

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

BEVERLY ENTERPRISES PENNSYLVANIA, INC.
d/b/a BEVERLY HEALTHCARE SCRANTON

Employer

and

Case 4-RC-20509

DISTRICT 1199P, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO-CLC

Petitioner

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, herein called 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.
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)(1) and Section 2(6) and (7) of the Act.
5. The Employer operates a 139-bed skilled nursing center in Scranton, Pennsylvania (herein called the Nursing Center). The Petitioner seeks to represent a unit of the full-time and regular part-time Licensed Practical Nurses (LPNs) at the Nursing Center. The

Employer contends that these LPNs are supervisors within the meaning of Section 2(11) of the Act.¹

Background

The Nursing Center is run by Executive Director (ED) Melissa Saxon.² Annette Miller is the Director of Nursing Services (DON). The DON is present at the Nursing Center on weekdays from about 8 a.m. to 3 or 4 p.m. When the DON is not on duty, she may be contacted by phone, and nurses have called her for guidance on minor and major issues. The Assistant Director of Nursing Services (ADON), Barbara Kennedy, reports to the DON. She is present on weekdays from 7 a.m. to 3 or 3:30 p.m. Next in the line of authority are the Registered Nurse Assessment Coordinators (RNAC), who help prepare patient care plans and input the billing data for Medicare and Medicaid.³

In addition to the DON, ADON, and RNAC, the Nursing Department includes about 15 Registered Nurses (RNs), 18 LPNs, and 51 Certified Nursing Assistants (CNAs), including five Senior CNAs. The Nursing Center has three shifts, 7 a.m. to 3 p.m. (day shift), 3 p.m. to 11 p.m. (evening shift), and 11 p.m. to 7 a.m. (night shift).

In the absence of the DON, ADON, and RNAC, an RN designated as RN Supervisor is in charge of the Nursing Department. LPNs and RNs both serve as charge nurses for their shifts and in that capacity work with a group of CNAs to care for residents.⁴ RNs and LPNs essentially have the same duties and responsibilities when they serve as charge nurses.

The Nursing Center has three floors and there are substantially fewer residents on the first floor than on the other two floors. The first floor can accommodate about 34-35 residents, and there are about 53 residents on the second floor and 52 residents on the third floor.

Staffing varies between shifts and floors.⁵ During the day and evening shifts there are at least two charge nurses on each floor, either two LPNs/Charge Nurses or one RN charge nurse and one LPN/Charge Nurse.⁶ On the day shift, two or three CNAs work on the first floor, three to five CNAs work on the second floor, and three to five CNAs work on the third floor. During the evening shift, there are three CNAs on the first floor and three or four CNAs on each of the other two floors. During the night shift, there is one charge nurse (either an LPN/Charge Nurse

¹ The Employer argues that while all of its LPNs act as charge nurses, whether or not they are acting in the charge nurse capacity, they are nevertheless supervisors within the meaning of Section 2(11) of the Act.

² The Employer introduced into the record an employee roster dated August 21, 2002. In this Decision, employees' names are spelled as reflected in the roster if the spelling differs from the spelling in the transcript.

³ Heather Brunett is the only RNAC mentioned by name in the record, but the record suggests there is more than one RNAC at the Nursing Center.

⁴ The record does not indicate with specificity how frequently LPNs serve as charge nurses.

⁵ The Employer is required by state law to have an RN present at the Nursing Center at all times. State law also requires the Employer to employ unspecified minimum numbers of LPNs and CNAs based on the number of residents.

⁶ The RN Supervisor during the evening shift works on the second floor, where there may be two RNs and one LPN.

or an RN charge nurse) on each floor and the RN Supervisor who works on the first floor. Two CNAs work on each floor during the night shift.

LPNs have various responsibilities related to resident care. At the start of the shift, an LPN receives a report about the residents from the staff from the last shift. Then the LPN distributes medication to all of the residents to whom he or she has been assigned and attends a meeting about patient care issues that arose the previous day. LPNs also update residents' charts, administer treatments such as changing bandages, speak with doctors, prepare patient care plans, contact families on behalf of residents, count narcotics, ensure that all residents receive meals on time, and give reports about the residents to the staff for the next shift. LPNs sometimes instruct CNAs to pay special attention to residents who are especially sick or who develop particular needs, such as assistance with eating or using the bathroom.

CNAs regularly care for the residents in basic ways such as: helping them in and out of bed and dressing them, giving them showers, assisting with meals, helping them use the bathroom, and ensuring that the shower rooms are clean. They record their daily tasks on an "Activities of Daily Living" chart. CNAs also perform special assignments for residents including checking temperatures, distributing water pitchers, taking their weight, counting calorie intake, and accompanying them on doctors' visits or recreational outings. Senior CNAs additionally help orient new employees and place resident food trays in proper sequence for distribution.

Job Descriptions

The charge nurse job description indicates that they are, "responsible for the independent supervision of the delivery of care to a group of residents on a nursing unit." According to the job description, charge nurses: assess resident needs and develop individual care plans; counsel and set goals for assigned staff in providing quality resident care; adjust daily assignments in conjunction with resident care needs and assigned staff's strengths; are accountable for the delivery of care through supervision of assigned staff; assign CNAs specific duties for resident care; assign hours, breaks, and meal periods to CNAs; discipline CNAs; attempt to resolve CNAs' problems and grievances; evaluate CNAs; revise CNAs' work schedules as necessary; and ensure proper staffing by calling in replacement employees for CNAs not reporting for work and by transferring or reassigning CNAs.

The CNA job description states that they work under the supervision of "licensed nursing personnel" and report to the unit charge nurse. The Employer also has issued other documents to employees indicating that charge nurses are considered to be supervisors and are responsible for assigning work to CNAs, attempting to resolve staff complaints, disciplining CNAs, and evaluating their performance.⁷

⁷ The Employer distributed a document titled "Acknowledgment of Supervisory Duties and Responsibilities for LPN and RN Charge Nurses," which also indicates that charge nurses have the authority to perform a variety of supervisory functions.

Scheduling

The DON and the ADON usually complete deployment sheets, which show how the Nursing Center will be staffed on a daily basis. These sheets indicate which RNs, LPNs, and CNAs will work on each floor for each shift.⁸ DON Miller testified that a “supervisor” also can complete these sheets, but further indicated that no LPN/Charge Nurse has ever entirely completed one. In fact, Miller gave no examples of an LPN/Charge Nurse preparing any part of a deployment sheet. When Miller completes the deployment sheets, she attempts to assign the CNAs regularly to the same floors so that they can become well acquainted with the residents.

To schedule leave time, CNAs contact the DON. During the day shift, the ADON considers CNA requests to leave work early. LPNs/Charge Nurses are not involved in these matters.

There was conflicting testimony about whether LPNs/Charge Nurses deal with staffing shortages and receive telephone calls from CNAs who are reporting that they will be absent. DON Miller testified that if neither she nor the ADON are in the building, calls from CNAs are forwarded to the first floor charge nurse, who may be an LPN or an RN. The charge nurse then tries to find a replacement by telephoning other employees using a staff roster. Other witnesses, however, testified that they are not involved in these matters. Thus, LPN/Charge Nurse Vicki Holweg and CNAs Sandy LaCroix and Joyce Cadwalder testified that CNAs report that they will be absent to an RN charge nurse or an RN Supervisor, while LPNs/Charge Nurses Laurie Nardozzi, Donna Mehall, and Bonnie Shiffer testified that an RN or the DON will decide about replacements for absent CNAs.

Breaks

The Employer’s Human Resources Management Policies and Procedures Manual (Policies Manual) and employee handbook provide that nurses and CNAs receive one 15-minute rest break for each four hours of working time, as well as a 30-minute unpaid meal period if the staff member is scheduled to work more than a five-hour shift. The handbook also states that employees who wish to leave the premises during their meal period must request permission from their supervisor and that they must receive approval before taking any breaks. CNAs and other staff punch in and out for meal breaks.

In practice, assignments of rest and meal breaks are handled differently on the various shifts and in a less formal manner than indicated in the handbook. LPNs/Charge Nurses Nardozzi and Mehall and CNA LaCroix testified that on the third floor day shift, CNAs take either first or second rest break periods from 9:00 to 9:15 a.m. and 9:15 to 9:30 a.m.⁹ First and second meal break periods usually are from 11:00 to 11:30 a.m. and 11:30 a.m. to noon. LPNs/Charge Nurses Nardozzi and Mehall testified that they schedule meals and breaks on CNA assignment sheets. Nardozzi usually schedules breaks on a rotating basis, i.e. CNAs who take a

⁸ The sheets do not indicate if the RN or LPN is designated a charge nurse.

⁹ The record does not contain any information about CNAs’ second set of rest breaks nor about the practice on other shifts and floors.

first break period one day take a second break period the following day. Sometimes she schedules two CNAs for a particular break period if they ask to take breaks together. She has, however, refused some CNA requests to change their breaks. She explained that she has denied requests because, “if I have said they’re on that break, they’re on that break.” For this same shift, LPN/Charge Nurse Mehall testified that when assigning breaks, she rotates the CNAs in taking first or second rest breaks or meal breaks, so that no CNA has the same breaks for an entire week. Mehall testified that CNAs may arrange among themselves to switch break times when patient care needs makes it impossible to begin a break on time. CNA LaCroix, who also works the third floor day shift, indicated that not all charge nurses rotate the CNAs in and out of particular rest break periods, and that she always takes a rest break between 9 a.m. and 9:15 a.m.

On the second floor evening shift, the charge nurses also initially assign break times. LPN/Charge Nurse Shiffer testified that she attempts to equalize when CNAs have first or second breaks and that the CNAs agree to changes amongst themselves.

On the third floor night shift, LPNs/Charge Nurses do not assign rest break times. LPN/Charge Nurse Holweg testified that she does not assign 15-minute breaks because most of the CNAs smoke and want to take several shorter breaks. They usually request breaks when the floor is quiet. Holweg also does not assign a meal break; the nursing staff all eats together.

In general, the charge nurses need to know when the CNAs leave for breaks, but they do not monitor when the CNAs return because the CNAs know that they need to return in 15 minutes. CNAs must notify the charge nurse if they wish to change their break times, but they do not need approval to begin a break late because of patient care requirements.

Assignment of Residents and Duties

Charge nurses on day shift and evening shift use a form titled “Daily CNA Assignment” (CNA Sheet) to assign residents and responsibilities to CNAs and to schedule breaks. On the sheet, the charge nurse writes in the name of a CNA to care for each group of residents, Group A, B, C, or D.¹⁰ CNAs are assigned to a group of residents on a rotational basis; usually a CNA handles a particular section for a week at a time. The charge nurse also indicates on the CNA Sheet the room numbers of the residents who need showers, break and meal times, special assignments, charge nurse notes, and residents’ temperatures and weights.

On the first and third floor day shifts, either an LPN/Charge Nurse, an RN Charge Nurse, or both, completes the CNA Sheet, which is kept at the desk on the floor. Second floor evening shift nurses also complete the CNA Sheet. On the day shift on the first floor, the CNAs divide initial responsibility for the residents among themselves, sometimes effectively changing the CNA Sheet, or an LPN/Charge Nurse will ask the CNAs what assignments they want. LPN/Charge Nurse Holweg, who works a 12-hour shift from 7 p.m. to 7 a.m. on the third floor, testified that she does not use the CNA Sheet and that the two CNAs on duty simply work together in taking care of all the residents.

¹⁰ At times when five CNAs are on duty, there will also be a Group E. There is no evidence that the Nursing Center groups residents based on their physical condition or the difficulties involved in providing them with care.

Charge nurses on different shifts handle special assignments differently. LPN/Charge Nurse Nardozzi, who works the third floor day shift, testified that she records on the CNA Sheet the shower assignments by room, using a list that the DON approves.¹¹ Nardozzi testified, without providing examples, that she sometimes assigns a shower without regard to the residents' room assignments or that she reassigns temperature taking assignments. She also stated that on her shift, if a resident has a doctor's appointment, the CNA who is assigned to that resident's room accompanies that resident on that visit. Holweg testified that it does not matter to whom she gives special assignments. CNA Cadwalder, who works the first floor day shift, testified that if a resident must leave the facility, a charge nurse notifies the CNAs verbally or in writing, and there is a group decision about who will accompany that resident.

LPNs/Charge Nurses sometimes are involved in transferring CNAs between floors, but the record does not indicate the extent of this authority. When LPN/Charge Nurse Holweg is on duty and a CNA must be transferred from her floor to another floor, she suggests who should be transferred, but an RN makes the final decision. The record does not show whether an RN has ever followed Holweg's suggestions, or if so, how often and in what circumstances. LPN/Charge Nurse Nardozzi testified that she had transferred CNAs to work in different rooms on her floor but did not explain the frequency or the motivation for these decisions.

There is a comprehensive nursing policy and procedures manual available for reference on every floor of the Nursing Center. The manual describes techniques and procedures for RNs, LPNs, and CNAs, including routine tasks like taking a resident's temperature and giving showers.

Monitoring Work

The charge nurse on the floor, whether an LPN or an RN, monitors the CNAs' work. While CNAs generally know how to perform their jobs, charge nurses are responsible for the immediate care the CNAs give in their areas. They make rounds to ensure that residents are receiving proper care and tell CNAs to perform required tasks or ask whether they have fulfilled certain responsibilities. Each day Nardozzi also checks the "Activities of Daily Living" charts to see if the CNAs have provided the appropriate kinds of care to residents.

DON Miller makes a complete round of the Nursing Center to check all of the residents once a day. Every morning on each floor, there is a meeting among the DON, ADON, RNAC, charge nurse, dietician, and social worker, where participants primarily discuss patient care and concerns of residents' families.

Grievances

The Policies Manual sets forth an Open Door/Problem Solving system that allows employees to express concerns about their working conditions through management channels.

¹¹ Nardozzi also testified that sometimes she makes a shower assignment that does not track the CNAs' residents' room assignments. She did not explain the circumstances in which she has done that.

An employee must initially present the problem to a charge nurse, but if dissatisfied with the response, he or she may then go to the next senior supervisor, then to the DON, and finally to the ED. The record does not indicate how this system has worked in practice or whether the LPNs/Charge Nurses have played a significant role in it.

Discipline

The Employer has a progressive discipline policy that is described in the handbook. The handbook states in part that progressive discipline often, “begins with counseling sessions with employees regarding their conduct or performance that take the form of ‘on the spot’ corrections or informal discussions. But for more serious infractions, written warnings may be issued to employees” DON Miller testified that verbal counseling does not constitute discipline at the Nursing Center.

When employees are disciplined, they receive an Associate Memorandum, which lists the level of discipline. The disciplinary steps are: first written warning, second written warning, third written warning, and suspension pending investigation for discharge. The Associate Memorandum also states that four disciplinary infractions within a twelve-month period is cause for discharge. According to Miller, the individual who completes the Associate Memorandum discusses the infraction with the employee after filling out the form, takes corrective action, and gives a copy to the employee and places another copy in the personnel file.

LPNs/Charge Nurses Nardozzi, Holweg, Shiffer and Mehall have spoken to CNAs about their performance problems, concerns of residents’ families, and conflicts with other staff members. Holweg and Mehall each indicated that if a problem cannot be resolved between herself and the CNA, she will report the incident to the DON or the ADON. On one occasion when a CNA failed to return from a break, Holweg reported the incident to the DON instead of completing a disciplinary form.

LPNs/Charge Nurses Nardozzi and Holweg, each of whom has worked for the Employer for more than 20 years, both testified that they were aware of the existence of the Associate Memorandum form but they had never used it. LPN/Charge Nurse Mehall, a 22-year employee, testified that she had never seen the form and that she had never been aware of any LPN disciplining a CNA. Holweg stated she was told that if she used an Associate Memorandum, she should describe the problem and then turn in the form to the DON.¹²

The record contains only a single example of a written warning issued by an LPN/Charge Nurse. A March 1998 Associate Memorandum reflects a first written warning to a CNA for creating an unsafe environment for a wheelchair-bound resident. The “Supervisor’s Comments” section of the describes the infraction, and Kimberly Noleski, an LPN at that time, signed the document. There was no evidence as to whether any member of management was involved in this discipline.

¹² She did not indicate who told her about this procedure.

Promotions

Since becoming the DON, Miller has selected five CNAs to become Senior CNAs, including Mary Beth Strausberger, who was recommended by LPN/Charge Nurse Nardozzi. Nardozzi's recommendation had a significant effect on Miller's decision, but Miller independently interviewed Strausberger for the position and formed a personal impression of her before promoting her. Senior CNAs received a raise of 25 cents to 35 cents an hour when they were named to the position.

Evaluations

The Employer gives CNAs two types of performance evaluations, introductory period evaluations and annual evaluations. The same form is used for both kinds of evaluations. The DON or ADON completes the upper portion of the form that lists basic statistical information about the employee. The LPN/Charge Nurse then provides ratings based on a scale of one through four for 51 different categories, totals the score, and provides brief comments on the CNA's strengths and areas for improvement.

A CNA becomes a full-time employee when he or she is recommended for retention at the conclusion of a 90-day introductory period. On the introductory period evaluation, a charge nurse completes a section of the form showing a recommendation for either retention, another review in 30 days, or non-retention. During the last two years no one has been recommended for non-retention. In fact, there is no evidence of any employee ever being recommended for non-retention.

The record contains two CNA introductory evaluations prepared by LPNs/Charge Nurses dated November 21, 2001 and August 15, 2002. Additionally, LPN/Charge Nurse Nardozzi testified that she has completed an unspecified number of introductory period evaluations of CNAs, and LPN/Charge Nurse Shiffer testified that she evaluated one CNA. She said that she gave it to Miller and does not know what happened to it after that.

The record also includes 10 CNA annual evaluations dated in 2002 and signed by various LPNs/Charge Nurses. DON Miller also reviewed and signed six of these evaluations. Miller testified that she reviews evaluations because she is the DON and because there may be merit raises awarded. According to Miller, annual evaluations may be considered in connection with merit raises, but the ED and corporate officials at a level higher than the ED decide whether or not staff members are entitled to raises.¹³ There was no evidence, however, of the Employer ever having awarded a merit raise to any employee.¹⁴ The last raise awarded to employees was an across-the-board three percent raise in October or November 2001.

¹³ Although the Policies Manual indicates that that performance evaluations are a factor in determining which employees may be selected for layoffs, there is no evidence that they have ever been used for this purpose.

¹⁴ Miller announced at a meeting of CNAs that in June 2002 there would be merit raises.

Miscellaneous

Occasionally LPNs/Charge Nurses initial time clock adjustment forms for CNAs who did not punch the time clock at the appropriate time. The forms then go to the payroll department for processing. DON Miller testified that by initialing the form the LPN/Charge Nurse merely reports that the CNA had been working on that day.

The Employer held two management and supervisory training seminars in January and April 2002 for employees of 10 Beverly Enterprises facilities, including the Nursing Center. DON Miller decided who would attend the seminars, but attendance was not mandatory. Two of the Employer's LPNs/Charge Nurses attended the January 2002 seminar, and another LPN/Charge Nurse attended the April 2002 seminar. Issues addressed at the seminars included the development of supervisory and leadership skills, the Employer's progressive discipline system, and the procedure for handling complaints and grievances. A few years ago Nardozzi attended a different management-training course.

At an April 2002 meeting of CNAs held by DON Miller and ADON Kennedy, Miller stated that the CNAs' chain of command is the charge nurse, the ADON, the DON, and, if the issue is patient-related, the Social Service Director. A few times a year Miller meets with the RNs and LPNs to report about new policies and procedures and shares other pertinent information with them.

The starting hourly wage rate for CNAs is \$8.50, compared with \$13.50 for LPNs. The benefit packages for CNAs and LPNs/Charge Nurses are the same.

Analysis and Conclusions

Legal Standards

The burden of establishing supervisory status is on the party asserting that such status exists. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001). Section 2(11) of the Act sets forth a three-part test for determining whether an individual is a supervisor. Pursuant to this test, employees are statutory supervisors if: (1) they hold the authority to engage in any one of the twelve supervisory functions listed in Section 2(11); (2) their exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment; and (3) their authority is held in the interest of the employer. *NLRB v. Kentucky River Community Care, Inc.*, supra, 532 U.S. at 712; *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-574 (1994).

The statutory criteria for supervisory status set forth in section 2(11) are read in the disjunctive, and possession of any one of the indicia listed is sufficient to make an individual a supervisor. *Juniper Industries, Inc.*, 311 NLRB 109, 110 (1993). The Board analyzes each case in order to differentiate between the exercise of independent judgment and the giving of routine instructions, between effective recommendation and forceful suggestions, and between the appearance of supervision and supervision in fact. The exercise of some supervisory authority in a merely routine, clerical or perfunctory manner does not confer supervisory status on an

employee. *Juniper Industries*, supra, 311 NLRB at 110. The authority effectively to recommend an action means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation ultimately is followed. *Children's Farm Home*, 324 NLRB 61 (1997); *Hawaiian Telephone Co.*, 186 NLRB 1 (1970). The sporadic exercise of supervisory authority is not sufficient to transform an employee into a supervisor. *Gaines Electric*, 309 NLRB 1077, 1078 (1992); *Ohio River Co.*, 303 NLRB 696, 714 (1991), enf. 961 F.2d 1578 (6th Cir. 1992).

In *Kentucky River*, the Court decided, contrary to the Board, that RNs at a residential care facility were supervisors within the meaning of the Act. In previously determining that the nurses were not supervisors, the Board had found, inter alia, that while they directed the work of aides, this direction did not involve independent judgment because it was by virtue of the nurses' training and experience, not because of their connection with management. The Court acknowledged that the term 'independent judgment' is ambiguous with respect to the *degree* of discretion required for supervisory status and recognized that it was "within the Board's discretion to determine, within reason, what scope of discretion qualifies." 532 U.S. at 713. The Court rejected the Board's analysis, however, because the Board erroneously excluded, "ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards" from the statutory definition of independent judgment, even where the employees exercised a sufficient degree of discretion that would otherwise warrant a supervisory finding. *Id.* In all other respects, the Court left intact the Board's traditional role in drawing the line between the performance of functions which are clerical and routine and assignment and direction that involve a sufficient element of discretion to confer supervisory status.¹⁵ The Court did not hold that every exercise of professional or technical judgment in directing other employees is necessarily an exercise of independent judgment, but recognized that the Board could determine the degree of independent judgment necessary to meet the statutory threshold for supervisory status. *Id.*

The Employer's Contentions

The Employer does not contend, and there is no evidence, that LPNs/Charge Nurses hire, suspend, lay off, recall, or discharge, employees, or effectively recommend such action. The Employer contends that the LPNs/Charge Nurses are supervisors based on their asserted authority to assign and direct CNA work, counsel and discipline employees, prepare performance evaluations, and adjust grievances.

Job Descriptions

¹⁵ The Court also indicated that, "the degree of judgment that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer. *Id.* at 713-714. The Court further suggested that the Board might, "offer a limiting interpretation of the supervisory function of responsible direction by distinguishing employees who direct the manner of others' performance of discrete tasks from employees who direct other employees" as Section 2(11) requires. *Id.* at 871.

Although the Charge Nurse job description and other documents issued by the Employer state that the Charge Nurses schedule and assign work to the CNAs, prepare their evaluations, discipline them, and take other action suggestive of supervisory status, it is settled that paper authority is not sufficient to confer supervisory status; there must be evidence of actual performance of supervisory functions. *Pine Manor Nursing Home*, 238 NLRB 1654, 1655 (1978); *North Miami Convalescent Home*, 224 NLRB 1271, 1272 (1976). Similarly, little weight can be given to general testimony that LPNs/Charge Nurses are responsible for the care CNAs give on the floor or to DON Miller's statement to the CNAs that the Charge Nurse is in the chain of command. Conclusory statements about an individual's authority are insufficient to establish supervisory status. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991); *American Radiator & Standard Sanitary Corporation*, 119 NLRB 1715, 1718 (1958). Accordingly, it is necessary to analyze how the LPNs actually carry out their responsibilities.

Scheduling

The DON and ADON complete the deployment sheets that schedule the CNAs' working hours, and the LPNs/Charge Nurses are not involved in this activity. There was conflicting testimony about whether an LPN/Charge Nurse may call in a CNA as a replacement for another CNA who reported that he or she would be absent. While DON Miller testified that LPNs/Charge Nurses may call in CNAs, all of the employee witnesses testified to the contrary. The Board normally will not find supervisory status where the evidence is in conflict or otherwise inconclusive on a particular indicia of supervisory authority. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). This principle is consistent with the Board's imposition of the burden of proof on the party asserting supervisory status. Moreover, even if the record conclusively showed that LPNs/Charge Nurses called in replacements, that authority still would not be sufficient to deem them statutory supervisors because the LPNs/Charge Nurses cannot insist that anyone come in to replace an absent employee. The Board has consistently held that the ability to transfer or call in workers based on staffing shortages requires routine, not independent, judgment. *Parkview Manor*, 321 NLRB 477, 478 (1996), overruled in part on other grounds; *Premier Living Center*, 331 NLRB 123 fn.5 (2000); *Lakeview Health Center*, 308 NLRB 75, 79 (1992). Moreover, the Board views the ability to ask—not to require—an employee to work extra hours as limited authority requiring only routine judgment. *Providence Hospital*, 320 NLRB 717, 732 (1996).

Breaks

The length of breaks is mandated by the handbook and the Policies Manual. On several shifts, the LPNs/Charge Nurses rotate CNAs on a daily or weekly basis and attempt to equalize when CNAs have first or second breaks. On the third floor night shift, the charge nurse does not assign breaks at all but allows employees to decide for themselves. Sometimes Nardozzi has scheduled CNAs for breaks considering two CNAs' desire to be on break at the same times, and she has denied CNA break time requests because she did not wish to change her initial assignments. Occasionally CNAs start breaks late because they are busy with their patient care duties.

At the Nursing Center, an LPN/Charge Nurse decision as to when an employee may take a break is a simple and routine task, not requiring independent judgment. *Kentucky River*, supra, 532 U.S. at 713-714; *Ten Broeck Commons*, 320 NLRB 806, 811 (1996). In *Ten Broeck*, the Board noted that, similar to this case, there were two choices of breaks, early and late, and the CNAs were switched between the two so they did not go the same time each day. The Board has characterized the ability to delay breaks due to workload as “routine clerical judgment” and determined that the performance of this function does not establish supervisory status. *Azusa Ranch Market*, 321 NLRB 811, 812 (1996). See also *Loyalhanna Care Center*, 332 NLRB No. 86, slip op. at 3 (2000). Nardozzi’s practice of scheduling CNAs for certain break periods because they want to be together and her denials of CNA requests for particular break periods do not support a finding of supervisory status. In this regard, she did not indicate how frequently she grants or denies such requests or the grounds on which she makes these decisions. *Tree-Fiber Co.*, 328 NLRB 389, 393 (1999) (conclusory testimony unsupported by specific examples insufficient for supervisory finding). See *Extendico-Professional Care, Inc.*, 272 NLRB 599 (1984), enfd. mem. 767 F.2d 926 (7th Cir. 1985). I therefore find that the evidence of LPNs’/Charge Nurses’ involvement in scheduling and approving break periods does not establish supervisory status.

Assignment of Residents and Duties

Depending on the floor and shift, LPNs/Charge Nurses may or may not initially assign residents to CNAs. Some LPNs/Charge Nurses prepare the CNA Sheet to assign the CNAs to various resident groups on a rotational basis while others allow CNAs to decide on their own who will give basic care to which residents. Special assignments such as taking temperatures or doctor’s visits are distributed based on the resident’s room number or decided by consensus among the charge nurses and CNAs. No discretion is involved in assigning responsibilities to CNAs based on rotation, on consensus, or on which CNAs already are caring for particular residents; these assignments do not involve sufficient independent judgment to confer supervisory status. See *Tree-Fiber Co.*, supra, 328 NLRB at 393; *Ten Broeck Commons*, supra, 320 NLRB at 810-811.

While LPNs/Charge Nurses sometimes transfer CNAs between areas on a floor or between floors, these reassignments do not alone indicate supervisory status. The Board generally views assignments made to equalize work or based on obvious variations in employee skill levels as not involving a degree of discretion sufficient to confer supervisory status. See, e.g., *Bozeman Deaconess Hospital*, 322 NLRB 1107 (1997); *Providence Hospital*, supra, 320 NLRB at 727. Transferring employees to short-staffed areas of a facility, without more, is routine and not supervisory. *Harborside Healthcare, Inc.*, 330 NLRB 1334, 1336 fn. 12 (2000).

Monitoring Work

LPNs/Charge Nurses monitor the work of the CNAs assigned to their areas and speak to CNAs about their performance. The Board has consistently held that no exercise of independent judgment is involved in checking the work of other employees and calling deficiencies to their

attention. *Ten Broeck Commons*, supra, 320 NLRB at 811. In *Beverly Health & Rehabilitation Services*, 335 NLRB No. 54, fn. 3 (2001), the Board concluded that the Supreme Court's *Kentucky River* decision did not require it to abandon this long held position. I therefore find that the role played by the LPNs/Charge Nurses in checking work of other employees does not make them supervisors.

Grievances

The Board has held that the limited authority to resolve minor disputes and personality conflicts is insufficient to establish supervisory status. See *Ken-Crest Services*, 335 NLRB No. 63, slip op. at 2-3 (2001). The Employer's Open Door/Problem Solving System provides that if the complaining employee is dissatisfied with a Charge Nurse's response to an initial complaint, he or she may take the matter to higher authorities, including the ED. There is no evidence of an LPN/Charge Nurse at the Nursing Center resolving an employee complaint or dispute. Thus, the record evidence does not show that LPNs/Charge Nurses can adjust grievances. *Id.*, slip op. at 3; *Passavant Health Center*, 284 NLRB 887, 891 (1987).

Discipline

As indicated by DON Miller, the LPNs'/Charge Nurses' authority to speak to CNAs about work issues does not constitute discipline. These discussions are not part of the Employer's progressive disciplinary system, which begins with written warnings. Several long-term LPNs/Charge Nurses testified that they have never been involved in issuing written warnings, and the only evidence of an LPN/Charge Nurse issuing discipline to a CNA is an Associate Memorandum memorializing a first written warning to a CNA about four years ago. There was no testimony about the circumstances surrounding this warning or the extent to which the CNA's conduct was investigated by higher authorities.

The Board has held that, in order for a charge nurse's discipline to confer supervisory status, the discipline must lead to personnel action, without independent investigation or review by other management personnel. *Beverly Health & Rehabilitation Services, Inc.*, supra, 335 NLRB No. 54, slip op. at 35 (2001). Accord: *Franklin Home Health Agency*, 337 NLRB No. 132, slip op. at 5 (2002). Moreover, even if the LPN/Charge Nurse issued the warning without any participation by upper management, the sporadic exercise of supervisory authority is not sufficient to transform an employee into a supervisor. *Gaines Electric*, supra, 309 NLRB at 1078. I therefore find that there is insufficient evidence that LPNs/Charge Nurses act as statutory supervisors in disciplining CNAs.

Promotions

The evidence does not show that any LPN/Charge Nurse has promoted or effectively recommended any CNA for promotion. The only example of LPN/Charge Nurse involvement in promotion was Strausberger's promotion to Senior CNA. While Nardoizzi's recommendation to Miller significantly affected her decision, Miller personally interviewed Strausberger and formed

an impression of Strausberger based on that interview. Thus, Miller did not rely solely on the LPN's/Charge Nurse's recommendation without further inquiry but independently investigated her qualifications. See *Children's Farm Home*, 324 NLRB 61 (1997); *Waverly-Cedar Falls Health Care, Inc.*, 297 NLRB 390, 392 (1989), enfd. 933 F.2d 626 (8th Cir. 1991). Even if the evidence showed that DON Miller had simply adopted Nardozzi's recommendation, there would be insufficient evidence of supervisory status because this was the only example offered to prove authority to promote employees. See *Gaines Electric*, supra, 309 NLRB at 1078.

Evaluations

LPNs/Charge Nurses have only occasionally completed CNAs' introductory period evaluations, and there is no evidence that any new employee ever has been discharged or had an extended probationary period because of an evaluation. LPNs/Charge Nurses more commonly prepare annual evaluations, which are sometimes reviewed by DON Miller, but there is no evidence that any annual evaluation triggered a raise or other result affecting the employee's work status. In this regard, the Employer has given raises to employees across-the-board, and evaluations have not led to merit raises.

The authority to evaluate is not one of the Section 2(11) supervisory status indicia. *Elmhurst Extended Care Facilities*, 329 NLRB 525, 536 (1999). Rather, when an evaluation does not, by itself, affect the wages and/or job status of the employee being evaluated, the individual preparing such an evaluation will not be found to be a statutory supervisor on the basis of the evaluations. *Franklin Home Health Agency*, supra, 337 NLRB No. 132, slip op. at 6 (2002); *Harborside Healthcare*, supra, 330 NLRB at 1334. Also, completion of probationary evaluation forms does not show supervisory status where there is no evidence that any probationary employee has been terminated or that any employee's probationary period has been extended as a result of the evaluations, and where the evaluation did not trigger a wage increase. *Coventry Health Center*, 332 NLRB No. 13, slip op. at 3-4 (2000). Accord: *Williamette Industries, Inc.*, 336 NLRB No. 59, slip op. at 1-2 (2001); *Elmhurst Extended Care Facilities, Inc.*, supra, 329 NLRB at 536-537. In *Elmhurst*, the Board rejected the regional director's conclusion that charge nurses' probationary and annual evaluations of CNAs demonstrated that the nurses were statutory supervisors, finding it insufficient that they effectively recommended the retention of CNAs after their three-month probationary period. 329 NLRB at 536, 538. There was insufficient evidence that any CNA in *Elmhurst* had been discharged, experienced a longer probationary period, or had his or her wages affected, because of a probationary evaluation. *Id.* at 537.¹⁶ Similarly, I find that the role played by the Employer's LPNs/Charge Nurses in evaluating CNAs does not make them supervisors.

¹⁶ In support of its argument that evaluations at the Nursing Center confer supervisory status on the LPNs, the Employer relies on cases that present materially different factual situations than the instant case. Thus, in *Hillhaven Kona Healthcare Center*, 323 NLRB 1171 (1997), LPNs and RNs were found to be statutory supervisors because they evaluated CNAs on a probationary and annual basis with numerical ratings that directly determined wage increases, continued probation, or possible discharge after continued poor performance. In *Pine Manor Nursing Center*, 270 NLRB 1008, 1009 (1984), the Board found LPNs and RNs to be Section 2(11) supervisors because, among other things, they disciplined employees by sending them home without pay, recommended pay raises through evaluations that the DON did not independently investigate, and the DON made the decision on retention of probationary employees based solely on the LPN's evaluation without independent investigation. In *Wedgewood*

Miscellaneous

The fact that LPNs/Charge Nurses earn higher wages than CNAs does not show statutory supervisory status. *First Western Building Services*, 309 NLRB 591, 603 (1992). In this regard, secondary indicia alone do not demonstrate supervisory status in the absence of any of the primary indicia set forth in Section 2(11). *Ken-Crest Services*, supra, 335 NLRB No. 63, slip op. at 3. Also, a few LPNs'/Charge Nurses' voluntary attendance at management training conferences does not establish Section 2(11) authority. *St. Alphonsus Hospital*, 261 NLRB 620, 626 (1982), enf. 703 F.2d 577 (9th Cir. 1983). LPNs/Charge Nurses have not used discretion in adjusting CNA timecards when the CNA failed to punch in but have simply have initialed them to report that the CNA was working that day. Pro forma approval of corrections to timecards does not entail the exercise of independent judgment. *Eastern Boiler & Electronics, Inc.*, 228 NLRB 568, 569 (1977). See *Loyalhanna Care Center*, supra, 332 NLRB No. 86, slip op. at 2.

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 Scranton, Pennsylvania nursing center, excluding all other employees, registered nurses, other professional employees, managers, senior certified nursing assistants, certified nursing assistants, nursing assistants, office clerical employees, service and maintenance employees, guards, and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently,¹⁷ subject to the Board's Rules and Regulations. Eligible to vote are those in the unit 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 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, employees

Health Care, 267 NLRB 525, 526-27 (1983), LPNs' authority to evaluate aides and orderlies indicated supervisory status where evaluations signed by LPNs were placed into employees' permanent personnel files, the DON rarely investigated a poor evaluation, and an LPN independently ended an employee's probationary period.

¹⁷ Your attention is directed to Section 103.20 of the Board's Rules and Regulations, a copy of which is enclosed. Section 103.20 provides that the Employer must post the Board's official Notice of Election at least three full working days before the election, excluding Saturdays and Sundays and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

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. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

**DISTRICT 1199P, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO-CLC**

LIST OF VOTERS

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 an election eligibility list, containing the **full** names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region Four within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. I shall, in turn, 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, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106, on or before **October 4, 2002**. 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 of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission. Since the list is to be made available to all parties to the election, please furnish a total of **3 copies**, unless the list is submitted by facsimile, in which case no copies need be submitted. To speed preliminary checking and the voting process itself, the names should be alphabetized (overall, or by department, etc.). If you have any questions, please contact the Regional Office.

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, Franklin Court, 1099 14th Street, N.W., Room 11613, Washington, D.C. 20570. This request must be received by the Board in Washington by **October 11, 2002**.

Signed: September 27, 2002

at Philadelphia, PA

/s/

DOROTHY L. MOORE-DUNCAN

Regional Director, Region Four

177-8520-0800
177-8520-1600
177-8520-2400
177-8520-3900
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177-8520-5500
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