

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

BEVERLY HEALTH AND REHABILITATION  
SERVICES, INC. AND ITS WHOLLY-OWNED  
SUBSIDIARY, BEVERLY ENTERPRISES-  
PENNSYLVANIA, INC. D/B/A BEVERLY  
HEALTHCARE D/B/A BEVERLY HEALTHCARE-  
MURRYSVILLE<sup>1</sup>

**Case 6-RC-12237**

Employer

and

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

Petitioner

**REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION**

The Employer, Beverly Health and Rehabilitation Services, Inc. and its wholly-owned subsidiary, Beverly Enterprises-Pennsylvania, Inc. d/b/a Beverly Healthcare d/b/a Beverly Healthcare-Murrysville, operates a skilled nursing facility in Murrysville, Pennsylvania. The Petitioner, District 1199P, Service Employees International Union, AFL-CIO, CLC, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of licensed practical nurses (LPNs). A hearing officer of the Board held a hearing and the parties filed timely briefs with me.

As evidenced at the hearing and in the briefs, the parties disagree on the supervisory status of the LPNs. The Employer contends that the petitioned-for LPNs are supervisors within

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<sup>1</sup> The Employer's name appears as amended at the hearing, and is fully consistent with the findings of the Board in Beverly Health and Rehabilitation Services, Inc., 335 NLRB No. 54, fn. 2 and slip op. at 5-6 (2001) and the findings of the Administrative Law Judge in Beverly Enterprises, Inc., JD-14-3 (February 11, 2003).

the meaning of Section 2(11) of the Act as they have the authority to assign and responsibly direct, discipline and evaluate other employees, or effectively to recommend such action, and therefore the petition should be dismissed, while the Petitioner contends that the LPNs do not possess or exercise any supervisory authority. The unit sought by the Petitioner has approximately 15 employees.

I have considered the evidence and the arguments presented by the parties on this issue. As discussed below, I have concluded that the LPNs at the Employer's facility are not supervisors within the meaning of the Act. Accordingly, I have directed an election in a unit that consists of approximately 15 employees.

To provide a context for my discussion of the issue, I will first provide an overview of the Employer's operations. Then, I will present in detail the facts and reasoning that supports my conclusion on the issue.

## **I. OVERVIEW OF OPERATIONS**

The Employer operates a 120-bed skilled nursing facility located in Murrysville, Pennsylvania. Executive Director Denise Curry is in charge of the overall operation of the facility. Reporting directly to Curry are the heads of the various departments, including nursing. The Nursing Department is under the direction of Director of Nursing Services (DON) Melissa Sullivan, and reporting to Sullivan is Assistant Director of Nursing Services (ADON) Gloria Grove. Reporting to Grove are five registered nurse (RN) supervisors.<sup>2</sup> Reporting to the RN

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<sup>2</sup> The parties have stipulated, and I so find, that the RN supervisors are supervisors within the meaning of Section 2(11) of the Act in that they direct the work of the other nurses and the certified nursing assistants (CNAs).

supervisors are the charge nurses, who may be either RNs or LPNs.<sup>3</sup> Finally, reporting to the charge nurses are the certified nursing assistants (CNAs).<sup>4</sup>

#### **A. Staffing of the Nursing Department**

For staffing purposes, the facility is divided into two units or wings: east and west. The east wing is further divided into two hallways, with each hallway described by the number of the resident room at the beginning of the hallway: the 101 hall and the 113 hall. The west wing is similarly divided into four hallways, called: the 125 hall, the 136 hall, the 143 hall and the ICU hall.

The DON works from 8 a.m. to 6 p.m., Monday through Friday, works weekends as part of a team, and is on-call at all times. The ADON works similar hours and is also on-call at all times.<sup>5</sup>

The Employer employs five RN supervisors. An RN supervisor is in the facility at all times and is available to all staff persons, including charge nurses and CNAs, who have questions or need assistance. In the absence of the DON and the ADON, the RN supervisor is the highest ranking member of the Nursing Department in the facility and is generally responsible for the Nursing Department. The RN supervisor works at the west nurses station. During the week, there is one RN supervisor on duty from 7 a.m. to 3 p.m., one RN supervisor on duty from 3 p.m. to 11 p.m., and one RN supervisor on duty from 11 p.m. to 7 a.m. On the

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<sup>3</sup> The Employer does not employ any LPNs other than those working as charge nurses. As noted, the Petitioner seeks to represent only the LPN charge nurses, not the RN charge nurses.

<sup>4</sup> The CNAs are represented by the Petitioner as part of an overall service and maintenance unit and are covered under a collective bargaining agreement between the Employer and the Petitioner.

<sup>5</sup> The ADON is currently on a leave of absence.

weekends, there is one RN supervisor on duty from 7 a.m. to 7 p.m. and one RN supervisor on duty from 7 p.m. to 7 a.m.<sup>6</sup>

The Employer employs about 22 charge nurses, 15 of whom are LPNs and 7 of whom are RNs.<sup>7</sup> The charge nurse assignments are designated by hallway, and charge nurses are usually assigned to a particular hallway for about a year. During the week, from 7 a.m. to 3:30 p.m., there are five charge nurses on duty; from 3 p.m. to 11:30 p.m., there are four charge nurses on duty; and from 11 p.m. to 7:30 a.m., there are two charge nurses on duty. On weekends, from 7 a.m. to 7:30 p.m., there are five charge nurses on duty, and from 7 p.m. to 7:30 a.m., there are four charge nurses on duty.

The Employer employs about 64 CNAs. The CNA assignments are designated by a grouping of rooms on a portion of a hallway, and the CNAs bid on particular assignments for a three-month period. At the end of the three-month period, the CNAs are rotated so that each CNA moves to a different grouping of rooms every three months. The Employer's optimal staffing for CNAs is: from 6 a.m. to 2 p.m., 13 CNAs; from 2 p.m. to 10 p.m., ten CNAs; and from 10 p.m. to 6 a.m., six CNAs. At present, however, the CNA staffing is lower than the optimal level, and there are only ten CNAs assigned to work on the daylight shift instead of 13. In practice, the ratio of CNAs to charge nurses varies from one to three CNAs per charge nurse.

### **B. Duties of Charge Nurses and CNAs**

The charge nurses are responsible for passing medications to the residents at designated times throughout the day; for performing treatments on residents, such as applying creams and changing dressings on wounds; and for charting. The charge nurses also assist the CNAs as needed, by doing such tasks as passing meal trays, feeding residents and assisting in

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<sup>6</sup> The nurses, both RNs and LPNs, working on weekends are assigned 12-hour shifts and are referred to as "Baylor nurses".

<sup>7</sup> The total number of charge nurses and the number of RN charge nurses is derived from Petitioner's Exhibit 1.

the lifting of residents. The charge nurses spend the bulk of their time directly caring for residents.

The duties of the charge nurses also include overseeing the CNAs, so that during the course of performing their nursing duties, the charge nurses observe and interact with the CNAs. During the course of the day, the charges nurses respond to questions from CNAs and tell CNAs to perform certain tasks.

The CNAs are responsible for attending to the daily needs of the residents. The CNAs provide mostly repetitive care, much of which does not vary significantly from resident to resident. Such duties include assisting residents in getting in and out of bed; properly positioning the residents in bed; placing residents in chairs; bathing, dressing, and feeding the residents; and taking care of the residents' toileting.

The care given to each resident is determined by a care plan. On admission, an immediate care plan is developed by the charge nurse; thereafter, an intensive care plan is developed by an interdisciplinary team. A care card is developed for each resident and is then followed by the CNA. Changes in the status of residents are reported to the CNAs by the charge nurses at the beginning of the CNAs' shift so that the CNAs can modify the care given. For example, if a resident had fallen on the prior shift, the CNA would be required to take vital signs on a regular basis.

In addition to the individualized care plans, there is a shower schedule posted at the nurses station that is followed by the CNAs. Also available to the CNAs are the Employer's practice and procedure manuals detailing every aspect of resident care. The CNA knows the precise needs of each resident by consulting the care card, along with the shower schedule, as modified by any reported changes in status.

When there is a non-routine occurrence with a resident, the CNA reports the situation to the charge nurse, who then takes appropriate action, which may result in a change in the care that the CNA gives. For example, if a CNA observes a bed sore on a resident, the CNA reports

this to the charge nurse. Typically, the charge nurse will examine the bed sore and report the findings to the RN supervisor. The RN supervisor may then contact a physician, or decide the course of treatment, and then inform the charge nurse of the treatment. If the treatment is to apply a cream on the affected area after incontinence care, the charge nurse will inform the CNA of this change.

### **C. Job Descriptions and Training**

The charge nurse job descriptions, by their terms, indicate that the charge nurses 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: participate in the assessment of residents, in the development of the plan of care, and in the implementation of the plan of care; are accountable for the delivery of care through the supervision of staff; evaluate CNAs; discipline CNAs; assign CNAs specific duties for resident care and direct their work; assign hours, breaks, and meal periods to CNAs; ensure proper staffing by calling in replacement employees for CNAs not reporting for work and by transferring or reassigning CNAs; and attempt to resolve CNAs’ problems and grievances. The CNAs’ job description states that they work under the supervision of “licensed nursing personnel” and report to the charge nurse. Consistent with these job descriptions, a poster displayed in the facility describes the charge nurses as part of the Employer’s management team.

Further, in the spring of 1999, the Employer conducted a one-day training session on supervision and leadership for the charge nurses, and participants received a certificate of attendance. However, this training has not been repeated and charge nurses who started at the facility after the spring of 1999 have not received this training.<sup>8</sup> Nor have the training materials been distributed to those charge nurses who did not attend the training.

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<sup>8</sup> Seven of the 15 LPN charge nurses attended the training.

#### **D. Assignments**

The ADON completes the staff schedules for the Nursing Department, including the CNAs, on a monthly basis. The charge nurses do not participate in the scheduling of CNAs. The RN supervisor on duty handles CNA call-offs, and handles obtaining replacements. The procedure to be followed for obtaining replacements is set forth in the collective bargaining agreement covering the CNAs.<sup>9</sup>

On each wing, east and west, the Employer maintains an assignment board which shows the group of residents each CNA is to care for, as well as the break and lunch times for the CNAs. As noted, there is an RN supervisor on duty at all times, working at the west nurses station. This RN supervisor is responsible for completing the assignment board for the west wing.<sup>10</sup> On the east wing, the charge nurses are responsible for completing the assignment board.

CNAs are assigned to care for the residents in a block of adjacent rooms. As noted, the CNAs bid on these resident assignments, and then rotate through the assignments every three months. The completion of the assignment board by the RN supervisor on the west wing and by the charges nurses on the east wing is therefore a matter of rotating the CNAs every three months.

When a CNA calls off and a replacement is obtained, the replacement CNA will generally be given the assignment of the absent CNA. If there are fewer CNAs working than the regular assignments, the RN supervisor on the west wing and the charge nurses on the east wing will equalize the number of residents assigned to each CNA, by adding additional rooms to the normal block of rooms. Similarly, if there is an extra CNA, this CNA may be assigned specific tasks to reduce the workload of the other CNAs. In making these different assignments,

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<sup>9</sup> On occasion, the RN supervisor may delegate this duty to one of the charge nurses.

<sup>10</sup> This duty, also, may on occasion be delegated to one of the charge nurses by the RN supervisor.

there is no consideration given to matching any particular training and skills and abilities of the CNAs with any specific resident needs.<sup>11</sup> Finally, when a CNA is on restricted duty, the ADON identifies the CNA's restrictions and the RN supervisor on the west wing or the charge nurse on the east wing assigns appropriate light duty tasks.

The Employer has two sets of pre-determined break and lunch times noted on the assignment board. Each CNA has two breaks and a lunch period. When completing the assignment board, the RN supervisor on the west wing and the charge nurses on the east wing list which CNAs are to take the early breaks and lunch and which CNAs are to take the late breaks and lunch. In designating breaks, the RN supervisor and the charge nurses ensure that there are enough CNAs remaining on the hall to handle the workload. As resident care needs require, the charge nurses on both wings may call the CNAs off of breaks or otherwise modify their break times.

On occasion, CNAs may ask to leave early or be asked to stay late. It appears that if the request to leave early is made to a charge nurse, the charge nurse will either refer the matter to the RN supervisor or grant the request and, at the same time, inform the RN supervisor of the situation. It further appears that if the charge nurse would like the CNA to stay late for 10 to 15 minutes to finish a task, the charge nurse may seek prior approval from the RN supervisor, or permit the CNA to stay late for a short period and, at the same time, inform the RN supervisor of the situation.

On occasion, a time clock adjustment form must be signed to record the hours a CNA works. This may occur if a CNA works overtime or if a CNA forgets to swipe the badge through the time clock. This time clock adjustment form may be completed by a charge nurse.

With regard to the matters described in this section, as with other matters described in this Decision, there is some variation between individual charge nurses as to whether they do

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<sup>11</sup> However, on occasion, there may be a need to consider the gender of the CNA and resident.

some of these things or whether they refer the CNA to the RN supervisor. For example, while one charge nurse may tell a CNA to take a time clock adjustment form to the RN supervisor for signature, another charge nurse may sign the form.

### **E. Discipline**

The Employer has a comprehensive progressive discipline system. The Employer disciplines CNAs using an "Associate Memorandum" form, which classifies violations as either "Category I" or "Category II." A Category I violation is a serious infraction resulting in the CNA being suspended pending investigation and possible discharge. A Category II violation results in progressive discipline. The progressive disciplinary steps are: first written warning, second written warning, third written warning, and suspension pending investigation for discharge. The Category II section of the form states that the immediate supervisor should review the employee's personnel file to determine the appropriate disciplinary step. The disciplinary form includes a listing of all other disciplinary actions involving the employee in the past year and provides spaces for the supervisor's comments, the employee's comments, and the corrective action to be taken by the employee. The CNA signs the form to verify that he or she received it and discussed the corrective action.

Under the Employer's system, the ADON handles all disciplinary matters related to attendance; the charge nurses have no involvement in attendance discipline. Besides attendance, however, the ADON and the RN supervisors are actively involved in resolving problems and issuing discipline.

Nine Associate Memorandum forms imposing discipline on CNAs for non-attendance matters were introduced into the record. Of these nine, seven were issued directly by the ADON, while two were issued by the same charge nurse (LPN Mary "Debbie" Schmidt), one on October 4, 2000 and one on July 30, 2001.

Specifically, the October 4, 2000 discipline was issued because the CNA was observed leaving her work area for an unscheduled break. The discipline imposed was a first written

warning. The July 30, 2001 discipline was issued because the CNA transferred a resident onto a geri-chair for a shower without a nurse being present. The discipline imposed on this occasion was a first written warning. This July 30, 2001 discipline, however, also contained comments from, and was signed by, another charge nurse as well as Schmidt.

In each of these cases, charge nurse Schmidt spoke with the ADON before the discipline was issued. In each case, Schmidt reported her observations to the ADON, the ADON provided the numbers of the disciplinary rules violated, Schmidt completed the form in the presence of the ADON, and the ADON directed Schmidt to discuss the matter with the CNA while having a Union representative present.<sup>12</sup>

Notwithstanding Schmidt's involvement in issuing discipline, at least two of the charge nurses believe that they do not have such authority based on past incidents when they complained about CNAs and were told by the ADON, in one instance, and the DON, in the other instance, that they did not have the authority to write up CNAs.

Without invoking the Employer's progressive discipline system, the charge nurses routinely counsel CNAs to correct certain problems. During the training given to charge nurses in the spring of 1999, the charge nurses were trained in the use of verbal coaching or counseling as a means of correcting improper behaviors. Examples of recent incidents for which CNAs were counseled include an incident where a CNA took a resident to the bathroom, but left the resident in the bathroom until the next shift came on, and a situation where a CNA did not follow the nap schedule for a resident. Charge nurses may document this counseling by writing an account on a piece of paper, or they may choose not to record it. This counseling is not part of the Employer's progressive discipline system, and there is no showing that any verbal counseling given by the charge nurses has had an adverse impact on a CNA's employment status.

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<sup>12</sup> The record does not disclose the involvement, if any, of the other charge nurse who signed off on the July 30, 2001 discipline in this process.

With regard to egregious misconduct, in the last three years, no CNA has been sent home for physical abuse of a resident, for swearing at a resident, or for being under the influence of alcohol or drugs. However, the charge nurses have been directed to “remove” the employee in such situations. At least one charge nurse believed that this would be the proper course of action based on her license, not based on an Employer directive.

Finally, the charge nurses may complete “Deficient Documentation” forms in the event of a repeated problem with CNA documentation. On a daily basis, the CNAs are to record the resident’s activities of daily living in binders. The charge nurses check the binders on a weekly basis to ensure that the documentation is complete. If the information is not recorded, the charge nurse may discuss the matter with the CNA, and tell the CNA to complete the information. If there is a continuing problem, the charge nurse may complete a Deficient Documentation form, which is given to the CNA. After the CNA completes the documentation, the CNA signs the form, which is then placed in the CNA’s file. In the last two years, only two such Deficient Documentation forms have been issued, both by the same charge nurse, Schmidt, on the same day. These Deficient Documentation forms are not part of the Employer’s progressive discipline system, and there is no showing that any Deficient Documentation forms issued by the charge nurses have had an adverse impact on a CNA’s employment status.

#### **F. Evaluations**

The Employer has a performance appraisal process pursuant to which CNAs are to be evaluated after a 90-day probationary period, and thereafter, annually on their anniversary dates.<sup>13</sup> On the form, numerical ratings from 1 to 4 for are given for 51 job elements in the following areas: General Skill and Customer Service; Residents’ Rights; Nursing Care Implementation; Nursing Care Evaluation; Education; and Personal Skills. The form has a place for comments on major strengths, contributions, and performance areas requiring improvement.

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<sup>13</sup> The evaluations are not always completed in a timely manner, however.

After rating all of the elements, an overall rating of 1 through 4 is computed by dividing the total of the individual ratings by 51. According to the form, an overall rating of 1 indicates that a CNA “exceeded all performance expectations,” a rating of 2 indicates that a CNA “met all and exceeded most performance expectations,” a rating of 3 indicates that a CNA “met performance expectations,” and a rating of 4 indicates that a CNA “did not meet performance expectations.”

Under this process, the charge nurses complete evaluations for the CNAs with whom they work. In order to complete the section of the evaluation dealing with attendance, the charge nurses rely on information provided to them by the ADON. After the evaluations are completed, the charge nurses review them with the CNAs and give the CNAs an opportunity to write comments on the forms. The charge nurses and the CNAs sign the completed evaluations and the evaluations are thereafter placed in the CNAs’ personnel files.<sup>14</sup>

The evaluations are used as a motivational tool, to commend the CNAs on good job performance, and to identify weakness where improvement is required. However, since the CNAs are represented by the Petitioner and are covered under a collective bargaining agreement, the evaluations do not affect their wages.<sup>15</sup>

## **II. SUPERVISORY STATUS OF CHARGE NURSES**

As previously stated, the Employer contends that the charge nurses at the Employer’s facility are supervisors within the meaning of the Act. In so asserting, the Employer contends that the charge nurses have the authority to assign, direct, discipline and evaluate CNAs.<sup>16</sup> The

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<sup>14</sup> There is evidence that in one case, the DON directed the charge nurse to lower an annual evaluation because the CNA was a newer employee.

<sup>15</sup> The contract sets forth the starting wages for CNAs. As a result of the longevity of some CNAs, the wage rates of some CNAs are close to the wage rates for some charge nurses. The parties have stipulated that the highest paid CNA earns between \$13.40 and \$13.72 per hour while the lowest paid LPN charge nurse earns \$14.35 per hour.

<sup>16</sup> The Employer does not assert that the charge nurses hire, transfer, suspend, lay off, recall, promote, discharge, or reward other employees, or adjust their grievances or effectively recommend such actions.

Petitioner, on the other hand, asserts that the charge nurses are not supervisors within the meaning of the Act even under the analysis required by NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706 (2001). As described in more detail below, I find that the Employer has not met its burden of establishing that the charge nurses are supervisors within the meaning of the Act, and therefore, I shall direct an election in an LPN unit.

Section 2(11) of the Act defines the term supervisor as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To meet the definition of supervisor in Section 2(11) of the Act, a person needs to possess only one of the 12 specific criteria listed, or the authority to effectively recommend such action. Ohio Power Co. v. NLRB, 176 F.2d 385 (6<sup>th</sup> Cir. 1949), cert. denied 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. Harborside Healthcare, Inc., 330 NLRB 1334 (2000).

The Board and the courts have observed that the Act sets forth a three-pronged test for determining whether an individual is a supervisor within the meaning of the Act:

Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (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'.

Franklin Home Health Agency, 337 NLRB No. 132, slip op. at 4 (2002), citing NLRB v. Kentucky River Community Care, Inc., supra.

The exercise of "some supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner," or through giving "some instructions or minor orders to other employees" does not confer supervisory status. Franklin Home Health Agency, supra at 4, citing Chicago Metallic Corp., 273 NLRB 1677, 1689 (1985).

The burden of proving supervisory status lies with the party asserting that such status exists. NLRB v. Kentucky River Community Care, Inc., supra at 710–712; Michigan Masonic Home, 332 NLRB 1409 (2000). This is a substantial burden in light of the exclusion of supervisors from the protection of the Act. The Board has frequently warned against construing supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act. See, e.g., Vencor Hospital – Los Angeles, 328 NLRB 1136, 1138 (1999). Lack of evidence is construed against the party asserting supervisory status. Michigan Masonic Home, supra. Further, mere inferences or conclusory statements without detailed, specific evidence of independent judgment are insufficient to establish supervisory authority. Sears, Roebuck & Co., 304 NLRB 193 (1991).

As previously stated, the Employer, contrary to the Petitioner, contends that the charge nurses at its facility are supervisors because it asserts that they have the authority to assign, direct, discipline and evaluate CNAs.<sup>17</sup> Upon the entire record, and in light of the direction of Kentucky River Community Care, Inc., I have concluded that the charge nurses in this case are not supervisors within the meaning of the Act.

#### **A. Analysis of Job Descriptions and Training**

The charge nurse job descriptions 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. The CNA job descriptions likewise state that the CNAs are supervised by charge nurses, and the Employer has designated the charge nurses as part of its management team. Nevertheless, it is well-settled that employees cannot be transformed into statutory supervisors merely by vesting them with the title or job description of supervisor. Heritage Hall, 333 NLRB 458, 458-459 (2001). Similarly, the fact that the Employer

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<sup>17</sup> As previously noted, the Employer does not assert, either through evidence presented at the hearing or through its brief, that the charge nurses possess any of the other indicia of supervisory authority enumerated in Section 2(11) of the Act. Consequently, I have not discussed those indicia in this Decision.

conducted a one-day supervisory and leadership training session for the charge nurses whom it employed four years ago, cannot control the disposition of this issue. Rather, to determine whether the charge nurses are supervisors, it is necessary to analyze how the charge nurses actually carry out their responsibilities.<sup>18</sup>

### **B. Analysis of Assignment and Direction of Work**

Applying the legal standards set out above to the facts of this case, I find that the charge nurses do not exercise independent judgment in making assignments or in directing the work of the CNAs.

The charge nurses do not schedule the CNAs; nor do they regularly handle call-offs or obtaining replacements. When delegated the task of obtaining replacements for call-offs, the charge nurses must follow the procedure set forth in the collective bargaining agreement. The Board has found that the ability to transfer or call in workers based on staffing shortages involves the exercise of routine, not independent, judgment. Harborside Healthcare, Inc., supra at 1336; Lakeview Health Center, 308 NLRB 75, 79 (1992).

On the west wing, the charge nurses do not complete the CNA assignment board. Although charge nurses on the east wing do complete the CNA assignment board, their authority to assign CNAs to groups of residents is limited by the fact that such assignments are bid on and rotate every three months. Moreover, there is no evidence that the charge nurses consider the capabilities of the CNAs in making these assignments. In addition, on those occasions when a substitute CNA is filling in, the groups of residents the CNAs are assigned are not normally reconfigured. Rather, the substitute CNA usually takes the group of residents normally assigned to the regular CNA who is absent. Rotating CNAs among groups of residents, or substituting a replacement CNA for an absent CNA is a merely ministerial task

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<sup>18</sup> Likewise, an employer's holding out an individual to employees as a supervisor is not necessarily dispositive of supervisory status. Blue Star Ready-Mix Concrete Corp., 305 NLRB 429, 430 (1991).

involving no exercise of independent judgment under the Act. See, e.g., Ten Broeck Commons, 320 NLRB 806, 810 (1996). When the east wing is short-staffed, the charge nurses will try to equalize the assignments between the CNAs. The Board generally views assignments made to equalize work as not involving a degree of discretion sufficient to confer supervisory status. See, e.g., Bozeman Deaconess Hospital, 322 NLRB 1107 (1997); Providence Hospital, 320 NLRB 717, 727 (1996).<sup>19</sup>

The east wing charge nurses assign breaks and meal periods to the CNAs, but there are only two times available for breaks and lunch, early and late. The charge nurses make decisions as to breaks and meals solely to ensure that there are enough CNAs remaining on the floor to handle the workload. The assignment of break and lunch times clearly requires no independent judgment; rather, the decision as to when an employee may take a break is a simple and routine task, not requiring independent judgment. Kentucky River Community Care, Inc., supra, 532 U.S. at 713-714; Ten Broeck Commons, supra 811.

The charge nurses can also change the break times, or summon a CNA from a break, if residents' needs require. The Board has characterized the ability to delay breaks due to workload as "routine clerical judgment" and has 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 933 (2000).

With respect to overtime, it appears that the charge nurses may occasionally approve small amounts of overtime work, while simultaneously informing the RN supervisor of the

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<sup>19</sup> I note that the Employer, in its brief, relies on the dissenting opinions in Ten Broeck Commons and its companion case Providence Hospital. In the judicial context, the United States Court of Appeals for the Third Circuit has stated: "Whatever may be the personal views of the district court as to the merits vel non of a decision of this court, the district court is not free to 'adopt' the dissent. This court is strict in its adherence to the precedent of its earlier opinions." Poulis v. State Farm Fire and Casualty Co., 747 F.2d 863, 867 (1984). The same principal is equally applicable in the administrative context. Moreover, the Board has recently reiterated its adherence to the principles of Ten Broeck Commons in its decision in Heritage Hall, 333 NLRB No. 63 fns. 13, 16, 17 (2001).

situation. There is no evidence that the charge nurses have ever required any CNA to work overtime, and the Board views the ability to ask—not to require—an employee to work extra hours as evidence of limited authority that requires only routine judgment. Providence Hospital, supra at 732. Further, to the extent that the charge nurses may occasionally allow CNAs to leave early in defined circumstances, this authority is routine in nature and is insufficient to establish supervisory status. Washington Nursing Home, Inc., 321 NLRB 366, fn. 4 (1996).

The charge nurses may sign time clock adjustment forms for CNAs to verify that the CNA had been working on that day. The charge nurses do not use discretion in adjusting CNA timecards, but simply sign the forms to confirm that the CNA was working. It is well-established that pro forma approval of corrections to timecards does not entail the exercise of independent judgment. J.C. Brock Corporation, 314 NLRB 157, 160 (1994).

The record also fails to show that the charge nurses use independent judgment in directing the work of the CNAs. The essential duty of the CNA is to take care of elderly people who are no longer able to care for themselves. For the most part, such duties require little skill, are repetitive, and at times, are even unpleasant.

Every day, CNAs must perform the same care, in the same manner, for the same residents. To be sure this is done, the Employer requires that each resident's particular needs be written on the care card. It is the responsibility of the CNA to consult and follow the care card with respect to each resident and perform all functions indicated for each resident.

One of the charge nurses' responsibilities is to be sure that the CNAs are properly performing their jobs. If a charge nurse sees a resident who needs attending to, or a job that has not been properly done, the charge nurse will call it to the attention of the CNA. This type of direction does not require the independent judgment of Section 2(11) of the Act. To some degree, the greater skill and experience of the charge nurse, who is an LPN or RN, may be involved as the charge nurse may more quickly recognize a situation that needs immediate attention. In other situations, the problems are usually quite obvious (a resident is wet or needs

to be dressed, etc.). In any event, workday tasks are governed by the detailed instructions contained in the care card, and the Employer's manuals. See Ten Broeck Commons, supra at 811-812.

The charge nurses, by virtue of their specialized nursing training, have many other responsibilities that do not involve CNAs, such as preparing and passing out medications, giving treatments, and updating residents' charts. Thus, the charge nurses' supervision of CNAs is narrowly circumscribed to giving rather general, routine directions to lesser skilled employees in order to maintain the quality of the CNAs' work. The Board has held that this type of authority is typical of that of the industrial strawboss and leadman, skilled employees with only limited authority, who are routinely excluded from the definition of supervisor. Ten Broeck Commons, supra at 811-812.

### **C. Analysis of Discipline**

In addition, the charge nurses' involvement in discipline does not render them supervisors within the meaning of Section 2(11). Contrary to the Employer's assertions in this regard, the evidence establishes that the charge nurses have rarely issued discipline to the CNAs.

Specifically, the Employer has a comprehensive progressive discipline system, and under that system, during the two and one half years preceding the hearing, there were nine non-attendance disciplinary notices issued. The ADON issued seven of these disciplinary notices. Thirteen of the LPN charge nurses issued no discipline and two were told that they had no authority to do so. Only one LPN charge nurse (Schmidt) issued any discipline, and the most recent of the two disciplinary notices written by Schmidt occurred almost two years before the hearing.<sup>20</sup> Further, in connection with those two disciplines, the record is clear that in each case, at the very least, Schmidt reported her observation of the problem to the ADON, the

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<sup>20</sup> Another LPN charge nurse signed off on one discipline that Schmidt issued, but the role of the other charge nurse in the process is not disclosed.

ADON told Schmidt what rules were violated, Schmidt completed the notice in the presence of the ADON and the ADON directed Schmidt to present the discipline to the CNA with a Union representative present.

Based on the ADON's involvement in the disciplinary process, it is far from clear that Schmidt issued these two disciplinary notices without review by the ADON. 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); Franklin Home Health Agency, supra, slip op. at 6.

Even assuming that Schmidt independently issued the discipline, it is well-established that the sporadic exercise of the duties of a supervisor does not confer supervisory status. Ohio Power Co., 80 NLRB 1334, 1340 (1948) enf. denied, 176 F.2d 385 (6<sup>th</sup> Cir), cert. denied, 338 U.S. 899 (1949). Given that during the two and one half years preceding the hearing, 13 of the LPN charge nurses issued no disciplinary notices; two LPN charge nurses believed, based on what they had previously been told, that they had no authority to do so; only one charge nurse issued any discipline and that the ADON had at least some involvement in those notices; it cannot be concluded that the Employer has sustained its burden of proving more than the sporadic exercise of supervisory duties. See Upshur-Rural Electric Cooperative Corporation, 254 NLRB 709, 710 (1981).

The Employer further asserts that, in effect, it considers verbal coaching or counseling as the initial steps in the discipline procedure because this counseling is an attempt to correct behavior before the resort to the imposition of formal punishment. However, counseling is not part of the Employer's established progressive discipline system. Moreover, the very purpose of such counseling – to avoid punishment – makes it clear that counseling is not discipline. Finally, the absence of any requirement that counseling be documented precludes the use of such counseling as the basis of future discipline.

The Deficient Documentation forms do not constitute discipline under the Employer's progressive discipline system, and they do not lead to any personnel action. Rather, they are merely written reminders to the CNAs to complete required documentation on the residents. In addition, during the last two years, only two such Deficient Documentation forms have been issued, both by the same charge nurse, Schmidt, on the same day.

In other cases where the charge nurses have had a greater role in the disciplinary process than the charge nurses do in this case, the Board has nevertheless found the charge nurses not to be supervisors. As the Board noted in Ten Brock Commons, supra at 812:

The authority to give employees oral warnings and also to write up warnings on forms retained in the employee's personnel file is typical in cases involving nursing-home charge nurses. Where this has occurred, the Board has found that the charge nurses are not supervisors either because their warnings do not result in any personnel action, or, if they do, such action is not taken without independent investigation or review by others. (Citations omitted.)

While the charge nurses have the authority to remove a CNA in the event of abuse or the CNA being under the influence of alcohol or drugs, this has never occurred. Moreover, the DON and ADON are always available by phone, and there is always an RN supervisor in the facility. The Board has repeatedly held that authority to remove CNAs for such egregiously gross misconduct does not involve the exercise of discretion. Heritage Hall, supra at 460.

#### **D. Analysis of Evaluations**

In this case, the annual evaluations completed by the charge nurses have no impact on the CNAs' wages or other terms and conditions of employment.<sup>21</sup> To the contrary, they are merely motivational tools. The authority to evaluate is not one of the Section 2(11) supervisory status indicia. Elmhurst Extended Care Facilities, Inc., 329 NLRB 535, 536 (1999). However, the Board has held that charge nurses are statutory supervisors when there is a direct

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<sup>21</sup> In its brief, the Employer argues that the evaluations affect transfers. This argument is based on a statement in the employee handbook stating that in order to be eligible for a transfer, employees must have, among other things, a performance rating of "meeting expectations" or better in the last year. The record, however, is devoid of any evidence regarding any transfer of any CNAs from this facility to any other facility. Specifically, there is no evidence to show that this requirement is, in fact, applied in practice.

correlation between the evaluations that they prepare and the merit increases received by the CNAs. Trevilla of Golden Valley, 330 NLRB 1377, 1378 (2000); Hillhaven Kona Healthcare Center, 323 NLRB 1171 (1997). When, on the other hand, an evaluation does not, by itself, affect the wages and/or the 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, slip op. at 6; Harborside Healthcare, supra at 1335.

In its brief, the Employer additionally argues that the evaluations are evidence of the charge nurses directing the work of the CNAs, so as to render the charge nurses statutory supervisors. In support of this assertion, the Employer points to comments written on the evaluations by the charge nurses, both acknowledging good performance and noting areas in which improvement is required. Typical of the comments cited is “completes assignments in a timely manner,” but “needs to improve on attendance.” Instead of establishing that the evaluations evidence the exercise of independent judgment in the direction of the CNAs’ work, the comments on the evaluations are fully consistent with the conclusion that the CNAs provide basic care to the residents and the direction required by the charge nurses does not require the exercise of independent judgment.

#### **E. Concluding Analysis**

In this case, the Employer has not presented evidence to support a finding that the charge nurses perform any of the twelve enumerated activities listed in Section 2(11). That is, based on the evidence before me, the Employer failed to provide sufficient support for the conclusory statements of the DON and the labor relations representative about the nature of the work performed by the charge nurses, and the authority purportedly vested in them. See Tree-Free Fiber Co., 328 NLRB 389, 393 (1999); Extendico-Professional Care, Inc., 272 NLRB 599 (1984), enfd. 767 F.2d 926 (7<sup>th</sup> Cir. 1985). Accordingly, I find that the Employer failed to meet its burden to establish that the charge nurses are supervisors under Section 2(11) of the Act.

### III. FINDINGS AND CONCLUSIONS

Based upon the entire record in this matter and in accordance with the discussion above, I find and conclude as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are 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 in this matter.
3. The Petitioner 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 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 Murrysville, Pennsylvania facility, excluding office clerical employees, registered nurses, managerial employees, service and maintenance employees, technical employees, and guards, supervisors and other professional employees as defined in the Act.

### IV. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by District 1199P, Service Employees International Union, AFL-CIO, CLC. The date, time and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

#### A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not

work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In 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. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

**B. Employer to Submit List of Eligible Voters**

To ensure 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 within seven (7) days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Room 1501, 1000 Liberty Avenue, Pittsburgh, PA 15222, on or before **August 8, 2003**. No extension of time to file this list will be granted, except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at 412/395-5986. Since the list will be made available to all parties to the election, please furnish a total of **two (2)** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

**C. Notice of Posting Obligations**

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of three (3) full working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least five (5) full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so precludes employers from filing objections based on non-posting of the election notice.

## V. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14<sup>th</sup> Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST (EDT), on **August 15, 2003**. The request may **not** be filed by facsimile.

Dated: August 1, 2003

/s/ Gerald Kobell

Gerald Kobell, Regional Director

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

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