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

ARISTACARE AT MEADOW SPRINGS[1] Employer and	Cases 4–RC–21641 and 4–RC–21642
DISTRICT 1199C, NATIONAL UNION of HOSPITAL and HEALTH CARE EMPLOYEES, AFSCME, AFL-CIO Petitioner	

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Employer, AristaCare at Meadow Springs, operates a rehabilitation facility in Plymouth Meeting, Pennsylvania. The Petitioner, District 1199C, NUHHCE, filed petitions with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent separate units of Registered Nurse (RN) Charge Nurses and Licensed Practical Nurse (LPN) Charge Nurses.[2] The Employer contends that all of the RN and LPN Charge Nurses are supervisors within the meaning of Section 2(11) of the Act, and therefore the petition should be dismissed.[3]

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[1] The Employer's name appears as amended at the hearing.

[2] The petition initially sought units of all LPNs and RNs employed by the Employer at the Plymouth Meeting facility, but at the hearing the Petitioner indicated that it wished to exclude RN Supervisors (Margaret Wrightson, Jeanne Kennedy, Deb Lilly, Renee Berman, and Jeanine Rogers), wound care nurses, and all other employees. The Employer agreed to these exclusions, and these classifications shall be excluded from the unit.

[3] The parties stipulated that if the petitions are not dismissed there should be a self-determination election for RNs, as provided for in *Sonotone Corp.*, 90 NLRB 1236 (1950). The parties further agreed that pool Charge Nurses who worked a weekly average of four hours or more during the period from November 1, 2009 through January 31, 2010 should be eligible to vote in the election. The Direction of Election reflects these agreements.

At the hearing, the Employer took the position that RN Charge Nurses were managerial employees and that Charge Nurses should be excluded from the units for unspecified reasons other than their purported supervisory and managerial status. However, the Employer limited its presentation of evidence and the arguments in its brief to the supervisory issue. Accordingly,

A Hearing Officer of the Board conducted a hearing,[4] and the Employer and the Petitioner filed briefs. I have considered the evidence and arguments presented by the parties, and, as discussed below, I have concluded that the Employer failed to sustain its burden to establish the supervisory status of the Charge Nurses, and I shall therefore direct elections pursuant to the petitions.

To provide a context for the discussion, this Decision will begin with a brief overview of the Employer's operations and then review the factors that must be evaluated in resolving the supervisory issue. Thereafter, the Decision will present in detail the relevant facts and reasoning that support my conclusion.

I. OVERVIEW OF OPERATIONS

The Employer operates a 150-bed post-acute care specialized rehabilitation facility. In approximately July of 2006, the Employer took over the operation of this facility from its predecessor, Plymouth House, Inc. The facility provides care for short-term and long-term residents who are dependent on ventilators and/or who have significant neurological impairment, such as traumatic brain injury, cerebral palsy, coma or persistent vegetative state, multiple sclerosis (MS), amyotrophic lateral sclerosis (ALS), quadriplegia, and paraplegia. The residents vary significantly as to their level of acuity and ability to take care of their basic needs. All residents are at least 18 years old, and the oldest residents are in their 60s. The residential/nursing units are located on the first floor of the facility, and the second floor houses administrative offices and the Human Resources Department.

Rhea Goodman is the Administrator of the facility and the highest-ranking management official on site. There are 11 administrative departments that report to her: Nursing, Maintenance, Human Resources, Dietary, Social Services, Admissions, Housekeeping, Recreation Therapy, Respiratory, Medical Records, and the Business Office. Each department is headed by a Director, and some departments also have Assistant Directors.

The facility has four nursing units: the Neurological Life Center (NLC), Pulmonary Life Centers (PLCs) 1 and 2, and the Neuro-Pulmonary Rehab Unit (NPRU). The NLC is a 60-bed unit for residents with spinal cord injuries and neurological diseases. The residents in this unit vary in their ability to perform daily living activities such as brushing their teeth, combing their hair, and taking a shower. The PLCs 1 and 2 each have 30 beds. They are primarily for residents with acute respiratory failure, and the rooms are equipped with piped-in oxygen and a ventilator. Some residents in these units are brain anoxic or in a coma/vegetative state and are incapable of performing daily living activities. The NPRU also has 30 beds. This unit is mainly for short-term residents, but there is no substantial difference with respect to resident acuity between the NPRU and the PLC units. At the time of the hearing, 60 of the residents in the

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this Decision shall only address the Employer's contention that the Charge Nurses are supervisors.

[4] The Employer's unopposed Motion to Correct Transcript is hereby granted.

NRPU and PLC units were ventilator-dependent, and the remainder used tracheotomy collars. There are generally two residents per room in all of the units.

Sandy Baber, the Director of Nursing (DON), is responsible for all operations in the Nursing Department, and she reports directly to the Administrator. Bill Bane, the Assistant Director of Nursing (ADON), reports to the DON. The Administrator, the DON, and the ADON generally work weekdays from 7:00 a.m. to 5:00 p.m. and are not at the facility outside those hours.

Each of the resident care units described above is headed by a Unit Manager or an RN Supervisor,[5] depending on the day and time. The four Unit Managers generally work from 7:00 a.m. to 5:00 p.m. during the week. During the Unit Managers' off hours during the week, and on weekends, one RN Supervisor oversees all four resident care units, on shifts usually running from 3:00 p.m. to 11:00 p.m. and 11:00 p.m. to 7:00 a.m. during the week, and from 7:00 a.m. to 7:00 p.m. and 7:00 p.m. to 7:00 a.m. on the weekends. The Unit Managers and RN Supervisors report directly to the DON and the ADON, and the DON conducts monthly management meetings and daily clinical meetings with them.

At the time of the hearing, there were about 148 residents at the facility. The record does not indicate the current number of RN and LPN Charge Nurses (CNs), but the petitions state that there are approximately 13 RNs and 30 LPNs. The facility has approximately 80 Certified Nursing Assistants (CNAs).

CNAs work 8-hour shifts: 7:00 a.m. to 3:00 p.m. (day shift), 3:00 p.m. to 11:00 p.m. (evening shift), or 11: 00 p.m. to 7:00 a.m. (night shift). CNs are usually assigned to one of these 8-hour shifts or to a 12-hour shift, 7:00 a.m. to 7:00 p.m., or 7:00 p.m. to 7:00 a.m., although some have other schedules. In the NLC unit, on the day and evening shifts there are about three CNs and six or seven CNAs, while on the night shift there are two CNs and four or five CNAs. In the other three units, for the first two shifts there are two CNs and three or four CNAs, and on the third shift, there are usually two CNs and three CNAs. The units are also staffed by Unit Clerks.

The Petitioner currently represents a unit of CNAs, dietary employees, housekeeping employees, laundry employees, maintenance employees, recreation aides, rehabilitation aides, and cooks employed by the Employer at the facility. When the Employer assumed control of the facility in 2006, it, in effect, adopted the existing five-year collective-bargaining agreement negotiated by Plymouth House. This agreement expires on September 30, 2010.

II. FACTORS RELEVANT TO EVALUATING THE SUPERVISORY STATUS OF THE CHARGE NURSES

The burden of establishing supervisory status is on the party asserting that such status exists. *NLRB v. Kentucky River Community Care, Inc.,* 532 U.S. 706, 711 (2001); *Dean &*

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[5] The RN Supervisor is also called the House Supervisor.

DeLuca New York, Inc., 338 NLRB 1046, 1047 (2003). The party seeking to prove supervisory status must establish it by a preponderance of the evidence. *Dean & Deluca,* above at 1047. Section 2(11) of the Act sets forth a three-part test for determining whether an individual is a supervisor. Pursuant to this test, employees are statutory supervisors if: (1) they hold the authority to engage in any one of the 12 supervisory functions listed in Section 2(11); (2) their exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment; and (3) their authority is held in the interest of the employer. See *NLRB v. Kentucky River Community Care, Inc.,* above at 712-713; *NLRB v. Health Care & Retirement Corp. of America,* 511 U.S. 571, 573-574 (1994).

The statutory criteria for supervisory status set forth in Section 2(11) are read in the disjunctive, and possession of any one of the indicia listed is sufficient to make an individual a supervisor. *Kentucky River,* above at 713*; Juniper Industries, Inc.*, 311 NLRB 109, 110 (1993). The Board analyzes each case in order to differentiate between the exercise of independent judgment and the giving of routine instructions, between effective recommendation and forceful suggestions, and between the appearance of supervision and supervision in fact. The exercise of some supervisory authority in a merely routine, clerical, or perfunctory manner does not confer supervisory status on an employee. See *J.C. Brock Corp.,* 314 NLRB 157, 158 (1994)*; Juniper Industries*, above at 110. The authority effectively to recommend an action means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation ultimately is followed. See *Children's Farm Home,* 324 NLRB 61 (1997); *Hawaiian Telephone Co.,* 186 NLRB 1 (1970). The Board has an obligation not to construe the statutory language too broadly because the individual found to be a supervisor is denied the protection of the Act. *Avante at Wilson, Inc.,* 348 NLRB 1056 (2006); *Chevron Shipping Co.,* 317 NLRB 379, 381 (1995). Where the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established, at least on the basis of those indicia. *Dole Fresh Vegetables Inc.,* 339 NLRB 785, 792 (2003); *Phelps Community Medical Center,* 295 NLRB 486, 490 (1989). The sporadic exercise of supervisory authority is not sufficient to transform an employee into a supervisor. See *Kanahwa Stone Co.,* 334 NLRB 235, 237 (2001); *Gaines Electric,* 309 NLRB 1077, 1078 (1992).

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

clerical and routine and assignment and direction that involve a sufficient element of discretion to confer supervisory status.[6] Thus, the Court did not hold that every exercise of professional or technical judgment in directing other employees is necessarily an exercise of independent judgment, but recognized that the Board could determine the degree of independent judgment necessary to meet the statutory threshold for supervisory status. Id. at 714.

In a series of cases issued in 2006, the Board clarified the circumstances in which it will find that individuals exercise sufficient discretion in performing two of the functions listed in Section 2(11) – assignment and responsible direction of work – to justify their classification as statutory supervisors. *Oakwood Healthcare, Inc.,* 348 NLRB 686 (2006); *Croft Metals, Inc.,* 348 NLRB 717 (2006); and *Golden Crest Healthcare Center*, 348 NLRB 727 (2006). As discussed in *Oakwood*, the term "assign" refers 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." *Oakwood*, above at 689. In the health care setting, the term "assign" encompasses the responsibility to assign other employees to particular patients. Ibid.

In *Oakwood,* the Board explained "responsible direction," as follows: "If a person on the shop floor has 'men under him,' and if that person decides 'what job shall be undertaken next or who shall do it,' that person is a supervisor, provided that the direction is both 'responsible . . . and carried out with independent judgment."[7] "Responsible direction," in contrast to "assignment," can involve the delegation of discrete tasks as opposed to overall duties. *Oakwood,* above at 691. But, an individual will be found to have the authority to responsibly direct other employees only if the individual is *accountable* for the performance of the tasks by the other employee. Accountability means that the employer has delegated to the putative supervisor the authority to direct the work and to take corrective action if necessary, and the putative supervisor faces the prospect of adverse consequences if the employees under his or her command fail to perform their tasks correctly. *Oakwood*, above at 692.

Assignment or responsible direction will, as noted above, produce a finding of supervisory status only if the exercise of independent judgment is involved. Independent judgment will be found where the alleged supervisor acts free from the control of others, is required to form an opinion by discerning and comparing data, and makes a decision not dictated by circumstances or company policy. *Oakwood,* above at 692. Independent judgment requires that the decision "rise above the merely routine or clerical." Ibid.

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6 The Court also indicated that, "the degree of judgment that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer." Id. at 713-714.

7 In providing this explanation, the Board referred to statements made by Senator Flanders during the 1947 Senate hearings concerning the Act. At those hearings, Senator Flanders offered the amendment adding the phrase "responsibly to direct" to Section 2(11). See NLRB, Legislative History of the Labor Management Relations Act of 1947, 103-104.

III. FACTS

A. Unit Managers and RN Supervisors

Unit Managers are responsible for running their units. They oversee the work of the unit CNs and CNAs, address all clinical issues involving residents, deal with the residents' families, complete a variety of recurring reports, and handle administrative issues.

RN Supervisors are responsible for everything that happens at the facility during the overnight hours during the week and on weekends, when they are generally the highest-ranking officials on site. RN Supervisors make rounds throughout the building. They deal with clinical and family issues involving residents, as well as facility and environmental issues. They do not personally perform any resident care other than on an ad hoc or emergency basis.

B. CNAs

CNAs provide their assigned residents with routine daily nursing and living care in accordance with their assessment and care plans and as otherwise directed. The services they provide for residents include: assisting them with meals, bathing, personal hygiene, and grooming; changing their clothes; turning them every two hours; making sure that safety equipment on their beds is properly engaged; moving them around the room or in or out of bed; taking vital signs and reporting changes in condition; transporting them around the facility and to scheduled activities and appointments outside the facility; responding to their calls; and cleaning their rooms. CNAs make rounds to check on the general condition of their residents, and they prepare notes regarding residents' care and condition. At the beginning of their shifts, they receive reports and instructions from CNs with respect to clinical developments.

C. Charge Nurses

1. *Duties and responsibilities*

CNs are responsible for ensuring that their areas are run properly and that residents receive appropriate care. They directly perform clinical duties for residents such as distributing medications, providing intravenous feedings, changing catheters, doing clinical assessments, and charting modifications to the nursing care plan. They pay particular attention to residents' wounds and skin condition and the stability of their vital signs. To ensure continuity of care, each CN receives a report from the CN on the prior shift and provides the same kind of report to the CN on the following shift. CNs interact as needed with other staff members who provide resident care, such as respiratory therapists, physical therapists, and recreation therapists, and they report significant clinical developments to the relevant physicians.

The job descriptions[8] for CNs, which are essentially the same for LPNs and RNs, indicate that they are responsible and accountable for the delivery of nursing services to the residents who are assigned to them. Their listed responsibilities include, in pertinent part: providing direct care

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8 The job descriptions were established in 2005 by the Employer's predecessor.

and administering medications and treatments to residents; "supervising" CNAs and distributing their daily assignments consistent with staff competency and the residents' nursing care plans; making rounds to monitor and assess resident care; adjusting staff care assignments according to the availability of qualified staff and resident needs; orienting new staff to unit procedures and routines; seeking input from staff regarding residents' conditions and needs; monitoring delivery of care by staff to determine that it is of acceptable quantity and quality; performing physical assessments of new admissions and current residents as needed; monitoring the implementation of nursing care plans and helping to evaluate the appropriateness of nursing care plans; training and developing skills of staff and reporting information to Unit Managers as part of the evaluation process; documenting the delivery of services and care to residents; reporting relevant information to the Unit Manager, including staff behavior (positive and negative); monitoring staff with respect to compliance with workplace safety policies; taking "job actions" with staff members under appropriate circumstances; applying policies regarding progressive discipline; removing staff, if necessary, to avoid endangering other staff or residents; and acting as a liaison between residents, physicians, and other members of the health care team. The job description also indicates that CNAs report directly to the Unit Manager but are "supervised" by CNs.

The authority, duties, and responsibilities of RN Charge Nurses in practice are the same as those of LPN Charge Nurses, except that unlike LPNs, RNs are permitted to make death pronouncements, administer intravenous feeding, and change suprapubic catheters. When there is more than one CN on duty in a unit, they are all equally responsible and have the same authority, regardless of whether the CN is an RN or LPN, and there is no difference in their scheduling and unit assignments. RNs are paid more than LPNs but less than RN Supervisors and Unit Managers, but the record does not indicate the precise amounts that employees in each of these classifications are paid. RNs and LPNs receive the same benefits.

2. *Scheduling and assignments*

Administrator Goodman and Director of Community Resources Dawn Welsh assign nursing staff, including CNAs, to particular units and schedules for each six-week period. They use the Employer's quantitative staffing guidelines that are based on the units' resident census. To maintain continuity of care, the Employer attempts to assign CNAs to the same shifts and units on a regular basis.

The daily assignment sheet for CNAs on each shift is usually posted in each unit, but the witnesses gave different and sometimes conflicting accounts regarding the procedures for assigning CNAs to residents within the units.

Baber testified that CNs are responsible for filling out the assignment sheets for the shifts that follow their own shifts. However, she acknowledged that in practice CNs do not make all of these assignments, but that some CNAs in some units complete the assignment sheets themselves. She noted that a CN has the authority to override the CNA assignments prepared by the CN on the prior shift. According to Baber, in making assignments, CNs attempt to balance the workload among CNAs according to the number of residents in the unit, their acuity and particular needs, the CNAs' relative skill and experience, continuity of care by CNAs who are familiar with the residents, and, at times, the residents' preferences. She further testified that on

some occasions, CNs fail to prepare the CNA assignments for the following shift, and the CN for that shift has to prepare the CNA assignments for her own shift. If the unit does not have the full complement of assigned CNAs, the CN must rearrange the workload among the unit CNAs who are available or request assistance from other units.

CN Tina Ann Russell testified that she makes CNA assignments to residents for her own shift at the beginning of the shift. She stated that the assignment rosters in the units where she has worked list the available CNAs with pre-set room assignments, and that she may follow the pre-set assignments or adjust them if she deems it warranted. She testified that in making assignment adjustments, she takes into account resident preferences and acuity and the relative abilities of the CNAs.

CN Elissa Dee testified that she does not make daily resident assignments, but that CNAs generally divide the residents among themselves. She stated that only the RN Supervisor has the authority to reassign CNAs within or between units to adjust to staffing shortages. CN Danielle Cevallos testified that CNAs generally are assigned to teams that rotate among residents and that adjustments to this format are generally made jointly by the CN and CNAs.[9] CN Carol Michener testified that she does not make room assignments to CNAs or complete daily assignment sheets. Rather, the Unit Manager does the CNA assignments and CNAs themselves play a role in determining room assignments. CN Charles Solomon similarly testified that he does not make daily assignments to CNAs, but that he has observed both the Unit Manager and a CNA completing the daily assignments sheets.

Two CNAs also testified as to how they are assigned to residents. Rachel Sullivan testified that in her experience, the CNAs make the room assignments and fill out the sheets themselves. Barbara Spitko testified that CNAs are grouped into teams which are assigned to blocks of rooms on a rotating basis and that CNAs fill in the assignment sheets themselves.

On one of the Employee Counseling Forms introduced into the record, (discussed below concerning Barbara Lowry) the narrative prepared by the CN stated that "V. Green CNA" does the assignments.

CN Russell further testified that CNs have the authority to move CNAs between units to alleviate staffing shortages. However, CNs Dee and Solomon[10] and CNAs Spitko and Sullivan testified that the RN Supervisor decides how CNAs are reallocated between units in response to staff shortages. CN Cevallos testified that Director of Community Resources Welsh decides how CNAs should be reassigned.

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[9] CN Eleanor Nixon testified that she prepared assignment sheets for beds and rooms every other month, though she said that she made the assignments for her own shift, rather than the next shift. She further stated that CNAs work in team rotations that change every 15 days.

[10] Solomon allowed that, hypothetically, he might make a reassignment if the RN Supervisor was temporarily unavailable, but he added that the RN Supervisor would have to confirm the change.

3. *Direction of work*

CNs have the authority to direct CNAs regarding the performance of their duties and to correct them if they fail to perform necessary tasks or perform them improperly. Baber acknowledged that most CNAs know their jobs well and that the kind of direction that she envisions applies primarily to new CNAs who are learning their unit's procedures and standards of care.

Baber testified that CNs are held accountable for their failure to supervise CNAs properly, and the Employer provided one example of such accountability. In November 2008, CN Michelle Latorre failed to ensure that a CNA in her unit had properly positioned an abdominal binder on a resident. As a result of the error, Latorre was issued a "Clinical Practice Referral" (CPR) and a written warning. The issuance of a CPR is not a disciplinary action, although the document is maintained in the employee's file. There is no other evidence of any other CN being issued a CPR or disciplinary document based on inadequate oversight of CNAs.

The Employer also introduced six CN performance appraisals that contained notations to the effect that the CNs needed to improve some aspect of their supervision or monitoring of CNAs. Baber said that such critical comments about a CN in an evaluation could be a factor in considering the CN for future discipline or selection for other positions at the facility. However, she provided no specific examples of any discipline or failure to be promoted based on evaluation comments. Moreover, all of these documents were issued in 2005 and 2006, and the Employer has not had a regular practice of preparing performance appraisals since it began to operate the facility in about July of 2006.[11]

CNAs are scheduled to take a 30-minute lunch period and a 15-minute break at set times each day and are expected to sign out and notify the CN when they leave. The witnesses generally agreed, however, that CNAs frequently do not notify the CNs when they leave for breaks, and there was no evidence that CNs were penalized for failing to enforce the notification requirement. The witnesses also agreed that there were occasions when resident care needs required the CNAs' presence and that CNs have the authority to delay breaks in such circumstances. In addition, CNAs sometimes choose to delay breaks themselves due to resident needs.

The Employer also maintains that CNs have independent authority to permit CNAs to leave work early. However, the only evidence presented in that regard was the testimony of CN Eleanor Nixon, who stated that on one occasion she permitted a CNA to leave work about an hour early. In that situation, the CNA had worked the day shift and stayed to work the evening shift to help alleviate a staff shortage. After checking and confirming that the CNAs were caught up on their work and that many residents were in bed, Nixon excused the employee because she was required to be at work at 7:00 a.m. the following morning. There was no other evidence of CNs granting requests to leave, and Baber did not testify that CNs had such authority.

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[11] DON Baber asserted that consistent with its new policy some evaluations had been prepared in January 2010. None of the 2010 evaluations were put in the record.

4. *Discipline*

The Employer has a progressive disciplinary policy which classifies violations of work rules into three categories based on their seriousness. Twenty-five violations are categorized as "Group I," including unsatisfactory work and/or attitude, excessive absenteeism and other attendance violations, profanity, loafing during work hours, horseplay, and inappropriate attire. For Group I violations, the penalties are as follows: First Offense-- Verbal Warning/Counseling; Second Offense-- Written Warning; Third Offense-- Suspension Without Pay; and Fourth Offense-- Termination of Employment. For the more serious Group II violations, which include, among other things, safety problems, neglect in resident care, no call/no show, and refusal to accept assignments, the penalties are: First Offense-- Suspension Without Pay, and Second Offense-- Termination. For the most serious violations, Group III, the penalty for a first offense is Termination of Employment. Group III violations include falsification of records, violence, sexual harassment, resident abuse, and gross negligence, among others. The Employer's Work Rules state, inter alia, that:

> If you have been cited for an offense under Group I, within a twelve (12) month period, any other offense that occurs in Group I will result in the next step of progressive action. If no Group I offense occurs in a twelve month period, all previous offenses older than twelve (12) months will be invalid. If you have been cited for an offense under Group II within a one (1) year period of any other offense in any Group, the offense may result in termination of employment. . . . Group I and Group II offenses may be combined for progressive discipline.

DON Baber testified generally that each CN has the authority to initiate a disciplinary action against a CNA by filling out a document called an "Employee Counseling Form."[12] She stated that after completing this form, the CN submits it to the Unit Manager, RN Supervisor, ADON, or DON for review to ensure that it is complete and filled out correctly, and Human Resources then decides the appropriate level of discipline based on a review of the employee's record. Baber testified that in deciding whether to impose discipline management would generally accept the facts as presented in the form prepared by the CN, while adding to the factual summary or conducting further investigation whenever necessary. Some allegations, such as resident abuse, require additional independent investigation because of other reporting requirements. The final document is given to the CNA, either by the CN or a member of management. The disciplinary action becomes part of the employee's file and could be the basis for later discipline pursuant to the progressive disciplinary policy.

CNs may address observed deficiencies in care provided by CNAs, such as improper technique or failure to perform required tasks, without resorting to the disciplinary process. In such cases, a CN could resolve the matter with an informal discussion with the CNA or by

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12 There are also disciplinary documents in the record called "Employee Counseling and Disciplinary Form."

completing and issuing a Clinical Practice Referral (CPR) form that documents the nature of the deficiency and the training provided. The issuance of a CPR is not a disciplinary action.

At the top of Employee Counseling Forms are boxes to be checked indicating which level of discipline has been issued, e.g., counseling, verbal warning, termination, etc. Then, following spaces for the employee's name and infraction date, there are boxes to be checked for "Type of Infraction" (either Work Rule, Policy/Procedure, or Standard of Practice), and a space for the Work Rule Violation Number. The form then has a space for a narrative of the incident and an additional space to describe the "Employee Counseling/Education or plan of correction." Thereafter, there are designated signature lines for the Employee, Union Representative, Supervisor/Counselor, and witness, and a space for an employee statement.

The Employer introduced into evidence several Employee Counseling Forms issued to CNAs that Baber testified were "initiated" by CNs. With one exception (the Elleby counseling described below),[13] the Employer did not present the CN or any other witness to describe the surrounding circumstances. The record contains no specific information as to how these disciplinary actions were initiated, processed, reviewed or decided or what independent investigation may have occurred in connection with them.[14] Rather, the documents for the most part contain only a factual report of what occurred and in some cases a plan of corrective action. None of the documents contain an explicit recommendation as to discipline by the CN, and there was no testimony as to how the selection of the particular level of discipline was determined. Based on Baber's testimony, it would appear that Human Resources, rather than the CN, makes that determination, and, as discussed below, a review of the documents does not show that Human Resources automatically moves employees to the next step of the disciplinary process with each successive incident of discipline.

The Employer placed into evidence disciplinary notices issued to the following employees:

Violet McMillan -- McMillan received a counseling on October 15, 2005 for failing to change a resident, and RN Tanya Robinson drafted the document. The plan of correction indicates that McMillan will provide care to incontinent residents in a more timely fashion.

Rachel Parent -- Parent received a verbal warning on February 1, 2006 for two "nonconsecutive absences within a 30-day rolling period." RN Othello Kwaidah drafted the document. The plan of correction indicates that Parent must report to work as scheduled and that failure to do so will result in progressive discipline.

Jackie Cooper -- Cooper received a verbal warning on March 24, 2006 for failing to notify the CN when she left the floor for breaks, causing residents to be left unattended. The

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13 While another Employee Counseling Form is in the record, memorializing an incident involving CN Dee and CNA Lowery, as discussed below, it does not appear that Lowry actually received discipline as a result of the incident.

14 In addition, all but four of the documents fail to indicate the Work Rule Violation Number or Group category.

signature of the CN who prepared the form is illegible, and Baber was unable to identify him or her. The plan of correction did not indicate any suggestions for improvement but only included further description of the offense.

Thereafter, Cooper received a counseling on June 25, 2006 for refusing to give a resident a shower in the early hours of the morning as requested by the resident. The form was prepared by RN Pat Lynn. The narrative portion states that "the charge nurse" told Cooper to give the resident a shower and that Cooper initially refused. The form further states, "Supervisor was called but when I arrived…" Based on this statement, it is unclear whether Lynn was acting as the RN Supervisor rather than as a CN at the time of the incident.

Lastly, Cooper received a one-day suspension on November 8, 2007 for insubordination. The form was prepared by RN Kevin Gaskins, who wrote that Cooper was discovered asleep in front of the computer and that he instructed her to begin her charting, but an hour-and-a-half later she still had not done so. Gaskins noted further that "the LPNs" told him that Cooper had taken an hour-long break and then spent an hour-and-a-half at the computer with her head down. Gaskins also noted Cooper's rude attitude toward the "supervisor."

It would appear from Gaskins' completion of the document that he was the RN Supervisor at the time inasmuch as the LPNs apparently provided information to him in connection with his preparation of the form, and from the notation that the "supervisor" was called and came to the unit to deal with Cooper. In addition, DON Baber signed the form and noted at the bottom "1-day suspension stands" and "Employee counseled on attitude [toward] supervisor and charge nurses," suggesting that Baber was directly involved in processing, reviewing and determining the disciplinary outcome of the incident and that both the "charge nurses" and the "supervisor," ostensibly Gaskins as the RN Supervisor, were involved in the incident. Baber testified that Gaskins, like Walker, has filled in as an RN Supervisor.

Because it appears that RN Supervisors may have prepared some of these forms, the series of documents involving Cooper raises a substantial question as to whether the nurses who prepared the other disciplinary documents in the record have been correctly identified as CNs. Cooper's disciplinary record also raises a question as to the consistency of the Employer's application of the progressive disciplinary system. Regarding the latter, having received a verbal warning in March 2006, Cooper presumably would have received at least a written warning, rather than another verbal warning, for her next violation, in June 2006. Considering this history there is some doubt that discipline initiated by a CN has predictably adverse future consequences for the employee.

Isaac Adjel -- Adjel received an "education" on April 30, 2006 for failing to obtain assistance from a second employee when using the Hoyer lift to transfer a resident, as required by the Employer's policy. LPN Carla Holloway prepared the document, though it was co-signed by RN Deborah Lilly, who is currently an RN Supervisor. The plan of correction indicates that the relevant policy was reviewed with the employee and that the employee would be subject to progressive discipline for future infractions. However, an "education" is not listed as a disciplinary action in the Employer's work rules.

Diane Peterson -- Peterson received a counseling on August 28, 2006 for failing to change the linens of an incontinent resident. This problem was reported to the CN by the CNA on the following shift who discovered it. Baber identified the person who prepared the document as CN Barbara Schweidel, and the document was co-signed by Monica Walker. There is no entry in the plan of correction section. Baber testified that Walker has, at times, filled in as an RN Supervisor. The record is unclear as to the position in which she was serving on this occasion or when she signed the other disciplinary documents that are in evidence in this case.

Debbie Butts -- Butts received a verbal warning on December 6, 2006 for failing to change a resident's bedding. The document was prepared by CN Monica Walker eight days earlier, on November 28, 2006. The entry in the plan of correction section indicates that all staff members were educated on the need to make continual rounds to check on the residents.

Danielle Elleby -- Elleby received a counseling on December 13, 2006 for failing to turn and reposition a resident. CN Charles Solomon prepared the form. The plan of correction indicates that the relevant turning protocol would be followed in the future and that any deviations would be coordinated with the CN or the RN Supervisor.

Solomon testified that upon discovering that Elleby had not been turning a resident as required by the protocol, he discussed the matter with her. Then, when Elleby again failed to turn a resident, Solomon "had to" complete the form, which he gave to the RN Supervisor. Solomon signed the document in the space provided for a witness rather than in the space for the supervisor/counselor. He testified that he was not questioned about the incident by higher management or told what, if any, action had been taken.

Yvette Butler -- Butler received a "1st written warning" on January 10, 2007 for going on break without first changing a resident. Monica Walker prepared the document. The factual statement indicates, "Called to unit at approximately 0315 to observe Foley bag that was filled to capacity and leaking—Charge nurse reports CNA left for break and left [patient] wet." Again, the reference to the Charge Nurse suggests that the person filling out the form was not the Charge Nurse but the RN Supervisor.

Butler received an additional counseling on February 7, 2007 for having a visitor while on duty. Walker prepared the document. Since the Employer's disciplinary policy requires a written warning for a second Group I offense, Butler should have received at least a written warning if the progressive disciplinary system were followed. There is no entry in the plan of correction section in either document.

Michael Stewart -- Stewart received a counseling on December 30, 2007 for failing to feed a resident on time and not responding promptly to a page. CN Othello Kwaidah signed the document. The plan of correction indicates that Stewart will understand the importance of feeding a resident on time.

Guss Spring[15] -- Spring received a suspension on June 30, 2008 for failing to turn a resident. CN Monica Walker prepared the factual summary, which states that the resident said that he had not been turned at all during the night shift and that he did not even see the CNA until 6:00 a.m. The document reflects a decision to suspend Spring and to conduct an investigation. The notations regarding the suspension were written in the handwriting of two different individuals, suggesting the direct involvement of management in reviewing the matter.

Wardell Piper -- the Employer introduced a document stating that Piper failed to change a resident during his entire shift, and the form indicates the discipline was a counseling. However, the form was not signed by Piper or by any official or witness in the designated places. Rather, CN Bridgette Whitmore wrote her name in the margin next to the narrative factual portion of the document. From the appearance of the document, it does not appear that it was ever issued to Piper.

As an additional example of a CN's authority to discipline a CNA, the Employer introduced an Employee Counseling Form that was completed by CN Elissa Dee regarding the behavior of CNA Barbara Lowry in 2009. On that occasion, Dee was engaged in discussions with another CN and a physician, and Lowry repeatedly interrupted the discussions to demand that Dee give Lowry her shift assignment. As a result, Dee instructed Lowry to leave the unit and go home, and she informed the RN Supervisor of Lowry's behavior. Dee testified that she completed a counseling form for Lowry and submitted it to the RN Supervisor and to Human Resources. However, Dee never heard whether any discipline was imposed on Lowry, the counseling document itself was unsigned by Lowry or any management official, and none of the boxes indicating the level of discipline was checked, suggesting that no disciplinary action was taken against Lowry. In addition, Dee observed Lowry working elsewhere at the facility the same night that Dee had sent her home.

Eleanor Nixon, a CN for approximately 18 months, testified that she had "written up" CNA Linda Rutledge for walking away from Nixon when she tried to speak to her. However, the Employer did not present any disciplinary documents regarding Rutledge. Nixon appeared to be unsure whether the write-up was a disciplinary action or a CPR, and she did not state that she gave it to Rutledge.

CN Carol Michener testified that in December 2009 she reported to her Unit Manager that a CNA had refused to help her when requested to do so. The Unit Manager asked Michener and two other witnesses to provide corroborating statements and subsequently told Michener that the CNA had been suspended for one day. Michener was not involved in completing or issuing any disciplinary document. She testified that she would generally go to her supervisor with any problem involving a recalcitrant CNA, but that such problems were not frequent.

5. *Evaluations*

Baber testified that CNs monitor newly-hired CNAs assigned to their units and provide feedback to higher management regarding their performance. However, the Employer has not

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15 The record is not clear as to the spelling of this name.

completed CNA performance evaluations, including probationary evaluations, on a regular basis for several years. Indeed, CNs Solomon, Dee,[16] and Michener testified that they have never evaluated a CNA, while CN Cevallos testified that she has only completed one CNA evaluation in seven years.

When CNs completed CNA evaluations, these evaluations were reviewed by higher management, including the DON. No specific examples were provided as to how any performance evaluation has affected any CNA's wages or future employment.

DON Baber testified that the Employer has recently instituted a plan to have CNs complete CNA performance appraisals, and some appraisals have already been prepared. Baber indicated that the Employer would look at these appraisals if the CNA were applying for other positions at the facility, but there is no evidence that they will be used to determine employee pay or any other form of compensation.

IV. ANALYSIS

The Employer contends that the CNs exercise sufficient independent judgment in assigning, directing, disciplining, and evaluating CNAs to establish that they are supervisors within the meaning of the Act. However, as discussed below, the Employer has not met its burden to demonstrate that the CNs meet the Board's test for supervisory status as to any of these indicia. I therefore find that the Employer has failed to establish that the CNs are supervisors within the meaning of Section 2(11) of the Act.

A. Assignment of Work

Although the CN job descriptions state that they are responsible for "supervising" and directing the CNAs in their daily activities, adjusting their assignments, imposing discipline, and taking other action suggestive of supervisory status, it is settled that paper authority is not sufficient to confer supervisory status; there must be evidence of actual performance of supervisory functions. *Franklin Home Health Agency,* 337 NLRB 826 (2002); *Crittenton Hospital,* 328 NLRB 879 (1999). Accordingly, to determine whether they are supervisors, it is necessary to analyze how the CNs actually carry out their responsibilities.

As previously discussed, in *Oakwood* above at 689, the Board decided that this Section 2(11) function refers 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." The Board also noted in *Oakwood* that in the health care setting, the term "assign" encompasses the responsibility to assign nurses and aides to particular residents. However, "assign" for purposes of Section 2(11) does not refer to ad hoc instructions to perform discrete tasks, and the Employer's CNs do not assign nurses or aides to their units, shifts, or overall tasks. Thus, in this case, the only function performed by the

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16 Dee recalled doing one or more CNA evaluations when she was an RN Supervisor, but none as a CN.

Employer's CNs which might fit within *Oakwood's* definition of "assign" is their designation of CNAs to care for particular residents.

The evidence as to CN assignment of residents to CNAs is in conflict. Although DON Baber testified that CNs regularly assign CNAs to residents on the upcoming shift, several witnesses disputed that assertion. Some witnesses testified that CNA assignments are determined by the CNAs themselves (CN Dee, CNAs Sullivan and Spitko), others stated that the Unit Manager and/or CNAs determine the assignments (CNs Michener and Solomon), another witness testified that CNs and CNAs work together to make resident assignment decisions (Cevallos), and two CNs testified that they assign CNAs to residents on their own shifts, not the following shifts (Russell, Nixon).

However, assuming that CNs do assign CNAs to residents at times, the Board also reaffirmed in *Oakwood* that supervisory status will be found only where resident assignments involve the exercise of independent judgment and are not clerical or routine. In this case, the Employer did not demonstrate that CNs exercise sufficient judgment in making resident assignments to be deemed supervisors.

Baber testified that in addition to equalizing the CNAs' workload, CNs attempt to assign CNAs according to their levels of skill and experience and the residents' needs. However, Russell was the only CN who supported Baber's general testimony about how such decisions are made. In addition, the Employer failed to demonstrate the CNs' exercise of this putative supervisory authority with actual, as opposed to hypothetical, examples. The Board has repeatedly indicated that conclusory testimony without supporting detail is not sufficient to establish supervisory status. *Loyalhanna Care Center*, 352 NLRB 863, 864 (2008); *Avante at Wilson,* above.

The totality of the evidence indicates that to the extent that CNs make resident assignments to CNAs, their principal goal is to balance their workloads as much as possible. The Board continues to adhere to its traditional view that assignments made solely for purposes of equalizing workloads do not involve an exercise of independent judgment sufficient to confer supervisory status. *Oakwood,* above at 697; *Golden Crest,* above at 730, fn. 9. Accordingly, I find the Employer has not proven that the CNs exercise supervisory authority in assigning staff to residents.

B. <u>Direction of work</u>

As defined by the Board, "direction" involves deciding which employee should perform which task in which order, determining the manner in which work is performed, and having the authority to take corrective action if the work is not done properly. *Oakwood*, above at 691; *Golden Crest*, above at 730. In this case, CNAs are required to perform routine recurring duties for the residents, and CNs are responsible for ensuring that CNAs carry out their tasks properly and may direct or correct them when they have not done so. When it is necessary, CNs may request CNAs to perform particular tasks at particular times. The record thus establishes that the CNs have the authority to "direct" CNAs. This does not end the inquiry, however. Supervisory

status will be found only if the direction is "responsible" and involves the exercise of independent judgment. *Oakwood*, above at 691; *Golden Crest,* above at 730.

The record does not demonstrate how the CNs use independent judgment in assigning discrete tasks. Several witnesses testified that a CN could delay a CNA's break if the unit is too busy or if resident needs require the CNA's presence, but the record does not include any examples of the use of independent judgment in making these decisions. In general, the evidence indicates that such delays may be required by the obvious, immediate needs of residents, and that either the CN or CNA could make this decision. Moreover, the CNs' role in making decisions as to lunch and break times is solely to ensure that there are enough CNAs remaining on the floor to handle the workload. Thus, at the Employer's facility, a CN decision as to when an employee may take a break is a simple and routine task, not requiring independent judgment. *Azusa Ranch Market*, 321 NLRB 811, 812 (1996); *Ten Broeck Commons*, 320 NLRB 806, 811 (1996). See also *Loyalhanna Care Center*, 332 NLRB 933, 935 (2000).

The evidence is also insufficient to show that CN direction of other employees is "responsible." In order for direction to be responsible, the asserted supervisor must be held accountable for the work performed by subordinates and be subject to adverse consequences if the work is not done properly. *Oakwood*, above at 692. The Employer provided one recent example of accountability—a written warning to CN Latorre for poor performance by a CNA in her unit. With that exception, nothing in the record suggests that the Employer's CNs have actually been punished or rewarded as a consequence of the manner in which CNAs on their units performed. This single incident appears to be nothing more than an isolated event insufficient to demonstrate that the Charge Nurses have supervisory authority. *Volair Contractors,* 341 NLRB 673, 675 (2004); *Dole Fresh Vegetables,* above, 339 NLRB at 786.

Baber asserted that critical remarks about a CN's supervisory direction of CNAs in a performance evaluation could be held against a CN. However, because the Employer has not done performance evaluations for CNs for several years, they can not serve as a basis for finding CN accountability for CNA performance. In short, the Employer has failed to show that CNs are held accountable for the work done by subordinates and might suffer adverse consequences if that work is not done correctly. I thus find the evidence insufficient to establish that CNs responsibly direct CNAs. *Oakwood*, above at 695; *Golden Crest*, above at 731-732.

C. Discipline

It is well established that, in order for discipline issued by a charge nurse to confer supervisory status, the discipline must lead to personnel action without independent investigation or review by other management personnel. *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002); *Beverly Health & Rehabilitation Services, Inc.*, 335 NLRB 635, 664 (2001), enfd. in pertinent part, 317 F. 3d 316 (D.C. Cir. 2003). In this case, the Employer failed to establish through detailed probative evidence that the CNs recommended discipline or that the Employer followed their recommendations without independent investigation. The Employer presented first-hand CN testimony as to the circumstances surrounding only one disciplinary form--

Solomon's counseling to Elleby.[17] As to the others, the Employer presented only Baber's more generalized testimony. Baber stated that CNs have the authority to prepare counseling forms, but she further indicated that those forms are reviewed by higher management, and she provided no specifics as to the extent of management involvement in any of these reviews. Her summary testimony is too imprecise to support the conclusion that CNs discipline employees without independent review or investigation by higher management.

Furthermore, there is affirmative evidence that the Employer does, at times, independently investigate CN reports of CNA infractions. CN Carol Michener explained that her complaint about a CNA's refusal to assist her was forwarded to a Unit Manager, who performed an investigation, requiring statements from Michener and others rather than relying exclusively on the facts presented by Michener.

The Employer does not automatically issue discipline to CNAs when CNs report their misconduct. Thus, although CN Dee complained about CNA Lowry's inappropriate behavior and completed a counseling form, it appears that the Employer did not issue the discipline to the CNA or support Dee's decision to send her home, but merely sent her to another unit. Similarly, the counseling form that was prepared by CN Whitmore for CNA Piper appears never to have been issued to him. The failure to impose the recommended discipline on Lowry and Piper suggests that the CNs lack the authority to effectively recommend discipline.

Many of the Employee Counseling Forms in the record raise questions as to the extent of input by RN Supervisors or other officials in their preparation. Thus, the annotations on the documents prepared for the disciplines of Guss Spring and Jackie Cooper suggest substantial involvement of management or supervisory personnel above the CN level. Similar questions arise with respect to the January 10, 2007 written warning to Yvette Butler that was prepared by Monica Walker. In fact, some of the disciplinary documents introduced by the Employer may have been prepared by RN Supervisors rather than CNs. In this connection, the language of the January 10 form document suggests that Walker may have been an RN Supervisor at the time she prepared it, and there is no evidence as to what position she held when she prepared the disciplinary documents for Debbie Butts or Diane Peterson. In light of these unexplained questions regarding the documents themselves, they cannot be relied on to show that CNs are supervisors.

Additionally, the disciplinary documents suggest that the CNs' role in preparing them is generally limited to a recitation of facts or observations regarding CNA conduct. None of the documents contain any CN recommendations regarding discipline, and most do not indicate the particular rule, or even the Group category, that had been violated. On the whole, these documents reflect a reportorial role by the CNs, and mere reporting of improper conduct does not establish supervisory status, especially where, as here, higher-ranking officials may independently investigate the CNA's conduct. See *Williamette Industries,* 336 NLRB 743, 744 (2001).

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[17] As noted above, CN Dee also testified concerning her complaint about Lowrey's conduct, but that complaint apparently did not result in discipline.

Finally, it is not clear that the discipline in evidence in this case had an effect on the CNAs' job status or tenure. The vast majority of these documents memorialized counselings or verbal warnings, the first step of the progressive disciplinary system for Group I violations, and the record shows that repeated violations did not result in more advanced levels of discipline.[18] Thus, under this system, Cooper should have received a written warning or a suspension, not a counseling, for her second warning in three months. Likewise, Butler should have received at least a written warning for her second violation. While Baber testified that a CNA's disciplinary record could be the basis for future discipline or a negative factor in consideration of a CNA's bid on other jobs at the facility, no evidence was presented to illustrate or corroborate her conclusory testimony in this regard.

Oak Park Nursing Care Center, 351 NLRB 27 (2007), in which the Board found LPN charge nurses to be statutory supervisors based on their role in the employer's progressive disciplinary system, is distinguishable. As here, the charge nurses had the authority to decide either to counsel CNAs verbally or prepare counseling forms, and those forms were issued by the DON or ADON, who also determined the level of discipline to be imposed. Contrary to the Regional Director, who found that the counseling forms did not constitute discipline, the Board found that they did, because unlike this case the employer demonstrated that under its progressive disciplinary system they laid the foundation for future discipline. Moreover, in *Oak Park,* there was affirmative evidence that LPNs followed disciplinary recommendations from charge nurses without conducting independent investigations. The Board further found in *Oak Park* that the charge nurses' discretion to initiate the progressive disciplinary process by issuing counseling forms to employees demonstrated that they used independent judgment. In contrast, the Employer here failed to show consistent application of the progressive disciplinary system or that the Employer follows CN recommendations without independent investigation.[19]

Recently, in *Bryant Health Center, Inc.*, 353 NLRB No. 80 (2009), LPNs were held not to be supervisors, despite having the authority to prepare pre-printed disciplinary forms, because there was no showing that the forms were for the purpose of recommending discipline, as opposed to reporting infractions, and there was no evidence that these forms were used as the basis for future disciplinary actions. *Bryant Health*, above, slip op. at 6-7. Similarly, in *Regal Health & Rehab Center, Inc.*, 354 NLRB No. 71 (2009), LPNs were not found to be supervisors

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18 One document (Adjel) was for an "education," which is not a step in the progressive disciplinary system.

19 In *Oak Park,* the Board distinguished *Jochims v. NLRB*, 480 F. 3d 1161 (D.C. Cir. 2007), which reversed the Board's decision in *Wilshire at Lakewood,* 345 NLRB 1050 (2005), noting that the write-ups in *Wilshire* posed only the possibility of discipline, were not a prerequisite to discipline, and did not routinely result in discipline, while in *Oak Park* the counseling forms were issued as discipline without independent investigation by management.

Sheraton Universal Hotel, 350 NLRB 1114 (2007), is also distinguishable. In that case, there was clear evidence, based on the testimony of the purported supervisor, that he initiated disciplinary action against the employee by conducting a "coach-and counsel" session with him, and followed up by discussing the matter with management. He further testified that he made a recommendation for harsh discipline, which the employer followed. That type of detailed, first-hand testimony is lacking in the instant case.

based on asserted disciplinary authority because, although they prepared disciplinary documents, there was insufficient evidence that they actually recommended discipline or that their role in the discipline went beyond the documentation of CNAs' substandard performance. In those cases, as in this one, the employers failed to provide sufficient evidence that the charge nurses had independent authority to issue meaningful discipline.

Accordingly, I find that the Employer has not met its burden to demonstrate that CNs have the authority to discipline or effectively recommend discipline.

D. Evaluations

The record shows that the CNs have rarely, if ever, been asked to perform written evaluations of the CNAs since the Employer took over the facility. Although the Employer plans to have CNs prepare them in the future, there is no evidence as to how regularly they will be produced or what form they will take.

Moreover, even assuming that CNs will regularly prepare evaluations for the CNAs, the authority to evaluate is not one of the Section 2(11) supervisory status indicia. *Elmhurst Extended Care Facilities, Inc*., 329 NLRB 535, 536-537 (1999). Rather, when an evaluation does not by itself affect the wages and/or job status of the employee being evaluated, the individual preparing such an evaluation will not be found to be a statutory supervisor on the basis of the evaluation. *Franklin Home Health Agency*, above at 831; *Harborside Healthcare*, 330 NLRB 1334 (2000). The Board has only held that nurses are statutory supervisors on the basis of preparing evaluations when there is a direct correlation between the evaluations that they prepare and merit increases received by the evaluated employees. *Trevilla of Golden Valley*, 330 NLRB 1377, 1378 (2000); *Hillhaven Kona Healthcare Center*, 323 NLRB 1171 (1997). In this case, there is no evidence that CNAs receive merit raises; wages appear to be based on the rates set forth in their collective-bargaining agreement. While Baber stated that evaluations could be used to help support disciplinary actions or future promotions, there is no evidence that this has ever occurred, and such testimony must be deemed speculative. Therefore, the role played by the Employer's LPNs in evaluating CNAs does not make them statutory supervisors.

E. Ratio of CNs to CNAs

The Board does not rely on secondary indicia of supervisory status in the absence of evidence of the existence of the primary indicia enumerated in Section 2(11), *RCC Fabricators, Inc*., 352 NLRB 701, 714, fn. 28 (2008), *J.C. Brock Corp.,* above at 159. In this case, the ratio of supervisors to employees, if CNs were determined to be supervisors, tends to support the finding that CNs are not supervisors.

There are currently 80 CNAs and 43 CNs,[20] yielding about a 2 to 1 CNA to CN ratio. While the ratio on particular units and shifts may differ, the Employer's staffing guidelines do

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[20] As noted above, the number of CNs is derived from the petition. These ratios do not account for the DON, ADON, RN Supervisors, and Unit Managers, all of whom have supervisory authority over the CNAs.

not indicate a significantly higher ratio. Thus, the prescribed staffing in PLCs 1 and 2 and the NPRU on the evening shift is a 2 to1 ratio when the census is between 26 and 30 residents, and 1.5 to 1 when it is between 15 and 25 residents. The prescribed ratio on the night shift for these units is 1.5 to 1 when the census is between 24 and 30, and 1 to 1 when it is between 13 and 23. The ratio in the NLC is marginally higher when the unit is at or near its capacity of 60 residents on the later shifts,[21] 2.3 to 1 on the evening shift and 2.5 to 1 on the night shift. Thus, the ratio is never higher than 2.5 CNAs to 1 CN.

A ratio of two to three employees to one supervisor would be unusually low, particularly where, as here, the employees perform repetitive tasks that, for the most part, are not highly technical in nature. This rather low employee-supervisory ratio also is inconsistent with the finding that CNAs do not require a substantial amount of direction in the completion of their usual tasks during a shift. An unbalanced ratio of supervisors to subordinates militates against finding statutory supervisory status. *Franklin Home Health Agency*, 337 NLRB 826, 831 (2002). Thus, the secondary indicia support a finding that CNs are not supervisors.

Considering all of the above, the Employer has not met its burden to establish that the CNs are supervisors within the meaning of the Act. Therefore, I shall direct elections in the petitioned-for units.

V. CONCLUSIONS AND FINDINGS

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 case.

3. The Petitioner claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

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[21] The guidelines provide for a 63-resident capacity in the NLC, but the testimony indicated that the working capacity was 60 residents.

UNIT A

> All full-time, regular part-time, and pool RN Charge Nurses[22] employed by the Employer at the AristaCare at Meadow Springs facility located in Plymouth Meeting, Pennsylvania; **excluding** LPN Charge Nurses, RN Supervisors, Unit Managers, wound care nurses, CNAs, all other employees, guards and supervisors as defined in the Act.

UNIT B

> All full-time, regular part-time, and pool LPN Charge Nurses[23] employed by the Employer at the AristaCare at Meadow Springs facility located in Plymouth Meeting, Pennsylvania; **excluding** RN Charge Nurses, RN Supervisors, Unit Managers, wound care nurses, CNAs, all other employees, guards and supervisors as defined in the Act.

An overall unit of professional and non-professional employees may constitute an appropriate unit, subject to the consent of the professional employees. Therefore, pursuant to the stipulation by the parties, I shall direct that a separate ballot be used for the RN Charge Nurses (Unit A). *Home of Guiding Hands*, 218 NLRB 1278, 1280 (1975). The ballot for Unit A will ask two questions:

> 1. Do you wish to be included in the same unit as the non-professional employees employed by the Employer for purposes of collective bargaining?
>
> 2. Do you desire to be represented for the purposes of collective bargaining by District 1199C, National Union of Hospital and Health Care Employees, AFSCME, AFL-CIO?

If the professional employees vote "yes" to the first question, indicating their desire to be included in the unit with non-professional employees, they will be included in one overall unit. If, on the other hand, the majority of the professional employees vote against inclusion, they will not be included in a unit with the non-professional employees. In that event, their votes on the second question will be counted to decide whether they wish to be represented by the Petitioner in a separate unit.

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22 Pool RN Charge Nurses who worked an average of at least four hours per week during the period November 1, 2009 through January 31, 2010 are included in the unit.

23 Pool LPN Charge Nurses who worked an average of at least four hours per week during the period November 1, 2009 through January 31, 2010 are included in the unit.

VI. DIRECTION OF ELECTION

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

A. Eligible Voters

The eligible voters shall be unit employees employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, employees engaged in an economic strike, which commenced less than 12 months before the election date, who have retained their status as strikers but who have been permanently replaced, as well as their replacement, are eligible to vote. Unit employees who are in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are: (1) employees who have quit or been discharged for cause after the designated payroll period for eligibility; (2) employees engaged in a strike who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees engaged in an economic strike which began more than 12 months before the election date who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman–Gordon Company*, 394 U.S. 759 (1969).

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

To be timely filed, the list must be received in the Regional Office, One Independence Mall, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106 on or before **Monday, March 8, 2010.** No extension of time to file this list shall be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the

election whenever proper objections are filed. The list may be submitted by mail, facsimile transmission at (215) 597–7658, or by electronic filing through the Agency's website at **www.nlrb.gov.** The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party. Guidance for electronic filing can be found under the **E-Gov** heading on the Agency's website. Since the list will be made available to all parties to the election, please furnish a total of 2 copies, unless the list is submitted by facsimile or electronic filing, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

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

VII. RIGHT TO REQUEST REVIEW

Pursuant to the provisions of Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, a request for review of this Decision may be filed with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001.

Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, DC by the close of business on **Monday, March 15, 2010, at 5:00 p.m. (ET)**, unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically.** If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time on the due date**. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.[24] A copy of the request for review must be served on each of the other parties to the proceeding, as

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[24] A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at **www.nlrb.gov.** Once the website is accessed, select the E-Gov tab and then click on the E-filing link on the pull-down menu. Click on the "File Documents" button under Board/Office of the Executive Secretary and then follow the directions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Signed**:** March 1, 2010

/s/ [Dorothy L. Moore-Duncan]
DOROTHY L. MOORE-DUNCAN
Regional Director, Region Four
National Labor Relations Board
615 Chestnut Street, 7th Floor
Philadelphia, PA 19106