law, the LPNs involved in this matter, can be full-time supervisors for the CNAs. *See*: 28 Pa. Code § 201.3 (definition of "charge nurse").¹ There is also no dispute that Pennsylvania law requires Bloomsburg to

staff 1 RN on each shift, referred to in the Regional Director's Decision, at page 3, as the "RN supervisors." 28 Pa. Code § 211.12(f)(1) (for facilities with census of 60-150, as here). The testimony cited to the Regional Director, Tr. at 18, lines 20-23, established that, under the current ownership, the LPNs are the "charge nurses." *See also*: Tr. at 26, lines 14-15 (Testimony of LPN Kim Rossman) ("And by "charge nurses," do you mean interchangeably the LPNs? Yes."); Tr. at 112, lines 11-13 (Testimony of LPN Krystal Lutz) ("We're their charge nurses and direct supervisor people that they come see."); Tr. 161, lines 1-6 (Testimony of LPN Krystal Lutz) ("No, I don't need to obtain the RN's signature to write somebody up. ... Not previous to writing them up. If they – if I have to write them up for any warning, I can use my judgment. I'm their charge nurse. It is my

¹ "Charge nurse—A person designated by the facility who is experienced in nursing service administration and supervision and in areas such as rehabilitative or geriatric nursing or who acquires the preparation through formal staff development programs and who is licensed by the Commonwealth as one of the following: (i) A registered nurse; (ii) A registered nurse licensed by another state as a registered nurse and who has applied for endorsement from the State Board of Nursing and has received written notice that the application has been received by the State Board of Nursing. This subparagraph applies for 1 year, or until Commonwealth licensure is completed, whichever period is shorter; (iii) A practical nurse who is a graduate of a Commonwealth recognized school of practical nursing or who has 2 years of appropriate experience following licensure by waiver as a practical nurse ; (iv) A practical nurse shall be designated by the facility as a charge nurse only on the night tour of duty in a facility with a census of 59 or less." As the Regional Director found, at page 2, that Bloomsburg has an average census of 30 residents per unit with 4 active units, Bloomsburg may have LPNs as such supervisors.

job. I can use the judgement.”); line 25 (“I am the LPN charge nurse.”); Tr. 168, lines 2-3 (Testimony of LPN John Robert Lutz) (“I’m an LPN charge nurse.”); *see also testimony of the following Union witnesses admitting the same*: Tr. 214, line 19 (Testimony of LPN Heather Reichenbach) (“charge nurse; licensed practical nurse”); Tr. 229, line 3 (Testimony of Leanna Hellenthal) (“Full time charge nurse”); Tr. 240, lines 22-25 (Testimony of Steven Brieto) (had title of charge nurse since 1996).

Bloomsburg’s Employee Handbook (Exhibit E-3 at page 62) expressly provides that the LPNs “as supervisors shall discipline CNAs pursuant to the Facility’s Progressive Discipline Policy.” The LPNs’ Job Descriptions (Exhibit E-10) expressly lists as one of their duties and responsibilities: “Issue verbal and written disciplinary warnings to assigned CNAs for violations of current rules, regulations and guidelines for the Center.”

The Employee Handbook (Exhibit E-3, at pages 62-66) defines Bloomsburg’s Discipline and Progressive Discipline Policy, including verbal and written disciplinary warnings; and, provides, at page 65:

Should a supervisor or the Administrator determine that an act of any employee merits disciplinary action, appropriate action will be taken. Except as necessary to deal with unusual circumstances, the Progressive Discipline System should be followed whenever an employee commits conduct that is subject to disciplinary action.

The Employee Handbook (Exhibit E-3, at page 65) provides that for the First Offense Involving a Group I Violation: “The employee’s supervisor will issue a verbal warning, and a notation shall be made in the employee’s file”; while, for a second such offense or the first for a Group II Violation: “The employee’s supervisor shall issue a written warning to the employee and shall include a reference to any prior verbal warnings, where appropriate” and that: “The Department Director may institute a disciplinary probationary period.” Disciplinary probation is further described at page 66 of Exhibit E-3 as follows: “Any employee placed on a Disciplinary Probation Period may be suspended without pay or terminated without regard to Bloomsburg Care and Rehabilitation Center’s progressive disciplinary system.” The Employee Handbook also provides for cases of Multiple Violations (Exhibit E-3 at page 66): “An employee who accumulates four (4) or more violations within a rolling twelve (12) month period may be dismissed immediately by the Administrator.

The Record contains an example of a March 21, 2019 First Warning (Exhibit E-4), which includes the following: “Consequences of Further Infractions: suspension and termination if c/o [complaints of] and no improvement.”

This case provides the Board with the opportunity to reconsider and clarify its policies relating to the requirements for technical employees such as LPN’s in nursing homes to qualify as statutory supervisors and be exempt from election orders in light of the experience from Board and Court decisions, including the critiques from former Chairman/Member Miscimarra that the Board’s current framework for analyzing supervisory status issues has become “increasingly abstract and out of touch with the practical realities of the workplace.” *See: Veolia Transportations Servs., Inc.* [Violia II], 363 NLRB No. 188, slip op. 10-15 (2016) (Member Miscimarra, dissenting); *Buchanan Marine, L.P.*, 363 NLRB No. 58. Slip. Op. 3-10 (2015) (Member Miscimarra, dissenting); *Veolia I*, 363 NLRB No. 98, slip op. 12-14 (Member Miscimarra, dissenting); *G4S Government Solutions, Inc.*, 363 NLRB No. 113, slip op. 4-7 (2016) (Member Miscimarra, dissenting).

In this case, Bloomsburg argued that the LPN’s met the requirements for statutory supervisors as defined in *New Vista Nursing and Rehabilitation*, 870 F.3d 113 (3rd Cir. 2017) (“*New Vista*”) and in *GGNSC Springfield LLC v. NLRB*, 721 F.3d 403 (6th Cir. 2013) (“GGNSC”), and that Bloomsburg met its burden of proof under applicable standards (copy of Bloomsburg’s Post-Hearing Brief attached). While the Regional Director’s Decision acknowledges, at page 18, that it is true, as held in *GGNSC*, “that employees can be statutory supervisors if they have the authority to effectively recommend discipline,” he then goes on to determine, without any analysis of the related holdings in *New Vista*, that Bloomsburg “has not met its burden of establishing that the LPNs possess the authority to discipline,” relying on Board decisions that the *New Vista* Court found inconsistent with the requirements of the NLRA.

When the Board last addressed the holding in *New Vista*, in *Coral Harbor Rehabilitation and Nursing Center*, 366 NLRB No. 75 at FN 6 (2018), *appeal pending decision at Nos. 18-2220 and 18-2619 (3rd Cir.)*, the Board concluded that its determination comported with *New Vista* because it found the record in that case did not meet the burden of proof required under *New Vista*:

“We observe that the same result would obtain under the standards employed by the United States Court of Appeals for the Third Circuit. See *NLRB v. New Vista Nursing & Rehabilitation*, 870 F.3d 113, 130-136

(3d Cir. 2017); see also *NLRB v. Attleboro Associates*, 176 F.3d 154, 164-166 (3d Cir. 1999). In the disciplinary context, the Third Circuit “recognize[s] three facts that together may show an employee is a statutory supervisor: (1) the employee has the discretion to take different actions, including verbally counseling the misbehaving employee or taking more formal action . . .; (2) the employee's actions ‘initiate’ the disciplinary process . . .; and (3) the employee's action functions like discipline because it increases severity of the consequences of a future rule violation . . .”

The *New Vista* Court, 870 F.3d at 130, however, stated:

“In its August 26, 2011 order, the Board applied a test that is incompatible with our caselaw. Specifically, the Board relied on the evidence that management independently investigated the LPNs' written complaints and that few LPNs apparently submitted written complaints. Our caselaw holds that those are inappropriate factors on which to rely. We will therefore remand for further consideration.”

and, further, at 131:

“...we concluded that “an acceptance of the Board’s reading of the NLRA in this case ‘would ... render the statutory phrase “effectively to recommend” nugatory.”

and, further, at 132-133:

“...we recognize three facts that together may show an employee is a statutory supervisor: (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 nurses 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 permanent

part of the CNA's personnel file and could lead to the CNA's termination."").we also derive two facts that do not disprove supervisory status: (1) whether a nurse's supervisor undertakes an independent investigation, *see Attleboro*, 176 F.3d at 164 ("[T]he 'relevant consideration is effective recommendation or control rather than final authority.' ... [T]he NLRA does not preclude a charge nurse from having supervisory status merely because her recommendation is subject to a superior's investigation." (citations omitted) (describing *Glenmark*)); and (2) whether the employees exercise their supervisory authority only a few times (or even just one time), *see Prime Energy Ltd. P'ship*, 224 F.3d [206,] at 210 [3rd Cir. 2000]."

The Board has not issued a determination on remand in *New Vista* to date. In this case, the Board is confronted with a similar clash of decision principles as in *Coral Harbor*; and, since the Regional Director's reliance is on caselaw and decision principles rejected by the *New Vista* Court and that are otherwise unreasonable for the reasons discussed by former Chairman/Member Miscimarra, the Board should here clarify and define decision principles for the determination of statutory supervisors in nursing homes consistent with those in *New Vista*; the rights of employers under Section 14(a) of the NLRA to the loyalty of the employers' designated supervisors, *Florida Power & Light Co. v. Int'l. Bhd. Of Elec. Workers, Local 641*, 417 U.S. 790, 807-812 (1974) (Congress sought, in enacting Section 14(a), "to assure the employer of the loyalty of his supervisors by reserving to him... the right to refuse to engage in collective bargaining with them."); and, the practical realities of nursing home operations. Here, the Regional Director fails to recognize that nursing homes require a reasonable number of individuals exercising supervisory authority at the facility during each shift; and, that the "charge nurse"/LPNs involved here are those individuals. *See also: prior comments of former Chairman/Member Miscimarra*, cited above.

The Regional Director's Decision does not make findings sufficient to rebut Bloomsburg's meeting its burden of proof under the *New Vista* standards. As previously argued by former Chairman/Member Miscimarra, *G4S Government Solutions, Inc.*, 363 NLRB No. 113, at page 5, where, as here, the evidence is sufficient, it does violence to the NLRA's preponderance of the evidence standard to disregard relevant evidence on the belief that the Employer should have introduced yet more.

The Regional Director's Decision, at page 8, accepts that the LPNs have always had the authority to issue verbal and written warnings to CNAs, that such authority is exercised, and that the LPNs do not have to consult with any superiors

prior to completing the warning forms. The Regional Director found at page 8, a lack of evidence that such forms “resulted in personnel action or discipline for this CNA that did or could eventually impact job status.” The Regional Director also found, at page 20, that: “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 Regional Director’s conclusions are inconsistent with the Record and his own later finding, at page 9, that there is testimony that such action resulted in a CNA being given such a warning after the LPN turned in the form to the Director of Nursing. The impact of LPNs disciplinary actions on job status is also corroborated both by the terms of the Employee Manual (Exhibit E-3), cited above, and, by the testimony of LPN Krystal Lutz, Tr. 159, lines 20-25:

20. Q. Did you write something about consequences of her

21 infraction?

22 A. Yes. I write consequences of the infraction all over the

23 place. That would be if she had to get a written warning next

24 time. It would be step two. If she kept it up, she could be

25 possibly suspend.

Where, as here, Bloomsburg maintains a defined progressive discipline policy, and cited violations count toward the number of missteps permitted before termination, those with independent authority to issue the citations are supervisors. *GGNSC* at 411, *citing, among others, Ohio Masonic Home*, 295 NLRB 390 (1989), which is also cited for the opposite conclusion by the Regional Director, at page 20. The Regional Director’s premise is also inconsistent with the standards applied by the *New Vista* Court, at 132 (“it is clear that a nurse can be a statutory supervisor if he or she has the authority to effectively recommend less onerous discipline, including calling a manager’s attention to instances of violations or work rules.”).

The Board should accept here the standard of the *New Vista* Court, at 132, that: “the number of instances of supervision does not determine whether employees are supervisors since that is ‘hardly a reasonable basis to conclude that the authority was lacking’ because it ‘simply suggests that the authority was rarely

needed.” As the Sixth Circuit noted in *GGNSC*, at 411, absent the LPNs decisions to write up an employee, there would be no resulting discipline; *see also: NLRB v. Lakepoint Senior Care & Rehab Center, LLC*, 680 Fed.Appx. 400, 402-403 (6th Cir. 2017) (same).

The Regional Director’s conclusion, at page 19, as to the LPNs exercise of independent judgment in these disciplinary acts is similarly flawed. The Regional Director stated: “There is also insufficient evidence to find that the LPNs are even able to complete warning forms independently...there is very little independent judgment involved; rather, the LPNs merely have a reporting function.” This conclusion ignores the unrebutted testimony of LPN Krystal Lutz, Tr. 160-161, on cross-examination about Exhibit E-4 (the First Warning), in which she details the process LPNs go through to determine whether to do nothing, whether to issue an educational form, or whether to write someone up for discipline. The Board has accepted that such a choice process demonstrates the exercise of “independent judgment,” *In re Progressive Transportations Services, Inc.*, 340 NLRB No. 126 at 1046 (2003); *see also: GGNSC* at 409, 411).

This case meets each of the standards established by the *New Vista* Court:

1. The LPNs have shown that they have the discretion to take different actions, including verbally counselling CNAs or taking more formal action. Testimony of Krystal Lutz (Tr. 160-161).
2. The LPNs’ actions initiate the disciplinary process. Testimony of Krystal Lutz (Tr. 160-161); Exhibits E-3 and E-4; Regional Director’s finding at page 9 that such a disciplinary action was issued as a result.
3. The LPNs’ actions function like discipline because their decisions to write up the CNAs could lead to termination. Testimony of Krystal Lutz (Tr. 159); Exhibits C-3 and C-4.

Further, the Board should reject the Regional Director’s reliance of standards precluded by the *New Vista* Court: (1) that further investigation by others with respect to a write up precludes a finding of supervisory status; and, (2) that the number of times such authority is exercised matters.

This case, like *Coral Harbor* and *New Vista*, also presents the Board with the problem of establishing practical standards for the determination of statutory supervisor status that can be applied at whatever point in time the issue presents. The Board is charged to strike a balance between employers’ legitimate

business interests and the statutorily protected workplace rights to organize. *See:*

Beth Israel Hospital v. NLRB, 437 U.S. 483, 504 (1978). In order to strike that balance and uphold the intent of Section 14(a), the Board must have an objective test for statutory supervisor status that can be applied at any point in the relationship, even on the very first day of operations. The standards applied by the Regional Director in this case fail that test, while those of the *New Vista* Court meet it. To have standards that cannot be applied on the first day of operations or even during a limited period when a new operator is permitted to change the job functions of employees, does not comport with standards that recognize the practical realities of the nursing home industry.

WHEREFORE, the Employer requests the Board to review the Regional Director's Decision and Direction of Election in this case and to reverse it.

Respectfully submitted,

A handwritten signature in cursive script that reads "Brandon S. Williams". The signature is written in black ink and is positioned above the typed name.

Brandon S. Williams, Esquire
Attorney for the Employer

Attachments:

Regional Director's Decision

Employer's Post-Hearing Brief

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Section 102.67 of the Board's Rules and Regulations, a true and correct copy of the Request for Board Review was served by email, addressed as follows:

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Brandon S. Williams, Esquire

DATE: July 11, 2019

**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).

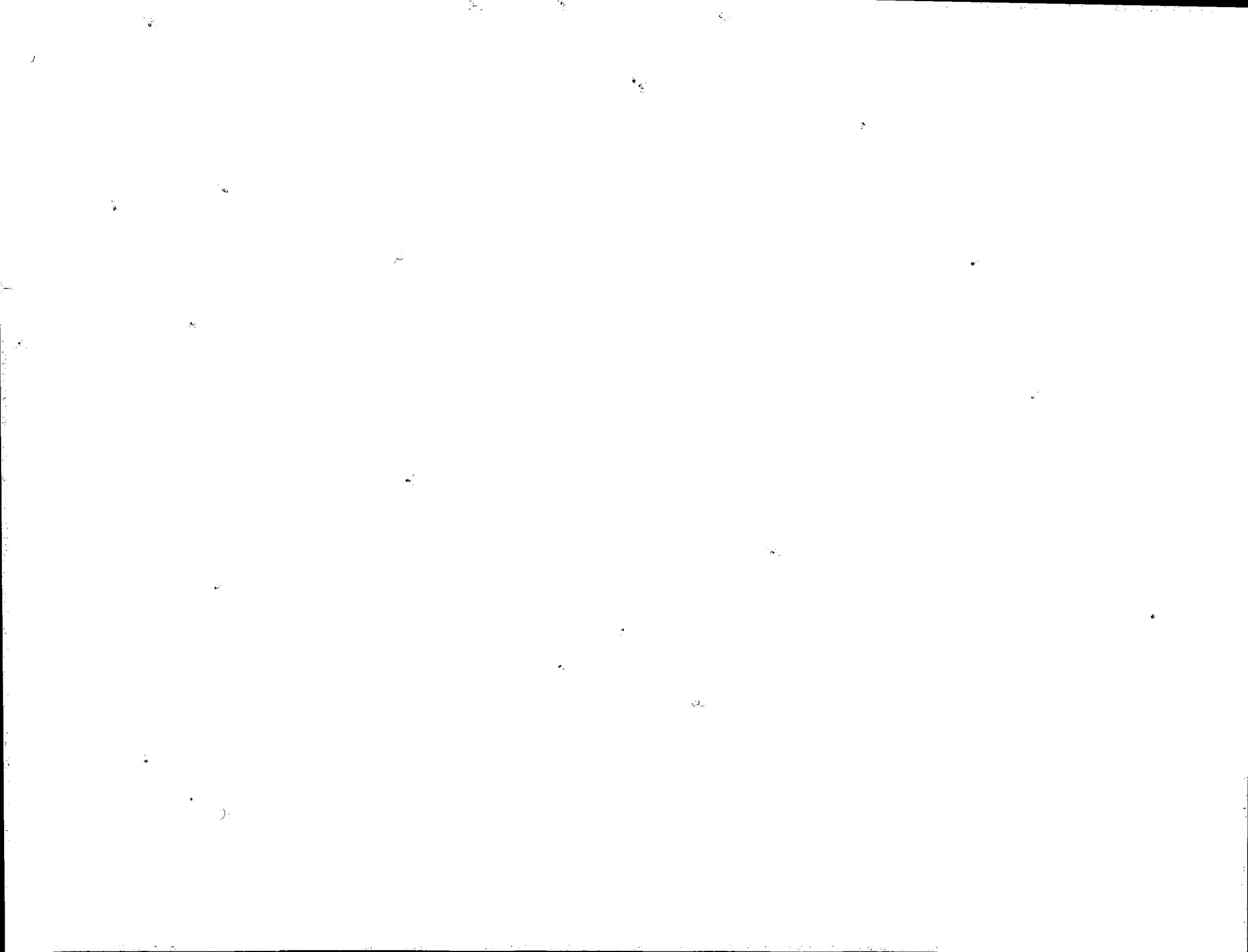
3. Authority to Assign Work

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
Region 6
1000 Liberty Ave., Room 904
Pittsburgh, PA 15222-4111



United States of America
National Labor Relations Board
NOTICE OF ELECTION



PURPOSE OF ELECTION: This election is to determine the representative, if any, desired by the eligible employees for purposes of collective bargaining with their employer. A majority of the valid ballots cast will determine the results of the election. Only one valid representation election may be held in a 12-month period.

SECRET BALLOT: The election will be by SECRET ballot under the supervision of the Regional Director of the National Labor Relations Board (NLRB). A sample of the official ballot is shown on the next page of this Notice. Voters will be allowed to vote without interference, restraint, or coercion. Electioneering will not be permitted at or near the polling place. Violations of these rules should be reported immediately to an NLRB agent. Your attention is called to Section 12 of the National Labor Relations Act which provides: ANY PERSON WHO SHALL WILLFULLY RESIST, PREVENT, IMPEDE, OR INTERFERE WITH ANY MEMBER OF THE BOARD OR ANY OF ITS AGENTS OR AGENCIES IN THE PERFORMANCE OF DUTIES PURSUANT TO THIS ACT SHALL BE PUNISHED BY A FINE OF NOT MORE THAN \$5,000 OR BY IMPRISONMENT FOR NOT MORE THAN ONE YEAR, OR BOTH.

ELIGIBILITY RULES: Employees eligible to vote are those described under the VOTING UNIT on the next page and include employees who did not work during the designated payroll period because they were ill or on vacation or temporarily laid off, and also include employees in the military service of the United States who appear in person at the polls. Employees who have quit or been discharged for cause since the designated payroll period and who have not been rehired or reinstated prior to the date of this election are *not* eligible to vote.

SPECIAL ASSISTANCE: Any employee or other participant in this election who has a handicap or needs special assistance such as a sign language interpreter to participate in this election should notify an NLRB Office as soon as possible and request the necessary assistance.

PROCESS OF VOTING: Upon arrival at the voting place, voters should proceed to the Board agent and identify themselves by stating their name. The Board agent will hand a ballot to each eligible voter. Voters will enter the voting booth and mark their ballot in secret. **DO NOT SIGN YOUR BALLOT.** Fold the ballot before leaving the voting booth, then personally deposit it in a ballot box under the supervision of the Board agent and leave the polling area.

CHALLENGE OF VOTERS: If your eligibility to vote is challenged, you will be allowed to vote a challenged ballot. Although you may believe you are eligible to vote, the polling area is not the place to resolve the issue. Give the Board agent your name and any other information you are asked to provide. After you receive a ballot, go to the voting booth, mark your ballot and fold it so as to keep the mark secret. **DO NOT SIGN YOUR BALLOT.** Return to the Board agent who will ask you to place your ballot in a challenge envelope, seal the envelope, place it in the ballot box, and leave the polling area. Your eligibility will be resolved later, if necessary.

AUTHORIZED OBSERVERS: Each party may designate an equal number of observers, this number to be determined by the NLRB. These observers (a) act as checkers at the voting place and at the counting of ballots; (b) assist in identifying voters; (c) challenge voters and ballots; and (d) otherwise assist the NLRB.



United States of America
National Labor Relations Board
NOTICE OF ELECTION



VOTING UNIT

EMPLOYEES ELIGIBLE TO VOTE:

Those eligible to vote are: All regular full-time and regular part-time LPNs, all flex time LPNs, super flex time LPNs, per diem LPNs, and PRN LPNs; who were employed by the Employer during the payroll period ending June 22, 2019.

EMPLOYEES NOT ELIGIBLE TO VOTE:

Those not eligible to vote are: All office clerical employees, and guards, professional employees and supervisors as defined in the Act, and other employees.

DATE, TIME AND PLACE OF ELECTION

| | | |
|-------------------------|---|---|
| Thursday, July 11, 2019 | 6:00 a.m. to 8:00 a.m. and 2:00 p.m. to 4:00 p.m. | 2 North Lounge 211 E 1st St. Bloomsburg, PA |
|-------------------------|---|---|

EMPLOYEES ARE FREE TO VOTE AT ANY TIME THE POLLS ARE OPEN.

ALL BALLOTS WILL BE MINGLED AND COUNTED IMMEDIATELY AFTER THE CONCLUSION OF THE LAST VOTING SESSION.

| | | |
|--|--|---|
| | <p>UNITED STATES OF AMERICA National Labor Relations Board 06-RC-241173</p> <p>OFFICIAL SECRET BALLOT</p> <p>For certain employees of BLOOMSBURG CARE AND REHABILITATION CENTER</p> | |
| <p>Do you wish to be represented for purposes of collective bargaining by RETAIL WHOLESALE AND DEPARTMENT STORE UNION (RWDSU)?</p> | | |
| <p>MARK AN "X" IN THE SQUARE OF YOUR CHOICE</p> | | |
| <p>YES</p> <input type="checkbox"/> | | <p>NO</p> <input type="checkbox"/> |
| <p>DO NOT SIGN THIS BALLOT. Fold and drop in the ballot box. If you spoil this ballot, return it to the Board Agent for a new one. The National Labor Relations Board does not endorse any choice in this election. Any markings that you may see on any sample ballot have not been put there by the National Labor Relations Board.</p> | | |



United States of America
National Labor Relations Board
NOTICE OF ELECTION



RIGHTS OF EMPLOYEES - FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union
- Choose representatives to bargain with your employer on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities
- In a State where such agreements are permitted, the Union and Employer may enter into a lawful union-security agreement requiring employees to pay periodic dues and initiation fees. Nonmembers who inform the Union that they object to the use of their payments for nonrepresentational purposes may be required to pay only their share of the Union's costs of representational activities (such as collective bargaining, contract administration, and grievance adjustment).

It is the responsibility of the National Labor Relations Board to protect employees in the exercise of these rights.

The Board wants all eligible voters to be fully informed about their rights under Federal law and wants both Employers and Unions to know what is expected of them when it holds an election.

If agents of either Unions or Employers interfere with your right to a free, fair, and honest election the election can be set aside by the Board. When appropriate, the Board provides other remedies, such as reinstatement for employees fired for exercising their rights, including backpay from the party responsible for their discharge.

The following are examples of conduct that interfere with the rights of employees and may result in setting aside of the election:

- Threatening loss of jobs or benefits by an Employer or a Union
- Promising or granting promotions, pay raises, or other benefits, to influence an employee's vote by a party capable of carrying out such promises
- An Employer firing employees to discourage or encourage union activity or a Union causing them to be fired to encourage union activity
- Making campaign speeches to assembled groups of employees on company time, where attendance is mandatory, within the 24-hour period before the polls for the election first open or the mail ballots are dispatched in a mail ballot election
- Incitement by either an Employer or a Union of racial or religious prejudice by inflammatory appeals
- Threatening physical force or violence to employees by a Union or an Employer to influence their votes

The National Labor Relations Board protects your right to a free choice.

Improper conduct will not be permitted. All parties are expected to cooperate fully with this Agency in maintaining basic principles of a fair election as required by law.

Anyone with a question about the election may contact the NLRB Office at (412)395-4400 or visit the NLRB website www.nlr.gov for assistance.

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

**BLOOMSBURG CARE AND
REHABILITATION CENTER**

Respondent,

Case No.06-RC-241173

AND

**RETAIL, WHOLESALE, AND DEPARTMENT
STORE UNION, UFCW**

Petitioner.

**POST-HEARING BRIEF OF EMPLOYER/RESPONDENT BLOOMSBURG
CARE AND REHABILITATION CENTER**

Respondent Bloomsburg Care and Rehabilitation Center (hereinafter “Bloomsburg”), by its attorneys, pursuant to the direction of Hearing Officer Dolores Moeller that briefs are due from the parties on June 5, 2019, and Case Handling Manual 11244.1 (relating to filing of briefs), hereby submits this Post-Hearing Brief in support of its position that the Proposed Bargaining unit of Licensed Practical Nurses could not be appropriately represented by the Retail, Wholesale, and Department Store Union, UFCW (hereinafter “Union”) as these employees are statutory supervisors under the National Labor Relations Act and, therefore, cannot have Collective Bargaining protections. *See, NLRB v. New Vista Nursing and Rehabilitation*, 870 F.3 113, 132 (3rd Cir. 2017) (it is clear that staff

can be statutory supervisor if he/she has the authority to effectively recommend less onerous discipline....). *GGNSC Springfield LLC v. NLRB*, 721 F.3d 403, 408 (6th Cir.)(Employees, but not Statutory Supervisors, have the right to have CBA protections.)

PROCEDURAL HISTORY AND STATUS

The Union filed a Petition for Election on or about May 9, 2019. The Union's Election Petition seeks to create a bargaining unit including the following employee classifications:

All Regular Full time and Regular Part time Licensed Practical Nurses (LPN's), All Flex Time Licensed Practical Nurses, Super Flex Time LPNs, and Per Diem LPNs, PRN LPNs

Bloomsburg timely filed its Position Statement on May 23, 2019 and objected to this proposed unit on the grounds that the described employees are statutory supervisors.

A hearing was held before Hearing Officer Dolores Moeller on Wednesday, May 29 and Thursday, May 30, 2019, with both Bloomsburg and the Union presenting witnesses and documentary evidence. At the close of the hearing, the Hearing Officer directed that the parties file Briefs on or before Wednesday, June 5, 2019 at 5:00 p.m.

LPN EMPLOYEES AT BLOOMSBURG ARE STATUTORY SUPERVISORS WHO DISCIPLINE AND ASSIGN CERTIFIED NURSING ASSISTANTS AND THEREFORE CANNOT HAVE THE PROTECTIONS OF A COLLECTIVE BARGAINING AGREEMENT

LPN Employees at Bloomsburg are Statutory Supervisors who use their independent judgment to issue disciplines to Certified Nursing Assistants and who assign job duties to Certified Nursing Assistants. Bloomsburg's policies, procedures, and job descriptions reflect these job responsibilities. But most tellingly, the testimony of EVERY witness presented confirmed these job duties and responsibilities-- Even the testimony of the witnesses presented by the Union.

The National Labor Relations Act makes it clear that not all persons a company employs are covered by the Act's bargaining rights; specifically, the Act at Section 2(3), in its definition of "employee," excludes "any individual employed as a supervisor" from the Act's protections. *NLRB v. NSTAR Elec. Co.*, 798 F.3d 1, 5-7 (1st Cir. 2015); *NLRB v. Sub Acute Rehabilitation Center of Kearny, LLC*, 2017 WL 108002 at *2, ___ Fed.Appx. ___ (3rd Cir. 2017) ("*Sub Acute*"); *see also*: 29 U.S.C. § 164(a)(Nothing in the Act shall prohibit individuals employed as supervisors from remaining a member of a union, but no employer shall be compelled to deem individuals defined by the Act as Supervisors as employees for any purpose relating to collective bargaining); *NLRB v. Lakepointe Senior Care & Rehab Center, LLC*, ___ Fed.Appx. ___, 2017 WL 715900 (6th Cir. 2017) (denying

enforcement of 363 NLRB No. 114 (2016)) (“*Lakepointe*”). The NLRA gives nursing home owners the ability to insist on the undivided loyalty of its nurses since they may want to implement policies to ensure their patients receive the best possible care despite potential adverse reaction from employees working their nurses’ direction. *NLRB v. Health Care & Ret. Corp.*, 511 U.S. 571, 581 (1994). Thus, an election for representation is not appropriate where those employees to be represented cannot enjoy the protections of a collective bargaining agreement. *Id.*; *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 709 (2001) (“*Kentucky River*”).

The Act, at 29 U.S.C. § 152(11), established that individuals are supervisors and not “employees” covered by the Act 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. *Kentucky River* at 713. An individual who recommends discipline may also be a “supervisor” under the Act, but only if her recommendations are “effective,” which means that higher managers give weight to them. *Lakepointe* at *2 citing *Caremore, Inc. v. NLRB*, 129 F.3d 365, 369-370 (6th Cir. 1997).

The Board’s interpretation of “independent judgment” turns on the degree of discretion exercised by a putative

supervisor. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 693 (2006), *cited in Sub Acute* at *2, III. Under this standard, a person exercises independent judgment if she acts or effectively recommends action, above the “routine or clerical,” free of the control of others and forms an opinion or evaluation by discerning and comparing data; however, judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of higher authority, or in the provisions of a collective bargaining agreement. *Id.*

The testimony of ALL of the witnesses supported the position that LPNs at Bloomsburg are Supervisors and use their discretion to discipline (or not discipline) CNAs.

The Testimony of LPN Kim Rossman

At the hearing before Hearing Officer Moeller, LPN Kim Rossman initially explained some administrative changes that occurred when the current operator of the facility, “Alliance”, took over operations from prior operator “Geisinger”:

When Geisinger stepped out and we became employees of Alliance, there were staffing changes again. The unit manager positions were no longer there, and it was the responsibility of the charge nurse.

Transcript, p. 18, lns. 20-23. However, even before Alliance took over and the unit managers were eliminated, Ms. Rossman indicated that LPN responsibilities for CNAs had always been part of her position as an LPN at Bloomsburg:

For 16 years, my responsibility is: I walk in. I take my floor load. I'm responsible for X amount of residents under the care of my X amount of aids. I'm responsible that they get this done, because if it's not completed in our timely manner, someone else comes and says, "Hey, this isn't getting done. The documentation is not getting done."

So we're responsible to make sure that [the aids are] doing their documentation, that they're taking their residents and giving them their orders and they're providing their meals in a timely manner, their baths and showers are taken care of plus little needs met by the residents that call asking for the minute small things that they need

Transcript, p. 18 ln. 24 – p. 19 ln.10.

Ms. Rossman continued to describe the form that supervising CNAs would take:

Q. Are there ever instances where CNAs violate facility policies or procedures or both?

A. Yes.

Q. What happens in those situations?

A. They would get -- based on the rule or violation -- a verbal to the written warning.

Q. Who issues that?

A. It should be the person that sees it. It would be their supervisor that notices it.

Q. In that situation is the LPN?

A. If I'm your nurse and I noticed it, it's my responsibility to say something.

Q. Do you have to ask a director of nursing whether or not you should issue that?

A. No.

Q. What criteria do you use in determining whether or not it's appropriate to issue such a document?

A. I refer back to our policy and procedure.

Q. Do you consult with anybody?

A. If I have to, HR.

Q. What would you consult with HR on?

A. In the past to see if there are any other similar reprimands that this warrants it's not a verbal anymore, and it would be classed as a written warning or a suspension. That I have asked in the past, and maybe some assistance with delivering it to the person that needs to be delivered; so it's not an one-on-one. There's a [neutral] person there.

Transcript, p. 22 ln. 20 – p. 23 ln.21.

She then recounted specific instances where she had issued disciplines to CNAs:

Q. Have you ever had cause to issue a discipline?

A. Yes.

Q. Could you explain?

A. Yes. I've issued a discipline over improper practices with mechanical lifts.

Q. Do you know when that was?

A. It probably is greater than three years that I did that. I have issued one recently -- come across the nurse's station and they had a YouTube channel up with videos playing. So I stopped and spoke with them, and did do a written documentation for them to be aware that they were being disciplined over it. They did not sign it wish to sign it, which it's their right.

Q. Did you seek the approval of a director of nursing or a health administrator before issuing that?

A. No. I did seek HR to find out exactly where on my policy, because I didn't have a current copy of that on me.

Q. Okay. Do you --

THE HEARING OFFICER: When did that happen?

THE WITNESS: Last week I came out of a meeting to observe it myself on the unit.

Transcript, p. 23 ln. 22 – p. 24 ln.16.

Ms. Rossman also explained LPN responsibilities for CNA assignments:

Q. Do you ever take a role and assigning different CNAs to different job responsibilities?

A. As a nurse if I need to switch their assignment for the day out because of -- this staff member and that resident may not be the best mix, I would switch their assignments. In the event that one assignment was a little bit heavier, I would swap it out so that it was even, and we are all getting our care done in a timely manner. So yes. I have switched assignments based on resident needs.

Q. Do you run those switches by the director of nursing or anybody else before you do them?

A. No. No.

Q. And who makes the estimation as to where the CNAs should go?

Is it you or somebody else?

A. We have a scheduler that sets out the primary schedule where everybody is assigned their unit that they're assigned for the day.

Q. I'm sorry. When you're making a change, who decides -- you said if a -- I believe you said if a care schedule is unbalance and needs to be rebalanced, do you rebalance that, or do you talk with somebody else above you?

A. Not above me. I do talk to the aids in regards to the changes, because it's a heavy load today, and it might not be the same regular works, and I will discuss it to the aids, because it's their care that they're giving up or taking on. At that time, I will discuss it with the aids I'm working with at that time to make the changes.

Q. Do you discuss it with anyone over you?

A. No.

Q. Could you talk about shower lists. Who writes the shower lists?

A. I've been the one that comes up with the shower list assignments. It was looked over at one time due to resident isolation needs. Various -- at one time we had a large census of residents that left the facility early in the morning for medical treatments. So we were trying to get their care taken care of, and the charge nurses keep up with it.

Q. And by "charge nurses," do you mean interchangeably the LPNs?

A. Yes.

Transcript, p. 24 ln. 25 – p. 26 ln.15. And more specifically with the scheduling of resident showers:

THE HEARING OFFICER: Will be witness please explain the scheduling for --

THE WITNESS: With the shower list -- I'll explain the shower list. The amount of residents on the nursing unit, we divide them down between two different shifts to give them showers at a minimum of once a week. We have many that we try to accommodate and do the best we can that like more often. So our shower list can grow to be three to four residents at a shift time. So you could be working 7:00 to 3:00 and there's four showers scheduled for that day. So one nursing assistant, just because of the way it went, their assignment is going to have all three of those four showers on it. At that point, that's where I'm coming in. "No listen, guys. You're switching with this person, and you're going to swap to even it out a little bit so that the care is getting done and a resident isn't being left longer waiting for the aid to come in to help him and everything can keep running in the smooth transition as we try to do." Now, the charge nurses can make changes on them based on a need that's going on. "I have so-and-so that has to go to an appointment today. She needed to have a wash scrub. So we swapped this person from today to tomorrow." We do that. We will switch them because of a need that came up that took precedence.

Transcript, p. 27 ln. 11 – p. 28 ln.10.

Ms. Rossman also confirmed that she and other LPNs were presented with a training seminar in April of 2019, which was included with the hearing transcript at Employer's Exhibit 2. Ms. Rossman confirmed that the training did not suggest any new job responsibilities, and she also confirmed that the trainer went over the third slide of that presentation, which indicates to those in attendance that "You Have the Authority To Exercise Your

Independent Judgment” See, Employer’s Exhibits 1 and 2 and Transcript, p. 31 ln. 8 – p. 32 ln 4.

Finally, Ms. Rossman also confirmed that an Employee Handbook was distributed in January of 2019, and that the Section found on page 24, “Role of Licensed Professional Nurses LPNS and Registered Nurses” “accurately reflect [her] responsibilities as an LPN.” Transcript p. 32, lns 8-19. That section details LPN responsibilities for supervising LPNs and recommending disciplines. See, Employer’s Exhibit 3 at p. 24.

The Testimony of LPN Crystal Lutz

Ms. Lutz, who has most recently been an LPN at Bloomsburg since 2016, also testified at the hearing as to her responsibilities as an LPN with regard to supervising the CNAs with whom she works: “[t]he aids directly report to us, the LPNs, on the unit. We’re their charge nurses and direct supervisor people that they come see.” Transcript p. 112, lns. 11-13. Some job responsibilities can be worked out among co-workers on the floor, but Ms. Lutz indicated that LPNs take the lead in determining the CNA assignments:

They have their assignments. Usually they rotate them. They have their assignments for about a month. Depending how many admissions we get, how many discharges we get and how many deaths we get, I’ll go back through and redo their lists so it’s even; even showers, even case loads, depending on day, who is there

and get their assignments. Some people work better doing two assists. Some work better on their own. So it depends on who is there and who you have as your workers, and go from there.

Transcript p.110 ln 18 – p. 111 ln 1.

Like her co-worker Ms. Rossman, Ms. Lutz also confirmed that the Employee Handbook Section “Role of Licensed Professional Nurses and Registered Nurses” accurately reflects her job duties with regard to supervising CNAs. Transcript p. 114 lns 3-10. She explained:

This is your role as a nurse. This is what you do. You're responsible for your patients, and you're also responsible for your girls or guys -- aids on the floor. You're responsible for making sure the jobs are taken care of. You're responsible making sure your floor run smoothly. You're responsible making sure everybody has their care; they're bathed, dressed, showers are done, meds, treatments or whatever. Ultimately, it's your responsibility, and it's your floor including their work, and you have your stuff done. It's just your responsibility. It's your job.

Transcript p. 114 lns 13-22.

Ms. Lutz described specific incidents when she had decided to write up CNAs for disciplinary infractions. First she discussed some incidents with CNA Melissa Krist where Ms. Lutz chose to give Ms. Krist only an informal verbal warning the first time Ms. Krist spoke rudely to a resident or family member, but when the behavior was repeated, Ms. Lutz decided a more formal discipline was warranted:

A. I have had to write a CNA up because I had a family member complain that she was being rude. So I wrote her up

and talked to her. I talked to her. I took her in the med room and wrote her up. Her name was Melissa Krist. I took care of that and turned that in. I also --

Q. Let's stick with Melissa Krist. So did you observe the incident? Was it reported to you by a family member?

A. It was reported to me by the family member, but Melissa Krist works for me. She's one of the CNAs on the floor. I have observed her. At times her tone is not to nice. She is short when she's busy or whatever, and I spoke to her before and said, "Watch how you're answering people, because it comes off not nice sometimes; like, you're being short." I talked to her and that was just a verbal between her and I. When I had a family member that came in and actually came to the desk and complained the very next day when I had came in -- because I was off the day that it happened -- they came to me and were like, "This is what happened. I was back in the dining room." They had a major complaint about her, because they said she was rude when they had asked -- she was asking them to get out because she said there wasn't enough room for the residents to go in there. You can accommodate. You can move somebody else over, if someone is independent feeding. There's another dining room there. There was ways around. You could have moved another chair in there or whatever. I mean, she did not have to, like, say it the way she said it. So I talked to her, and when we were talking in the room that she did say, "Yeah, I told them that there wasn't enough room." I said, "It was your tone and how you said it, and they were upset." So I did give her a verbal and a written, and I had her read it and sign it, and I turned that in. That is one.

Q. Let's stay on that one now. When did that happen?

A. Maybe a month or two months ago. It's been recent.

Q. And the first time when you talked to her, did I understand correctly that you didn't file any formal paperwork; is that correct?

A. No.

Q. Why didn't you file any formal paperwork at that time?

A. I didn't think that it needed to be filed. I talked to her, and I gave her a verbal. It's our discretion. I mean, if it was warranted I would have done something -- if I thought it was really bad, then I would have done something. To me, it only warranted me

saying, "Hey, just watch how you're talking to somebody. You know, it's your tone of voice or whatever," or, "How your saying something isn't coming across very nice. It's coming across rude or whatever." I just talk to them first. I don't automatically, boom, pop out a write up unless it's something that warrants it. Then that would be different.

Q. Who would make that decision, or who does make that decision?

A. I do.

Q. And whenever -- the first time whenever you talked to her, did you -- before you spoke with her, did you consult with anybody above you in the chain of command?

A. No.

Q. Before you decided to write her up, did you consult with anybody above you in the chain of command?

A. No.

Q. Did you let anybody above you in the chain of command know about it after you wrote her up?

A. Yeah. I turned it in afterwards and told my supervisor what happened.

Q. Did you present this write up to -- when you wrote her up, did you present it to the employee?

A. Yes. I took her in the med room. It was just her and I. It was nobody else's business; just her and I. We went into the med room. I talked to her and showed her. She read it.

Q. And did you talk to anybody above you in the chain of command before you gave it to her?

A. No.

Transcript p.115 ln 10 – p. 118 ln 7.

Ms. Lutz also explained another discipline she had issued to Aid Kathleen Roberts and how she had previously given Ms. Roberts a verbal warning about rudeness, and then determined a formal discipline was necessary when the behavior was repeated. Transcript p.118 ln 8 – p. 122 ln 12, See Employer's Exhibit 4.

Ms. Lutz further discussed an incident where she chose to issue Staff Educations to Aids for failing to use heel protectors on residents, rather than disciplines. Transcript p. 123 ln. 16 – p. 125 ln. 3. Again, Ms. Lutz indicated that no one instructed her to issue educations, that it was her decision to do so, and that she had no need to discuss doing so with a superior before taking action.

Transcript p. 124 lns. 4-10. In describing this incident, Ms. Lutz explained her job responsibilities and thought process when exercising them:

I didn't feel anybody else all needed to be wrote up. I just educated them. I mean, that's our job. It's not write up happy. If they need an education, they get an education. If it's something really bad and I had already talked to them -- either verbally pulled them aside or gave them a verbal written because I pulled them aside more than once, because I knew they got pulled aside more than once because of something -- then I would resort to what is your E 4 document and giving them an actual write up. **But it's our discretion. You're a charge nurse. It's your discretion what you're doing on the floor. It's your discretion, and you have to make sure that the residents are safe.** There's a lot of stuff that's happening, and it's very busy. Everybody is busy. People are running around and people are doing their jobs. Nobody is God, and nobody is perfect. Everybody forgets something. This is just a staff education form, and it says, "Hey, remember. We got to take up an extra couple of minutes and make sure this is on and that is on. Is everybody safe before you leave the resident and leave the room?" This is all this is, and no, I did not ask.

Transcript p.130 ln. 10 – p. 131 ln. 4 (emphasis added).

Ms. Lutz then continued by explaining how she assigns CNAs and handles the resident shower schedule. Ms. Lutz described at great length how she is

responsible for assigning the CNAs, modifying their task lists when necessary, and evening up shower schedules among the aids. See, Transcript p. 131 ln. 16- p. 136 ln. 15.

The Testimony of LPN John Lutz

Mr. Lutz, another LPN at Bloomsburg since 2016 characterized his job responsibilities as including “I get the CNAs to get their work done. I give out some assignments, I change assignments around . . .” Transcript p. 170, lns. 1-3. He explained how after a week on his current floor he rearranged CNA assignments without discussing the changes with any one above him on the chain of command. Transcript p.172 ln 24 – p. 173 ln 17.

Mr. Lutz also discussed his ability to issue Staff Educations, and Disciplines when necessary though he noted that he hasn’t recently had cause to issue any disciplines “Because I haven’t had anything happen on my unit.” Transcript p. 174 ln. 12 – p. 175 ln. 21.

Mr. Lutz also identified his current job description, and indicated that, while it was formally signed in April of 2019, that his job duties always included disciplining and supervising CNAs, as reflected in that document. See Transcript p. 178 ln. 12 – p. 197 ln. 24, Employer’s Exhibit 10.

The Testimony of the Union's LPN Witnesses

On the second day of the hearing, the Union presented its witnesses-- four LPNs, three of whom worked the late night shift, and another who works in the evening.

The Union's first witness, Heather Reichenbach, works the 11:00-7:00 shift. As with other LPNs working this shift, she typically has only one CNA working with her, and therefore little need or opportunity to assign duties between multiple aids. She also testified that while she had never written up a CNA, she had never seen a CNA engage in activity she felt was worthy of a disciplinary action. Transcript p. 219 Ins. 4-6. However, not having a need to exercise her authority is not the same as not having that authority.

Union witness Leanna Hellenthal also mostly works the late night 11:00 p.m. to 7:00 a.m. shift. Transcript p. 229 Ins. 6-8. Ms. Hellenthal testified that despite having not written up any CNAs herself, that "ever since I've worked there, for 13 years, we have had the authority to write people up." Transcript p. 233 Ins. 14-15. She did, however, admit to having engaged in informal efforts to resolve issues among the staff on her floors before advancing things up the chain of command:

Well, rather than -- it's always been follow chain of command. So they always taught us to try to resolve the issues among floor before bringing in -- because some people would go straight to the DON and the DON would say, "Follow chain of

command," which would be the charge nurse. Then if you don't get no satisfaction, then you go to the supervisor. No satisfaction? Then you go to the DON. That's how we were always taught, and that's what we try to do.

Transcript p. 239 Ins. 12-19. Ms. Hellenthal also explained to the Hearing Officer how CNAs should report issues with residents to the LPN on the floor first via the same chain of command. Transcript p. 238 Ins. 12-22.

The testimony of Union witness Steven Brieto further confirmed the LPNs' roles as supervisors of CNAs. Mr. Brieto confirmed that he has previously written up CNAs, Transcript p. 243 Ins. 9-23, but that since that one incident, he hasn't seen any CNAs engage in activity that warranted disciplines. Transcript p. 244 Ins. 21-25. When asked if he has the authority to write up CNAs now, his answer was "Yes." Transcript p. 225 Ins. 1-2. Mr. Brieto explained under direct examination by the Union's counsel:

Q. You said that have you the power the write up people?

A. Yes.

Q. Does the CNA have the power or authority to write you up?

A. No.

Q. When you say that you have the authority to write somebody up what does that mean?

A. If I see that they're doing something, and they don't respond to me telling them not to do it, it's a last resort. I will write them up; just a written warning.

Q. And how do you go about doing that?

A. I get an employee warning form, and I state what happened and the reason why I wrote them up, and I give it to them, and then they have the chance to write their version of events, and they are supposed to sign it, but they don't always sign it, and then they give me to me, and I give it to the nursing supervisor.

Q. And what does the nursing supervisor do with it when she has it?

A. She, I believe, in turn gives it to the director of nursing. It really depends on the infraction. If it's severe enough, the nursing supervisor can send them home or fire them; like resident abuse for example.

Transcript p. 245 ln. 19 – p. 246 ln. 15. He then confirmed under cross examination that it is his decision whether to initiate the write up or not.

Transcript p. 246 ln. 25- p. 247 ln. 2.

The Union's final witness, Ronda Allen, also tends to work the 11:00-7:00 shift. She also indicated that she has written up CNAs as recently as February of this year. Transcript p. 252, ln. 9- p. 253 ln. 2. She also indicated that while she attended the training seminar reflected in Employer's Exhibit 3, that she didn't learn anything at that session "I mean, everything was spelled out that we were already doing. Like, I already knew I could write people up." Transcript p. 264, lns. 18-20.

Argument

Here, all of the LPN witnesses, whether testifying at the behest of the Employer, or called by the Union, stated that they have the authority to issue disciplines to CNAs. All of them indicated that it is their decision whether to issue a discipline, or a staff education, or even to do nothing formal at all. The fact that the LPNs have a choice to do nothing, conduct education, or write up the employee

shows they used independent judgment when deciding to write up the employees. *GGNSC Springfield LLC* at 409, 411; *In re Progressive Transportations Services, Inc.*, 340 NLRB No. 126 at 1046 (2003). The Board has previously determined in *Oak Park Nursing Care Center*, 351 NLRB 27 (2007) that the authority to initiate disciplinary action as part of a progressive discipline system, as here, was sufficient evidence of statutory supervisor status. Here the Employer's Progressive Disciplinary System is described in its Employee Handbook. Employer's Exhibit 3 at pp. 62-66. Testimony of Kim Rossman, Transcript, p. 67 lns. 6-20, p. 101 ln. 19 – p. 102 ln. 3. Also, the fact that the LPNs may have rarely exercised their authority is not determinative of whether they are statutory supervisors. See, *NLRB v. Prime Energy Ltd. P'ship*. 224 F.3d 206 (3rd Cir. 2000) Given the short period of time at issue at the hearing, it would be unusual to have such subsequent events in the record as recognized in *New Vista* at 132-133, citing *NLRB v. Prime Energy Ltd. P'ship*. (“The mere fact that the regional director found only one instance...is hardly a reasonable basis to conclude that the authority was lacking. It simply suggests that the authority was rarely needed.”).

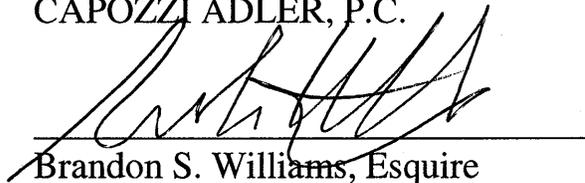
Furthermore, the various witnesses identified current job descriptions which they indicated accurately reflected their job duties, provisions in the employee handbook which they indicated accurately reflected their relationship with CNAs, and a training session reviewing their supervisory duties-- all of which indicated

that these employees are supervisors of LPNs. LPNs who worked with more than one CNA also tended to confirm that it was their responsibility to assign the CNAs job duties when needed, and/or that CNAs fell below the LPNs in the chain of command.

WHEREFORE, Employer Bloomsburg requests the Board to dismiss the Union's Election Petition for an election of LPNs at Bloomsburg because those employees are Statutory Supervisors.

Respectfully submitted,

CAPOZZI ADLER, P.C.

A handwritten signature in black ink, appearing to read "Brandon S. Williams", is written over a horizontal line.

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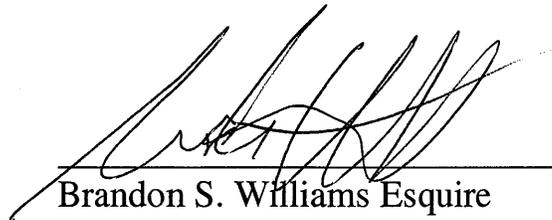
DATE: June 5, 2019

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Section 102.21 of the Board's Rules and Regulations, a true and correct copy of the Brief of the Respondent was served by email, addressed as follows:

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DATE: June 5, 2019

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