

Michigan Masonic Home and Local 486, International Brotherhood of Teamsters, AFL-CIO.
Case 7-RC-21662

December 15, 2000

DECISION ON REVIEW AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On October 15, 1999, the Regional Director for Region 7 issued a Decision and Direction of Election in the above-titled proceeding, in which he found that the Employer's licensed practical nurses (LPNs) are not supervisors within the meaning of Section 2(11) of the Act.

Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Employer filed a timely request for review of the Regional Director's decision. By Order dated November 12, 1999, the Board granted the Employer's request for review solely with respect to the Regional Director's finding that the Employer's LPNs do not possess supervisory authority with respect to their role in the Employer's disciplinary process.¹ The election was conducted as scheduled on November 12, 1999, and the ballots were impounded.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having carefully reviewed the record, including the Employer's brief on review, we affirm the Regional Director's findings for the reasons set forth below.

The Employer operates a continuing care retirement community consisting of facilities providing three levels of service: an independent care center; a skilled nursing center; and a licensed home for the aged. The Employer maintains a single nursing department. The petitioned-for LPNs are all physically located in either the skilled nursing center or the home for the aged. There are 204 beds in the skilled nursing center and 222 beds in the home for the aged. The Employer's nursing department's hierarchy consists of a facility administrator and an associate administrator, who are together responsible for the entire nursing operation; a director of nursing (DON); an assistant director of nursing; 4 nurse managers; 45 LPNs; and approximately 115 certified equivalency nursing assistants (CENAs).

The term "supervisor" is defined in Section 2(11) of the Act 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 ac-

¹ Member Hurtgen, dissenting in part, would have granted the Employer's request for review in its entirety.

tion, 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.

The possession of any one of the above listed criteria will render a person a statutory supervisor so long as exercise of that authority is not routine but requires the use of independent judgment. *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1138 (1999).

The Board has long held that the burden of proving supervisory status rests on the party asserting that such status exists. *Ohio Masonic Home*, 295 NLRB 390, 393 (1989).² Thus, any lack of evidence in the record is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities*, 329 NLRB 535, fn. 8 (1999). In making determinations regarding supervisory status under Section 2(11) of the Act, "the Board has a duty not to construe the statutory language too broadly because the individual found to be a supervisor is denied employee rights protected under the Act." *St. Francis Medical Center-West*, 323 NLRB 1046, 1047 (1997).

As explained below, we agree with the Regional Director's finding that on this record the Employer has not met its burden of establishing that the LPNs perform a supervisory function in disciplining employees.

1. Effectively recommending discipline

The Employer has a progressive disciplinary policy that provides different penalties for different infractions. Certain misconduct warrants immediate discharge, while less serious offenses merit only an oral or written warning. However, under the policy as written in the Employer's policy manual, even a minor offense *could* result in discharge if it is the fourth such offense.

It is undisputed that LPNs do not have the authority to issue formal verbal and written warnings. Nurse managers can independently issue formal verbal and written warnings, but only the administrators and the DON can make a final determination regarding employee suspension or discharge. In making such final determinations, the administrators and DON review testimony from witnesses, anecdotal notes from the employee's peer evaluation forms, and, if applicable, the nurse manager's independent investigation report. The issue presented here is whether the LPNs have limited authority to make recommendations to nurse managers as to whether a particu-

² We recognize that this case arises in the Sixth Circuit and that the Sixth Circuit Court of Appeals has disagreed with the Board regarding the issue of which party has the burden of proof in establishing supervisory status and the meaning of the term "independent judgment" in Sec. 2(11). We note, however, that the Supreme Court has recently granted certiorari to resolve the conflict in the circuits over these issues. *NLRB v. Kentucky River Community Care*, 121 S.Ct. 27 (2000).

lar employee should receive some form of formal discipline.

The Employer's associate administrator, Cindy Bosley, testified that when an LPN encounters a problem with a CENA, the LPN counsels that employee, documents the incident, and, "if necessary," makes a recommendation to a nurse manager as to whether some formal disciplinary action should be taken. Mark Royer, one of the Employer's four nurse managers, testified that when a nurse manager receives a recommendation from an LPN regarding formal discipline, the nurse manager "interview[s] the charge nurse [i.e., LPN] who reported the incident, and review[s] her documentation." According to Royer, nurse managers rely on the report of the LPN and the Employer's policy manual in making lower level disciplinary decisions (i.e., formal verbal and written warnings). Royer stated that he always follows the LPN's recommendation unless it conflicts with policy. We note, however, that the Employer's policy manual specifically lays out and categorizes an extensive list of possible violations and the appropriate disciplinary action to be taken for each offense.³ Royer acknowledged that this level of specificity was implemented in order to remove the "guesswork" from the process of assigning the appropriate disciplinary action for any given offense.

Although Bosley and Royer testified generally that LPNs could make specific recommendations for formal discipline, the record is devoid of any specific examples of LPNs actually making such recommendations. In fact, the only LPN to testify stated that in her 22 years with the Employer, she never recommended employee discipline, and that the one time she did write up an incident involving a CENA, it was at the direction of a nurse manager. Further, neither the peer evaluations nor the corrective action sheet submitted into evidence by the Employer contains an LPN recommendation for discipline.

Even if the LPNs do make specific recommendations for formal discipline, the testimony of Mark Royer shows that such recommendations are severely restricted by the procedures mandated by the Employer's policy manual. Thus, we find that the Employer has failed to show that LPNs use independent judgment in recom-

mending discipline. *Western Union Telegraph Co.*, 242 NLRB 825, 827 (1979) (employee did not use independent judgment where her decisions were strictly regulated by specific employer policy). We further find that the Employer has failed to establish the extent to which the LPNs' recommendations are followed by nurse managers, and that the Employer has therefore also failed to demonstrate that such recommendations are generally effective.⁴ *Vencor Hospital-Los Angeles*, 328 NLRB supra, slip op. at 6 (RNs did not effectively recommend discipline when the record showed no evidence of any instance in which a recommendation was made and, accordingly, no evidence with respect to what resulted from such a recommendation).

Accordingly, we find that the Employer failed to show that LPNs effectively recommend discipline within the meaning of Section 2(11) of the Act.

2. Sending employees home

The Employer also contends that LPNs have supervisory authority as they can send employees home for intoxication, patient abuse, and for performance-based reasons. We find that this claim is not sufficiently supported by the record evidence to warrant a finding of supervisory status.

The nurse manager and associate administrator generally averred that, in the absence of a higher level official, LPNs would have this power. However, the LPNs' job description does not mention any such authority, there is no written or orally disseminated policy that LPNs possess such authority, and the record is devoid of even a single example of an LPN exercising such authority. The one LPN who testified stated that she "did not know" whether she had the authority to send an employee home even in a case of patient abuse. In fact, when asked what she would do if she came across a situation where a CENA was endangering a resident, she said would remove the CENA from the situation rather than send her home. Given the lack of specific evidence to support the Employer's claim, it has failed to meet its burden of proving supervisory status. See *Ten Broeck Commons*, 320 NLRB 806 (1996) (failure to exercise supervisory authority is probative of whether such authority exists); *Lakeview Health Center*, 308 NLRB 75, 78 (1992) (finding no actual authority to terminate where, inter alia,

³ For example, "Class One" offenses include, inter alia, posting or removal of notices, signs, or writing in any form on or from administrative bulletin boards on Home property at any time without specific authority of the CEO or department head; creating or contributing to unsanitary conditions by improperly discarding refuse or leaving objects on the floor or putting them out windows on the Home's premises; and consuming food or beverages at unauthorized times in areas other than those authorized by the administration. The Employer's manual indicates that an employee would receive a documented verbal warning for the first such offense and a written warning for the second offense.

⁴ We make this finding notwithstanding the associate administrator's testimony that she "d[id]n't know of any times" that a nurse manager failed to follow the recommendation of an LPN. Such testimony is of negligible value as there was no indication in the record that the associate administrator would have been privy to such exchanges. Moreover, the associate administrator gave no testimony indicating that she had any actual knowledge of nurse managers following LPN recommendations.

authority did not appear in job description and had never been exercised).⁵

Accordingly, we affirm the Regional Director's finding that the Employer's LPNs do not possess supervisory authority with respect to their role in the Employer's disciplinary process.

ORDER

The Regional Director's Decision and Direction of Election is affirmed. The case is remanded to the Regional Director for further appropriate action.

MEMBER HURTGEN dissenting.

Contrary to my colleagues, I conclude that the Employer's LPNs are statutory supervisors. In my view, the Employer's LPNs' disciplinary authority over the Employer's CENAs renders them supervisors under Section 2(11) of the Act.

The Employer's system of discipline involves various kinds of "formal" discipline: verbal warning, written warning, suspension, and discharge. Also, under the Employer's system of progressive discipline, repeated offenses can lead to greater discipline. A discharge can take place only if it is a serious offense or a fourth minor offense.

When an LPN observes a problem with a CENA, the LPN can decide to document the incident and can decide whether to recommend formal discipline. Thus, the LPN uses independent judgment in deciding whether to document the incident and whether to recommend formal discipline.

The Regional Director found that LPNs can and do document disciplinary incidents regarding job performance, refusal to perform job duties, or problems with other staff employees. In addition, LPNs can and do

make recommendations regarding disciplinary action. According to the Employer's nurse manager, Royer, nurse managers rely on and follow the recommendations of the LPNs. And, the associate administrator testified, without contradiction, that she did not know of any time when a recommendation of an LPN was not followed.

My colleagues nonetheless state that LPNs do not use independent judgment in their recommendations. They note that an administrator or the director of nursing makes a final determination regarding an employee's suspension or discharge. However, the fact that higher authority makes a final decision does not undercut the fact that the LPN makes an effective recommendation regarding the discipline to be imposed. My colleagues also state that any LPNs' recommendations are "severely restricted by the procedures mandated by the Employer's policy manual." However, this does not belie the significant authority of the LPNs. Even where the Employer's manual has set forth predetermined discipline for certain infractions, the LPNs have the authority to decide whether an infraction has occurred and whether discipline should be recommended.

I also find that the LPNs are supervisors based on their authority to send employees home from work—particularly for performance-based reasons. The Employer presented evidence that LPNs have this authority. Concededly, first-shift LPNs check with their superior before sending an employee home. However, second- and third-shift LPNs may do so without prior approval. My colleagues discount the Employer's evidence, finding "lack of specific evidence." I do not agree. The testimony of the Employer's nurse manager and associate administrator was clear that the LPNs in fact have this authority.

Based on the above, I conclude that the Employer's LPNs are Section 2(11) supervisors.

⁵ Moreover, we have long held that the authority to suspend or send employees home for flagrant violations such as patient abuse or intoxication does not demonstrate supervisory authority because it does not require the use of independent judgment. See *Vencor Hospital*, supra, slip op. at 4; *Northcrest Nursing Home*, 313 NLRB 491, 497 (1993).