

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
Eighteenth Region

Extendicare Health Services, Inc. d/b/a Galtier Health  
Care Center<sup>1</sup>

Employer

and

Minnesota's Health Care Union, Service Employees  
International Union, Local 113

Petitioner

Case 18-RC-17155

**DECISION AND DIRECTION OF ELECTION**

Petitioner seeks a unit of the Employer's registered and licensed practical nurses. The Employer, however, contends that the employees sought by Petitioner are supervisors within the meaning of Section 2(11) of the Act. After reviewing the record, I conclude that the Employer has failed to carry its burden of establishing that the unit sought by Petitioner consists of supervisors.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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<sup>1</sup> The Employer's name appears as amended at the hearing.

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.<sup>2</sup>
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. In order to understand my conclusion, I will first summarize the record regarding the Employer's overall operation, facility, and departmental structure. I will then describe in detail the operation of the nursing department. Third, I will focus on the job duties of the RNs and LPNs who, according to the Employer, are supervisors because they are charge nurses. I will then describe in detail the functions of the RNs and LPNs that the Employer contends establish supervisory status. Finally, I will summarize Board law concerning the supervisory status of charge nurses, and apply the law to the facts established by the record in this case.

### **The Employer's Operation**

The Employer operates a licensed long-term care facility. Its facility consists of four floors plus the basement. There are a total of 125 beds. Twelve of the 125 beds are on the first floor, 38 are on the second floor, 36 are on the third floor, and 39 are on the fourth floor.

The Employer has divided its employees into various departments. The maintenance

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<sup>2</sup> The Employer, Extencicare Health Services, Inc. d/b/a Galtier Health Care Center, is a Delaware corporation with an office and place of business in St. Paul, Minnesota, where it is engaged in the operation of a skilled nursing facility for the aged and infirm. During the past 12 months, a representative period, the Employer purchased and received goods and services in excess of \$50,000 directly from suppliers located outside the State of Minnesota, and derived gross revenues in excess of \$1 million.

department consists of two employees who are responsible for repairs, five to six housekeeping employees who clean rooms, and about four laundry employees. The head of the maintenance department is Jay Jagroo. The business office consists of a receptionist and one assistant, plus the department head, Eileen Jacobowski. The dietary department consists of 10 to 12 employees and the head of the department, who is Joanne Richardson. The therapy department (occupational, speech and physical) is headed by Molly (last name unknown) and includes three employees. There are two employees and the head of the department in recreational therapy, which is a separate department from the therapy department. One employee is located in the social services department, and that employee reports to Michelle Erickson. Finally, the nursing department's head is the Director of Nursing (DON). At the time of the hearing, the interim DON was Joan Jarombek. The makeup of the nursing department will be described in more detail later in this decision. All department heads work from about 8:00 a.m. to 5:00 p.m., Monday through Friday each week. They report to the administrator, who is Fred Haack.

All employees employed by the Employer except the RNs, LPNs, office clerical employees, administrators, guards and supervisors are currently represented by UFCW Local 789, and covered by a contract in effect through December 31, 2004.

### **The Operation of the Nursing Department**

The basic function of the employees in the nursing department is to provide direct care for residents, including following doctors' orders. As already noted, overall responsibility for the nursing department is given to the DON.

Reporting to the DON are four nurse managers. There is a nurse manager for each floor of the facility. The first floor nurse manager is LPN Pearl Hua. The second floor nurse manager is RN Jennifer Haubrich. The third floor nurse manager is Vicki Condon. The acting fourth

floor nurse manager is LPN Karen Orr.<sup>3</sup> Nurse managers work from about 8:00 a.m. to 4:30 p.m., Monday through Friday. The job of the nurse managers is to make sure that their floors run smoothly and that the nursing staff correctly follows orders. In addition, nurse managers can be called at home if major problems develop, or as a resource for questions when they are not at the facility. The Employer and Petitioner stipulated that the floor managers should be excluded from the unit sought by Petitioner.

Also employed in the nursing department are the MDS coordinator, Medicare coordinator, staff development/infection control person (also identified as the Staff Development Coordinator), and staffing coordinator. The role of MDS Coordinator Jodi O'Connor (RN) is to provide plans of care and payment systems for Medicaid residents. The role of Medicare Coordinator Susette Parenteau (LPN) is to perform the same duties as O'Connor, but for Medicare patients. Staff Development/Infection Control Person Kim Close (RN) performs new employee orientation and in-service training, ensures that OSHA guidelines are followed, and tracks infection control problems. The parties stipulated to the exclusion of Staff Development Coordinator Close from the unit. Staffing Coordinator Murrae Dochniak does all scheduling, and thus assigns nursing department employees to the floors they will work on. The staffing coordinator works from 6:00 a.m. – 2:30 p.m., Monday through Friday, and is in the unit represented by the UFCW.

Nursing department employees work one of three shifts, which are from 6:00 a.m. to 2:30 p.m., 2:00 p.m. to 10:30 p.m., and 10:00 p.m. to 6:30 a.m. These employees work seven days a week. There are five RN floor nurses, three of whom are full time, and 25 LPN floor nurses, 15 of whom are full time. It is the Employer's position that, within the nursing department, the

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<sup>3</sup> Orr is acting for Jarombek, who is, as noted, acting DON.

hierarchy among employees is that nursing assistants registered (NARs), who are in the UFCW unit, report to the floor nurses (LPNs and RNs); that the floor nurses report to the nurse managers; and that the nurse managers report to the DON.

Staffing on the first shift is two floor nurses and one NAR on the first floor, and two floor nurses and four NARs on each of the second, third and fourth floors. For the 2<sup>nd</sup> shift there are two floor nurses and one NAR on the first floor, one floor nurse, one trained medical assistant (who can pass some medications), and four NARs on the second floor, and two floor nurses and four NARs on each of the third and fourth floors. Finally, on the 3<sup>rd</sup> shift there is one floor nurse and one NAR on the first floor, one trained medical assistant and one NAR on the second floor, and one staff nurse and one NAR on each of the third and fourth floors. The staff nurses on the third and fourth floors cover tube feedings and assessments of residents that need to be completed on the second floor during the 3<sup>rd</sup> shift.

There are 65 NARs employed by the Employer. Their overall duties are to help clean, groom and dress residents; get residents in and out of bed and wheelchairs; bathe residents; assist with feeding residents; and perform other general duties related to the well-being of residents.

### **Job Duties of LPNs and RNs**

Employer testimony and the job descriptions for the LPNs and RNs suggest that there is little difference in their respective job duties. It appears that RNs perform some medical procedures that LPNs are not licensed to perform, and have responsibility that LPNs do not have to reassign employees from one area to another. In addition, the RN job description states that they are to complete weekly shift meetings with NARs, although there is no evidence that these meetings occur. Otherwise, both groups of employees coordinate, implement and evaluate residents' plans of care; manage the environment to ensure resident safety; monitor the NARs'

care of residents; and are responsible for following Employer policies and procedures, and performing their duties as defined by the State Nurse Practice Act. Both sets of employees are to make frequent rounds to monitor resident care; administer medications; keep physicians and/or higher levels of management informed of changes in residents' health; receive and transcribe doctors' orders; chart; give and receive report at shift changes; complete all necessary forms; complete documentation required by Medicare, Medicaid, and the Employer; help during mealtimes; and ensure that work areas are clean. The job description for each LPN classifies each LPN as an "LPN Monitor," while the RN job description classifies each RN as an "RN Supervisor."

The job descriptions for both RNs and LPNs also state that they have the duties of making daily work assignments, directing work of employees, scheduling breaks, authorizing early departure, authorizing overtime, preparing written evaluations, enforcing facility policies with authorization to issue disciplinary action reports, suspending employees for violation of rules, initialing time cards to authorize variances, and handling employee complaints. It is, of course, because of these duties that the Employer contends LPNs and RNs are supervisors. Therefore, the next section of the decision will summarize record evidence regarding these duties, as the mere presence of the duties in the job descriptions is insufficient to establish supervisory status under the Act.

### **Functions of RNs and LPNs Related to Supervisory Status Issue**

There is no evidence that floor nurses hire or effectively recommend the hiring of new employees or are involved in the interview of applicants. Contrary to the job descriptions, they also do not evaluate employees. They do not orient new employees, approve time off requests, decide whether absences are excused or unexcused, grant or recommend the granting of wage

increases, or lay off or recall employees. They do not discharge employees, although, as discussed below, the Employer contends that they effectively recommend discharge. Floor nurses also have no role in processing or adjusting employee grievances. Finally, the LPNs and RNs do not attend monthly management meetings held by the DON when there is a permanent DON. Attending those meetings are the nurse managers, the staff development person, and the Medicare and MDS coordinators.

The record contains testimony and/or exhibits regarding the responsibilities of the LPNs and RNs in the following areas:

*Assignment and Direction of Work*

The staffing coordinator puts together a staffing book for each floor that has the schedule for who is working on each floor for each shift. Thus, the staffing book lists who will work on each floor, and the times each employee will be working.

With regard to the assignment of specific residents to specific NARs, 3<sup>rd</sup> Floor Nurse Manager Vicki Condon, who was the Employer's main witness, initially testified that floor nurses fill out assignment sheets for each shift, assigning each NAR to a group of residents. However, she later acknowledged that on the third floor there is a rotation schedule that the floor nurse refers to decide which residents will be assigned to which NAR. That is, the nurse managers have put together a rotation system, and full-time NARs are rotated on a weekly basis among the residents by unit numbers. While Condon testified she did not know if this rotation system exists other than on the third floor, testimony by employee witnesses made clear that it does. Thus, for full-time NARs, floor nurses merely follow the rotation schedule in deciding where to assign them.

The record is clear that floor nurses might have to rearrange the rotation schedule. First, the rotation schedule does not include part-time employees. It appears that they are assigned to whatever holes exist in the assignments on the rotation schedule. Also, if a resident and NAR do not get along, the floor nurse will reassign. According to the testimony of two floor nurses, those reassignments are accomplished by agreement among the NARs. One floor nurse further testified that if there is no agreement, the NARs draw straws. In addition, if an employee calls in absent and a person is not called in to fill the position, the area has to work short. In that instance, the residents without an assigned NAR must be assigned to those NARs who are working. According to the testimony of two floor nurses, the NARs and floor nurses come to agreement on how to divide up the extra work. On the other hand, Condon testified generally that in all of these circumstances the floor nurse must exercise her judgment by analyzing the level of care needed, the experience level of the remaining NARs, resident preferences, and any NARs who have working restrictions.

There is no dispute among the witnesses that LPNs and RNs monitor the work of NARs to make sure that assignments are completed and performed properly, in accordance with resident care plans. The floor nurses, therefore, “guide and direct” (to use Condon’s words) the NARs. Floor nurses perform this function on an ongoing basis as they make rounds or otherwise perform their own duties. Nurse Manager Condon estimated that floor nurses spend perhaps one-half to one hour on their shifts monitoring the performance of NARs, while performing their own duties with residents. There is also no question that floor nurses verbally instruct NARs to correct performance, or to perform certain functions as needed. Those verbal instructions may or may not be considered a verbal warning by the floor nurses and NARs. Even in those circumstances where the floor nurse verbally warns an NAR on a performance issue, the floor

nurse can do so without documenting it. If the floor nurse chooses to document it, the floor nurse uses a form titled "Galtier Health Service Inservice/Education Discussion." According to Condon, these forms are not considered discipline, but rather a training form. In evidence are five of these forms that have been filled out. Four are from the year 2001, and the most recent is dated January 27, 2002. Some were filled out by LPN Susette Parenteau when she was first floor nurse manager, although others were filled out by floor nurses.

*Discipline Including Recommending Discharge*

The Employer contends that RNs and LPNs have the authority to discipline employees, and have effectively recommended the discharge of NARs.

The record reveals that the Employer has an Employee Handbook with a Discipline Procedure in it. The first form of discipline is a written warning titled "First Notice." After a "Second Notice" and "Final Notice," the fourth step is a last chance "Discharge Warning." Finally, the last step in the process is termination. Thus, verbal warnings are not included in the Discipline Procedure.

According to Condon, RNs and LPNs can "begin the process of issuing a written warning" by filling out parts of a document titled "Disciplinary Action Report." The staff nurse does so by writing down his/her observations of what has occurred, and by looking in the Employee Handbook to determine the class of violation, and writing in the appropriate class number. This form ultimately goes to the DON, although it appears nurse managers review it also. The DON or nurse manager then decides what discipline to issue.

At issue is whether anyone conducts an investigation of the floor nurses' reports. Condon testified at one point that in some circumstances an independent investigation might not be conducted, but gave no examples. At another point in her testimony, Condon stated that floor

nurses do not issue disciplinary reports, but pass on incidents to somebody else who decides if discipline issues.

Employer Administrator Haack also testified about specific examples of discipline that have been issued, some involving employees who were discharged following reports of misconduct by floor nurses. However, he cited no examples where independent investigations did not occur. For example, Haack described an incident where an NAR refused to follow the instructions of a floor nurse and verbally abused the floor nurse. The floor nurse wrote an account of the incident. According to the administrator, “there was a significant amount of investigation that occurred with this. We had at least 3 or 4 witnesses ... and needed no further investigation other than to talk to the people that ... provided the written documentation ...” The NAR was terminated. Administrator Haack also testified that if a nurse stated that an NAR was not performing the job during the NAR’s probationary period, he would let the employee go. However, at another point in this testimony he stated that unless witness statements were already attached to the form submitted by the nurse, the DON or he would go back and talk with employees and the nurse before making a determination on the validity of the statements made by a nurse on the form. Haack described one example of where he discharged a probationary NAR, giving significant weight to the comments of the LPN involved. However, he also stated that he got some other feedback verbally (not further described) and that he made the decision to terminate.

Both employees who testified for Petitioner stated that while they do fill out parts of the “Disciplinary Action Report,” they only write what they observe and then give the document to the nurse manager or DON. One testified that she did not know whether the NAR in question was disciplined or not. The other, who filled out parts of three of the disciplinary reports in

evidence, stated that she did not fill out the discipline box, and on two of them consulted the nurse manager on duty before writing anything. In one case the nurse manager wrote out what occurred and the floor nurse only wrote in the NAR's name and signed it, and in the other the nurse manager told her to write up a report and send the employee home.

Witnesses for both parties agree that floor nurses have no access to personnel files, and that only the DON or nurse managers can decide whether disciplinary action is a first, second, or final notice or a discharge warning or discharge.

#### *Sending Employees Home for Misconduct*

Both Nurse Manager Condon and Administrator Haack testified that RNs and LPNs can send NARs home, as is also suggested in their job descriptions. According to Condon, floor nurses can do so and then call the DON to let the DON know. Condon recalled that an NAR was sent home for resident abuse on one occasion, but she did not know who actually sent the NAR home. According to Haack, he would want a floor nurse to send an NAR home if the nurse saw resident abuse by the NAR. He recalled an LPN sending an NAR home two to three months ago, but conceded that he did not know the reason. In one case described by a witness for Petitioner, the witness stated that she sent an NAR home who "cussed me out," but did so only after the first floor manager told her to do so.

#### *The Use of House Supervisors, PM and Night Supervisors, and the On-Call Rotation*

Floor nurses act as house supervisors on weekends, PM supervisors for parts of the 2<sup>nd</sup> shift, and as night supervisors for the 3<sup>rd</sup> shift. They oversee the operation of the nursing department when nurse managers and the DON are not present. Thus, they are not used during day shifts, Monday through Friday. In addition, such supervisors are not required for the beginning of the 2<sup>nd</sup> shift, as nurse managers and the DON are present for about the first three

hours of the 2<sup>nd</sup> shift. Not all floor nurses act as supervisors even on the 3<sup>rd</sup> shift, where a supervisor would be assigned for the entire shift. Generally, RN Anu Tharayil is the supervisor on 3<sup>rd</sup> shift, with LPN James Whear sometimes filling that role on 3<sup>rd</sup> shift. These supervisors receive an extra \$1.50 per hour, and are generally the floor nurses with the most seniority.

There is little record evidence suggesting that the role of the house, PM or night supervisor is much different than the role of floor nurse. They deal with call-ins when employees will be absent, although presumably not on the 2<sup>nd</sup> shift as the staffing coordinator and/or nurse managers are present for the start of the 2<sup>nd</sup> shift. In doing so, the supervisor and floor nurse together decide whether to call in an unscheduled employee, to work short or to float someone from another floor. How this determination is made is not further explained in the record, other than, like the floor nurse, the supervisor cannot require an unscheduled employee to come in and work for an employee who is absent. These supervisors can also ask employees to work extra – although the evidence does not suggest they can require employees to do so.<sup>4</sup> House supervisors also respond to concerns raised by the families of residents. Finally, in the event concerns arise that the house supervisors are unsure about, they are to contact the on-call person. For example, a floor nurse who testified on behalf of Petitioner and who acted as a house supervisor eight to nine months before the hearing, stated that if she saw resident abused by an NAR, as the house supervisor, she would contact the on-call person.

Although not entirely clear, it appears that the DON and administrator are on call 24 hours a day, seven days a week. However, the Employer also maintains a weekend on-call

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<sup>4</sup> In its post-hearing brief, the Employer also contends that the record supports a conclusion that house, PM and night supervisors can authorize and approve overtime. In my view the evidence does not support such a conclusion. On the contrary, Nurse Manager Condon was clear that overtime is discouraged, and that only the DON can authorize it.

calendar rotation. The rotation provides that every seventh weekend one of seven persons is on call for the weekend. On the on-call list are the nurse managers (including interim manager Orr), the interim DON, and two floor LPNs. Other than the fact that these individuals are on call every seventh weekend, the record is silent with regard to what they do. For example, particularly with regard to the LPNs who are not managers and who are on the rotation schedule, there is no evidence or testimony whether they have the same authority as the DON or nurse managers who are also on the rotation. The record also contains no evidence concerning the powers of the LPNs who are on the rotation, or whether they exercise any independent judgment when the weekend on-call person.

*Authorizing Leaving Early and Overtime, Signing Timecards, Calling  
Unscheduled NARs to Work, and Altering Break Times*

With regard to floor nurses allowing NARs to leave prior to the end of their shifts, Nurse Manager Condon testified that NARs would ask floor nurses if they could leave early, and the floor nurses would most likely ask the house supervisor. Condon's testimony was confirmed by a floor nurse, who indicated, however, that she would allow an NAR to leave early if the NAR were ill and if it were a weekend shift.

The record is clear that only the DON can authorize overtime. There is no evidence that a floor nurse can decide on her/his own that overtime will be worked. According to Condon, floor nurses sign off on the overtime as a witness that the NAR was working as stated on the overtime request.

Condon's testimony with regard to floor nurses signing off on timecards is similar to her testimony on overtime. That is, in the event an NAR forgets to punch in, the NAR fills out a form that a floor nurse also signs. The floor nurse, by signing the form, is acting as a witness that the NAR was in fact working during the time the NAR forgot to punch in.

With regard to calling in NARs to fill in for absent employees, there is no evidence that NARs can be required to work unscheduled hours. Generally, it is the responsibility of the nurse managers or staffing coordinator to contact employees and ask them to work extra. However, a trained medical assistant in the unit currently represented by the UFCW has also been assigned to both take calls from employees who will be absent and to make calls to ask other employees to work for absent employees, during the hours that the TMA is working. There is also evidence that floor nurses can make the same calls if the TMA, staff coordinator or nurse managers are not present at the facility.

Finally, there is evidence that in certain circumstances RNs and LPNs can alter break times. Break times for NARs are pre-set by the rotating assignment schedules. However, in the event that a section is working short, the floor nurse can alter the break times. From the record it appears that working short of staff occurs every week. One of Petitioner's witnesses stated that her preference when working short is to send all of the NARs on break together, while the two nurses monitor the floor. Other than that testimony, there is no other testimony regarding what kind of judgment RNs or LPNs use when they alter break times.

### **Board Law and Application of the Law to the Facts of This Case**

The party alleging that an individual is a supervisor has the burden of proof. NLRB v. Kentucky River Community Care, 121 S.Ct. 1861, 1866-1867 (2001). In order to prove supervisory status, the party alleging it must prove that the individual "possess(es) one or more of the indicia set forth in Section 2(11) of the Act and exercise(s) that authority in a manner which is not merely routine or clerical in nature." Williamette Industries, Inc., 336 NLRB No. 59, slip. op., p. 1. Any lack of evidence in the record is construed against the party asserting

supervisory status. Elmhurst Extended Care Facilities, 329 NLRB 535, 536 fn. 8 (1999). Only individuals with “genuine management prerogatives” should be construed supervisors, as opposed to “straw bosses, leadmen . . . and other minor supervisory employees.” Chicago Metallic Corp., 273 NLRB 1677, 1688 (1985), enfd. in relevant part 794 F.2d 527 (9<sup>th</sup> Cir. 1986). Thus, an individual who exercises some “supervisory authority” only in routine, clerical or perfunctory manner will not be found to be a supervisor. Bowne of Houston, Inc., 280 NLRB 1222, 1223 (1986). “The Board must judge whether the record proves that an alleged supervisor’s role was other than routine communication of instructions between management and employees without the exercise of any significant discretion.” Quadrex Environmental Co., 308 NLRB 101, 102 (1992). See also Azusa Ranch Market, 321 NLRB 811 (1996).

Based on the record, I conclude that the Employer has failed to meet its burden of demonstrating that either LPNs or RNs are supervisors within the meaning of Section 2(11) of the Act. In reaching this conclusion, I note that the Employer does not contend, and the record does not establish, that LPNs or RNs have the authority to hire, lay off, recall, discharge, evaluate or reward, or adjust the grievances of employees. There is also no contention that they effectively recommend hiring of employees.

With regard to assigning work to NARs, I conclude that the actions of the RNs and LPNs are routine in nature and do not require the use of independent judgment. First, it is clear that RNs and LPNs do not schedule the work hours or break times of NARs, and do not initially assign NARs to the care of particular residents. On the other hand, it is clear that RNs and LPNs adjust break times and adjust resident assignments if an NAR calls in absent, or if a part-time NAR is scheduled to work. However, there is no evidence that in doing so RNs or LPNs exercise independent judgment. While Nurse Manager Condon suggested that the RNs and

LPNs have to make a judgment whether to call someone in, work short or float someone, in fact they cannot require an NAR to come in. Moreover, the record lacks any specific context or examples on how these decisions are made. Decisions to assign a different NAR to a particular resident because the resident does not like the NAR does not appear to require independent judgment—but instead common sense. Likewise, the Employer does not explain what independent judgment is required when an RN or LPN takes into account medical restrictions of an NAR as assignments are adjusted in the event of a shortage. I also note that the floor nurses who testified made it clear that, in the event of a staff shortage, they have the NARs figure out how to divide up the residents that were to have been cared for by the absent NAR. Further, it is clear that the staffing coordinator and a TMA, both in the UFCW unit and neither of whom are contended by the Employer to be 2(11) supervisors, have similar roles in staffing. Therefore, in the absence of evidence that RNs or LPNs use independent judgment, or of what happens in the event an NAR would refuse to deviate from the assignment sheet as requested by an RN or LPN, I decline to find that the RNs or LPNs are supervisors because they adjust schedules to account for absent NARs. Harborside Healthcare, Inc., 330 NLRB 1334 (2000) (calling and requesting employees to volunteer to work does not establish supervisory status); Providence Hospital, 320 NLRB, 717,732 (determining break times is routine clerical judgment); Clark Machine Corp., 308 NLRB 555 (1992) (evidence fails to establish that assignments of work required independent judgment and were not routine); Anamag, 284 NLRB 621 (1987) (where assignments are determined by team as a group and no evidence team leaders exercise independent judgment when they move employees from one machine to another, team leaders are not supervisors).

There is no question that part of the duties of the RNs and LPNs is to monitor the resident care provided by NARs, to correct NARs in the performance of their tasks, and to verbally

admonish NARs should they choose to if NARs fail to perform their jobs adequately. However, the record contains no evidence that in doing so the RNS or LPNs exercise independent judgment. That is, there is no evidence that the RNs or LPNs decide what type of care is provided for each resident. Rather, all employees involved in the care of residents are expected to follow doctors' orders, assignment sheets, and resident care plans. Therefore, it appears that the discretion of RNs and LPNs is circumscribed by Employer policies and care plans. NLRB v. Kentucky River Community Care, 121 S.Ct. 1861, 1867; Beverly Health & Rehabilitation Services, 335 NLRB No. 54, slip. op. at 1, fn. 3 (2001) (LPNs not supervisors where their direction of employees is routine), enf. in pertinent part at 317 F.3d 316, 171 LRRM 3017 (D.C. Cir. 2003); Dynamic Science, Inc., 334 NLRB 391 (2001) (team leaders not supervisors because role in directing employees circumscribed by detailed orders and operating practices issued by employer); Chevron Shipping Co., 317 NLRB 379, 381 (1995) (where discretion is circumscribed by employer policies, monitoring work of others does not establish independent judgment). Finally, I note that even the Employer acknowledged at the hearing that any verbal warnings given to NARs by RNs or LPNs are not considered discipline, even if the RNs or LPNs choose to document the conversation. The Board has concluded that such verbal warnings do not establish supervisory status. Ten Broeck Commons, 320 NLRB 806, 812 (1996) (authority to give employee verbal warnings does not establish supervisory status).

With regard to discipline other than verbal warnings, the record is clear that RNs and LPNs might begin the disciplinary process by completing a "Disciplinary Action Report." However, the record is also clear that RNs or LPNs who complete such a report merely record their observations, and then look in the Employee Handbook to determine the class of the offense observed. Moreover, both Nurse Manager Condon and Administrator Haack were clear that the

nurse managers, administrator, or the DON independently investigate reported incidents, including talking to relevant witnesses. In fact, RNs and LPNs do not have access to personnel files, and have no idea whether or what level of discipline issues as a result of their initiation of the process. Therefore, RNs and LPNs do little more than report employee infractions to management, which makes the final decision whether discipline issues, apparently nearly always after conducting its own investigation. In similar circumstances, the Board has concluded that this reporting function does not establish supervisory status. Williamette Industries, 336 NLRB No. 59 (2001); Beverly Health and Rehabilitation Services, Inc., supra, at p. 35; Ten Broeck Commons, supra, at 812.

While the Employer contends that RNs and LPNs can send NARs home for certain infractions like resident abuse, there is no evidence that they have done so. Both Nurse Manager Condon and Administrator Haack cited examples where they later conceded that they did not have sufficient information to know what transpired. At best, their conclusionary testimony is that RNs and LPNs can send NARs home if the NARs engage in resident abuse. I also note that one of Petitioner's witnesses testified that she sent an employee home only after her nurse manager told her to do so. Thus, I conclude that whatever authority RNs and LPNs have to send NARs home, it is insufficient to establish supervisory status, particularly as the Board has found that the authority to only send employees home who are believed to be endangering the health and safety of patients does not constitute evidence of supervisory status. Vencor Hospital-Los Angeles, 328 NLRB 1136, 1139 (1999); Washington Home Nursing, Inc., 321 NLRB 366, 367 fn. 4 (1996).

I also conclude that, as Nurse Manager Condon testified, when RNs and LPNs initial overtime slips or timecards, they are merely witnessing the fact that the NARs were present, and

that these acts of initialing do not establish supervisory status. Neither does the fact that RNs and LPNs might let an NAR go home early, particularly as the only specific evidence on this point suggests that they do so only if an NAR is ill. Id. (authority to permit aides to leave early is routine in nature and not evidence of supervisory status).

Finally, I acknowledge that at least some RNs and LPNs are regularly assigned to be house, PM and night supervisors. Moreover, three LPNs (including one who is an acting nurse manager) are on the rotation schedule to be on call for weekends. However, the record contains virtually no information regarding their duties. From this record, the evidence is that floor nurses consult the house, PM and night supervisors on how to deal with staff shortages in the absence of managers. However, house managers also cannot require NARs to work unscheduled hours. Beyond this consultation role, there is no evidence that house, PM or night supervisors have any authority beyond that of floor nurses (other than to deal with residents' families). While most of the individuals on the weekend on-call rotation are managers, there is no record evidence regarding the authority of the LPNs who share the rotation. Thus, the Employer has not met its burden of establishing that when floor nurses are house, PM or night supervisors or work the weekend on-call rotation, they exercise any authority that establishes supervisory status, or for that matter, that differs from the authority of the floor nurses as described above.

For all the reasons set forth above, I conclude that the Employer has not met its burden of establishing the supervisory status of the RNs and LPNs, and I find that they are not supervisors as that term is defined in Section 2(11) of the Act.

6. Under Section 9(b)(1) of the Act, the Board is prohibited from including professional employees in a unit with employees who are not professional, unless a majority of the professional employees vote for inclusion in such a unit. To carry out the statutory requirement,

the Board has adopted a special type of self-determination procedure in such an election known as a Sonotone election. Under this procedure, a separate voting group encompassing all professionals would elect whether to constitute a separate appropriate bargaining unit or be included in the larger unit with non-professional employees. Accordingly, I find that all professional employees constitute a separate voting group which, depending on the outcome of the election, may constitute either a separate appropriate bargaining unit, or be included in the unit with the non-professional employees.

I, therefore, find that the following employees of the Employer may 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 registered nurses and licensed practical nurses, including the MDS Coordinator and the Medicare Coordinator, employed by the Employer at its St. Paul, Minnesota facility; excluding guards and supervisors as defined in the Act, and all other employees.

In order to ascertain the desires of the professional employees as to their inclusion in the unit with the non-professional employees, I shall direct separate elections in the following groups:

- (a) All full-time and regular part-time registered nurses, including the MDS Coordinator, employed by the Employer at its St. Paul, Minnesota facility; excluding licensed practical nurses, guards and supervisors as defined in the Act, and all other employees.
- (b) All full-time and regular part-time licensed practical nurses, including the Medicare Coordinator, employed by the Employer at its St. Paul, Minnesota facility; excluding registered nurses, guards and supervisors as defined in the Act, and all other employees.

The employees in the professional voting group (a) will be asked two questions on their ballot:

- (1) Do you wish to be represented in a unit that includes the non-professional employees of Extencicare Health Services, Inc. d/b/a Galtier Health Care Center for the purposes of collective bargaining?
- (2) Do you desire to be represented for the purposes of collective bargaining by Minnesota's Health Care Union, Service Employees International Union, Local 113?

If a majority of the professional employees in voting group (a) vote “yes” to the first question, indicating their wish to be included in the unit with non-professional employees, they will be so included. Their votes on the second question will then be counted together with the votes of the non-professional voting group (b) to determine whether or not the employees in the combined professional and non-professional unit wish to be represented by Minnesota's Health Care Union, Service Employees International Union, Local 113. If, on the other hand, a majority of the professional employees in voting group (a) vote against such inclusion, they will not be included with the non-professional employees. Their votes on the second question will then be separately counted to determine whether or not they wish to be represented by Minnesota's Health Care Union, Service Employees International Union, Local 113.

The employees in the non-professional voting group (b) will be polled to determine whether or not they wish to be represented by Minnesota's Health Care Union, Service Employees International Union, Local 113.

The unit determination is based, in part, on the results of the election among the professional employees. However, the following findings in regard to the appropriate unit are now made:

(1) If a majority of the professional employees (RNs) vote for inclusion in the unit with the non-professional employees (LPNs), I find that the following will constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time registered nurses and licensed practical nurses, including the MDS Coordinator and the Medicare Coordinator, employed by the Employer at its St. Paul, Minnesota facility; excluding guards and supervisors as defined in the Act, and all other employees.

(2) If a majority of the professional employees (RNs) do not vote for inclusion in the unit with the non-professional employees (LPNs), but do vote for representation apart from them, I find that the following two groups of employees will constitute separate units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

- (a) All full-time and regular part-time registered nurses, including the MDS Coordinator, employed by the Employer at its St. Paul, Minnesota facility; excluding licensed practical nurses, guards and supervisors as defined in the Act, and all other employees.
- (b) All full-time and regular part-time licensed practical nurses, including the Medicare Coordinator, employed by the Employer at its St. Paul, Minnesota facility; excluding registered nurses, guards and supervisors as defined in the Act, and all other employees.

### **DIRECTION OF ELECTION<sup>5</sup>**

An election by secret ballot will be conducted by the undersigned among the employees in the units found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the units who were employed during the payroll period ending immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In

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<sup>5</sup> Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street, NW, Washington, DC 20570. This request must be received by the Board in Washington by **June 24, 2003**.

addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are persons who have quit or been discharged for cause since the designated payroll period, 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.<sup>6</sup>

Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Minnesota's Health Care Union, Service Employees International Union, Local 113.

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<sup>6</sup> To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. Excelsior Underwear Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969). Accordingly, it is directed that two copies of 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 within seven (7) days of the date of this Decision and Direction of Election. North Macon Health Care Facility, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. In order to be timely filed, this list must be received in the Minneapolis Regional Office, 330 South Second Avenue, Suite 790, Minneapolis, MN 55401-2221, on or before close of business **June 17, 2003**. No extension of time to file this list may be granted by the Regional Director except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Signed at Minneapolis, Minnesota, this 10th day of June, 2003.

/s/ Ronald M. Sharp

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Ronald M. Sharp, Regional Director  
Eighteenth Region  
National Labor Relations Board  
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Minneapolis, MN 55401

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