UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BLOOMSBURG CARE AND REHABILITATION CENTER
Employer

and Case 06-RC-241173

RETAIL WHOLESALE AND DEPARTMENT STORE UNION (RWDSU)
Petitioner

ORDER

The Employer's Request for Review of the Regional Director's Decision and Direction of Election is denied as it raises no substantial issues warranting review.[1]

[1] 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 . . . ." *New Vista*, supra at 132 (internal citations omitted). Here, although the evidence suggests that the LPNs' actions meet the first part of the Third Circuit test, we find that the Employer has not demonstrated that their actions meet the second and third parts of the test. The Employer has failed to establish that the LPNs "initiate" a progressive discipline process because—even setting aside the conflicting testimony regarding whether LPNs possess the authority to issue disciplinary warnings—under its written disciplinary policy (as set forth in its Employee Manual and described in its training handout), the disciplinary notices in evidence do not follow any defined progression. The Employer also has not demonstrated that the LPNs' involvement with disciplinary notices "increases severity of the consequences of a future rule violation" because there is no evidence that a disciplinary notice initiated at the discretion of an LPN was used to increase the severity of discipline for a subsequent infraction, and none of the disciplinary notices in evidence refer to earlier notices or even indicate whether any discipline was actually later imposed. See *Coral Harbor Rehabilitation and Nursing Center*, 366 NLRB No. 75, slip op. at 2, fn. 6 (2018). Finally, there is no evidence of an LPN actually recommending discipline in a warning form and thus the Employer has not shown that these forms function as effective recommendations for future discipline upon future infractions even without the existence of a progressive discipline system.

We agree that the Employer's LPNs are not supervisors. We note, however, that the concerns articulated by the Third Circuit regarding the Board's test for whether putative supervisors may effectively recommend discipline warrant careful consideration, and we would be open to reconsidering extant Board law on this topic in a future appropriate case.

JOHN F. RING, CHAIRMAN

MARVIN E. KAPLAN, MEMBER

WILLIAM J. EMANUEL, MEMBER

Dated, Washington, D.C., December 3, 2019.