

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

In the Matter of

DELPIR ASSOCIATES, L.P.,
d/b/a VICTORIA COURT

Employer¹

and

NEW ENGLAND HEALTH CARE
EMPLOYEES UNION, DISTRICT 1199,
a/w SERVICE EMPLOYEES
INTERNATIONAL UNION

Petitioner

Case 1-RC-22187

DECISION AND DIRECTION OF ELECTION²

In this matter, New England Health Care Employees Union, District 1199, a/w Service Employees International Union (Union) seeks to represent certain employees³ of

¹ The name of the Employer appears as amended at the hearing.

² Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

Upon the entire record in this proceeding, I find that: 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 in this matter; 3) the labor organization involved claims to represent certain employees of the Employer; and 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.

³ The parties stipulated that the following unit is appropriate for the purposes of collective bargaining: All full-time and regular part-time employees, including Certified Medical Technicians (CMTs or Med Techs), Certified Nursing Assistants (CNAs), Personal Care Attendants (PCAs), reception employees, maintenance employees, housekeeping/laundry employees, kitchen and dietary employees, activities employees, and the dietician, excluding all managers and confidential employees, the bookkeeper, and supervisors as defined by the Act.

Delpir Associates, L.P., d/b/a Victoria Court (Employer or Victoria Court), including eight CMT supervisors and a housekeeping supervisor.⁴ The Employer takes the position that the CMT supervisors and housekeeping supervisor must be excluded from the bargaining unit because of their supervisory authority over CNAs and PCAs, and housekeeping employees, respectively. In addition, the Employer takes the position that the housekeeping supervisor is also a managerial employee and is, therefore, ineligible for representation. The Union asserts that the nine individuals at issue are nonsupervisory, non-managerial employees.

I find, for the reasons set forth below, that the CMT supervisors, including CMT Supervisor/QA Representative Carmen Quezada, are nonsupervisory employees, and that the housekeeping supervisor is a nonsupervisory, non-managerial employee, and that they should be included in the petitioned-for unit.

FACTS

The Employer's Operation at Victoria Court

Victoria Court is an assisted living facility located in Cranston, Rhode Island. The facility consists of 45 apartments and several common areas, including a dining room, library, leisure lounge, beauty salon, and arts and crafts studio. It is home to approximately 56 elderly residents, many of whom suffer from dementia and Alzheimer's Disease. Victoria Court's 55 employees assist residents with daily living needs, such as bathing and eating, as well as social and recreational activities. For the safety and security of residents, the facility is locked at all times. A receptionist is on duty from 9 a.m. to 9 p.m., and the facility is staffed 24 hours a day, seven days a week.

Within the facility, the Employer operates a memory loss program, where residents participate in activities appropriate to their cognitive abilities. Activities Director Donna Robitaille oversees the memory loss program, and divides residents into smaller groups according to their functioning levels. The groups meet daily in various locations within the facility, including the arts and crafts studio, the library, and the leisure lounge.

Administrator Caroline DelFino⁵ oversees the day-to-day operation of the facility. In addition to her regular, daytime work hours, she is frequently in the facility on evenings and weekends. When she is not present, she is on-call around the clock and expects to be contacted by staff when serious issues arise at the facility. The director of

⁴ One of the CMT supervisors, Carmen Quezada, is also the Quality Assurance (QA) representative for the Employer.

⁵ DelFino is married to the owner of Victoria Court.

nursing, activities director, food service director, and housekeeping supervisor report directly to DelFino.⁶

The Nursing Department

The Employer's nursing staff is supervised by Director of Nursing Kathleen LaPorte, the only RN in the facility, who oversees the medical needs of each resident and develops an individualized care plan for each upon admission. LaPorte supervises the CMT supervisors at issue herein,⁷ who in turn oversee the CNAs and PCAs, collectively known as resident care assistants (RCAs).⁸

Under Rhode Island law, CMTs must take a 16-week course and pass an exam in order to administer medications to patients in a health care setting. At Victoria Court, CMTs distribute medications to residents, pass out assignment sheets to RCAs at the beginning of each shift, help oversee the dining room during resident mealtimes, and are available to resolve any issues that arise for RCAs and residents.

RCAs perform most of the patient care functions, such as bathing, dressing, toileting, escorting to and from meals, and other activities of daily living, as well as helping with the various activities offered to residents. All RCAs are trained and oriented to ensure that they can perform any of the functions of an RCA.

The nursing staff works three traditional shifts: 7 a.m. to 3 p.m., 3 p.m. to 11 p.m., and 11 p.m. to 7 a.m. Carmen Quezada and Carmella Trudeau are the CMT supervisors on the day shift, with Quezada taking the senior role on all shifts she works and Trudeau assuming that role when Quezada is not working. In addition to the two CMT supervisors assigned to the day shift, there are six RCAs who work days. CMT supervisor Elizabeth Gomez typically works as an RCA during the day shift, except on days when Quezada or Trudeau is off, when she serves as a CMT supervisor. CMT supervisor Elizabeth Maillot also works part-time on the day shift.

The evening shift is similarly staffed. Lynn Piacitelli is the senior CMT supervisor whenever she works. On those evenings, the second CMT supervisor – either Marie Exilas or Olusola Segunmara – splits her time between CMT duties (from 3 to 7

⁶ The parties stipulated, and I find, that the following employees are supervisors within the meaning of Section 2(11) of the Act and/or managerial employees, and are therefore excluded from any unit found appropriate: Administrator Caroline DelFino, Director of Food Services Matthew Giusseppi, Director of Nursing Kathleen LaPorte, and Activities Director Donna Robitaille.

⁷ The eight CMT supervisors are: Carmen Quezada (who is also the QA representative), Carmella Trudeau, Elizabeth Gomez, Elizabeth Mailhot, Lynn Piacitelli, Maria Exilas, Olusola Segunmara, and Heather Denniston.

⁸ None of the CMT supervisors or RCAs testified at the hearing.

p.m.) and RCA duties (from 7 to 11 p.m.). When Piacitelli is not scheduled to work, Exilas assumes the senior CMT supervisor role, with Segunmara splitting her shift as described above. In addition to the CMT supervisors, six RCAs are normally assigned to the evening shift.⁹

Only three nursing staff are assigned to work the overnight shift, CMT supervisor Heather Denniston and two RCAs. On Denniston's nights off, the two RCAs work alone without a CMT supervisor on duty.

The director of nursing works from about 7:45 a.m. to about 3:45 p.m. When neither she nor Administrator DelFino is in the building, the CMT supervisor is responsible for overseeing the nursing staff.

The Housekeeping Department

The Employer's housekeeping department consists of three employees, Doriann Ovsepien, Lori Ragosta, and Cheri Abatiello. Ovsepien, the most senior of the three, with over eleven years at Victoria Court, is considered the supervisor of the housekeeping department.¹⁰ She and Ragosta work identical hours, from 7 a.m. to 3:30 p.m., and perform the same duties. Abatiello is the part-time weekend housekeeper, working Saturdays and Sundays from 7 to 11 a.m.¹¹ Ovsepien earns \$13 an hour, while Ragosta, who has worked for the Employer for eight years, earns an unspecified lesser amount.

Quality Assurance

In addition to her CMT supervisor duties, Carmen Quezada is the Employer's QA representative. In this capacity, she regularly visits every area of the facility and uses a preprinted checklist to note any deficiencies in cleanliness and safety. For example, she would document whether a resident's bed was made or whether a carpet needed cleaning, or that the placement of a resident's furniture raised safety concerns. According to Administrator DelFino, Quezada bases her safety findings on her knowledge of the individual residents' needs and abilities.

After documenting any areas needing attention, Quezada distributes the forms to all department heads, who meet once a month to discuss them. Quezada attends these

⁹ Among the six RCAs are two "assistant supervisors" – RCAs Alexandra Pozo and Sobeida Villanueva – who hand out assignments when the CMT supervisor is busy with medications. There is no comparable "assistant supervisor" position on any other shift. The Employer does not take the position that assistant supervisors should be excluded from the unit.

¹⁰ Administrator DelFino referred to Ovsepien as the "Director of Housekeeping," while Ovsepien called herself a housekeeper.

¹¹ Abatiello also works in Victoria Court's laundry room three days a week.

monthly meetings, at which she points out any problems and recommends corrective action. The group then decides which department head will address the problem.

SUPERVISORY STATUS OF THE CMT SUPERVISORS

The Employer asserts that the CMT supervisors are statutory supervisors by virtue of their authority to assign RCAs to particular stations, duties, and residents; to responsibly direct them; and to discipline and reward them.¹²

Authority to Assign RCAs to Tasks and to Residents

Director of Nursing LaPorte creates the weekly work schedules for CMT supervisors and RCAs, while the CMT supervisors make the daily work assignments. On the day shift, three RCAs are assigned to work the floor, while three are assigned to the memory loss program. Those who work on the floor are responsible for bathing, grooming, and dressing residents; bringing them meal trays; escorting them to and from meals; performing evening and bedtime care duties; and checking on them through the night. Those who are assigned to the memory loss program work with residents in group activities designed and overseen by the director of activities according to the functioning level of the residents. The CMT supervisor does not perform any of these patient care duties during her shift.¹³

There are no permanent or standing assignments. Instead, the CMT supervisor decides on a shift-by-shift basis where each RCA is going to work that day, using a rotating schedule so that the various duties are shared equitably.

The day-to-day assignments are based on “assignment sheets” created by CMT Supervisor Carmen Quezada for the first and second shifts. Although DeFino’s testimony regarding the assignment sheets was vague, and no assignment sheets were offered into evidence, it appears that they are created for each resident when they move in, based on the care plan established by the director of nursing. The assignment sheets do not assign any particular personnel to specific tasks, but appear to merely enumerate and to equitably divide the tasks associated with each resident. They are changed or rewritten only when a resident moves into or out of the facility, or when a resident’s needs change.

At the beginning of each shift, the CMT supervisor or her assistant passes out the assignment sheets. On the first and second shifts, as noted above, three RCAs are assigned to the memory loss program, where Director of Activities Donna Robitaille

¹² Victoria Court does not contend that the CMT supervisors have statutory authority to hire or recommend hiring; to fire or recommend firing; or to adjust grievances.

¹³ Some CMT supervisors, such as Elizabeth Gomez described above, are also CNAs and perform such patient care duties when they are scheduled to work as RCAs, rather than as the CMT supervisor.

assigns them to a particular group of residents. The CMT supervisor plays no role in the assignment of the RCA to a particular group of residents in the memory loss program.¹⁴

CMT supervisors on the first and second shifts spend the majority of their time distributing medications to residents, monitoring the resident shower log (in which RCAs document when residents have been showered), and assisting in the dining room during meals. Throughout each shift, the CMT supervisor makes notations on the “Shift to Shift Report” form, documenting resident medical issues and any other information she wants to communicate to the CMT supervisor on the following shift. The director of nursing also makes notations on the same form.

CMT supervisors assign breaks and meal periods to the RCAs on a day-to-day basis. Each first shift RCA is assigned to one of three lunch periods – 11:30, 12, or 12:30; and each evening RCA is assigned to one of two unspecified dinner breaks. These assignments are rotated in the interest of fairness.¹⁵

Authority to Assign RCAs to a Time

As noted above, the director of nursing creates the weekly work schedules to ensure nursing coverage on all three shifts. The CMT supervisor has no role in the creation of the weekly schedule.

When an RCA calls in sick, the CMT supervisor is responsible for trying to find a replacement. The CMT supervisor either covers the shift herself, performing the duties of an RCA, or calls in a replacement from a list of part-time employees. If the CMT supervisor cannot find a replacement from that list, she must obtain authorization from the administrator or director of nursing before offering the shift to a full-time employee and incurring overtime costs. The CMT supervisor has no authority to authorize overtime, to compel an employee to stay beyond the end of her shift, or to require an off-duty employee to report for work.

Authority to Responsibly Direct

The CMT supervisors are responsible for making sure that residents’ care needs are met on a day-to-day basis. If a CMT supervisor observes that a resident needs attention – for example, if he is unclean or unkempt – she has the authority to direct an RCA to take care of the problem. In this situation, the CMT supervisor would speak to the RCA who had responsibility for the particular resident, ask what happened, and instruct the RCA to correct the problem.

¹⁴ Administrator DeFino testified that the CMT supervisor decides which RCA works with each group of residents in the memory loss program. However, Activities Director Robitaille, who is directly responsible for the memory loss program, testified that she makes such assignments.

¹⁵ The RCAs assigned to the first lunch period have resident “toileting duties,” while the others do not.

As previously mentioned, Victoria Court maintains a resident shower log, overseen by the CMT supervisors, in which RCAs document when residents have been showered. There is no evidence indicating who creates the shower schedule, or how it is determined. If a resident has not been showered according to schedule, the CMT supervisor has the authority to instruct the RCA to do so and, if necessary, to discipline her.

There is no evidence that a CMT supervisor has ever been disciplined due to poor performance by an RCA. CMT supervisors are evaluated annually on the same form as all other employees. While they are judged on their ability to supervise the work of the RCAs and ensure that all RCA duties are performed, the evaluation form does not list these criteria. Moreover, there is no evidence that CMT supervisors are held accountable for the mistakes or deficiencies of the RCAs, or rewarded for their achievements.

Authority to Discipline

CMT supervisors have authority to issue written warnings, and to send employees home early for disciplinary purposes.¹⁶ There is no evidence indicating that they have authority to terminate employees.

The Employer produced several written warnings issued and signed by CMT supervisors, including warnings for poor attitude, excessive tardiness, and resident care issues. There is no evidence, however, indicating whether the director of nursing had any role in the issuance of the warnings. None of the warnings threaten further discipline affecting the employee's job status, and there was no testimony regarding whether the Employer uses a progressive discipline system.

Authority to Reward RCAs by Virtue of the CMT Supervisors' Role in Annual Evaluations

Employees are reviewed annually on a one-page form that is used throughout the facility. Each employee is rated in the areas of job performance, attitude, and personal appearance, and is scored excellent, good, acceptable, or poor in twelve sub-categories. The form includes space for narrative comments, as well as places for the employee's and

¹⁶ The Employer asserts in its brief that CMT supervisors have authority to suspend employees. There is no evidence that a CMT supervisor has ever sent an employee home early, although Administrator DeFino testified that they have the authority to do so; nor is there any evidence regarding whether such discipline would result in a loss of pay or otherwise affect an employee's status.

CMT supervisor's signatures.¹⁷ CMT supervisors complete the evaluation forms for RCAs, and the director of nursing conducts the evaluations of CMT supervisors.¹⁸

Because Victoria Court has no human resources personnel, Administrator DelFino keeps track of when employees need to be evaluated. She typically fills out the top part of the appraisal form, containing the employee's name and job title, as well as the CMT supervisor's name, before passing it along to the CMT supervisor to complete. After the CMT supervisor fills out the form, she returns it to DelFino, who reviews the evaluation, sometimes adds her own observations of the employee's performance in the comment section, signs off on the evaluation, and gives it back to the CMT supervisor to deliver to the RCA.

DelFino testified that she takes the evaluation into consideration when deciding the amount of an employee's wage increase. However, there is no score associated with the evaluation, and no direct correlation between the appraisal and the raise. CMT supervisors make no recommendations as to the amount of the increase. There was no testimony concerning how the Employer determines wages increases for its employees, or concerning the actual increases in recent years.

Secondary Indicia

The CMT supervisors are in charge of the facility during the evening, night, and weekend shifts when the administrator and director of nursing are absent, although they are expected to call DelFino or LaPorte regarding any serious resident or staffing issues that arise during off hours. DelFino testified that such calls are infrequent.

With the exception of QA representative Carmen Quezada, the CMT supervisors do not attend monthly department head meetings. Additionally, stipulated supervisors DelFino and LaPorte are available by phone 24 hours a day should problems arise at the facility, whereas the petitioned-for CMT supervisors do not participate as a resource in this off-shift on-call procedure.

ANALYSIS OF THE SUPERVISORY ISSUE REGARDING THE CMT SUPERVISORS

Pursuant to Section 2(11) of the Act, the term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, where the exercise of such authority is not of a merely routine or clerical nature, but requires the use

¹⁷ Some of the forms admitted into evidence also have a line for the "counselor's" signature. In those cases, it is always DelFino's signature on that line.

¹⁸ It appears that only three CMT supervisors – Lynn Piacitelli, Carmen Quezada, and Heather Denniston – actually fill out evaluations for RCAs.

of independent judgment. To qualify as a supervisor, it is not necessary that an individual possess all of the powers specified in Section 2(11) of the Act. Rather, possession of any one of them is sufficient to confer supervisory status. *Chicago Metallic Corp.*¹⁹

The Board has consistently applied the principle that authority effectively to recommend generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed. *Children's Farm Home.*²⁰ The burden of proving supervisory status rests on the party alleging that such status exists. *NLRB v. Kentucky River Community Care.*²¹ The Board will refrain from construing supervisory status too broadly, because the inevitable consequence of such a construction is to remove individuals from the protection of the Act. *Quadrex Environmental Co.*²²

In *Oakwood Healthcare, Inc.*,²³ the Board recently refined its analysis of the terms “assign,” “responsibly direct,” and “independent judgment” in assessing supervisory status. The Board announced that it construes the term “assign” to refer to “the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee. In the health care setting, the term “assign” encompasses the alleged supervisor’s responsibility to assign nurses and aides to particular patients. *Id.*²⁴

With respect to “responsible direction,” the Board explained in *Oakwood* that, if a person has “men under him” and if that person decides which job shall be undertaken or who shall do it, that person is a supervisor, provided that the direction is both “responsible” and carried out with independent judgment. For direction to be “responsible,” the person directing the oversight of the employee must be accountable for the performance of the task by the other. To establish accountability, it must be shown that the employer delegated to the putative supervisors authority to direct the work and take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisors if they do not take these steps. *Id.*²⁵

¹⁹ 273 NLRB 1677, 1689 (1985).

²⁰ 324 NLRB 61 (1997).

²¹ 532 U.S. 706, 121 S.Ct. 1861, 167 LRRM 2164 (2001).

²² 308 NLRB 101, 102 (1992).

²³ 348 NLRB No. 37 (2006).

²⁴ Slip op. at 4.

²⁵ Slip op. at 5-7.

Finally, the Board held in *Oakwood* that to establish that an individual possesses supervisory authority with respect to any of the statutory functions, the individual must also exercise independent judgment in exercising that authority, which depends on the degree of discretion with which the function is exercised. “[T]o exercise independent judgment, an individual must at a minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” *Id.*²⁶ “[A] judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” *Id.* The Board also stated that the degree of discretion exercised must rise above the “routine or clerical.” *Id.*

As noted above, Victoria Court asserts that the CMT supervisors are statutory supervisors because of their authority to assign RCAs to particular residents and tasks, to responsibly direct them, and to discipline and reward them. I find, however, that the Employer has failed to meet its burden of demonstrating that the CMT supervisors are Section 2(11) supervisors.

Authority to Assign RCAs to Tasks and to Residents

The Employer asserts that the CMT supervisors exercise independent judgment in making daily patient care assignments. In this regard, the Employer argues that the CMT supervisors decide, without the involvement of the administrator or director of nursing, which RCAs will cover the various nursing functions each day, and that they are guided by discretion in determining whether a resident needs attention.

I find that the Employer has failed to demonstrate that the CMT supervisors possess statutory authority to assign RCAs to tasks or to residents. Daily assignments are dictated by a policy of rotating duties to ensure fairness, as some duties are less desirable than others. The assignment of work does not require independent judgment where the RCAs all possess the same skills and training, and where the distribution of daily assignments is rotated in the interest of fairness to employees. *Oakwood Healthcare*²⁷ (assignments made solely on the basis of equalizing workloads do not implicate independent judgment). CMT supervisors do not take into account the relative skills of the RCAs, or the specific needs of the residents, but simply pass out assignments in an attempt to be fair. Moreover, the CMT supervisor has no role in determining which RCA will work with the various groups in the memory loss program.

I note that one CMT supervisor, Carmen Quezada, appears to have somewhat more authority in making assignments than others in the same classification. Quezada has responsibility for creating the assignment sheets that are passed out to RCAs each day. However, those assignment sheets do not correspond to the duties of a particular

²⁶ Slip op. at 8.

²⁷ Slip op. at 9.

nursing employee, but appear to be lists of tasks that need to be done for each individual resident. Moreover, I note that not one assignment sheet completed by Quezada was submitted into evidence; nor is there evidence that any particular assignment sheet required Quezada to assess the skills of the RCAs. All RCAs are trained in the various duties of the job, and can be and are assigned to the various tasks and residents interchangeably from day to day. In these circumstances, the Employer has not met its burden of establishing that the CMT supervisors assign tasks or residents to the RCAs and exercise independent judgment in doing so.

Authority to Assign RCAs to a Time

The Employer contends that the CMT supervisors have authority to assign the times RCAs work and are, therefore, statutory supervisors. CMT supervisors have no role in determining which RCAs will work the day, evening, or night shifts, or in creating the weekly shift schedules. Although CMT supervisors are responsible for finding coverage when an RCA calls in sick, I find that the Employer has failed to establish that the CMT supervisors have primary authority, on their own, to increase staffing or authorize overtime. Rather, CMT supervisors follow the Employer's established policy in determining how to fill the vacancy, and they lack the authority to compel any employee to report to work early or stay beyond the end of her scheduled shift. *Franklin Hospital Medical Center*.²⁸ A putative supervisor who lacks the power to compel, rather than merely request employees to take a certain action, does not possess the requisite supervisory authority. *Golden Crest Healthcare*.²⁹

Authority to Responsibly Direct

The Employer contends that the CMT supervisors responsibly direct the RCAs because they are "in charge" of them throughout the shift. In this regard, the CMT supervisor has the authority to instruct an RCA to complete a task that the RCA failed to do, or to direct an RCA if in the CMT supervisor's judgment a resident appears to need attention – duties that are already within the scope of an RCAs daily functions by virtue of the assignment sheets passed out at the beginning of each shift. RCAs may also report to the CMT supervisor throughout the day if they need direction.

To constitute "responsible" direction under *Oakwood Healthcare*, the person performing the oversight must be held accountable for the performance of the tasks such that some adverse consequence will befall them if the employees fail to perform their jobs properly. I find that the Employer has not met the *Oakwood Healthcare* requirement of establishing that there is a prospect of adverse consequences for the CMT supervisors if the RCAs perform poorly.

²⁸ 337 NLRB 826, 830 (2002).

²⁹ 348 NLRB No. 39, slip op. at 3 (2006)

The Employer contends that the nurses are held accountable for the work of the RCAs in that they are rated in their evaluations on their ability to supervise the RCAs. To demonstrate accountability, the Board requires that the putative supervisors be held accountable for the performance of their subordinates, not just for their own performance. *Oakwood Healthcare*³⁰ (evidence that the employer disciplined a charge nurse for failing to make fair assignments shows that charge nurses are accountable for their *own* performance or lack thereof, not the performance of *others*) (emphasis in the original). CMT supervisors are evaluated using the same form and criteria used for all other employees, both supervisory and non-supervisory, a factor indicating that they are not held accountable for the performance of the RCAs. *Franklin Hospital Medical Center*.³¹ While their ability to supervise the RCAs is undoubtedly considered by the director of nursing conducting their evaluations, there is nothing on the appraisal form calling for a rating in this area. Moreover, even if the CMT supervisors are judged on their ability to supervise the RCAs, this factor is too ambiguous to conclude that the CMT supervisors are held accountable for the performance of the RCAs, rather than for their own performance. Further, because there is no direct correlation between the CMT supervisors' evaluations and their salary increases, Victoria Court has failed to demonstrate that they face a prospect of any adverse consequence due to poor performance by the RCAs.

Because the Employer has failed to establish the element of accountability, I need not reach the issue of whether the CMT supervisors exercise independent judgment in directing the RCAs.

Authority to Discipline

The Employer asserts that the CMT supervisors have authority to discipline employees by issuing written warnings and suspending them. In this regard, some CMT supervisors have issued written warnings to RCAs, although there is no evidence indicating whether they did so without any involvement by the director of nursing.

Assuming the CMT supervisors have authority to issue written warnings without the approval of the director of nursing, I find that this does not, by itself, confer supervisory authority. The power to "point out and correct deficiencies" in an employee's work does not confer supervisory authority. *Franklin Hospital Medical Center*.³² Moreover, "the exercise of disciplinary authority must lead to personnel action...." *Id.* Unless they are themselves a form of discipline,³³ or contain disciplinary

³⁰ *Supra*, 348 NLRB No. 37, slip op. at 10.

³¹ *Supra*, 337 NLRB at 831.

³² *Id.* at 830, citing *Crittenton Hospital*, 328 NLRB at 879.

³³ *Oak Park Nursing Care Center*, 351 NLRB No. 9 (2007).

recommendations,³⁴ written warnings are merely reportorial and do not indicate supervisory authority. I find that the warnings issued by the CMT supervisors are merely reportorial because they have no effect on employees' employment status.

With respect to the Employer's assertion that CMT supervisors have authority to suspend employees, I find that there is insufficient evidence that such authority has actually been conferred upon the CMT supervisors. Although Section 2(11) requires only possession of authority rather than its actual exercise, testimony utterly lacking in specificity is insufficient to establish that supervisory authority exists. *Avante at Wilson, Inc.*³⁵ DelFino's bald assertion that the CMT supervisors have authority to suspend employees does not support a finding of supervisory authority, where the Employer has presented no evidence concerning any particular occasion in which a CMT supervisor did so, nor any evidence of the circumstances in which they have authority to do so.

Authority to Reward RCAs by Virtue of the CMT Supervisors' Role in Annual Evaluations

I find that the CMT supervisors' role in the evaluation process does not establish their supervisory authority. When an evaluation does not, by itself, affect the wages and/or job status of the employee being evaluated, the individual performing the evaluation will not be found to be a statutory supervisor. DelFino's testimony that she considers the performance appraisals when determining wage increases falls short of establishing that there is a direct correlation between the ratings that the CMT supervisors give the RCAs and the amount of their increases. Cf. *Bayou Mental Health Center*³⁶ (LPNs are supervisors where there is no review of the numerical scores awarded by the LPN, and CNAs receive a specific percentage increase corresponding to the numerical scores). DelFino conceded that there is no direct correlation between the scores on the RCAs' appraisals and the amount of their wage increases.

Accordingly, I find that the Employer has failed to meet its burden of proving that the CMT supervisors are supervisors within the meaning of Section 2(11), and I conclude that they are nonsupervisory employees who should be included in the unit found appropriate.

SUPERVISORY STATUS OF THE HOUSEKEEPING SUPERVISOR

Facts Pertaining to Supervisory Status

The Employer also asserts that Housekeeping Supervisor Doriann Ovsepien is a supervisory employee because she schedules and assigns the other housekeepers to

³⁴ *Franklin Hospital Medical Center*, Supra at 830.

³⁵ 348 NLRB No. 71, slip op. at 2 (2006).

³⁶ 311 NLRB 955 (1993).

particular duties, responsibly directs them, evaluates their performance, and grants or effectively recommends time off.³⁷

Authority to Assign Tasks

Doriann Ovsepien oversees the Employer's housekeeping department, which consists of three employees. Ovsepien and Lori Ragosta are the only two housekeeping employees in the facility on weekdays, while Cheri Abatiello is the part-time weekend housekeeper.

From Monday to Friday, Ovsepien and Ragosta split the housekeeping duties, following a routine they established when Ragosta began working eight years ago. Ovsepien reports at 7 a.m. and immediately begins distributing newspapers to residents. When she finishes, she stocks her cleaning cart and begins cleaning the rooms on the first floor of the facility. Ragosta covers the reception desk from 8 to 9 a.m., when the receptionist arrives, and then gets her cart and begins cleaning the lower level rooms. After their lunch break, Ragosta removes trash from all residents' apartments, while Ovsepien continues cleaning rooms.

Ovsepien testified that there are no assignments in the housekeeping department. She and Ragosta perform the same duties every day, having long ago divided the duties evenly. The only time their routine varies is when a resident moves out, or when there is an accident or other special situation requiring cleaning. In the case of the former, Ovsepien and Ragosta work together to clean the resident's apartment. In the latter situation, one of the housekeepers will be called on her walkie-talkie and directed to respond to the incident. Ovsepien does not make assignments to weekend housekeeper Abatiello, who performs the same duties on every shift.

Authority to Assign Housekeeping Employees to a Time

Although the Employer takes the position that Ovsepien makes the schedule for her department, Ovsepien testified that she and Ragosta have worked the same schedule, without variation, for the eight years that Ragosta has been employed at Victoria Court, and that she has no authority to vary it. Additionally, Abatiello has worked the same weekend schedule for many years.

The work schedule is different on holidays, when only one housekeeper is needed. Ovsepien and Ragosta take turns working holidays that fall on weekdays, and Abatiello works all holidays that fall on weekends. Ovsepien testified that she does not have the authority to force an employee to work on a holiday, or to substitute herself on a weekend

³⁷ Although there was some testimony about Ovsepien's involvement in the interviewing and hiring of a housekeeper under a previous administrator, the Employer does not take the position in its post-hearing brief that she has authority to hire or recommend hiring, fire or recommend firing, discipline employees, or adjust grievances. In any event, this evidence is insufficient to establish the existence of supervisory authority on Ovsepien's part.

holiday without the approval of Administrator DelFino. There is no evidence that Ovsepien played any role in the decision to have only one cleaner work on holidays.

The housekeeping supervisor gives initial approval to employee requests for time off. Housekeeping employees submit written requests for time off on preprinted forms used throughout the facility. Based on the needs of the facility, Ovsepien approves the request by signing the form, which then goes to Administrator DelFino for her approval. DelFino routinely approves time off requests that are signed by Ovsepien. Ovsepien testified that she lacks the authority to deny a time off request, and stated that if a request presented a scheduling conflict, she would have to seek DelFino's permission before denying it.

When one of the two housekeeping employees calls in sick, Ovsepien waits for Administrator DelFino to arrive before finding a replacement. After discussion, DelFino instructs Ovsepien to call Ragosta or Abatiello to fill in. Ovsepien testified that she lacks the authority to call a replacement, and that she cannot authorize overtime without DelFino's approval.

Authority to Responsibly Direct

The housekeeping supervisor is responsible for the cleanliness of the facility, and oversees the performance of the daily housekeeping duties. According to Ovsepien, the housekeeping duties are so routine that she does not need to direct Ragosta's work throughout the day. When an accident or other special situation causes a break in that routine, the administrator, an RCA, or some other staff member communicates directly with the housekeeper via the walkie-talkies that all employees carry. Although Administrator DelFino testified that Ovsepien supervises the housekeepers' tasks, there was no testimony regarding her authority to vary the routine or use independent judgment in deciding what tasks to assign.

There is no evidence that Ovsepien has ever been disciplined due to poor performance by the other housekeepers. Ovsepien is evaluated annually on the same form as all other employees, and there is no evidence that she is held accountable for the mistakes or deficiencies of the housekeepers, or rewarded for their achievements.

Authority to Reward Employees by Virtue of the Housekeeping Supervisor's Role in Annual Evaluations

Like all other Victoria Court employees, housekeeping employees are reviewed annually on a one-page form that is used throughout the facility. As noted above, each employee is rated in the areas of job performance, attitude, and personal appearance, and is scored excellent, good, acceptable, or poor in twelve sub-categories. The form includes space for narrative comments, as well as places for employee, supervisor, and administrator signatures.

Ovsepien completes the annual evaluations of housekeepers Ragosta and Abatiello, and returns them to DelFino for her independent review and comments. DelFino then meets with the employee to discuss the evaluation and wage increase. The housekeeping supervisor does not participate in this meeting, and gives no input regarding the employee's raise.

DelFino testified that she considers Ovsepien's evaluation when deciding the amount of an employee's wage increase. However, as with other employees, there is no score associated with the evaluation, and no direct correlation between the appraisal and the raise, if any.

Secondary Indicia

Ovsepien, like the other housekeepers, is hourly paid, earning \$13 an hour. Ragosta, who has worked for the Employer for fewer years, earns an unspecified lower hourly rate. Ovsepien acknowledged that she received a \$.50 hourly wage increase when the previous administrator gave her the supervisory title. Ovsepien also attends the Employer's monthly QA meetings. No other housekeeping employees attend these meetings.

ANALYSIS OF THE SUPERVISORY ISSUE REGARDING THE HOUSEKEEPING SUPERVISOR

The Employer takes the position that Housekeeping Supervisor Doriann Ovsepien is a statutory supervisor on the basis of her authority to assign and responsibly direct employees, to reward employees, and to grant or deny time off.

Authority to Assign Housekeepers to Tasks

The Employer asserts that Housekeeping Supervisor Ovsepien exercises independent judgment in assigning housekeepers to their daily tasks. On the days when Ovsepien works, the only other housekeeper in the facility is Lori Ragosta. The two share the daily housekeeping functions, following a long-established routine, and jointly decide which one will perform a particular task when necessary. Tasks are divided equally so that Ovsepien and Ragosta have similar duties. On weekends, Ovsepien has no oversight at all of part-time housekeeper Abatiello, who similarly follows an established routine in completing her cleaning duties.

I find that the Employer has failed to demonstrate that the housekeeping supervisor possesses statutory authority to assign employees to tasks. To the extent that Ovsepien makes assignments at all, I find that those assignments are clerical in nature and do not require the exercise of independent judgment. Ovsepien does not take into account the relative skills of the housekeepers, but simply divides up the facility to ensure that all areas are cleaned. Such routine or clerical considerations do not meet the *Oakwood Healthcare* requirement of independent judgment.

Authority to Assign Housekeepers to a Time

The Employer asserts that Ovsepien's role in granting time off requests makes her a statutory supervisor. When Ovsepien receives a time off request from one of the two other housekeepers, she signs the form indicating that there is no scheduling conflict and that the absence will not create a gap in housekeeping services. The form then goes to DelFino for her approval. Ovsepien has never denied an employee's request for time off, and testified that she lacks the authority to do so. If she foresees a scheduling conflict, Ovsepien discusses the situation with DelFino, and the two decide whether to grant the request. To the extent that Ovsepien has authority to deny such requests, her authority is diluted by the involvement of DelFino, Victoria Court's highest-ranking official. Moreover, Ovsepien lacks the authority to approve overtime, and, therefore, cannot direct Ragosta to work more than 40 hours without DelFino's approval.

I find that the Employer has failed to meet its burden of demonstrating that Ovsepien has independent authority to grant or deny time off, or to approve overtime. Even assuming that she does possess authority to approve time off requests, that authority does not involve the exercise of independent judgment, but is clerical in nature, especially in a three-person department where coverage issues are uncomplicated.

Authority to Responsibly Direct

The Employer contends that the housekeeping supervisor is in charge of the housekeepers and, therefore, responsibly directs them. Given the lack of evidence that Ovsepien has ever directed an employee in any regard, I find that she does not possess statutory authority to responsibly direct employees.

Further, as discussed above, the alleged supervisor must be held accountable for the employees' performance of the assigned tasks in order to be deemed a Section 2(11) supervisor. To demonstrate accountability, the Board requires that the putative supervisor be held accountable for the performance of her subordinates, not just for her own performance, and that she face the prospect of adverse consequences if they do perform poorly. *Oakwood Healthcare*.³⁸ The housekeeping supervisor is not evaluated based on the performance of the other housekeepers, but only on her own performance. In this regard, the Employer's use of the same appraisal form for all housekeepers, including Ovsepien, indicates that she is not held accountable for the other housekeepers' performance. Further, because there is no direct correlation between Ovsepien's evaluations and her annual salary increases, Victoria Court has failed to demonstrate that she faces a prospect of any adverse consequence due to poor performance by the other housekeepers.

³⁸ *Supra*, 348 NLRB, slip op. at 10.

Authority to Reward Employees by Virtue of the Housekeeping Supervisor's Role in Annual Evaluations

Ovsepien's role in the appraisal process is similar to that of the CMT supervisors and does not establish supervisory authority. When an evaluation does not, by itself, affect the wages and/or job status of the employee being evaluated, the individual performing such an evaluation will not be found to be a statutory supervisor. DelFino's testimony that she considers the performance appraisals when determining wage increases falls short of establishing that there is a direct correlation between the ratings that Ovsepien gives the housekeepers and the amount of their increases. Cf. *Bayou Mental Health Center*.³⁹ DelFino conceded that there is no direct correlation between the scores on the housekeepers' appraisals and the amount of their wage increases.

Secondary Indicia

The Employer asserts that the fact that Ovsepien receives a higher hourly wage than those who report to her, as well as the fact that she attends QA meetings, supports a finding that she is a supervisor. However, these factors are secondary indicia, which are insufficient by themselves to establish supervisory status in the absence of evidence that an individual possesses any one of the several primary Section 2(11) indicia. *Ken-Crest Services*.⁴⁰ Moreover, the Employer produced no evidence of the actual differences between Ovsepien's wage rate and those of the other housekeepers.

Accordingly, I find that the Employer has failed to meet its burden of establishing that the housekeeping supervisor is a supervisor within the meaning of Section 2(11), and I conclude that she is a nonsupervisory employee who should not be excluded from the unit found appropriate on this basis.

MANAGERIAL STATUS OF THE HOUSEKEEPING SUPERVISOR

Facts Pertaining to Managerial Status

The Employer contends that Housekeeping Supervisor Doriann Ovsepien is a managerial employee by virtue of her participation in QA meetings with other department heads.

The Managerial Authority of the Housekeeping Supervisor

As described above, Doriann Ovsepien is the Employer's housekeeping supervisor and the most senior employee in that department. Unlike the nursing department, housekeeping does not have a stipulated supervisor to oversee the department, leaving Ovsepien as the person in charge.

³⁹ *Supra*, 311 NLRB 955.

⁴⁰ 335 NLRB 777, 779 (2001).

The Employer holds monthly QA meetings, attended by department heads. Ovsepien regularly attends these meetings, along with Administrator DeFino, Director of Nursing LaPorte, Food Services Director Giusseppe, Activities Director Robitaille, and QA representative Quezada. During QA meetings, the group discusses Quezada's inspection reports, created on the basis of her regular rounds of the facility. The group discusses possible solutions to Quezada's findings and determines which department head will be responsible for taking the appropriate corrective measures. Ovsepien testified that her role at these meetings is to be informed of any cleaning deficiencies found during QA inspections so that she and Ragosta can correct them. As noted above, other employees do not attend QA meetings.

DeFino testified that the group discusses "pertinent issues" that any department head wants the others to know about, and the Employer asserted in its post-hearing brief that they "discuss operational and quality assurance challenges as a management team," but neither described the types of issues that are raised in the monthly meetings.

ANALYSIS OF THE MANAGERIAL STATUS OF THE HOUSEKEEPING SUPERVISOR

Although not specified in the Act, managerial employees are excluded from bargaining units as a matter of Board policy. The Board has defined managerial employees as those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer." *NLRB v. Yeshiva University*.⁴¹ Because they are "aligned with management," managerial employees "represent employer interests by taking or recommending discretionary actions that effectively control or implement employer policy." *Id.*

The Employer asserts that Housekeeping Supervisor Ovsepien is a managerial employee because she "has express responsibility for overseeing the entire housekeeping department." Further, it argues that Ovsepien's participation in QA meetings distinguishes her from other employees and excludes her from any appropriate bargaining unit. I find that the Employer has not established that Ovsepien formulates or effectuates management policies simply by attending the QA meetings.

The Employer's argument that Ovsepien is a managerial employee is based solely on her presence at these meetings. Other than QA issues, however, it is not clear that any management policies are discussed in the monthly meetings. Ovsepien attends the meetings as representative of the housekeeping department so that any deficiencies or concerns regarding housekeeping can be communicated to the appropriate employees. That Ovsepien is the conduit of information between the department heads and the other

⁴¹ 444 U.S. 672, 682-683 (1980).

housekeepers falls far short of establishing that she formulates and effectuates management policy, and is not indicative of managerial status. I find, therefore, that the record falls far short of establishing Ovsepien's managerial status, and I shall include her in the appropriate unit.

Accordingly, based upon the foregoing and the stipulations of the parties at the hearing, I find that the following employees of the Employer constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time employees, including CMTs and CMT supervisors, CNAs, PCAs, reception employees, maintenance employees, housekeeping employees, the housekeeping supervisor, laundry employees, kitchen and dietary employees, activities employees, and the dietician employed by the Employer at its Victoria Court facility, but excluding the bookkeeper, managers, confidential employees, guards, and all supervisors as defined by the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. 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. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date, and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for purposes of collective bargaining by the New England Health Care Employees Union, District 1199, a/w Service Employees International Union.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the 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.*,⁴² *NLRB v. Wyman-Gordon Co.*⁴³ Accordingly, it is hereby directed that within seven days of the date of this Decision, two copies of an election eligibility list containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the Regional Director, who shall make the list available to all parties to the election. *North Macon Health Care Facility*.⁴⁴ In order to be timely filed, such list must be received by the Regional Office, Thomas P. O'Neill, Jr. Federal Building, Sixth Floor, 10 Causeway Street, Boston, Massachusetts, on or before April 7, 2008. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review this Decision and Direction of Election may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by April 14, 2008.

In the Regional Office's original correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board web site at www.nlr.gov. On the home page of the web site, select the **E-Gov** tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.

/s/ Rosemary Pye

Rosemary Pye, Regional Director
First Region
National Labor Relations Board
Thomas P. O'Neill, Jr. Federal Building
10 Causeway Street, Sixth Floor
Boston, MA 02222-1072

Dated at Boston, Massachusetts
this 31st day of March, 2008.

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⁴² 156 NLRB 1236 (1966).

⁴³ 394 U.S. 759 (1969).

⁴⁴ 315 NLRB 359 (1994).