

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

MANOR CARE, INC. d/b/a MANOR CARE
HEALTH SERVICES OF GREENTREE¹

Employer

and

Case 6-RC-11751

UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, LOCAL UNION 23,
AFL-CIO, CLC

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Kim Siegert, a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.²

Upon the entire record³ in this case, the Regional Director finds:

¹ The name of the Employer appears as amended at hearing.

² 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, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by January 6, 2000.

³ The Employer and the Petitioner filed timely briefs in this matter which have been duly considered by the undersigned. On December 21, 1999, the Employer filed a Motion to Strike the Petitioner's Post-Hearing Brief inasmuch as the Petitioner failed to send a copy of the brief to the Employer. The Petitioner's attorney sent to the Regional office a copy of a letter to the Employer's counsel dated December 21, 1999, in which she states that the brief was being transmitted and stating that the brief was inadvertently omitted from a mailing sent to counsel earlier. Inasmuch as there is no provision for responsive briefs in these proceedings and the failure to serve the brief appears to have been inadvertent, and has now been corrected, the Motion to Strike is denied.

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.

3. The labor organization involved claims to represent certain employees of the Employer.

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

The Petitioner seeks to represent a unit of all full-time and regular part-time licensed practical nurses employed by the Employer at its Pittsburgh, Pennsylvania, facility; excluding all office clerical employees and guards, professional employees and supervisors as defined in the Act. The Employer, contrary to the Petitioner, contends that the licensed practical nurses (LPNs) do not constitute an appropriate unit because they are statutory supervisors. There are approximately 21 LPNs in the petitioned-for unit. There is no history of collective bargaining for any of the employees involved herein.

The Employer is engaged in the operation of a nursing facility⁴ providing long-term intermediate and skilled nursing care. The facility consists of three floors. Located on the first floor are the administrative offices, therapy rooms and the Arcadia Unit which houses residents suffering from Alzheimer's Disease and dementia.⁵ The second floor is designated as the intermediate care area, while the third floor is designated as the skilled care area. There are

⁴ The Employer's facility is part of a nation-wide chain of about 400 nursing homes. Approximately one year ago, Manor Care, Inc. merged with HCR, Inc. (hereinafter referred to as HCR). The Employer involved herein was part of Manor Care, Inc. before the merger.

⁵ The Arcadia Unit, which opened in October 1999, has the capacity to house 24 to 30 residents. At the time of the hearing, the unit was occupied by about ten residents.

120 beds on the second and third floors. The facility also has an assisted living center for residents who can live somewhat independently.⁶

The facility is under the overall direction of Administrator Lisa Malosh. Reporting to Malosh is Director of Human Resources Robyn Fischer and Director of Nursing (DON) Sandra Jacobs. Reporting to Jacobs is the Assistant Director of Nursing (ADON). The DON and ADON are RNs.

In addition to the DON and the ADON, the Employer employs approximately 16 other RNs. Six of these individuals act as Critical Care Managers (CCMs).⁷ The remaining ten RNs are employed in the job classification of nurse supervisors and are on duty during each shift. Since July 1, 1999, the Employer has classified both RNs and LPNs as nurse supervisors⁸, with a position code of NSL for the LPNs and NSR for the registered nurses. At a meeting on September 21, 1999, the DON communicated this change in title and provided a new job description to LPNs and RNs.⁹ There are about 21 LPNs and approximately 44 Nursing Assistants (NAs) working in the nursing department.

The facility operates on a 24-hour per day, seven day per week basis. The nursing department works three shifts: 7 a.m. to 3 p.m.; 3 p.m. to 11 p.m.; and 11 p.m. to 7 a.m. The DON and ADON work weekdays.¹⁰ Likewise, the Arcadia Unit Manager¹¹ works on weekdays but is on call by pager 24-hours per day. At all times there is at least one CCM in the facility.

⁶ The Assisted Living Center is staffed by Personal Care Manager Darlene Armel, who is an LPN, and a nursing assistant. The parties stipulated, and I find, that the Personal Care Manager in the Assisted Living area is a supervisor within the meaning of the Act inasmuch as she possesses one or more of the authorities enumerated in Section 2(11) of the Act.

⁷ The record establishes that there is a CCM at the facility at all times. The parties stipulated, and I find, that CCMs are supervisors within the meaning of Section 2(11) of the Act inasmuch as they responsibly direct and have the authority to discipline employees based on independent discretion.

⁸ The Employer previously classified LPNs as either charge nurse or staff nurse.

⁹ The Petitioner is not seeking to represent RNs nor does the Employer contend that RNs should be included in any unit found appropriate. For the sake of clarity, I will refer to LPN nurse supervisors simply as LPNs and RN nurse supervisors simply as RNs.

¹⁰ Although the scheduled hours are from 8 a.m. to 4 p.m., the DON works from about 6 a.m. to 6 p.m. on Mondays through Fridays and, occasionally, is at the facility on weekends. The ADON works hours

The staffing of the nursing department is as follows: on day shift, on the skilled unit, there is a CCM, an RN or LPN and NAs; on the intermediate unit there is a CCM, LPNs and NAs; the Arcadia Unit¹² is staffed by an LPN and one NA. On the second shift there is a CCM, also referred to as the House RN manager, on duty.¹³ Working on the skilled unit are LPNs or RNs and NAs, and on the intermediate unit there is one or more LPNs and NAs. The Arcadia Unit is staffed on this shift with an LPN and one NA. The third shift is staffed in the same manner as the second shift, except that in the intermediate unit only one RN or LPN is on duty.¹⁴ As with the second shift, there is an RN House Manager on duty. On weekends, an RN House Manager is on duty on the day shift.¹⁵

There is no evidence or contention by the Employer that the LPNs have authority to hire,¹⁶ lay off or recall employees, promote, reward or effectively recommend such action or to independently discharge employees. In its brief, the Employer argues that the LPNs are statutory supervisors by virtue of their responsibilities to assign and direct the work of NAs, annually evaluate NAs performance, discipline NAs and adjust NAs grievances.

similar to those worked by the DON on Mondays through Fridays and often is present at the facility on weekends

¹¹ The Arcadia Unit Manager is a social worker

¹² The Employer characterizes the Arcadia Unit to be a “self-staffing” unit, meaning that this unit has a separate staff and does not pull from the facility when needing to supplement its staff due to a call-off. In the Arcadia Unit, after consulting with the CCM on duty, the LPN calls employees on the earlier and/or later shift to fill in for those who are off on a particular day. The record indicates that the LPN can determine which employee to call once the decision is made to supplement the staff.

¹³ Generally, the House RN manager is stationed on the skilled unit but she makes rounds throughout the facility.

¹⁴ The record does not reveal the specific numbers of nursing department staff assigned on each unit inasmuch as these numbers vary according to patient census.

¹⁵ The Employer is required to have an RN present at the facility at all times.

¹⁶ LPNs do not participate in the interview or hiring of NAs, or in the assignment of their training. Newly hired NAs go through the Employer’s orientation program which is conducted by the Human Resources Manager. The Staffing Coordinator then assigns the new employees to “shadow” a more experienced employee.

In support of its supervisory contention, the Employer argues that the LPNs have possessed supervisory authority under the policies in effect both before and after the merger noted earlier, and particularly since the implementation of certain of those policies which were utilized by HCR before the merger. Although the merger occurred about one year ago, the facility has been in a state of flux due to changes in the administration of the facility¹⁷, changes in policies and because of problems identified by the Commonwealth of Pennsylvania Department of Health during various surveys.¹⁸

The undisputed record evidence establishes that the majority of the work time of the LPNs involve direct patient care duties in accordance with each resident's individual detailed care plan.¹⁹ Upon arriving at work, LPNs count narcotics with a nurse from the earlier shift. Then, the LPNs receive report regarding activities on the earlier shift. Upon receiving report, the LPNs perform regular daily duties such as passing medications²⁰, checking IVs and vital signs if necessary. If no treatment nurse is on duty on the unit, LPNs perform treatments such as wound care and skin care. The balance of the shift is spent answering call lights, making sure residents receive their meal tray and assisting in the feeding, toileting and bathing of residents and the updating of resident charts. LPNs make sure that fluid intake and output data is

¹⁷ The record indicates that within the past 12 months there have been four DONs. DON Jacobs had been employed for 10 weeks as of the date of the hearing. The Administrator had been employed by that time for about 3-1/2 months, and the Human Resource Manager for 1-1/2 months.

¹⁸ The DON testified that in April 1998 the facility was put on a 180-day "fast track" survey due to numerous deficiencies uncovered during the annual survey. If the deficiencies were not corrected within the 180 day period, the facility faced closure, or loss of certain Medicare/Medicaid funding. The survey was extended because deficiencies were not corrected within the 180 days. In the 10 weeks before the hearing, the facility had undergone three survey visits and had, as of the hearing, finally corrected all deficiencies.

¹⁹ Each resident has a care plan detailing any treatment to be provided. There is conflicting testimony in the record as to whether LPNs can independently depart from a resident's care plan. The LPNs who testified at the hearing stated they were previously unaware that they have this authority and, that, to date, they have not departed from a care plan without approval from higher management. According to the Employer, care plans should be prepared by all nursing staff, including LPNs. The Employer acknowledged that some LPNs have not performed this function, and is presently considering whether discipline should issue to those who do not.

²⁰ The record indicates that the passing of medications can take the majority of the LPNs' work time.

collected for each resident. The record indicates that LPNs and NAs work together and provide feedback to each other in performing their duties.

RNs can perform some duties by virtue of their license which cannot be performed by LPNs or NAs. For instance, only RNs can receive telephone orders from a physician and record such orders on a resident's chart. Thus in cases where an LPN calls a physician due to a change in a resident's condition, an RN must be available. It also appears that only RNs perform admission assessments on new residents.

The DON is ultimately responsible for ensuring compliance with Medicare/Medicaid guidelines. However, the Employer wants all licensed personnel to be involved in this endeavor. Although the DON testimony that LPNs have the authority to independently depart from the guidelines, no specific examples of the exercise of this authority could be given.

NAs are responsible for waking, toileting, bathing and dressing residents. NAs also transport residents to the dining area and are primarily responsible for feeding residents.

The record reveals that LPNs will monitor or direct the NAs' work to the extent that LPNs may request help in changing a patient or performing nail care. The LPN in these instances may also show the NA the correct way to perform these procedures if it appears that the task is being performed incorrectly. Other examples of such direction include reminding an NA to put shoes on a resident, or to wake a particular resident early.

The Employer utilizes daily "sign in and daily assignments" sheet for each unit on each shift, listing in detail the work to be performed by NAs. The sheets are partially completed by Staffing Coordinator²¹ to the extent that the "permanent" room/work assignments and break times and lunch times for each NA is predetermined.²² The Employer has different versions of

²¹ The Staffing Coordinator developed these sheets with input from each unit's CCM. LPNs had no role in developing the form.

²² For example, the predetermined work assignments for a specific NA working on the second floor from 7 a.m. to 3 p.m., when the census requires the staffing of 4 CNAs, would be that for rooms 221 to 232 he or she must "pass trays", "transport to lounge", "stay in lounge to feed", "clean soiled utility room", and "fire blankets to site". The NA performing this assignment has breaks, which are prescheduled, at 9:30 a.m. and 1:45 p.m. and a lunch period at 11:45 a.m. All assignment sheets contain a notation to NAs to "pass ice water."

the form to deal with census changes dividing rooms on the unit into thirds, fourth and fifths. Thus, if the unit's census is 30, 40 or 50 residents, the Employer schedules 3 NAs, 4 NAs or 5 NAs, respectively.

The name of the NA assigned to a particular assignment is completed by the CCM on duty but, according to the Employer, could be completed by an LPN or RN during the weekend or on an off shift. There is no evidence in the record that an LPN has done this.

With respect to call-offs, on the dayshift the CCM and the Staffing Coordinator would reassign the rooms left unassigned by the call-off. On the 3 to 11 p.m. shift on the second floor a team leader NA fills in the name in consultation with the LPN. The Employer cites one example of an LPN reassigning rooms on the second floor to deal with a late arrival of an NA. However, the record indicates that in case of call-offs on the Arcadia Unit, the LPN on the off shift must page the unit manager to report a call-off. In addition, on the third floor, LPNs do not handle call-offs.

If additional staff is required to deal with a call-off, the CCM on duty generally handles the finding of a replacement either by calling in additional staff or authorizing overtime to be worked by the NA who is working on the shift either before or after the shift which is short-staffed. Any overtime to be worked is usually given to those who volunteer. Although the Employer asserts that LPNs can authorize overtime, there is no evidence in the record that this has been done. Rather, the record reveals that during the week before the hearing in this matter the LPN in the Arcadia Unit answered a telephone call during which the relief LPN communicated her resignation. When the LPN relayed this information to the Unit Manager²³, she was informed that such calls were to be transferred to the CCM on duty.

With respect to the LPNs' evaluation of NAs, the record reveals that pursuant to a corporate directive effective July 1, 1999, the Employer replaced its performance appraisal

²³ The record indicates that LPNs on the off shift call the Unit Manager to inform her of call offs, the prescribing of new psychotropic medications and new restraint orders.

process with the process which had previously been utilized by HCR.²⁴ The new evaluation process includes replacing the job descriptions and the evaluation forms formerly used by Manor Care.²⁵ At a meeting on September 21, 1999, new job descriptions²⁶ were provided to the nursing staff who were present on that day. However, those LPNs who were not on duty at the time of the meeting had not received new job descriptions as of the date of the hearing. The job description form lists duties and responsibilities and is the same form which is utilized for appraisal purposes.

The new evaluation form to be used by LPNs in evaluating NAs requires a rating from 1 (unsatisfactory) to 5 (outstanding) in numerous²⁷ areas under general categories of General Responsibilities, Residents' Rights, Safety and Sanitation, Staff Development, Personal Nursing Care Responsibilities, Special Documentation, Admission, Transfer and Discharge Responsibilities and Care Plan Responsibilities. As noted on the evaluation form, to determine the performance rating, the point total for all sections is to be divided by the total number of items scored in all sections. The resulting score is then rounded to the nearest tenth and is used to determine the employee's performance rating. The performance ratings are as follows: Outstanding (5.0 and above); Exceeds Requirements (4.0 – 4.9); Meets All Requirements (3.0 – 3.9); Meets Some Requirements (2.0 – 2.9) and Unsatisfactory (1.0 to 1.9).

²⁴ The Employer's performance evaluation system has been and will continue to be one under which employees are evaluated annually on their anniversary date. However, the record indicates that due to survey problems previously described, evaluations at this facility have not been performed on a timely basis.

²⁵ As stated previously, LPNs at the facility had been classified as Staff Nurse or Charge Nurse. According to their new job descriptions their title, as well as the title of RNs, is nursing supervisor. The job description of nursing supervisor gives LPNs the authority, inter alia, to "supervise CNAs", "participate in hiring, directing and assigning of nursing staff," "counsel/discipline personnel as necessary" and "receive, investigate and respond to employee grievances."

²⁶ The new job description contains a job summary and the listing of more than 150 essential job functions on which the "Nursing Supervisor" will be rated on when evaluated. This same form is utilized by the CCM in evaluating RNs/LPNs.

²⁷ There are approximately 85 duties and responsibilities of NAs which are to be rated.

The record indicates that once the form is completed it is to be returned to the DON. The Administrator compares the performance rating to the Employer's wage increase grid²⁸ to ascertain the wage increase, which is always to "be a whole number," according to the Employer's Performance Appraisal process. The DON then schedules a performance review meeting at which the employee, the evaluator and herself are present.

The record contains one example of an evaluation form completed by an LPN, Mary King, on October 15, 1999.²⁹ In that instance, DON Sandra Jacobs gave the Employer's evaluation form to King for evaluation of NA Jackie Hagan with the request that King complete the form inasmuch as she works closely with Hagan. King communicated her discomfort with this request inasmuch as she had never before completed an evaluation form, whereupon she was told the Employer planned to show a video on performing evaluations.³⁰ King discussed the form with two RNs, completed the numerical scoring, and returned to the form to the DON. The record indicates that the LPN did not know the correlation between the number assigned to each task and the raise which would be granted. The DON, King and Hagan met to discuss the evaluation. During the meeting, the DON explained the evaluation process, discussed the form and telephoned the Administrator to ascertain the amount of the wage increase.³¹

As a result of the evaluation, NA Hagan's wage rate was increased from \$8.10 to \$8.38 per hour. This 28 cent per hour increase constitutes a 3.25 percent wage increase. This is so despite the fact that increases provided for on the Employer's grid are whole percentages

²⁸ The record indicates that the grid is confidential.

²⁹ The record establishes that the Petitioner began its organizing drive among LPNs in September 1999, and that the Employer distributed a letter to the LPNs regarding the Union's drive on October 2, 1999.

³⁰ The record indicates that as of the hearing in this matter the video had not been shown. The record also indicates that the Employer had plans to conduct supervisory training for LPNs in December 1999.

³¹ The Employer's Eastern Division Human Resources Director Theresa Chiodi testified that generally the data from the performance appraisal determines an employee's percentage wage increase, but she could not affirmatively state that there are no exceptions to this general practice.

between 0 percent and 5 percent.³² At the hearing, Administrator Malosh offered the explanation that while she told the DON that the wage increase to be awarded to Hagan, based on her performance rating was three percent, she mistakenly hit .0325 on the calculator and told the DON that Hagan's wage rate was to be increased to \$8.38 per hour.³³

The record also contains six performance evaluations of NAs from the period before July 1, 1999. Inasmuch as neither the Human Resources Manager, the Administrator or the current DON were employed at the facility when these were completed, no testimony was offered regarding the particular circumstances surrounding the evaluations. While the evaluations were apparently completed by an LPN staff nurse, all performance appraisal forms indicate that they were approved by the DON or the Administrator. In addition, three of the appraisals contain signatures indicating "Human Resources Review." Three evaluations show that the DON/Administrator approved the evaluation before it was reviewed with the employee. One evaluation is undated by all involved and indicates that the initial ratings were changed to lower the overall rating. It appears that two evaluations were approved after they were reviewed with the employee. However, one of those was co-signed by an RN and the ratings on it were also changed to lower the overall rating. In any event, it appears that no raise was received until the evaluation was approved and the percentage increase assigned by higher authority.

The record also contains six³⁴ evaluations of LPNs working in the staff nurse position and two for an LPN working in the charge nurse position.³⁵ The two evaluations for the LPN charge nurse were completed at a facility other than the facility involved in this proceeding. Three of the staff nurse performance appraisals were completed by nurses who act in the CCM

³² Only the Administrator has the authority to approve increases at the maximum amount.

³³ There is no evidence that the Employer sought to conform the Hagan's wage increase to the grid.

³⁴ Exhibits 23 and 24 are the same document.

³⁵ As noted earlier, before the title changed to nurse supervisor, the Employer classified LPNs as "staff nurses" or "charge nurses."

capacity on a regular basis. A fourth appraisal lists both an RN and a CCM as “appraisers” but it was signed only by the RN on line for appraisers signature. As with the performance appraisals of the NAs, all indicate that they were approved by the DON/Administrator. Three clearly indicate DON/Administrator approval before the appraisal meeting was held with the employee involved. The employee involved did not sign and date the document. One of these two evaluations contains a change in a rating but does not indicate who made the change. The one evaluation which indicates approval after the review with the employee indicates that it was a 90-day evaluation and was completed by a CCM.

On the whole, a review of the performance evaluations establishes that DON/Administrator approval was required and that changes to a reviewer’s scoring was not an uncommon occurrence.

The record indicates that access to employee personnel files is limited to the Administrator and the Human Resources Manager. In addition, wages are set at the corporate level. The wage scale of the nursing staff is evaluated quarterly by the Employer’s Divisional Human Resource Director based on market conditions.

The Employer’s disciplinary procedure is set forth in its Employee Handbook, which is provided to new employees upon their orientation.³⁶ Offenses are categorized as minor, major and critical and the appropriate discipline for the various categories is listed. Examples of minor offenses are also set forth. An accumulation of four minor offenses within a 12-month period can result in discharge. The progression for such minor offenses are oral reprimand, followed by a written warning, final warning and discharge. Twenty-three major offenses are listed. Major offenses warrant a written warning for the first offense followed by discharge for the second major offense. If an employee committed a major offense and his or her second violation was a minor offense, he/she would be issued a final warning. Critical offenses, of

³⁶ The employee handbook which is utilized and in effect at the facility is the handbook utilized by Manor Care before the merger. This handbook was most recently revised in August 1996.

which 23 are set forth in the employee handbook, are those for which the employee is to be immediately discharged.

The Employer contends that LPNs have the authority to initiate and complete oral and written disciplinary warnings.³⁷ If additional time is required for an investigation of misconduct such as patient abuse, drunkenness or fighting, the LPN can, according to the Employer, suspend an employee pending investigation. Termination can occur only after consultation between the Human Resource Director and the Administrator, after the Administrator evaluates the employee's offense and his or her disciplinary record.

The record establishes the current DON has discussed authority to issue discipline with some of the LPNs in the two months before the hearing, or in some cases within days of the hearing. Of the three LPNs who were called as witnesses at the hearing, two testified that they had never been informed of their authority to discipline, and have never completed any disciplinary forms. It appears that newly hired NAs are being informed of the LPNs' authority to discipline them. The NAs already on staff have not been so informed.

The record reveals that during the current DON's tenure no discipline has been issued by any LPN. One recent incident, the details of which were not disclosed, involved an NA being told not to report to work pending investigation of a report of misconduct. In that case, the ADON called the NA involved and advised her not to report.

With respect to disciplinary actions at this facility before the current administration, the record indicates that between 1996 and the hearing in this matter there were less than 10 disciplinary actions signed by LPNs. The record contains one example of an oral reprimand to a NA on an Employee Disciplinary Form signed by two LPNs in August 1996. Apparently, the NA involved refused to sign the reprimand. This fact was noted on the form and signed by an RN

³⁷ According to the Employee Handbook, "coaching", even those instances which include a written tool, as to performance which adversely affects co-workers or residents is not considered a reprimand, but "merely a record of issues and action steps intended to motivate and encourage" an employee to be more productive.

and one of the LPNs who issued the warning. The document also contains a notation that it was reviewed one week later by the then DON.

The record also discloses an example of an action taken by the LPN when a resident reported abuse by a CNA. The LPN involved worked in the skilled care unit on the day shift. Upon hearing of the incident, the LPN spoke with the patient then discussed the matter with her supervisor.³⁸ The supervisor then spoke with the patient and prepared an incident report.

There was also testimony regarding an LPN's issuance of a verbal warning to a NA for failing to pass water pitchers. In this incident, the then DON informed the LPN that she would be disciplined if she failed to warn the NA. The LPN then had an RN accompany her to give the oral warning.

The Employer also contends that LPNs are authorized to complete incident reports. However, the record contains only one example of an LPN doing so to document that a combative resident twisted the arm of an NA. When the LPN brought this document to the RN for her signature, she was told that only RNs could complete incident reports.

As to the LPNs' authority to resolve employee disputes or to handle complaints from residents' families, the record indicates that, by and large, LPNs have not been informed they have the authority to resolve such disputes and furthermore they have not done so to date.

As described in the employee handbook, the Employer has procedures to resolve employee problems. First, the Employer has an Open Door Policy pursuant to which an employee may approach their supervisor or Human Resources representative. In addition, the Employer established a confidential Employee Answerline³⁹ pursuant to which employees can get information about company policies, discuss a problem, issue or concern or compliment a co-worker. In calling the Employee Answerline, an employee can speak with a Manor Care Health Services Human Resources representative.

³⁸ The record is unclear as to whether the reference to the LPNs' "supervisor" was a reference to the CCM on duty on that shift and or was a reference to one of the other RNs working on the floor.

³⁹ This is a 1-800 "hot line" number.

Finally, the Employer has a dispute resolution procedure pursuant to which an employee is to describe his/her problem to the immediate supervisor or the department manager and the supervisor is to review the problem and respond within three working days. The next step of the procedure involves the facility's Administrator/Director who is to review the problem and respond within five working days. Step three involves submitting a written summary on the Employer's form to the Director of Operations who will review the problem and respond within ten working days. Step four requires the employee to submit a written summary to the District/Division Vice President who is to review the dispute and respond within ten working days. Finally, at step five, an employee can submit a written summary to the President of Manor Care Health Services. The President or his designee will review the issue and respond within 30 working days.

It is clear that the LPN plays no role in the Employee Answerline. Additionally, while Divisional Human Resources Director Theresa Chiodi testified that the term immediate supervisor in the dispute resolution process would apply to LPNs, she admitted that in utilizing the dispute resolution procedure NAs could go to their LPN or could chose the department manager.

The record indicates that LPNs call their supervisor to handle problems which arise between NAs. During the ten weeks of the current DON's employment she has been instructing newly hired NAs during their orientation as to the disciplinary procedure and the dispute resolution procedure and has told these employees of the LPN's role in such matters. The rest of the nursing staff has not been so instructed.

There exists in the record one example of an LPN dealing with a resident complaint. Apparently the resident involved did not want a Black NA attending to her. According to the DON, an LPN on the floor apparently changed that assignment, but she was unable to specify the exact identity of the LPN who reassigned the NA involved.

All nursing staff, whether RN, LPN or NA, share the same benefits, including health care coverage and pension benefits. The NAs' starting wage rate is \$8.10 per our whereas LPNs

and RNs wages start at approximately \$12 per our and \$14.50 per hour, respectively.⁴⁰

Likewise, all nursing staff punch the time clock and utilize the same rest room. The Employer does not require its nursing staff to wear uniforms. Name tags worn by nursing staff indicate the employee's name and position. The record indicates that in some cases, the employee's licensure, whether RN or LPN, is set forth on the employee's name tag and, in other cases, their job title follows their name on the name tag.

The LPNs do not attend the manager meetings which are attended by the DON, ADON and CCMs. However, the Employer plans to have LPNs and RNs attend "licensed" meetings. The record contains evidence of only one such meeting being conducted in the 2-3 month period before the hearing.⁴¹ The main topic of that meeting was the course of action to be taken to deal with issues relating to the survey.

To meet the statutory definition of a supervisor, a person needs to possess only one of the specific criteria listed in Section 2(11), or the authority to effectively recommend such action, so long as the performance of that function is not routine but requires the use of independent judgment. Nymed, Inc., d/b/a Ten Broeck Commons, 320 NLRB 806, 809 (1996).

The United States Supreme Court in NLRB v. Health Care & Retirement Corp., 511 U.S. 571, 114 S. Ct. 1778 (1994), in rejecting the existing patient care analysis test then utilized by the Board for the supervisory status of nurses, did not interpret the meaning of "independent judgment". Instead, the Court agreed with the Board that such a phrase, together with the 2(11) term "responsibly to direct", are "ambiguous, so the Board needs to be given ample room to apply them to different categories of employees". 511 U.S. at 577-78, 114 S.Ct. at 1782. The Court also noted that "in applying Section 2(11) in other industries the Board on occasion reaches a result reflecting a distinction between authority arising from professional knowledge and authority encompassing front-line management prerogatives." Id. at 583, 1145 Ct. at 1785.

⁴⁰ The CCMs' starting wage rate is between \$16 and \$17 per hour.

⁴¹ The record indicates that this meeting was not attended by all of the LPNs or RNs.

The phrase "encompassing front-line management prerogatives" is repeatedly utilized by the Court throughout its Health Care decision and accordingly, in my opinion, evidences the Court's confirmation of the proposition long espoused by the Board, that only individuals with genuine management prerogatives should be considered supervisors, as opposed to "straw bosses, leadmen . . . and other minor supervisory employees" since otherwise, an overly broad construction of the language contained in Section 2(11) would deny the individuals found to be supervisors the employee rights that are protected under the Act. E.g. Azuza Ranch Markets, 321 NLRB 811, 812 (1996) and cases cited therein; Chicago Metallic Corp., 273 NLRB 1677, 1688 (1985), enfd. in relevant part 794 F.2d 527 (9th Cir. 1986). Thus, as the Court appears to recognize, an individual who exercises some supervisory authority in only a routine, clerical or perfunctory manner should not be found to be a supervisor since the exercise of such authority occurs without the exercise of any significant discretion. See Bowne of Houston, Inc., 280 NLRB 1222, 1223 (1986); Quadrex Environmental Co., 308 NLRB 101, 102 (1992).

The Court in Health Care further affirmed the long-standing proposition that the burden of proving that an individual is a supervisor is on the party urging such status. See Elmhurst Extended Care Facilities, Inc., 329 NLRB No. 55 (1999); Bozeman Deaconess Hospital, 322 NLRB 1107 (1997); Azuza Ranch Markets, supra; St. Alphonsus Hospital, 261 NLRB 620, 624 (1982) enfd 703 F.2d 577 (9th Cir. 1983). In the instant case, the Employer must demonstrate that the LPNs exhibit at least one of the twelve statutory indicia of supervisory status and that this attribute is exercised using independent judgment i.e. the Employer must establish that the LPNs have the discretion to make decisions in the interest of the Employer which truly impact upon, in a nonroutine way, the NAs' terms and conditions of employment.

It is axiomatic, of course, that the possession of supervisory authority or lack thereof determines whether an individual is an employee or a supervisor, but the real task which confronts the Board, particularly in cases involving nurses in the health care industry, is the difficult one of finding whether the supervisory power in fact exists, and this can only be

ascertained as a result of a painstaking analysis of the facts in each case. This analysis is to be performed in the context of two governing principles discussed previously. First, the burden of establishing supervisory status rests on the party asserting that status. Second, the individuals asserted to be supervisors must be endowed with genuine management prerogatives, since an overly broad construction of the language contained in Section 2(11) would deny the individuals found to be supervisors the employee rights that are protected under the Act.

In cases involving the alleged supervisory status of LPNs at nursing and personal care homes, this analysis is also made in the context that the "supervision" undertaken by the LPNs involves the oversight and guidance provided for a small number (unusually less than five or six and often three or less) of lower skilled, less educated non-unit employees performing routine health care tasks. Further, the "supervision" of these lower skilled, non-unit employees takes place often, as here, notwithstanding the on duty availability, particularly during the normal workday, of a number of individuals who clearly do enjoy Section 2(11) status (DON, ADONs, and other RN managers and supervisors). Finally, this analysis must be made under the circumstances in which the health care employer asserting the existence of the supervisory authority is seeking not to exclude from the Act's coverage one or two individuals, but an entire employee classification involving a larger number of workers. Thus, in these circumstances, although the existence of supervisory authority possessed by nursing home LPNs often exists, the health care employer must clearly demonstrate in each case by the preponderance of the evidence, that the LPNs whose status is in dispute are endowed with Section 2(11) authority, and the health care employer bears the burden of providing nonambiguous, fact specific testimony and documentary evidence which will support its assertion.⁴²

⁴² In its brief, the Employer asserts that because the Employer's facility is located in Pittsburgh, Pennsylvania, the precedent of the U.S. Circuit Court of Appeals for the Third Circuit applies. The Employer thereafter cites *Passavant Retirement and Health Center v. National Labor Relations Board*, 149 F. 3rd 243 (3d. Cir. 1998) in support of its contention that the LPNs herein are supervisors within the meaning of the Act. However, it is the duty of the Board to establish a uniform labor policy, as distinct from a patchwork of geographically distinct rules. *Manor West, Inc.*, 311 NLRB 655, 667 (1993). It is to

As noted, the Employer contends that LPNs are supervisors within the meaning of the Act. Specifically, the Employer contends in its brief that LPNs have authority to discipline and evaluate NAs. There is also the contention that LPNs assign and direct NAs and adjust their grievances and that LPNs can transfer NAs among units as staffing needs require. It is undisputed that LPNs do not hire, layoff, recall, promote, reward or discharge employees.

As stated, the Employer contends that the role of the LPNs in the Employer's evaluation process is an indicia of their supervisory status. The Board has recognized that in filling out evaluations of lower skilled personnel, nurses use some professional or technical judgment based on their greater skills and expertise, but the question to be answered is whether the judgment is supervisory independent judgment. The Board has reaffirmed that the burden is on the employer to establish that the role played by the nurses in preparing evaluations involves the use of supervisory independent judgment and any lack of evidence in the record is construed against the party asserting supervisory status. Elmhurst Extended Care Facilities, Inc., 329 NLRB No. 55 (Sept. 30, 1999).

In its brief, the Employer relies on First Healthcare Corporation d/b/a Hill Haven Kona Health Care Center, 323 NLRB 1171 (1997) in arguing that the LPNs' role in evaluating NAs establishes their supervisory status. The Employer argues that the LPNs at issue here, like the LPNs and RNs in First Healthcare, are responsible for evaluating the performance of NAs by

be noted that the Board's position on the supervisory status of nurses has been upheld by the Seventh, Eighth, Ninth and District of Columbia Circuits. Lynwood Health Care Center v. NLRB, 148 F.3d 1042 (8th Cir. 1998) enfd. 323 NLRB No. 200 (1997); Moundview Health Care Center v. NLRB, 129 F.3d 1269 (D.C. Cir. 1997) enfd. 322 NLRB No. 54 (1996); Providence Alaska Medical Center v. NLRB, 121 F.3d 548 (9th Cir. 1997) enfd. 321 NLRB No. 100 (1996); NLRB v. Audabon Health Care Center, 170 F. 3d 662 (7th Cir. 1999). In VenCor Hospital-Los Angeles, 328 NLRB No. 167 at sl. op. p. 3, fn. 9 (Aug. 5, 1999), the Board specifically held that it was respectfully declining to follow certain circuit decisions, including Passavant, which were contrary to the principles set forth in Providence Hospital, 320 NLRB 717 (1996). Therefore, the Board's precedents are controlling herein, notwithstanding seemingly conflicting rulings by certain circuit courts of appeals. It is long established that the Board precedent which has not been reversed by the Board or the U.S. Supreme Court is to be followed, even in light of contrary authority in the U.S. Court of Appeals.

independently rating their competency, and that the raises accorded to the employees are based on those scores.

In deciding First Healthcare, the Board relied on Bayou Manor Healthcare Center, 311 NLRB 955 (1993) to determine that the LPNs and RNs whose status was in dispute were supervisors because of their role in preparing evaluations of CNAs had directly affected the CNAs employment status. In Bayou Manor the Board found that the evaluations completed by the employer's LPNs directly affected the CNAs wages, and that there was a direct correlation between the evaluations completed by the LPNs and the specific merit increases or occasional department bonuses awarded to the employees. The LPNs in Bayou Manor assigned numerical readings to several categories relating to work performance and personal characteristics and an overall score was computed for each CNA. There was no review of the numerical scores by any higher ranking individual. Thereafter a maximum departmental increase was determined and specific percentage increases corresponding to the various average scores were awarded to the CNAs. Significantly, the Board found that in each of the three years preceding the hearing, that same procedure was followed and the employer consistently allocated merit increases based solely upon the charge nurses' numerical assessment of the aides' skill and performance.

In the instant case, only one evaluation has been prepared since the Employer distributed the revised job descriptions and implemented its current evaluation system. Although the Employer contends that these evaluations will be the sole determining factor in the raises granted to NAs, the raise granted based on the one evaluation issued as of the hearing, albeit by mistake or otherwise, did not conform to the Employer's grid. Thus, it is impossible to determine at this time whether the Employer is going to consistently follow its evaluation procedure or whether raises will be consistently allocated based solely upon the LPNs numerical assessment.

With respect to the LPNs' past authority to issue evaluations before the implementation of the current appraisal system, the record establishes that in the vast majority of cases the evaluation was subject to review and approval by higher authority before the evaluation was reviewed with the employee involved. Further, the record indicates that in several cases the evaluator's initial score was changed and the appraised employee's raise was affected. In light of these factors and noting that no evidence was proffered by the Employer regarding the circumstances surrounding the completion of the evaluations issued pursuant to the previous evaluation process was offered at the hearing, I find that the LPN's role in the evaluation process is insufficient to confer supervisory status.

The Employer further contends, contrary to the Petitioner, that the LPNs are supervisors in that they have authority to discipline NAs. In support of this contention, the Employer offered general testimony that LPNs have authority to issue oral and written disciplinary warnings, and to suspend NAs pending investigation of serious infractions. The record herein contains little evidence to establish the exercise of this asserted authority. The current Human Resources Manager testified that she reviewed the personnel files at the facility and that in the three to four years prior to the hearing there were "less than 10" warning issued by LPNs. One of these warnings was offered as an exhibit at the hearing. Clearly, this warning was reviewed by the the DON employed at that time. It also appears that an RN was involved in the process but no evidence was presented as to the position held by this particular RN or the level of her involvement. Moreover, no evidence was presented detailing the circumstances regarding the counseling of the employee involved or how the determination of the level of discipline to be issued was reached. In addition, I note that two of the three LPNs who testified at the hearing stated that they have not been informed that they possess authority in regard to disciplining NAs. The third LPN who testified stated under a prior administration she was on one occasion specifically directed by the DON to discipline an NA for failing to properly perform one of her

duties, or the LPN would be disciplined herself. The one recent instance of an NA being suspended pending an investigation was handled by the ADON.

Section 2(11) requires an individual to use independent judgment in exercising authority to either “discipline” or “effectively to recommend” discipline. Illinois Veterans Home at Anna L.P., 323 NLRB 890 (1997). The record herein fails to establish that LPNs have actually used independent judgment in disciplining or effectively recommending discipline. The Board rejects claims that individuals possess supervisory authority and has stated that it is the exercise of that authority that controls. See Ten Broeck Commons, 320 NLRB 806 (1996).

With regard to the Employer’s contention that LPNs assign and direct the work of NAs, it is clear that in determining whether the assignment and direction of work by LPNs satisfies the statutory mandate of Section 2(11) of the Act, the Board decides whether such assignment and direction requires the use of independent judgment or whether it is merely routine. Ten Broeck Commons, 320 NLRB at 810. In that case, the Board stated:

The essential duty of the CNA is to take care of elderly people who are no longer able to care for themselves. For the most part, such duties require little skill, are repetitive, and at times even unpleasant.

Every day, CNAs must perform the same care, in the same manner, for the same people. To be sure this is done, the Employer requires that each patient’s particular needs be kept in the Aidex. It is the responsibility of the NA to consult and follow the Aidex with respect to each patient and perform all functions indicated for each resident.

One of the LPNs’ responsibilities is to be sure that the CNAs are properly performing their jobs. Thus, LPNs make patient rounds and consult the Aidex. If an LPN sees a patient that needs attending to or a job that has not been properly done, the LPN will call it to the attention of the CNA. This type of direction does not require the independent judgment of Section 2(11). 320 NLRB at 811.

The quoted description of the tasks of the CNAs in Ten Broeck Commons is applicable to the NAs at this facility as well. The residents for whom each NA is responsible, as well as any additional tasks, are listed on the daily assignment schedule which is prepared by the Staffing Coordinator. The LPNs may adjust this preset schedule as needed in case of call-offs

or changes in the census.⁴³ If any special circumstances arise during a shift the LPN may have to reschedule certain of the preassigned tasks. This rescheduling of tasks occurs in cases of call off or if there is a death of a resident. Such limited authority of the LPNs to assign and direct NAs does not require the use of independent judgment and is, therefore, not indicative of supervisory status,

The Board has held that work assignments made to equalize employees' work on a rotational or other rational basis are routine assignments. Providence Hospital, 320 NLRB 717, 727 (1996) enfd. 121 F.3rd 548 (9th Cir. 1997); Ohio Masonic Home, 295 NLRB 390, 395 (1989). Further, the Board has held that the authority to adjust work schedules in the event of an emergency or call off, to call in replacements or request that an assistant work overtime, or to reschedule or postpone breaks, does not support a finding that a nurse possesses supervisory status. Illinois Veterans Home at Anna L.P., supra, at 891 ; Rest Haven Living Center, Inc., d/b/a Rest Haven Nursing Home, 322 NLRB 210, 211 (1996); Providence Hospital, supra at 733. The authority to make such scheduling changes in order to address patient needs is routine in nature and does not require the use of independent judgment. Providence Hospital, Id.⁴⁴

In addition, the Employer contends that LPNs adjust NA disputes. As noted, the role of LPNs in resolving disputes is limited to informally resolving minor problems with residents or with the job. For example, an LPN could advise which type of chair pad should be utilized if two

⁴³ The rescheduling duties may also be done by an RN or CCM. The DON initially testified that an LPN recently reassigned a NA based on room proximity, and not on the skill level of the particular NA, but later stated that the LPN was free to rely on other factors such as skill and experience.

⁴⁴ In NLRB v. Attleboro Associates, ___ F. 3d___ 161LRRM 2139 (3d Cir. 1999), the Court of Appeals for the Third Circuit found that LPNs employed at a nursing home were supervisors within the meaning of the Act because they had the authority, inter alia, to use independent judgment in assigning work to, and directing the work of, aides on a daily basis. It does not appear that, unlike the LPNs in Attleboro, the LPNs at issue herein assign work to, and direct the work of, NAs to any significant degree. Moreover, the Board has recently stated that it will continue to adhere to the principles set forth in Providence Hospital, 320 NLRB 717 (1996), concerning the supervisory status of charge nurses notwithstanding the decisions of certain circuit courts of appeal to the contrary. VinCor Hospital-Los Angeles, 328 NLRB No. 167 at sl. op. p. 3, fn. 9 (Aug 5, 1999).

NAs were in disagreement on the issue, or would tell NAs to resolve the personal dispute out of the hearing residents. It appears that to resolve more in depth problems between NAs the LPNs would call on their supervisor for assistance. It further appears that LPNs have not been informed that they have any authority or role with respect to the Employer's dispute resolution procedure. The limited involvement of LPNs in the dispute resolution process is not indicative of supervisory status within the meaning of the Act. Illinois Veterans Home, supra; Ohio Masonic Home, 295 NLRB at 395; Beverly Enterprises d/b/a Beverly Manor Convalescent Centers, 275 NLRB 943, 946 (1985).⁴⁵

With respect to incident reports, there was one specific example of an LPN's involvement with respect to such a report. The LPN submitted the in incident report to document that a resident twisted the arm of an NA and was told that only RNs had the authority to issue such reports.

As to the authority of LPNs to send home an employee for flagrant violations of employer rules such as drunkenness or patient abuse, this is not an indication of supervisory status because no independent judgment is involved; the offenses or violations of the employer's policies under such circumstances speak for themselves. The Board has repeatedly held that responding to flagrant violations of the employer's policies is insufficient to establish supervisory authority. Beverly Enterprises, Alabama, Inc. d/b/a River Chase Health Care Center, 304 NLRB

⁴⁵ Passavant Retirement & Health Center v. National Labor Relations Board, supra, relied upon by the Employer in its brief, involved the nurses' resolution of complaints which could ripen into grievances cognizable under the collective-bargaining agreement covering the CNAs. In contrast, in the instant case, the nurses are giving routine assignments and direction of work, rather than informally resolving disputes which would constitute contractual grievances since the NAs are not represented for collective bargaining purposes. In Passavant, in this regard, the court emphasized that the definition of "grievance" contained in the existing collective bargaining agreement in that case was very broad and included sections pertaining to daily assignments, break times, and lunch breaks and the like, matters which the nurses in Passavant could resolve and adjust when disputes arose among the aides with respect to these matters. In the instant case, it does not appear that the LPNs at issue have the authority to resolve minor problems of this type. See Beverly Enterprises-Pennsylvania, Inc., 327 NLRB No. 62 (1998) where the Board distinguished Passavant on the ground that the record therein contained only two instances of "grievance adjustment" by nurses alleged to be supervisors. The Board held that such evidence was insufficient to establish that the nurses played a significant role in grievance processing.

861, 865 (1991); Manor West, Inc., 311 NLRB at 662 (1993). Moreover, while the DON asserted at the hearing that LPNs possessed such authority, the Employer did not present any examples or other supporting evidence of the exercise of this authority. The Board has held that conclusionary statements made in testimony without support evidence, do not establish supervisory authority. Custom Mattress Manufacturing, Inc., 327 NLRB No. 30, slip. op. 1-2 (Oct. 30, 1998); Sears Roebuck & Co., 304 NLRB 193 (1991).⁴⁶

For the reasons set forth above and the record as a whole, I find that the Employer has failed to meet its burden of affirmatively showing that the LPNs possess supervisory authority. Therefore, I find that the LPNs at issue herein are not supervisors within the meaning of the Act.

Accordingly, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time licensed practical nurses employed by the Employer at its Pittsburgh, Pennsylvania, facility; excluding all office clerical employees and guards, professional employees and supervisors as defined in the Act, and all other employees⁴⁷.

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undersigned Regional Director among the employees in the unit set forth above at the time and place set forth in the Notice of

⁴⁶ In Passavant, unlike the NAs here, the record clearly established that the nurses at issue there, had the authority to suspend aides for flagrant violations of the employer's policies. See VIP Health Services v. NLRB, 164 F. 3d 644, 648 (D.C. Cir. 1999), wherein the Court of Appeals for the District of Columbia Circuit distinguished Passavant on the ground that the substantial evidence contained in the record supported the finding of the Board in the underlying representation case that the nurses at issue did not have the authority to discipline aides for flagrant violations. More specifically, in that case, the employer's assertion that the nurses could unilaterally discipline aides was contradicted by the nurses' testimony. See also the recent Board decisions in Schnurmacher Nursing Home, 327 NLRB No. 56 (1998) and Genesis Health Ventures, Inc., 327 NLRB No. 40 (1998).

⁴⁷ The phrase "all other employees" is being added to the unit description to further clarify that the unit in the instant proceeding is limited to the LPNs.

Election to be issued subsequently, subject to the Board's Rules and Regulations.⁴⁸ Eligible to vote are those employees in the unit who were employed during the payroll period immediately preceding the date below, 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 which 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 and employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.⁴⁹ Those eligible shall vote whether

⁴⁸ Pursuant to Section 103.20 of the Board's Rules and Regulations, official Notices of Election shall be posted by the Employer in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. As soon as the election arrangements are finalized, the Employer will be informed when the Notices must be posted in order to comply with the posting requirement. Failure to post the Election Notices as required shall be grounds for setting aside the election whenever proper and timely objections are filed.

⁴⁹ In order to assure that all eligible voters may 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, which may be used to communicate with them. Excelsior Underwear, Inc. 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that the election eligibility list, containing the full names and addresses of all eligible voters, must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, Room 1501, 1000 Liberty Avenue, Pittsburgh, PA 15222, on or before December 30, 1999. No extension of time to file this list may be granted, except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

or not they desire to be represented for collective bargaining by United Food and Commercial Workers International Union, Local Union 23, AFL-CIO, CLC.

Dated at Pittsburgh, Pennsylvania, this 23rd day of December 1999.

/s/Gerald Kobell

Gerald Kobell
Regional Director, Region Six

NATIONAL LABOR RELATIONS BOARD
Room 1501, 1000 Liberty Avenue
Pittsburgh, PA 15222

177-8580-8050