

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8**

**VENCOR NURSING CENTER EAST LLC
d/b/a MARIETTA CENTER FOR HEALTH &
REHABILITATION¹**

Employer

and

Case No. 8-RC-15821

**UNITED STEELWORKERS OF AMERICA,
AFL-CIO, CLC**

Petitioner

DECISION AND ORDER

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.

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,² 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.
3. The labor organization involved claims to represent certain employees of the Employer.

¹ The Employer's name appears as amended at hearing.

² The Employer and Petitioner filed briefs in this matter. I have carefully considered the arguments made by each party in their respective brief.

4. No 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, for the following reasons:

The Petitioner seeks to represent a unit of licensed practical nurses (LPNs) employed by the Employer at its Marietta, Ohio facility. The Employer argues that all its LPNs are supervisors and, therefore, the unit sought is inappropriate.

The Employer owns a number of long-term and skilled nursing and rehabilitation facilities, including the one at issue in this proceeding located at 117 Bartlett Street, Marietta, Ohio. It has the ability to serve approximately 150 residents at this location. The facility is divided into five wings or “halls” as the Employer refers to them. One hall, Lafayette, is devoted to patients who have recently been transferred from a hospital and therefore require skilled nursing care. Another hall, Reflections, is for residents with Alzheimer’s disease. The remaining three halls, Harmar, Putnam and Bennett, are for residents requiring long-term care.

The administrator of the facility is Jack Goldsberry. The director of nursing (DON) and assistant director of nursing (ADON) report directly to him.³ Directly below the DON and ADON in the chain of command are four unit managers. These positions are all occupied by registered nurses (RNs). The unit managers work exclusively a Monday through Friday, day shift (7 A.M.-3 P.M.) schedule. As described in the record, the duties of this position are largely limited to the assessment of the residents within a portion of the facility, called a “unit”. This includes writing and amending care plans, outlining treatment for residents and attending planning and policy meetings relating to those tasks. These duties require a unit manager to be away from her unit approximately 5 hours out of each 8-hour shift. The Employer also employs RN supervisors. They are scheduled one per shift during afternoon, evening and all weekend shifts. There are no unit managers scheduled to work during these shifts. The RN supervisors primary duty is to carry out skilled nursing services, such as starting IV’s, which LPNs are not

³ At present, the position of Director of Nursing is vacant.

permitted to perform by state law. Most of the residents requiring care by an RN supervisor are in Lafayette hall. However, RN supervisors can “roam” throughout the building in the performance of their duties. Reporting to unit managers and RN supervisors are the LPNs, which the Employer classifies as charge nurses.⁴ On most halls, there is one charge nurse scheduled per shift, 7 days per week. In Reflections, the charge nurses work 12 hours shifts, so there are only two scheduled every day rather than three. In Lafayette, there are two charge nurses on both the day and afternoon shifts. There is only one charge nurse working the night shift on this hall. In addition, there is one LPN, Julia Freeland, who works as a restorative nurse. Her responsibilities are to develop and conduct programs designed to assist residents in gaining or retaining mobility. Working with Freeland are three certified nursing assistants (CNAs). Additionally, there are a number of CNAs working in all five halls. Specifically, there are either 2 or 3 CNAs working day and afternoon shifts on most of the halls, with 4 being scheduled on those shifts in Lafayette. On the night shift, there are either 1 or 2 CNAs scheduled per shift. The record reflects that these CNAs are the persons primarily responsible for carrying out the care of the residents.

The record reveals that the charge nurses are not involved in the hiring or interviewing of CNAs. There is no evidence, or even a claim by the Employer, that these individuals can make hiring recommendations. There is also no evidence that the LPNs take an active role in the training of new CNAs. The record indicates that the staff development coordinator, an admitted supervisor, handles formal training. Any “on the job training” is handled by other, experienced CNAs.

There is substantial evidence in the record regarding the evaluation of probationary employees as well as the manner in which annual performance evaluations are conducted. Misty Cunion, a unit manager called by the Employer, testified that probationary CNAs are evaluated

⁴ The record indicates that RNs sometimes fill-in as charge nurses when there are not enough LPNs available for scheduling purposes. However, my use of the term “charge nurse” herein will be used only in reference to the LPNs in question.

after their first 30, 60 and 90 days of employment. She further stated that the evaluation process was often a collaborative effort between unit manager and charge nurse. However, she testified that the unit manager normally deferred to the judgment of the charge nurse because they had more first hand knowledge of the employee's work performance. The charge nurses who testified all confirmed that they frequently complete both probationary and annual evaluations without the involvement of a unit manager. The testimony of several of the LPNs confirmed that the unit managers nearly always accepted their recommendations, that a probationary CNA should be retained, without question. There is no specific evidence of a charge nurse recommending that a CNA not be retained at the end of his or her probationary period. However, there is testimony that an LPN charge nurse did effectively recommend that a CNA's probationary period be extended. There is also evidence that on at least one occasion in recent months, a CNA was terminated after a charge nurse gave her a poor 30 day evaluation and also initiated a written verbal warning for poor job performance and overstaying breaks. While these items were noted in the employee's termination notice, the LPN in question did not participate in the decision to terminate the employee.

The record reflects that employees receive a written evaluation each year near the anniversary date of their employment. Employees are also eligible for a raise on their anniversary date. The unrefuted testimony of the Employer's witnesses is that there had always been a direct correlation between a good evaluation and these pay increases. In August, 1998 the Employer implemented a new evaluation form. Completion of this form involves giving the employee a numerical score between 1 and 5 (with 5 being the highest) in several categories. That total is then divided by the number of categories to come up with an average, final score. This score is then considered by the person doing the evaluation in recommending the size of the raise that the employee receives. With one exception, there is no hard and fast formula establishing that a particular score automatically results in a specified raise. The exception is a recommendation of a 4% raise. Such a recommendation requires that the person receive a perfect evaluation score. In all other cases, determining there is some discretion residing in the

evaluator. The evaluation forms entered into evidence show that pay increase recommendations of 2% and 3% were made and approved for evaluations that had significant variation in scoring when compared to one another over a period of the past 3 years. The record is clear that the Employer routinely accepts recommendations of 2% or 3% raises. For a significant period of time, charge nurses have conducted the evaluations of CNAs almost exclusively. If the unit managers are involved, it is to a far lesser extent than even with probationary evaluations.

The Employer employs a disciplinary policy which provides for progressive steps, beginning with a verbal warning, then a written warning, a final warning and/or suspension and, finally, termination. Witnesses called by the Employer testified that charge nurses are empowered to issue verbal and written warnings. These can be recorded in one of two forms; an "Employee Conference Report" form and a more recently issued form called "Notice of Disciplinary Action". The former is tailored primarily for situations to inform an employee of corrective action to be taken for a minor mistake. The latter form is used for more serious matters. The Employer's witnesses admit that the new form is better tailored to "fit" into their progressive discipline system. They claim however that disciplinary actions recorded on the Employee Conference Report have always been considered steps in that system. There are examples in the record in which LPNs employed the Employee Conference Report to reprimand CNAs who used inappropriate language to residents; been insubordinate; taken unauthorized breaks and made personal phone calls while on duty. The record is clear that the charge nurses can, and do, issue such discipline of their own volition. Some of the charge nurses testified that they prefer to discuss a matter with a superior before taking disciplinary action. However, it is undisputed that there is no requirement that they do so. There is no evidence in this record of a charge nurse recommending that an employee be suspended or terminated. However, the Employer's witnesses testified that these nurses have the authority to recommend that an employee be suspended or terminated, as evidenced by the provisions of the written job description for charge nurses.

The Employer also asserts that the charge nurses exercise substantial oversight of the work of the CNAs. The record indicates that a charge nurse can alter a CNA's work assignments and, in cooperation with other charge nurses, move them from hall to hall as workloads dictate. While CNAs usually coordinate breaks among themselves, there is evidence that charge nurses can, and do, dictate when breaks will be taken. There is also testimony in the record that charge nurses can, and have, required CNAs to work overtime. An RN, either a unit manager or RN supervisor, must, at some point, use their identification card to enter the overtime rate on the CNAs time card. However, there is no evidence in the record that an RN has ever refused to authorize payment for overtime work assigned by a charge nurse. While the record indicates that charge nurses have called in off duty CNAs to cover staff shortages, it is equally clear that they cannot compel the employees to come to work. The Employer also contends that charge nurses can send employees home on their own authority. However, the record shows that where charge nurses attempted to exercise this authority, they were not permitted to do so without the approval of either a unit manager or RN supervisor.

The record is clear that while charge nurses are more highly paid than CNAs, both classifications are hourly rated. All employees at the Marietta facility enjoy the same fringe benefits.

Section 2(11) of the Act defines the term "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 responsibility direct them, or 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 judgement.

In applying this provision of the Act, the Board has consistently held that possession of any one of the supervisory indicia set forth above is sufficient to confer supervisory status.

Valley View Nursing Home, Inc., 310 NLRB 1002 (1993).

Considering the record as a whole, I note that the LPN charge nurses have clear authority in at least two, and possibly more, areas that suffice to confer supervisory status upon them. First is their authority to evaluate employees. As noted above, the charge nurses prepare written evaluations of the CNAs they oversee, both during probationary periods and once a year thereafter. While unit managers or RN supervisors may participate in this evaluation process, the record is clear that the LPNs routinely complete these evaluations without any input. Even in instances where an evaluation is a collaborative effort, it is clear that the LPNs' recommendations are paramount.

The Petitioner argues that these evaluations have no direct impact on compensation or employment status. I do not find this to be an accurate characterization of the evidence on the whole. It is true that there is no evidence of a specific example where an LPN terminated a probationary employee solely as a result of poor evaluation. As noted above, however, there is evidence of an aide who was terminated, in significant part, because of a poor evaluation she received. Further, there is clear evidence that LPNs frequently make effective recommendations, as part of the evaluation process, that probationary status be extended. Finally, I believe it extremely significant that the LPNs' recommendations that probationary employees be converted to permanent status, are routinely accepted without question by the Employer. The Petitioner and its witnesses do not seriously dispute that annual evaluations are normally performed by LPNs alone, that LPNs make pay increase recommendations as part of the evaluation process, and that the Employer nearly always accepts these recommendations. As the Employer has accurately noted, the Board has consistently held that the ability to prepare evaluations, which lead to pay increases, is a significant factor in conferring supervisory status on an individual. **Hillhaven Kona Healthcare Center, 323 NLRB No. 202, 155 LRRM 1209 (1997).**

The Petitioner argues, however, that all the pay recommendations are for the same percentage of pay increase, therefore the LPNs do not in fact exercise any discretion. I find to the contrary. The evidence is clear that LPNs have the ability to recommend different pay increase percentages. The only issue is whether this discretion runs between 0% to 4%, as the Employer contends or 2%-3% as even the Petitioner's witnesses acknowledge. While most of the examples entered into evidence were of 3% raises, there is also evidence of 2% raises being recommended by LPNs as long ago as 1996. Many of the LPNs who testified at the hearing confirmed that they knew they had the authority to grant a pay increase less than 3% should they deem it appropriate. Further, I deem it significant that that Employer does not place strict criteria on the LPNs as to what level of performance an aide must attain to qualify for a 3%, increase, a 2% increase, etc. Leaving this determination to the individual nurse's discretion, without review, certainly evidences the LPNs' independent discretion in this regard. The weight that LPNs' recommendations carry is also reflected by the fact that a group of LPNs recently initiated a successful campaign to secure an across the board pay increase for all aides. In sum, based upon the above, I am convinced that the LPNs do in fact have meaningful, effective authority, by their participation in the evaluation process, which affects employees' status and compensation.

Based on the above, I find this case more like **Hillhaven**, supra rather than the case cited by the Petitioner, **Riverchase Health Care Center, 304 NLRB 861 (1991)**. In that latter case, the LPNs in question prepared evaluations, but did not recommend pay increases. Obviously, the facts in the instant case are different and more like **Hillhaven, supra**, where the individuals input in the evaluation process directly impacted employee pay increases. Relying on

Hillhaven, I conclude that the evaluation authority exercised by the Employer's LPNs evidences supervisory status.

I also conclude that LPNs have a significant measure of authority in matters of discipline. As outlined above, they can, and have, issue both written and verbal warnings to aides. Such reprimands have led to more significant disciplinary actions, including termination, under the Employer's progressive discipline system. Even if the use of the newer "Disciplinary Actions" forms by LPNs has not become as wide spread as the earlier "Conference Report" forms, it is undisputed that the Employer considers incidents written up in either to be steps in the progressive discipline process. As noted earlier herein, either document reflects more than a factual report to a superior.

This distinguishes this case from those cited by the Petitioner, including **Waverly-Cedar Falls Health Care, Inc.**, 297 NLRB 390 (1989) and **Riverchase Health Care Center**, 304 NLRB 861 (1991). Instead, I have concluded that the disciplinary authority possessed by this Employer's charge nurses is more like that of the charge nurses in **Pine Manor Nursing Center**, 270 NLRB 1008 (1984). In that case the Board found the authority to issue verbal reprimands and issue/or recommend written warnings conferred supervisory status. In this connection, I note that Petitioner's witness LPN Maggie Storer testified regarding the independent discretion exercised by LPNs in the area of discipline. Storer had recently investigated an instance of potential misconduct by CNAs. Storer ultimately concluded, on her own, that the matter warranted no disciplinary action and did not even report the matter to higher authority.

I have considered the other arguments made by the Petitioner in urging a finding that the Employer's LPNs are not statutory supervisors⁵. The Petitioner correctly notes that not all the LPNs have exercised the same degree of authority in matters relating to evaluations and discipline. However, from the testimony of many of the LPNs, the minutes of the nurse meeting and the written job descriptions entered into evidence, it cannot be disputed that the Employer has granted LPNs broad discretion in these areas, even if not all of them have chosen to fully exercise it. In the final analysis, it is the possession of supervisory power, rather than full exercise of it by every individual in question, that confers supervisory status. **Atlanta Newspapers, 263 NLRB 632 (1982)**. Further, it is recognized that some of the other alleged authority the Employer claims the LPNs possess, such as permitting aides to leave early, does not evidence supervisory status. However, it is the authority that LPN charge nurses possess and exercise in evaluations, discipline, transfer and the assignment of overtime that establishes their status as statutory supervisors.⁶

⁵ Much of the Petitioner's brief is given over to arguments that much of the ostensible authority exercised by the LPNs had been granted to them only at the outset of the organizing campaign, in an effort to confer supervisory status where none previously existed. Therefore, argues the Petitioner, I should not consider any evidence relating to that period of time after the Employer became aware of the organizing campaign. First, I disagree with the Petitioner that the record establishes that these LPNs did not possess supervisory authority prior to July 1998, the month the Employer apparently became aware of the campaign. At a minimum, there is significant evidence relating to the independent authority of LPNs in recommending pay increases and issuing verbal and written warnings prior to that date. In any event, the Petitioner's arguments regarding the motivation of any recent grant of additional authority are currently the subject of an unfair labor practice charge in 8-CA-30389. It is proper to consider such arguments in that charge, not in this representation case. **Cf. Ironton Publications, 321 NLRB 1048 (1996)**. For purposes of this proceeding, I deem it immaterial that the LPNs may not have possessed certain authority for a long time period, as this record is clear that they have not only been granted the authority, but have exercised it as well

⁶ The record evidence establishes that Julia Freeland, the restorative nurse, exercises authority over the aides assigned to her which is identical to that possessed by the LPN/charge nurses. Accordingly, I find her position to be that of a statutory supervisor also.

Accordingly, based upon the foregoing, and the record as a whole, I find that the Employer has met its burden in establishing its LPN charge nurses are supervisors within the meaning of the Act and shall order that the petition be dismissed.⁷

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.

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, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by **March 4, 1999**.

Dated at Cleveland, Ohio this 18th day of February 1999.

/s/ John Kollar

John Kollar
Acting Regional Director
National Labor Relations Board
Region 8

177-8540-8050

⁷ I note that the Employer requested an administrative investigation of the sufficiency of the Petitioner's showing of interest. In light of my decision to dismiss the petition, it is unnecessary to conduct such an investigation.