

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

THE LEMINGTON CENTER¹

Employer

and

Case 6-UC-460

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

Union-Petitioner

REGIONAL DIRECTOR'S DECISION AND ORDER

The Employer, The Lemington Center, herein called the Employer, is engaged in the operation of a nursing home in Pittsburgh, Pennsylvania, herein called the Employer's facility. The Union-Petitioner, District 1199P, Service Employees International Union, AFL-CIO, CLC, filed a petition with the National Labor Relations Board under Section 9(b) of the National Labor Relations Act seeking to clarify an existing unit of registered nurses, herein called RNs, by including the position of clinical manager.² The unit, as certified on June 5, 1996, is as follows: All full-time and regular part-time registered nurses, including the manager of quality assurance and the registered nurse assessment coordinator employed by the Employer at its Pittsburgh, Pennsylvania, facility; excluding kitchen employees, dining room girls, maids, janitors, laundry employees, licensed practical nurses, certified nurse aides, office clerical

¹ The Employer's name appears as it does on the certification in Case 6-RC-11237.

² The Union predicates its request for inclusion on the ground primarily that the individuals sought fall within the language of its certification, do substantially the same kind of work as employees in the Unit have historically performed, and are not supervisors within the meaning of the Act.

employees and guards, other professional employees and supervisors as defined in the Act.³

The election in this unit was held pursuant to a Decision and Direction of Election in Case 6-RC-11237, which issued on November 1, 1995. At the hearing in that case, the Employer, contrary to the Petitioner, contended that of the sixteen RNs then employed, ten RNs designated as clinical supervisors should be excluded as supervisors within the meaning of the Act.⁴ During the course of the hearing, the parties stipulated, and I found, that three RNs classified as clinical managers should be excluded as supervisors within the meaning of the Act.

Since the date of certification, the parties have entered into two successive collective-bargaining agreements for the Unit, the most recent of which was executed in late December 1999, and was effective by its terms June 12, 1999, to June 12, 2004.⁵ The parties are presently engaged in negotiations for a new collective-bargaining agreement. The petition in this case was filed April 26, 2004, shortly before the expiration of the current contract. Since the certification, the clinical managers have been excluded from the Unit.

Contrary to the Union, the Employer asserts that the requested clarification is not appropriate for the following reasons:

1. At the hearing in Case 6-RC-11237, the parties stipulated that the clinical managers are supervisors within the meaning of the Act, and since that time clinical

³ The contract recognition clause also includes "irregular part-time employees as hereinafter defined."

⁴ The Employer also contended, contrary to the Union, that two other RNs, the RN assessment coordinator and the manager of quality assurance, should be excluded as managerial employees. I found that these RNs are not managerial employees and, accordingly, I included them in the unit. Finally, in agreement with the Employer, I excluded one RN as a casual employee.

⁵ The record does not indicate when the parties reached final agreement on the terms of the 1999-2004 contract. It appears the predecessor contract expired in June 1999.

managers continued to possess and exercise supervisory authority over other members of the nursing staff, RNs, licensed practical nurses (LPNs) and certified nurse assistants (CNAs)⁶ and thus are supervisors within the meaning of the Act.⁷

2. Assuming clinical managers are not supervisors, this classification has been historically excluded from the Unit, with the Union's acquiescence. Accordingly, a unit clarification proceeding is an improper procedure for resolving their placement in the unit.

I have considered the testimony and the evidence presented at the hearing in this matter, as well as the arguments presented by both parties in their briefs.⁸ I have concluded, as discussed below, that although I agree with the Union that the petition in this matter is appropriate for consideration, I find that the clinical managers at the facility are supervisors within the meaning of the Act.

I. FACTS – THE EMPLOYER'S OPERATIONS FROM 1995 TO PRESENT

The Employer operates a four-story, 120-bed nursing home at the facility as well as an assisted living operation. Solely involved herein is the Employer's nursing home operation. The Employer's administrative offices are located on the first floor of the facility and the assisted living area is located on the second floor. The third floor consists of a 30-bed skilled nursing unit and a 30-bed intermediate care unit. A 60-bed intermediate care nursing unit is located on the fourth floor. The record does not reveal the current patient census.

⁶ Certified nurse aides are referred to by the parties as certified nurse assistants.

⁷ The LPNs and CNAs have been represented for a number of years by the Union as part of a service and maintenance unit. The parties are currently engaged in negotiations for a successor collective-bargaining agreement.

⁸ Both parties filed timely briefs, which I have duly considered.

The Employer's facility, which operates on a three-shift, 24-hour basis, is under the overall supervision of Administrator Mel Causey. Although the record is not entirely clear, it appears Causey assumed this position sometime in 1999. Reporting to Causey are, inter alia, Director of Human Resources Gay Webber and Acting Director of Nursing Joseph Scholl.⁹

As noted, at the time of the certification, the Employer employed ten unit RN clinical supervisors (four full-time and six part-time).¹⁰ The Employer also employed at that time three RN clinical managers (two full-time and one part-time). The nursing staff also consisted of a director of nursing, an assistant director of nursing, the RN assessment coordinator, an RN manager of quality assurance, an RN who was a casual employee, a number of LPNs and a greater number of CNAs.¹¹

At the time of the certification, the clinical managers, who were then and continue to be salaried,¹² were employed exclusively on the day shift with two clinical managers on duty Monday through Friday, and one clinical manager on duty weekends.¹³ The four full-time and six part-time RN supervisors worked exclusively on the evening and night shifts. One RN supervisor was on duty on the skilled nursing floor and one RN

⁹ Scholl is also the Assistant Director of Nursing. The record does not indicate how long the Director of Nursing position has been vacant or whether the Employer intends to fill the position in the near future. Scholl's position as the Acting Director of Nursing will be referred to herein as the ADON.

¹⁰ The parties refer to clinical supervisors in this proceeding as RN supervisors. For the sake of clarity and consistency, these employees will either be referred to as RN supervisors or unit RNs.

¹¹ The entire second floor of the facility housed the skilled nursing unit and the third and fourth floors housed the intermediate care nursing units. Thus, since 1995-1996, it is clear that the Employer's nursing operation has substantially contracted.

¹² Presently, with benefits, the clinical managers are paid a salary which represents over a \$21 per hour rate. If clinical managers choose not to receive benefits, they receive a salary which represents over a \$25 per hour rate.

¹³ Also employed on the day shift were, per floor, 4 to 6 LPNs and 12 to 15 CNAs.

supervisor was on duty and responsible for both intermediate nursing floors.¹⁴ The RN supervisors were then and are now hourly paid.¹⁵

At the time of the certification, both clinical managers and RN supervisors performed many of the same job functions on their respective shifts. Specifically, both spent a substantial portion of their time engaged in direct patient care and a substantial portion of their time in certain administrative duties. These administrative duties were set forth in their respective job descriptions and included such matters as, inter alia, performing all procedures entailed in the patient admission and readmission process; ensuring that adequate staff was available for the shift and, when necessary, implementing the Employer's staff replacement call-in procedures; participating in patient care plan conferences; giving and receiving patient status reports at the time of shift changes; evaluating patient room environment on a daily basis and taking corrective action, when necessary; contacting physicians to obtain new patient prescriptions and faxing these orders to pharmacies; transcribing physician orders on to patient medical records; and conducting orientation for new patients and their families. In addition, it appears that the full-time RN supervisors acted as "house" supervisors and were responsible, like the clinical managers, for, inter alia, preparing employee evaluations and making assignments to the LPNs and CNAs.

At the hearing in Case 6-RC-11237, the Employer took the position that RN supervisors were supervisors within the meaning of the Act since they possessed the same authority and performed the same job functions on the evening and night shifts as the clinical managers, whom the parties stipulated to be supervisors, possessed and

¹⁴ Also on duty on these shifts were 3 to 4 LPNs and 9 to 12 CNAs on the skilled nursing unit and 2 LPNs and 7 CNAs on each of the intermediate care nursing floors.

¹⁵ Renee Stokes, who has been employed as an RN supervisor since 1995, currently receives an hourly wage of \$18.80 per hour, plus benefits.

performed on the day shift. In my Decision, I found that the clinical managers had greater authority and more job responsibilities than the RN supervisors and that, accordingly, the two positions were not comparable. In this regard, in footnotes 14 and 15 of my Decision and Direction of Election, I specifically noted that the clinical manager job description then in existence, unlike the job description for the RN supervisor classification, stated, *inter alia*, that the clinical manager must apply “sound and effective principles of management objectively in evaluating and supervising personnel, in preparing reports, researching materials, conducting surveys and audits, producing programs, etc. against judgmental and verifiable criteria . . . Exercises management skills in producing results with a minimum degree of guidance[I]s responsible for the direct administrative and technical supervision of nursing programs of the unit; of coordinating staffing assignments outlining individual nursing duties; for evaluating and completing job performance of nursing personnel; for being responsible for ongoing continuing education of the nursing staff according to policies and procedures; and for implementing programs of quality assurance and utilization review.” Thus, I concluded that the fact that the parties stipulated the clinical managers to be supervisors was not particularly relevant with respect to a resolution of the supervisory status of the RN supervisors.

During the years following the certification, it appears the patient census dropped dramatically. In late December 1999, when the 1999-2004 contract was executed, the Employer employed only four RN supervisors and two clinical managers. Two of the RN supervisors and one clinical manager were recent hires, hired since July of that year.

Sometime in mid-1999, the Employer prepared a new job description for the RN supervisors. The job description, which is dated June 24, 1999, eliminated the above-

described administrative duties from the RN supervisor job responsibilities.¹⁶ The new job description states that the unit RNs report to clinical managers. It also appears that about this time, the Employer made the decision to employ a clinical manager on each of the evening and night shifts and to eliminate one RN supervisor position for each of these shifts.¹⁷ The record does not reveal whether the Employer's decision to interpose a level of management on the evening and night shifts, if made by mid-1999, was communicated to the Union prior to the execution of the 1999-2004 contract. In any event, there is no evidence indicating that during negotiations for the 1999-2004 contract the topics of the change in the RN supervisor job description and the anticipated new clinical manager staffing pattern were discussed.

By August 2002, it appears that clinical managers had been assigned to the evening and night shifts and assumed the administrative duties on those shifts previously performed by RN supervisors.¹⁸ On August 12, 2002, the Employer formulated a new job description for the clinical manager classification. Significantly, the job description eliminated the language contained in the job description in existence in 1995 described in footnotes 14 and 15 of my Decision and Direction of Election. More

¹⁶ This job description also changed the title of the position from RN Supervisor to Registered Nurse (RN), but the Employer continues at times to refer to the position as RN supervisor. For the sake of clarity and consistency, the RNs who are included in the unit will either be referred to as RN supervisors or unit RNs.

¹⁷ RN Supervisor Stokes testified that Employer Administrator Causey told her that the Employer "did not want clinical supervisors . . . [the Employer] wanted to rename them and reclassify them as clinical managers . . . because [the Employer] wanted management to communicate with management". Stokes estimates that this conversation occurred sometime in 1999. She was not more specific as to the date.

¹⁸ By August 2002, only one RN Supervisor, Stokes, was employed, while eight clinical managers were employed.

significantly, the clinical manager job description was changed to read almost identically with the job description of the RN supervisor classification which existed in 1995.¹⁹

Presently, the Employer employs two full-time RN supervisors²⁰ and three full-time and three part-time clinical managers.²¹ In addition, there is a vacancy for a full-time clinical manager on the day shift. Two clinical managers continue to be employed on the day shift Monday through Friday and one clinical manager is employed on the weekend day shift.²² One clinical manager is employed on each of the evening and night shifts.²³

Although the record is not entirely clear, it does not appear that when the Employer made its decision to add clinical managers to the evening and night shifts, it also made the decision to eliminate in its entirety the RN supervisor position.²⁴ Since 1999, the Employer has continually but unsuccessfully sought to fill open unit RN positions and has placed advertisements in newspapers and other publications for this position. According to Human Resources Director Webber, the Employer wishes to

¹⁹ The job description for the clinical manager classification which existed prior to August 2002 is not contained in the record.

²⁰ Although Stokes testified that she is "part-time", she further testified that she works the 11 p.m. to 7 a.m. shift six nights a week.

²¹ The record does not reveal whether, during the transitional period of mid-1999 to mid-2002, when the full complement of clinical managers had been hired, unit RNs continued to perform the administrative duties described previously.

²² As noted, there is a vacancy for a full-time clinical manager on the day shift. Because of this vacancy, clinical managers normally assigned to the off shifts may temporarily be assigned to the day shift or there may be only one clinical manager on duty during the day shift if a fill-in is not assigned.

²³ Presently, the Employer employs 12 to 14 LPNs and 28 to 30 CNAs.

²⁴ No RN supervisor was hired by the Employer from 1999 until July 2004. In July 2004, the Employer hired a new full-time RN supervisor, Michal Guest. Guest works on the evening shift. Stokes works on the night shift, six nights a week, as she has done since her hire in 1995. When Stokes is not on duty, an LPN assumes her position.

employ an RN supervisor on every shift, in addition to the clinical managers.²⁵ The record does not reveal the reasons the Employer has been unable to attract RNs to fill these positions. As noted, RNs hired as clinical managers receive a salary equal to over \$25 per hour if no benefits are received. Open RN supervisor positions, consistent with the provisions set forth in the collective-bargaining agreement, are offered at a much lower hourly wage rate plus benefits.

There is no evidence, apart from filing the instant petition and apart from raising the issue of the clinical managers' unit inclusion during the ongoing negotiations for a new contract, that the Union took any legal action seeking to include the position in the Unit since June 1999, or took any legal action contesting the utilization of clinical managers on the evening and night shifts.²⁶

II. ANALYSIS – THE APPROPRIATENESS OF THE INSTANT UNIT CLARIFICATION PROCEEDING

As set forth previously, I have concluded that a valid issue has been raised concerning the unit placement of clinical managers that is appropriate for resolution in this unit clarification proceeding.

It is well established that a unit clarification proceeding is appropriate for resolving ambiguities concerning the unit placement of individuals who, for example, come within newly established classifications of disputed unit placement, or within an existing classification which has undergone recent, substantial changes in the duties and responsibilities of employees in it so as to create a real doubt as to whether the individuals in such classification continue to fall within the category--excluded or

²⁵ As a consequence, the Employer apparently wishes to employ three full-time and three part-time RN supervisors.

²⁶ In this regard, the parties' most recent contract, at Article I, Recognition, specifically provided that the Employer would not establish jobs or job titles for the purpose of excluding such employees from the bargaining unit, and further provided that supervisors might perform bargaining unit work provided it did not result in an erosion of the bargaining unit.

included--that they occupied in the past. Clarification is not appropriate, however, for upsetting an agreement or an established practice of a union and employer concerning the unit placement of various individuals even if the agreement was entered into by one of the parties for what it claims to be mistaken reasons or the practice has become established by acquiescence and not by express consent. Union Electric Co., 217 NLRB 666, 667 (1975). Thus, where a classification has historically been excluded from or included in the unit, and there have been no recent, substantial changes in the duties, responsibilities or job practices of the classification that would call into question the placement of the employees in the unit, the Board generally will not entertain a petition to clarify the status of that position or classification, regardless of when in the bargaining cycle the petition is filed, i.e. mid-term of an existing collective-bargaining agreement or at a time when an existing collective-bargaining agreement is about to expire. Kaiser Foundation Hospitals, 337 NLRB 1061 (2002); Bethlehem Steel Corp., 329 NLRB 243, 244 (1999); Robert Wood Johnson Memorial Hospital, 328 NLRB 912, 914 (1999); Boston Cutting Die Company, 258 NLRB 771 (1981); Plough, Inc., 203 NLRB 818, 819 fn. 4 (1973); Lufkin Foundry & Machine Co., 174 NLRB 556 (1969). Where, however, there has been a recent, substantial change in the duties and responsibilities of the classification, a clarification proceeding is appropriate to resolve the unit placement of the historically excluded position. Union Electric Co., supra, at 669, fn. 14. See also, Fairleigh Dickinson University, 227 NLRB 239, 242 (1976); Cincinnati Bell, Inc., 227 NLRB 1930 (1977).²⁷

²⁷ If an historically excluded position undergoes a recent, substantial change during the term of a collective-bargaining agreement, a party may timely file a unit clarification petition during the term of the contract seeking the position's inclusion in the unit. Union Electric Co., supra. Normally, unit clarification petitions filed mid-term of a collective-bargaining agreement are dismissed as untimely under the principles enunciated in Wallace-Murray Corp., 192 NLRB 1090 (1971), unless certain factors warranting an exception to that principle are present.

In the instant case, the clinical manager classification existed at the time of the Union's certification in 1996 and has been excluded from the unit since that time based upon the parties' stipulation and my finding in Case 6-RC-11237 that clinical managers were supervisors within the meaning of the Act. The record affirmatively establishes, however, that during the term of the parties' 1999-2004 collective-bargaining agreement, there was arguably a change in the duties, responsibilities and job practices of the classification sufficient in scope and in time to call into question the clinical managers' continued status as supervisors. Specifically, the record establishes that sometime in mid to late 1999 the Employer made the decision to assign clinical managers to the evening and night shifts and to have those clinical managers subsume, to a certain extent, the job duties and responsibilities of the RN supervisors on those shifts.²⁸ There is no evidence that prior to the execution of the 1999-2004 contract, the Employer communicated to the Union its decision to utilize clinical managers on the off shifts. Further, in August 2002, the Employer changed, presumably without the knowledge or acquiescence of the Union, the job description of the clinical manager classification in the manner discussed previously and, by August 2002, the Employer's operational change had clearly manifested itself since by that time only one RN supervisor (Stokes) was employed while eight clinical managers were then working, presumably with one clinical manager working on each of the off shifts seven evenings and nights per week.

²⁸ Clearly, the clinical managers assumed those administrative duties which the RN supervisors performed prior to June 1999 when the RN supervisor job description was changed to eliminate these administrative job functions from the RN supervisor job description. In addition, clinical managers apparently began to perform a certain amount of direct patient care work on these shifts which had previously been performed by the RN supervisors. Thus, on the night shift, although RN supervisor Renee Stokes continued to work six night shifts a week as an RN supervisor, there were two RN supervisors working on that shift prior to the utilization of clinical managers. Similarly, on the evening shift, two RN supervisors had been working on that shift prior to the change in assignment of the clinical managers. From August 2002 to July 2004, no RN supervisors were employed on that shift, and now, only one full-time RN supervisor is employed, Michal Guest. Accordingly, the presumption is certainly warranted that clinical managers have, and are now, performing a certain amount of direct patient care work previously performed by RN supervisors.

Accordingly, although the number of full-time equivalent clinical manager positions (FTEs) has only increased from 2.4 FTEs in 1995 to 5.2 FTEs today, these changes in the Employer's nursing department clearly warrant considering, in this proceeding, the issue of the clinical managers' supervisory status as a basis for their exclusion from the unit. Union Electric Co., supra.²⁹

III. THE SUPERVISORY STATUS OF THE CLINICAL MANAGERS

As previously stated, the Union filed the present unit clarification petition on the ground that the clinical managers at the Employer's facility are not supervisors within the meaning of the Act and should be included in the unit. The Employer contends that the clinical managers have the authority to assign, direct and discipline employees and to adjust their grievances.³⁰ The Union, on the other hand, asserts that the clinical managers are not supervisors within the meaning of the Act since the clinical managers' authority does not reach the level of supervisory authority. As described in more detail below, I find that the clinical managers are supervisors, and therefore, I shall dismiss the unit clarification petition herein.

²⁹ I also note that the parties' stipulation, and my finding, concerning the supervisory status of the RN supervisors occurred in 1995, prior to the United States Supreme Court's decision in NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706 (2001), which requires the Board to reassess its analysis of the use of independent judgment when making decisions regarding the supervisory status of individuals.

The Union suggests that clarification is appropriate here to include clinical managers in the unit because since June 1999, the clinical managers are performing substantially the same job duties on the off shifts as RN supervisors performed prior to that time. In this regard, the Union relies on such cases as Swedish Medical Center, 325 NLRB 683 (1998) and Premcor, Inc., 333 NLRB 1365 (2001) to support its position. In those cases, as well as the Board's decisions in such cases as Developmental Disabilities Institute, 334 NLRB 1166 (2001), and Magna Corporation, 261 NLRB 104 (1982), the Board clarified existing units to include newly-created classifications where basic job functions were substantially identical to and co-extensive with the same functions historically performed by members of the bargaining unit since in those circumstances the newly-created positions at issue were encompassed within the language of the unit descriptions. However, in these cases, unlike the situation presented herein, there was no statutory impediment to the inclusion of the classifications at issue in the unit.

³⁰ There was no evidence presented at the hearing nor was there any assertion by the Employer that the clinical managers have any authority to hire, suspend, lay off, recall, promote, transfer, discharge or reward employees.

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 (6th 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 when analyzing 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 Hospital Medical Center d/b/a Franklin Home Health Agency, 337 NLRB 826, 829 (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 Hospital Medical Center d/b/a Franklin Home Health Agency, supra at 829, citing Chicago Metallic Corp., 273 NLRB 1677, 1689 (1985).

With regard to the use of independent judgment, it is difficult to analyze whether individuals alleged to be supervisors have the authority to responsibly direct employees within the meaning of Section 2(11) of the Act, particularly in the health care field, since the Board, prior to Kentucky River Community Care, Inc., held that employees are not

using independent judgment when they utilize ordinary professional judgment in directing less-skilled employees in accordance with employer-specified standards. This view was rejected by the Supreme Court in Kentucky River Community Care, Inc., supra at 713, finding that this categorical exclusion was overly broad.

However, the Supreme Court did accept two aspects of the Board's interpretation of independent judgment. First, the Court agreed that the term "independent judgment" is ambiguous, and that many nominally supervisory functions may be performed without such a degree of judgment or discretion as to warrant a finding of supervisory status. Second, the Court found that detailed orders and directions from the employer may reduce the degree of judgment exercised below the statutory threshold for supervisory status. Id. at 712–714. The Court allowed that the Board has the discretion to make the determination as to whether the degree of judgment utilized reaches the level of independent judgment sufficient to warrant a finding of supervisory status. Id.

The Supreme Court did not find that all nurses are supervisors in Kentucky River Community Care, Inc.. Rather, it left it to the Board to analyze the facts of each individual case to determine whether, in light of the findings in Kentucky River Community Care, Inc., the individuals at issue utilize independent judgment. If the judgment being analyzed is constrained by employer-specified standards, or higher authorities have not delegated power to the individuals to make independent decisions, then the judgment may well be routine and not considered supervisory within the meaning of the Act.

As previously stated, contrary to the Union, the Employer contends that the clinical managers at its facility are supervisors because it asserts that the clinical managers have the authority to assign, responsibly direct and discipline employees and to adjust their grievances. Upon the entire record, and in light of the direction of Kentucky River Community Care, Inc., I have concluded that the clinical managers in

this case are supervisors within the meaning of the Act. I shall discuss each of the indicia at issue below.

A. Assignment of Work

The record reveals that the Employer's staffing coordinator establishes the basic work schedule for the nursing staff by assigning staff to particular days and shifts on a weekly basis. The staffing coordinator provides the list to the clinical managers who review it and, with respect to the evening and night shift, assign staff to either the skilled or intermediate nursing units taking into account patient acuity, the skills and experience of the individual staff members on duty, and the maintenance of correct patient to staff ratios. Once assigned to a particular nursing unit, the clinical manager assigns each member of the staff a particular geographical grouping of rooms. This latter assignment is based primarily on patient to staff ratios. On occasion, clinical managers transfer staff between nursing units and/or floors and/or particular patient rooms to deal with personality conflicts between employees and patients. Similarly, a clinical manager has the authority to assign a particular staff member to a particular patient outside the geographical grouping of rooms to which the staff member is assigned if the clinical manager is of the opinion that the patient and staff member have a good rapport and thus that it would be in the best interests of the patient to have that staff member attend to his or her care needs.³¹

When an employee is unable to work a particular shift, the Employer's call-off procedure requires that the employee call in at least two hours in advance of the scheduled shift to inform the clinical manager of the anticipated absence. The clinical manager then fills out a form, known as the 911 form, to document the absence. The

³¹ In 1995, the RN supervisors did not assign nursing staff to particular nursing units or patients. As set forth in my Decision and Direction of Election, the LPNs agreed among themselves as to who would work on each nursing unit and on each floor and the LPNs would assign the CNAs to various work locations.

one clinical manager who testified at the hearing, Cynthia Currie,³² testified that she places a note on the comment section of the 911 form whether the absence was excused or unexcused.³³ Currie testified that she did not know whether other clinical managers make a similar notation. The record does not reflect whether any disciplinary action has been taken against employees who accumulated an excessive number of unexcused absences. There is one incident described in the record where an employee received a five-day suspension for being absent and not following the two-hour call-in requirement.³⁴

When an employee is absent, the clinical manager determines whether or not to have another employee replace her on her scheduled shift. The determination is based initially on state mandated patient-to-staff minimum ratios. However, a clinical manager may determine that even if mandated patient-to-staff ratios are met without the absent employee, an employee should be called to work to replace the absent employee depending on the needs of the nursing units.³⁵ In determining to whom to offer

³² Currie works on the day shift.

³³ The Employer's call-in policy does contain exceptions to the two-hour call-in rule. The record is unclear whether Currie, in making a note designating whether the absence was excused or unexcused, is merely signifying whether the two-hour call-in-policy was properly followed by the staff member. In any event, the Employer introduced three 911 forms into evidence. None of these forms had any notes in the comment section other than the word "ill" on two of these forms. In addition, the forms have a space for the human resource department to mark "excused" or "unexcused". None of the forms in evidence had either box checked. Pursuant to the Employer's policies, staff receive a specified number of sick and personal days. When calling off, a staff member desiring to take a sick or personal day must so notify the clinical manager. Upon returning to work, the employee is required to complete a request for benefit time off form and submit it to the clinical manager or the ADON who verifies whether the employee is eligible for paid time off. This form is then sent by the clinical manager to the staffing coordinator who then submits it to the payroll department.

³⁴ The Employer's absentee policy provides for a progressive disciplinary system for employees who engage in a pattern of absenteeism. Apparently, an employee's attendance is monitored by the payroll department, which notifies the human resource department when a pattern of absenteeism is exhibited by an employee.

³⁵ In my aforementioned Decision and Direction of Election, I noted that in 1995 the RN supervisors had authority to call in replacements for employees who called off only if replacements were needed to meet the state mandated minimum staffing levels.

additional work, the clinical manager does not necessarily follow seniority but rather determines who to call based on her analysis of employee work schedules and employees' previously expressed willingness to work in these circumstances. The clinical manager, however, has no authority to require an employee to report to work to replace a call off or to require employees currently on duty to work overtime.

B. Discipline

The Employer has a progressive discipline policy set forth in the Employee Handbook that provides different penalties for different infractions. Certain misconduct warrants immediate discharge, while less serious offenses merit only an oral or written warning or a suspension. However, under the policy as written, even a minor offense could result in discharge if it is the fourth such offense. Under the Employer's policy, no management official, even the administrator, can impose discipline in the form of a written warning, suspension or termination without the consent of the director of human resources.

Clinical managers are charged with the responsibility of ensuring that the Employer's policies, both with respect to proper patient care and employee personnel matters, are adhered to on their respective shifts. In this regard, clinical managers have the authority, which they have exercised, to send disruptive employees home in the middle of the shift and to informally counsel employees to change their behavior to avoid the need for discipline.

If a clinical manager determines that an employee has engaged in some form of conduct warranting discipline, i.e. unsatisfactory job performance or an infraction of the Employer's previously described personnel policies, the clinical manager prepares a corrective action report, which is a document recommending that discipline be imposed. The corrective action report contains spaces for the form of discipline to be imposed and

the type of violation which has occurred,³⁶ a comment section which is utilized by the clinical manager to summarize the facts of the incident, and a section for the employee's response. The corrective action reports also contain spaces for the signatures of the clinical manager, employee, Union representative and director of human resources. Corrective action reports are kept in the employee's personnel file.³⁷ When a clinical manager prepares a corrective action report, he or she will check the form of discipline to be imposed and the type of violation which has occurred. In this regard, the clinical manager, in recommending the form of discipline, is guided by the Employer's disciplinary policy, which provides a specific penalty for infractions committed.

The clinical manager, with respect to minor offenses, has the authority to decide to document the incident in the form of a corrective action report or to merely informally counsel the employee. Clinical managers have the authority to issue corrective action reports imposing a verbal warning without approval from the director of human resources. Indeed, the record reflects that verbal warnings have been imposed by clinical managers for such matters as employees leaving work early for scheduled medical procedures without the employee properly notifying the Employer in advance and for job performance matters.³⁸ For more severe infractions, or for the reoccurrence

³⁶ The types of violations include absenteeism, work rules, work performance, insubordination, safety, no call-no show, other.

³⁷ As set forth in my Decision and Direction of Election, I found that RN supervisors had neither the authority to impose discipline themselves or to effectively recommend the imposition of discipline. Rather, the authority of the RN supervisors was limited to preparing reports known as incident reports, with respect to incidents of patient abuse or other violations of policy. Incident reports, which simply reported the occurrence of an incident, may or may not have been discussed with the employee, employees were not asked to sign the incident report and incident reports were not placed in the employee's file. The incident reports made no recommendations for discipline. A clinical manager who testified at the hearing stated that RN supervisors did not have the authority to prepare documents which constituted a recommendation for the imposition of formal discipline.

³⁸ Verbal warnings are the first step in the Employer's disciplinary policy and will lead to more severe discipline if future infractions occur. Authority to issue verbal warnings which lead to the imposition of more severe discipline evidences an individual's supervisory authority. Progressive

of minor offenses, the clinical manager prepares a corrective action report, recommending the type of discipline to be imposed, and submits it to the director of human resources. At that point, the director of human resources, after reviewing the corrective action report, arranges a disciplinary meeting with the employee and the Union representative, together with the clinical manager and ADON. At the disciplinary meeting, the clinical manager reviews the facts of the incident and the employee is invited to give a response and to sign a corrective action report. Following the meeting, the director of human resources may decide to interview witnesses to the incident at issue. The director of human resources then discusses the matter with the clinical manager and ADON and a decision is reached on the final form of the discipline. The corrective action report is then signed by the director of human resources and placed in the employee's personnel file. Webber testified that in the three years she has been employed at the facility, she has overturned a clinical manager's recommendation on only one occasion. The record does not reveal the total number of corrective action reports filed during this period.

It is significant that even when certain types of more severe infractions of the Employer's policies occur, the clinical manager has a certain amount of discretion to resolve the matter without recommending discipline. Thus, the record reveals that an employee was about to walk off the job because the employee was upset. The clinical manager tried to dissuade the employee from leaving. After the employee persisted and

Transportation Services, 340 NLRB No. 126 (2003). In that case, the Board distinguished such cases as Vencor Hospital, 328 NLRB 1136 (1999) and Ken-Crest Services, 335 NLRB 777 (2001), where the Board declined to find that the issuance of verbal warnings established supervisory authority since there was no evidence that verbal warnings automatically led to further discipline. In this case, the record details a situation where a probationary employee was terminated pursuant to the employer's progressive disciplinary policy after accumulating a series of verbal warnings for unsatisfactory job performance.

left the facility, the clinical manager prepared a corrective action report and submitted it to Webber.

C. Adjustment of Grievances

As previously discussed, not only does the Union represent the RN unit at the Employer, but it also represents, in a separate unit, the service and maintenance employees which includes LPNs and CNAs.

Clinical managers receive approximately 3.5 to 4 hours of collective-bargaining agreement administration training from Webber. Clinical managers are given a copy of all of the Employer's personnel policies as well as copies of the collective-bargaining agreements. There is general testimony that clinical managers serve as the first-step representatives under the grievance and arbitration procedures set forth in the contracts.³⁹

In addition, Webber testified that in addition to resolving grievances at the first step, clinical managers also participate in third-step meetings on grievances which involve actions they had taken, by both testifying as to the facts of the incident and by actively participating in the grievance meetings by questioning witnesses and participating in determining the Employer's response to the grievance.⁴⁰

The record contains evidence that clinical managers regularly resolve informal employee complaints or problems, particularly with respect to claims by employees for additional pay because their work on a given day was not recorded. If the clinical

³⁹ The record does not contain any evidence of any situations where the clinical managers served as the first step representative. Since the first step of the grievance procedure is an oral step pursuant to the terms of the contracts, there is no written record of the grievances resolved. Written grievances are only submitted if there is no resolution at the first step.

⁴⁰ The record contains several examples of third step meetings where clinical managers presented the facts upon which the discipline was predicated. There is no evidence that RN supervisors ever participated in third step grievance meetings prior to 1999, or at any time thereafter, as a representative of management.

managers find the claims are justified, they will notify the payroll department to pay the employees. It appears that the payroll department automatically accepts the decision of the clinical managers, and that higher management approval of the payroll change is not required.

D. Concluding Findings

As noted previously, I find that notwithstanding any change that may have occurred in 2002 with respect to the wording of the clinical manager job description, the clinical managers are supervisors within the meaning of the Act.⁴¹ In this regard, I find it significant that there is no evidence contained in the record, other than the revision in the clinical manager job description, that there has been any diminution in the authority possessed and the job functions performed by clinical managers in 1995 compared to the authority they possess and the job functions they perform today.⁴² I also find it significant that although the current job description for the clinical manager classification tracks, almost identically, the language of the RN supervisor position job description in effect from at least 1995 to 1999, the record in this case establishes, as discussed previously, that the authority possessed by the clinical managers is more extensive than the authority ever possessed by RN supervisors with respect to such critical matters as assignment of work, adjustment of grievances and the discipline of employees.

⁴¹ In this regard, I deem it unnecessary to pass upon the Union's contention that the burden of proving supervisory status is the Employer's since the Employer is the party asserting that status. Certainly, under normal circumstances, the Union is correct that this burden rests with the party alleging that a class of individuals are supervisors within the meaning of the Act. NLRB v. Kentucky River Community Care, Inc., supra, at 710-712; Michigan Masonic Home, 332 NLRB 1409 (2000). However, given the fact that the Union is claiming that clinical managers, historically excluded as supervisors, should now be included in the unit because of changed circumstances, it is unclear whether the burden of establishing the supervisory status of the clinical managers rests with the Employer.

⁴² In this regard, I note that the 1995 clinical manager job description states that clinical managers have the responsibility for evaluating the job performance of members of the nursing staff. The record is clear that clinical managers do not perform this job function today.

In this case, clinical managers are supervisors within the meaning of the Act since (1) they have the ability and responsibility to assign nursing staff to specific work tasks and patients based upon, inter alia, their assessment of the skill and experience of the individual staff member; to send staff home, if necessary; to resolve employee complaints before the contract's grievance-arbitration procedures are formally instituted by the filing of a written grievance; to act as a management representative at third step grievance meetings; to determine whether an infraction of the Employer's policies has occurred warranting the issuance of a corrective action report; to recommend in the corrective action reports that discipline be issued and the form of the discipline to be imposed, recommendations that virtually in all circumstances are accepted by the director of human resources; to issue corrective action reports without higher management approval, imposing verbal warnings which verbal warnings can lead to further discipline; to participate as a management representative in disciplinary meetings with members of staff and their union representative and (2) they exercise independent judgment in their work pursuant to the criteria set forth in NLRB v. Kentucky River Community Care, Inc., inasmuch as they are the most senior staff on duty for roughly two-thirds of the time; they are responsible for taking action necessary in order to maintain the nursing operation; they are not required to contact higher management authority except in the most urgent circumstances to resolve problems;⁴³ they must make an array of decisions dealing with proper patient care, staff assignments, ensuring proper levels of staff on duty, and dealing with employee behavioral and job performance problems, requiring the exercise of judgment for which, in many circumstances, there are no specific guidelines or criteria established by the employer. In addition, although not controlling, I find it significant that the clinical managers

⁴³ Clinical manager Cynthia Currie testified that she contacts the ADON only once every several months concerning matters which she feels she is not in a position to resolve herself.

apparently consider themselves to be part of management,⁴⁴ and that if the clinical managers are not supervisors, the only supervisor for the Employer's entire nursing operation would be the ADON,⁴⁵ an operational impracticality.⁴⁶

Accordingly, based upon all the circumstances presented herein, I find that clinical managers are supervisors within the meaning of the Act under the analysis required by NLRB v. Kentucky River Community Care, Inc., supra.

IV. FINDINGS AND CONCLUSION

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

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. District 1199P, Service Employees International Union, AFL-CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.

⁴⁴ Testimony of clinical manager Cynthia Currie, the only clinical manager who testified at the hearing.

⁴⁵ If the Employer ever fills the director of nursing position on a permanent basis, there will, of course, be two supervisors for the nursing operation in addition to the clinical managers. In addition, unlike other nursing staff, clinical managers are salaried, participate in the management benefits program and are not required to wear nursing uniforms.

⁴⁶ The record clearly establishes that a primary consideration for the Union's filing the instant clarification petition was its apparent belief that the unit was being severely eroded by the Employer's utilization of clinical managers on the evening and night shifts and that clinical managers were replacing RN supervisors in their entirety on those shifts. As discussed previously, only one of two RN supervisory positions on each of these shifts was replaced by a clinical manager. In addition, there is an open position for an RN supervisor on the day shift. The Employer apparently desires to have a management representative, the clinical manager, on duty on every shift for legitimate business considerations. The Union has never filed an unfair labor practice charge alleging that the Employer violated Section 8(a)(1) and (5) of the Act by transferring unit work to the clinical managers assigned to the evening and night shifts without notification to and bargaining with it.

In sum, based on the above and the record as a whole, I find that in light of the direction given by the United States Supreme Court in NLRB v. Kentucky River Community Care, Inc., the clinical managers are supervisors within the meaning of the Act. Therefore, I find no valid issue has been raised concerning the inclusion of the clinical managers in the RN bargaining unit through a clarification proceeding. I shall, therefore, dismiss the petition in the instant case.

ORDER

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

Dated at Pittsburgh, Pennsylvania, this 13th day of August 2004.

/s/ Gerald Kobell

Gerald Kobell
Regional Director, Region Six

NATIONAL LABOR RELATIONS BOARD
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