

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

MARINER HEALTH OF MOUNT CLARE

Employer

and

SERVICE EMPLOYEES INTERNATIONAL
UNION, DISTRICT 1199E-DC

Petitioner

Case 5-RC-14806

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.^{1/}
3. The Petitioner involved claims to represent certain employees of the Employer.^{2/}
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.^{3/}

All full-time and regular part-time licensed practical nurses (LPNs) employed by the Employer at its Baltimore, Maryland facility, but excluding all other employees, guards and supervisors as defined by the Act.

DIRECTION OF ELECTION

An Election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, 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 employees engaged in an

OVER

economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by

**SERVICE EMPLOYEES INTERNATIONAL UNION,
DISTRICT 1199E-DC**

LIST OF VOTERS

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this Decision. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. The request must be received by the Board in Washington by **April 30, 1999**.

Dated April 16, 1999

at Baltimore, Maryland

Regional Director, Region 5



1/ The parties stipulated and I find that: Mariner Health of Mount Clare (hereinafter the Employer) is a Maryland corporation with an office and place of business in Baltimore, Maryland; the Employer is engaged in the operation of a nursing home providing long-term care to the elderly; during the last 12 months, a representative period, the Employer, in the course and conduct of its business operations described above, derived gross revenues in excess of \$100,000; during the same period, the Employer, in the course and conduct of its business operations described above, purchased and received supplies and goods valued in excess of \$10,000 directly from points located outside the State of Maryland.

2/ The parties stipulated and I find that the Service Employees International Union, District 1199E-DC (hereinafter the Union or Petitioner) is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act (hereinafter the Act).

3/ At the hearing, the Petitioner amended the Petition and is seeking to represent employees in the following unit, which includes 17 employees:

All full-time and regular part-time licensed practical nurses (LPNs) employed by the Employer at its Baltimore, Maryland facility, but excluding all other employees, guards and supervisors as defined by the Act.

The parties stipulated that the following employees are supervisors within the meaning of the Act: James Hayden, Nancy Matthews, Carol Peake, Fran Rudder, Janice Lubitz, Mary Baker, Mary McMillan, Lenora Chapman, Mamie Cousins and Mildred Guy-Colbert.

DISPUTED ISSUES

Whether licensed practical nurses (LPNs) are supervisors within the meaning of Section 2(11) of the Act.

POSITIONS OF THE PARTIES

PETITIONER

The Petitioner contends that LPNs are not supervisors within the meaning of the Act and thus the petitioned-for Unit is appropriate for the purpose of collective bargaining.

EMPLOYER

The Employer contends that LPNs are supervisors within the meaning of the Act and thus the petitioned-for Unit is not appropriate for the purpose of collective bargaining.

BACKGROUND

The Employer operates a nursing home that provides long-term care to the elderly in Baltimore, Maryland. The facility houses 208 beds throughout four floors or units. Each unit contains various double, triple, and quadruple patient bedrooms, various showers, toilet areas, and a nursing station. The third floor houses the contagious disease care area where HIV and AIDS patients live. The facility also has a basement and a fifth floor, which contains the business office. The facility operates 24 hours per day, 7 days per week, on three shifts: day (7:00 a.m. to 3:30 p.m.), evening (3:00 p.m. to 11:30 p.m.), and night (11:00 p.m. to 7:30 a.m.).

The Employer's operation is headed by James Hayden, Administrator, who has overall control of the facility. Under Hayden, in the nursing department, is Nancie Mathews, Director of Nursing (DON), Carol Peake, Assistant Director of Nursing (ADON), and four Unit Managers, one for each floor, all of whom are registered nurses (RNs): Janice Lubitz (first floor); Mary Baker (second floor); Mary McMillan (third floor); and Lenora Chapman (fourth floor). All of these individuals are stipulated to be supervisors under the Act. The DON, ADON, and Unit Managers are scheduled to work from 9:00 a.m. to 5:00 p.m., although, according to Hayden, the DON and ADON are generally at the facility "a lot earlier than that" and "they put in a lot of extra time."

During the evening and night shifts, the Employer maintains a House Supervisor who has staffing and administrative control of the facility when the DON and the ADON are not working. Thus, for example, if a geriatric nursing assistant (GNA) does not report to work on any given day, the House Supervisor has the authority to call off-duty GNAs to fill that void or, if none is available, to obtain a temporary replacement from an employment agency. The House Supervisor also has the authority to redistribute staff throughout the four units to compensate for any absences. In her administrative capacity, the House Supervisor coordinates maintenance work during her shift and takes care of any emergency that may arise in the facility. Mamie Cousins is the evening House Supervisor and Mildred Guy-Colbert is the night House Supervisor. They are both stipulated to be supervisors under the Act.

In addition to the House Supervisor, the Employer maintains in its facility at least one RN during the evening and night shifts. House Supervisor Guy-Colbert acknowledged during the hearing that RNs are above all LPNs and GNAs.

The Employer employs 17 LPNs, 55 GNAs, and 6 certified medical aides (CMAs) to cover three shifts, seven days a week. The GNAs are the primary hands-on

caregivers at the facility. The GNAs take care of the bathing, feeding, ambulation, transportation, and other activities of daily life of the residents. The CMAs distribute medications to the residents at designated times. The LPNs provide technical assistance and guidance to the GNAs and brief them at the beginning of the shift regarding admissions, discharges, and other special events. LPNs also distribute the work among the GNAs on a head-count basis. Thus, for example, LPN Maxine Bollin testified during the hearing that if she has 50 residents and 5 GNAs in her unit, she assigns ten residents to each GNA. Bollin further testified that in making the assignments she does not make any judgment as to the relative abilities of each GNA; she simply divides the number of residents equally among the GNAs. Whenever something unusual occurs, such as when a resident falls to the ground, the LPNs are called by the GNAs to assess the status of the resident and to decide what action needs to be taken. The LPN then may instruct the GNAs to call 911 or to return the resident to bed and take further action. The LPNs also oversee the work done by the GNAs to ensure residents receive appropriate care.

LPNs often serve as mediators for the GNAs when they have problems among themselves or with the unit. If the LPN is unable to solve the problem to the satisfaction of all parties, however, they are referred to the Unit Manager who then takes whatever action is necessary.

LPNs have the authority to “write up” GNAs or CMAs without prior approval from anyone. The write-up is then given to the Unit Manager who independently investigates the matter and assesses what disciplinary action is necessary. In doing so, the Unit Manager discusses the write-up with the LPN and the written-up employee. After investigating the matter, the Unit Manager may issue the write-up prepared by the LPN or may disregard the write-up altogether. LPN Bollin testified, for example, of a time she had written up an employee for engaging in certain misconduct. The Unit Manager investigated the matter and decided not to act on the write-up because there was no corroborating evidence that the misconduct occurred. As Bollin noted, “the Unit Manager said there was no one to support what I said, so she just said it was my word against [the employee’s], so she let it go.”

The LPNs do not have authority to hire, discharge, suspend, layoff or recall from layoff, promote, approve vacation, transfer from floor to floor, or authorize overtime or shift changes. In case of an emergency, a LPN may ask a GNA to continue to work through the GNA’s assigned break until the emergency is resolved. LPNs do not have the authority to call in replacements to fill in for absent GNAs.

The Unit Managers are responsible for evaluating the GNAs and CMAs in their respective units. In doing the evaluations, the Unit Managers may seek input from the House Supervisors and LPNs when they are not familiar with the work of a particular employee. This happens mostly with the night shift because the Unit Managers have less individual contact with the employees on that shift. As Administrator Hayden noted, however, it is the Unit Manager’s final responsibility to complete and conduct the evaluations and to make decisions on what areas need to be improved.

During the day shift and part of the evening shift, the DON, ADON and four Unit Managers (one for each unit) are present at the facility. In addition, during the day shift there is 1 LPN and 2 GNAs on the first floor, 2 LPNs and 5 GNAs on the second floor, 1 LPN and 2 GNAs on the third floor, and 2 LPNs and 5 GNAs on the fourth floor. During the evening and night shifts there is 1 LPN and 2 GNAs on the first floor, 2 LPNs and 3 GNAs on the second floor, 1 LPN and 1 GNA on the third floor, and 2 LPNs and 3 GNAs on the fourth floor. Finally, during the evening and night shifts there is a House Supervisor and a RN present at the facility. The RN on duty during the evening or night shifts may be the DON, the ADON or one of the Unit Managers if no other RN is scheduled to work.

THE STATUS OF LPNs

It is by now a self-evident truth that the line that separates employees from supervisors is not always clear. Section 2(3) of the Act excludes from the definition of “employee” “any individual employed as a supervisor.” Section 2(11) defines “supervisor” as:

any 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.

In determining whether a person is a statutory supervisor, the Board examines whether the person in question exercises any of the functions listed in Section 2(11), uses independent judgment in performing any of those supervisory functions, and does so in the interest of management. NLRB v. Health Care & Retirement Corp. of America, 511 U.S. 571, 573-74 (1994); Hydro Conduit Corp., 254 NLRB 433, 437 (1981). In enacting Section 2(11), Congress sought to distinguish between truly supervisory personnel, who are vested with “genuine management prerogatives,” and employees, such as “straw bosses, leadmen, set-up men, and other minor supervisory employees,” who enjoy the Act’s protections even though they perform “minor supervisory duties.” NLRB v. Bell Aerospace Co., 416 U.S. 267, 280-81 (1974) (quoting Senate Rep. No. 105, 80th Cong., 1st Sess. 4 (1947)). Consistent with this congressional intent, the Board has long recognized that often times highly skilled employees whose primary function is physical participation in the production or operating processes of their employer's plants and who incidentally direct the movements and operations of less skilled subordinate employees are not supervisors within the meaning of the Act, because their authority is based on their working skills and experience and not in the possession of supervisory authority as defined in Section 2(11) of the Act. Southern Bleachery & Print Works, Inc., 115 NLRB 787, 791 (1956), enforced, 257 F.2d 235 (4th Cir. 1958), cert. denied, 359 U.S. 911 (1959); Gulf Bottlers, Inc., 127 NLRB 850, n. 3, 858-61 (1960), enforced sub nom, United Brewery Workers v. NLRB, 298 F.2d 297 (D.C. Cir. 1961); Koons Ford of

Annapolis, 282 NLRB 506, 513-14 (1986), enforced, 833 F.2d 310 (4th Cir. 1987), cert. denied, 485 U.S. 1021 (1988).

A party seeking to exclude an individual from voting for a collective-bargaining representative has the burden of establishing that the individual is ineligible to vote. Golden Fan Inn, 281 NLRB 226, 229-30 n.12 (1986) see also Northern Montana Health Care Center, 324 NLRB 752 (1997); Bennett Industries, 313 NLRB 1363 (1994); The Ohio Masonic Home, 295 NLRB 390, 393 (1989); The Dickinson-Iron Community Action Agency, 283 NLRB 1029, 1034 (1987); Tucson Gas & Electric Co., 241 NLRB 181 (1979). Conclusory evidence, "without specific explanation that the [disputed person or classification] in fact exercised independent judgment," does not establish supervisory authority. Sears, Roebuck & Co., 304 NLRB 193 (1991). Furthermore, "whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia." Phelps Community Medical Center, 295 NLRB 486, 490 (1989).

Applying these criteria to the instant case, I conclude that LPNs are not supervisors within the meaning of Section 2(11) of the Act. The record clearly shows that LPNs do not have the authority to hire, transfer, lay off, recall, promote, or discharge any of the Employer's GNAs or CMAs. The Employer contends that the LPNs are supervisors because they have the authority to assign and direct, evaluate and reward, and discipline and suspend GNAs and CMAs, and to adjust their grievances. As detailed fully below, I disagree with the Employer's contention. The record as a whole shows that LPNs either do not possess the authority imputed to them by the Employer, or exercise that authority without using independent judgment as required by Section 2(11) of the Act. Accordingly, I will direct an election in the petitioned-for Unit.

Assignment and Responsible Direction

In determining whether LPNs' assignments and directions render them statutory supervisors, the Board decides whether the assignments and directions given require independent judgment or whether such assignments and directions are merely routine. The Board has noted that "[t]here are no hard and fast rules; [] each case turns on its own particular facts." Providence Hospital, 320 NLRB 717, 725 (1996). Board precedent clearly establishes, however, that not all assignments and directions given by an employee involve the exercise of supervisory authority. See, e.g., Northern Montana Health Care Center, 324 NLRB 752 (1997); Illinois Veterans Home at Anna L.P., 323 NLRB 890 (1997); Washington Nursing Home, Inc., 321 NLRB 366 (1996); Providence Hospital, 320 NLRB 717, 725 (1996); Ten Broeck Commons, 320 NLRB 806 (1996). Supervisory status is found only where a person's role in assigning and directing the work of others requires the exercise of "independent judgment" as that term is used in Section 2(11) of the Act. Washington Nursing Home, Inc., 321 NLRB 366 n.4 (1996). In the present case, I find that the LPNs' role in assigning and directing GNAs and CMAs is merely routine and, consequently, does not constitute supervisory authority within the meaning of Section 2(11).

The Employer asserts that LPNs are supervisors because they distribute work among the GNAs telling them what patients to care for and what tasks to perform; they schedule breaks for GNAs and may require them to reschedule their breaks in case of an emergency; and may direct GNAs to perform unscheduled tasks in emergency situations such as when a patient falls to the ground. The record evidence shows, however, that LPNs generally divide work equally among GNAs based on the number of patients needing care and the number of GNAs available to do the work. Such a straight arithmetic division of work is the quintessence of “routine.” Moreover, even in cases in which LPNs regularly take into consideration the relative ability of CNAs in assigning and directing their work, the Board has consistently held that the use of such judgment stems from the LPNs professional expertise and not from supervisory authority. See, e.g., Illinois Veterans Home at Anna L.P., 323 NLRB at 891; Washington Nursing Home, Inc., 321 NLRB at 366 n.4; Providence Hospital, 320 NLRB at 727-30; Ten Broeck Commons, 320 NLRB 809-12. As the Board noted in Ten Broeck Commons:

LPNs’ supervision of CNAs is narrowly circumscribed to giving rather general, routine directions to lesser skilled employees in order to maintain the quality of their work. This type of authority is typical of that of the industrial strawboss and leadman, skilled employees with only limited authority, who are routinely excluded from the definition of supervisor.

Ten Broeck Commons, 320 NLRB at 812. The Board has similarly held that the authority to decide when aides can take their breaks is routine in nature. Washington Nursing Home, Inc., 321 NLRB at 366 n.4.

The Employer contends that “it strains credulity and is demeaning for licensed professionals like LPNs to be told that they do not exercise independent judgment.” (Employer’s Brief at 10). Indeed, professionals like LPNs exercise judgment in performing their work. As the Board noted in Providence Hospital, 320 NLRB at 730, “the essence of professionalism requires the exercise of expert judgment.” The Employer, however, erroneously equates the “judgment” exercised by LPNs from their status as professionals to the “independent judgment” exercised by supervisors under the Act. It is indeed noteworthy that the word “judgment” is not only used in Section 2(11) of the Act, but also in Section 2(12), which defines “professional employee.” The record evidence as a whole, as well as the controlling Board precedent, shows that the “judgment” exercised by LPNs here is the expert “judgment” exercised by professional employees, not the “independent judgment” exercised by supervisors. See generally Northern Montana Heath Care Center, 324 NLRB 752 (1997); Providence Hospital, 320 NLRB 717 (1996); Ten Broeck Commons, 320 NLRB 806 (1996).

The Employer next contends that LPNs have the authority to assign GNAs to different units if a particular unit is short-staffed, to authorize overtime work, and to call in GNAs to work in the event of staff shortages. Contrary to the Employer’s contention, however, the record shows that LPNs do not have authority over the staffing of their units. The testimony of House Supervisor Guy-Colbert, one of the Employer’s own witnesses, clearly establishes that the Staffing Coordinator during the day shift and the

House Supervisors during the evening and night shifts, have sole responsibility over the staffing of the facility. Thus, Guy-Colbert testified that she alone as House Supervisor is authorized to call other GNAs to work in the event of staff shortages during her shift; if she is unable to find a substitute she then calls an employment agency to obtain a temporary substitute; if the agency is unable to provide the requested substitute she then reassigns staff to different units to equalize the workload. Guy-Colbert further testified that LPNs do not have the authority to grant days off, and that any request for overtime has to be approved by the Staffing Coordinator. Finally, according to Guy-Colbert, LPNs do not have the authority even to authorize shift changes among consenting GNAs; such changes have to be submitted in writing by the interested GNAs and approved by the Staffing Coordinator. The testimony of Guy-Colbert in this regard is corroborated by the testimony of LPN Bollin. I therefore find, based on the record as a whole, that LPNs do not have the authority over staffing that is imputed to them by the Employer. Even if the LPNs had the aforementioned authority, however, the Board has repeatedly held under similar circumstances that such authority does not require the exercise of “independent judgment” within the meaning of Section 2(11). See, e.g., Illinois Veterans Home at Anna L.P., 323 NLRB at 891; Washington Nursing Home, Inc., 321 NLRB at 366 n.4; Providence Hospital, 320 NLRB at 731-32.

For the foregoing reasons, I find that the LPNs do not have the authority to assign and responsibly direct GNAs and CMAs within the meaning of Section 2(11) of the Act.

Evaluation and Reward

The Employer next argues that LPNs are supervisors under the Act because they have the authority to evaluate and reward GNAs and CMAs. The record shows, however, that the Unit Managers are responsible for evaluating the GNAs and CMAs in their respective units. The record further shows that in preparing the evaluations the Unit Managers occasionally seek input from the House Supervisors and LPNs when they are not familiar with the work of a particular employee. This happens mostly with the night shift because the Unit Managers have less individual contact with those employees. As Administrator Hayden noted, however, it is the Unit Manager’s final responsibility to complete and conduct the evaluations and to decide what areas need to be improved by each GNA or CMA. Such limited and sporadic involvement by LPNs in the evaluation of GNAs and CMAs is insufficient to vest upon them the status of supervisors. Illinois Veterans Home at Anna L.P., 323 NLRB at 891.

Indeed, the Employer presented only scant evidence of LPN involvement in the evaluation of GNAs and CNAs and no evidence regarding the extent to which such involvement may have impacted the final evaluations and pay increases of GNAs or CMAs. Thus, the Employer introduced at the hearing photocopies of three employee evaluations it alleged were prepared by LPNs. Two of these evaluations (Employer exhibits 9 and 10) were prepared prior to the Employer obtaining the facility, bear the heading of “Camden Yards Nursing and Rehabilitation Center,” and date as far back as 1995. Employer’s exhibit number 8, on the other hand, is a performance evaluation that was prepared in July of 1998 and bears the name of the Employer, “Mariner Health

Care,” on its heading. The Employer made no showing at the hearing that the methods of evaluation used by Camden Yards Nursing were similar to the ones used by the Employer. In fact, the method of evaluation of both employers are substantially different; Camden Yards Nursing evaluated their GNAs on 11 categories, rating the employees from 5 (the highest) to 1 (the lowest) while the Employer evaluates its GNAs on 5 categories, rating the employees from 1 (the highest) to 5 (the lowest). Employer exhibit 8, the only evaluation on record performed by the Employer in this case, consists of three pages: a cover page, and a two-page evaluation form. The cover page contains a line-space with the notation “Manager Completing Review” which bears the signature “Angela R. Rochester LPN/C. Peake, RN.” The actual evaluation, however, is signed only by Carol Peake, RN and by Rosemary Windsor, former DON. This is consistent with Administrator Hayden’s testimony that the Unit Managers have the ultimate responsibility of completing and conducting the evaluations and of deciding what areas needed to be improved by each GNA and CMA.

For the foregoing reasons, I find that the LPNs do not have the authority to evaluate or reward GNAs and CMAs within the meaning of Section 2(11) of the Act.

Discipline and Suspend

The Employer next argues that LPNs are supervisors under the Act because they have the authority to discipline and suspend GNAs and CMAs. The record shows that LPNs have the authority to “write up” GNAs or CMAs without prior approval from anyone. The write-up is then given to the Unit Manager who independently investigates the matter and assesses what disciplinary action is necessary. In doing so, the Unit Manager discusses the write-up with the LPN and the written-up employee. After investigating the matter, the Unit Manager may issue the write-up prepared by the LPN or may disregard the write-up altogether. If the Unit Manager issues the write-up, it is then reviewed by the DON or the ADON, and by the Administrator, all of whom have the authority to overturn the write-up if they do not agree with it. Based on the foregoing facts, I find that the “write-ups” prepared by the LPNs in this case are reportorial in nature and not an indicium of supervisory authority. As noted above, the record as a whole fails to show that the write-ups independently result in adverse action to the GNAs or CMAs without further investigation and review by higher authority. The Board has consistently held under similar circumstances that such write-ups are not discipline or effective recommendation of discipline within the meaning of Section 2(11) of the Act. See, e.g., Illinois Veterans Home at Anna L.P., 323 NLRB at 890; Washington Nursing Home, Inc., 321 NLRB at 366 n.4; Ten Broeck Commons, 320 NLRB at 812. As the Board noted in Ten Broeck Commons:

The 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. Usually, the director of nursing or some other managerial/supervisory person 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.

Ten Broeck Commons, 320 NLRB at 812 (citing Northcrest Nursing Home, 313 NLRB 491, 497 (1993)).

I note that I have carefully considered Employer's exhibits 2 through 7, all of which are write-ups allegedly prepared by LPNs. At least two of these write-ups pre-date the Employer's ownership of the facility. The three most recent write-ups, Employer's exhibits 5-7, were prepared by House Supervisor Guy-Colbert, who was stipulated by the parties to be a supervisor under the Act. Finally, I note that the last write-up, Employer's exhibit 7, was prepared by House Supervisor Guy-Colbert and issued to a LPN, not a GNA or CMA.

The Employer's argument that LPNs have the authority to suspend GNAs or CMAs is belied by the testimony of its own witness, House Supervisor Guy-Colbert. Thus, Guy-Colbert testified upon questioning by the Hearing Officer:

HEARING OFFICER []: . . . I'm going to ask you about the discipline write-offs in there, you have testified to a few where you had written, actually written – does it ever come back to you what happened with those –

. . . .

after writing up one of these disciplinary forms, what is told to you after the fact?

MS. GY-COLBERT [sic]: Well, if a person is suspended, it's told to me because I'm the House Supervisor that we cannot – this person cannot work, if it's on my floor, or if the person's in the building, and they're suspended, then it's told to me that this person cannot work until the assignment, they're suspended for two days, they cannot come back to work, that means if someone calls in, I'm not to call that person.

HEARING OFFICER []: Okay. And who would let you know this?

MS. GY-COLBERT [sic]: The Unit Manager or the DON, or the Staffing Supervisor, the staffing person.

HEARING OFFICER []: Would you be part of a meeting or a decision of the suspension?

MS. GY-COLBERT [sic]: No.

(Tr. at 122-23). LPN Bollin also testified that LPNs do not have the authority to suspend GNAs or CMAs. The record shows that LPNs have the limited authority to send GNAs and CMAs home if they engage in patient abuse or if they are under the influence of alcohol or a controlled substance. Even then, however, the GNA or the CMA in question cannot return to work before undergoing an interview and evaluation by the DON. The

Board has held that such exercise of authority by LPNs under the aforementioned limited circumstances is routine in nature and not an indicium of supervisory status. See Washington Nursing Home, Inc., 321 NLRB at 366 n.4.

For the foregoing reasons, I find that LPNs do not have the authority to discipline or to effectively recommend discipline within the meaning of Section 2(11) of the Act.

Adjustment of Grievances

The Employer finally argues that LPNs are supervisors under the Act because they have the authority to adjust grievances for GNAs and CMAs. The Employer produced scant evidence regarding this allegation. The record shows that LPNs often serve as mediators for GNAs and CMAs when they have problems among themselves or with the unit. Contrary to the Employer's assertions, however, the record shows that such intervention is informal in nature and not final or binding. House Supervisor Guy-Colbert and LPN Bollin testified that if a LPN is unable to resolve a dispute between aides to the satisfaction of all parties, the parties are simply referred to the Unit Manager who assesses the problem and takes whatever action is necessary to formally settle the grievance. Indeed, Guy-Colbert testified that employees can bring their grievances directly to the Unit Manager. If the Unit Manager's intervention is unsuccessful, then the ADON, the DON, and the Administrator intervene in successive formal steps. Notably, the Employer's "Problem Resolution" procedure detailed in its employee manual (Employer's exhibit 1) describes only a three-step grievance process. Even then, the person intervening at the first step has the authority only to "suggest" a resolution to the dispute. If the parties do not agree with the suggested solution, they may file a formal "Problem Resolution Form" which triggers a meeting with a "supervisor/department head." The record thus shows that the LPNs' role in resolving grievances among the aides is informal in nature and not final or binding. The Board has held that such limited and non-binding role in resolving disputes between employees is not indicium of supervisory authority. See Illinois Veterans home at Anna L.P., 323 NLRB at 891. Accordingly, I find that LPNs do not have the authority to adjust employee grievances within the meaning of Section 2(11) of the Act.

Additional Indicia

Having found that LPNs do not possess the supervisory authority imputed to them by the Employer, I note that an analysis of the supervisor-to-employee ratio at the Employer's facility supports my conclusion that LPNs are not supervisors under the Act. Thus, for example, during the day shift the Employer has in its facility the Administrator, the DON, the ADON, 4 Unit Managers, 6 LPNs, and 14 GNAs. If the LPNs were found to be supervisors, the Employer would have 13 supervisors for 14 employees; a supervisor-to-employee ratio of 1:1.08. Similarly, during the evening and night shifts the Employer has in its facility the House Supervisor, a RN, 5 LPNs, and 9 GNAs. If the LPNs were found to be supervisors, the Employer would have 7 supervisors for 9 employees; a supervisor-to-employee ratio of 1:1.29. As the Seventh Circuit noted in reviewing a less top-heavy set up: "Such a highly improbable ratio of bosses to drones 'raises a warning flag.'" NLRB v. Grancare, Inc., 1999 WL 107918 (March 3, 1999) (en banc).

For the foregoing reasons, I find that LPNs are not supervisors within the meaning of Section 2(11) of the Act.

177-8520-0100; 177-8520-0800; 177-8520-1600; 177-8520-2400; 177-8520-3900;
177-8520-4700; 177-8520-7800; 177-8560-1000; 177-8560-2800; 177-8580-8050;
177-9762.