

Lincoln Park Nursing and Convalescent Home, Inc. t/a Lincoln Park Nursing Home; Jeryl Industries, Inc. and Lincoln Park Nursing and Convalescent Home, Inc., a Co-Partnership d/b/a Lincoln Park Intermediate Care Center, jointly known as Lincoln Park Nursing Center and 1115 Nursing Home and Service Employees Union-New Jersey A, a Division of 1115 District Council, H.E.R.E., AFL-CIO, Petitioner.
Case 22-RC-10895

September 18, 1995

DECISION ON REVIEW AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

On July 19, 1994, the Regional Director for Region 22 issued a Decision and Direction of Election in the above-entitled proceeding. The Regional Director found the petitioned-for unit of all full-time and regular part-time service and maintenance employees employed by the Employer, Lincoln Park Nursing Center, at its Lincoln Park, New Jersey Intermediate Care Center (ICC) and nursing home facilities (the Center) to be an appropriate unit, excluding business office clericals, office clerical employees, professional employees, technical employees, consultants, guards and supervisors as defined by the Act.¹

Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Employer filed a timely request for review of the Regional Director's decision, contending that, contrary to the Regional Director's findings, (1) licensed practical nurses (LPNs), the Employer's only technical employees, should be included in the unit; (2) the ICC maintenance super-

¹Included in the unit are nurses aides, orderlies, quality assurance aides, unit ward clerks, medical records clerks-ICC, medical assistant, unit supply clerks, in-service secretary, employee health secretary, cooks, assistant cooks, first cooks, sanitary supply employees, dietary aides, utility persons, dishwashers, dietary department secretary/purchasing coordinator, social workers (unlicensed, uncertified, without a master's degree), maintenance supervisor-nursing home, general maintenance employees, maintenance-elevator operators, maintenance/plumbers, maintenance/electrical employees, maintenance/carpenters, maintenance/painters, recreation therapists, recreation aides, mimeograph operator, music therapist, beautician, voluntary coordinator, housekeeping aides, housekeeping porters, laundry aides, laundry porters, buffers, personal clothing aides, admission clerks, and admission coordinator. Excluded are directors of nursing, assistant directors of nursing, nursing supervisors, quality assurance manager, registered nurses, licensed practical nurses, MDS coordinators, in-service manager, in-service instructor, nursing department secretaries, nursing department payroll clerk, medical records clerk/secretary-nursing home, director of social services, director of personnel, personnel clerk, personnel recruiter, director of maintenance, maintenance supervisor-ICC, licensed boiler operators, director of recreation, director of dietary, assistant director of dietary supervisors, dieticians, director of housekeeping and laundry, housekeeping and laundry supervisors, receptionists and administrative secretary.

visor and the quality assurance manager are not statutory supervisors; (3) the nursing department secretaries, nursing department payroll clerk, receptionists, personnel clerk, personnel recruiter, and the administrative secretary are not business office clericals; and (4) the nursing home medical records clerk is not a confidential employee. The Petitioner filed an opposition. On September 16, 1994, the Board granted the Employer's request for review with regard to the exclusion of the LPNs; the supervisory status of the ICC's maintenance supervisor and quality assurance manager; and the exclusion of the ICC nursing department secretary, the ICC nursing department payroll clerk, the nursing home nursing department secretary, and the ICC and nursing home receptionists as business office clericals.² The election was held as scheduled on September 16, 1994, and the ballots were impounded pending the Board's Decision on Review. No briefs on review were filed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

We have considered the entire record in the case with respect to the issues on review and have decided to affirm the Regional Director's finding excluding LPNs, the only technical employees in the facility, from the nonprofessional service and maintenance unit found appropriate. We, however reverse the Regional Director's findings regarding the supervisory status of the ICC maintenance supervisor and the quality assurance manager, and the business office clerical status of the ICC nursing department secretary, the ICC nursing department payroll clerk, the nursing home nursing department secretary, and the ICC and nursing home receptionists.

The ICC and nursing home facilities are on the same property and less than 100 yards apart. Both facilities operate 24 hours a day, 7 days a week. Employees work on the day, evening, or night shift. A separate licensed administrator is in charge of each facility. However, the administrator of the nursing home reports to the administrator of the ICC, who is also the executive administrator for both facilities. The ICC is a 3-level facility which can accommodate 547 residents. The Center's business office is located on the second (main) level of the ICC, as are the administrative offices, the receptionist, and the admissions office. The two upper levels each house four patient-care wings and the lower level has two patient-care wings. The remaining space is used by the personnel, dietary, housekeeping-laundry, recreation, and maintenance departments. The nursing home is a 2-level building

² Through a clerical error, the Order also inadvertently granted review with respect to the placement of the personnel clerk and personnel recruiter. That error is corrected, and review is denied as to these classifications.

which can accommodate 159 residents, and each floor has 2 patient-care wings.

I. LICENSED PRACTICAL NURSES

There are approximately 31 LPNs who work in ICC and about 7 in the nursing home. The nursing departments in ICC and the nursing home are the largest departments in the Center. In charge of the departments are directors of nursing (DONs) at each facility. The DON at the ICC has three assistant directors of nursing (ADON) who work under her, and the DON at the nursing home has only one. Under the ADONs are nursing supervisors and charge nurses, who must be registered nurses (RNs), and wing nurses, who could be either RNs or LPNs. The LPNs in dispute are all employed as wing nurses.

Wing nurses each cover a particular wing during a shift at the Center and are responsible for delivering patient care to the patients on the wing. The number of patients on a wing varies between about 40 and 50. Also working on each wing during any given shift are between three and eight nurses aides or orderlies (aides), depending on the patient care needs of the wing.

The LPNs employed by the Employer must have attended and graduated from an accredited hospital or school of nursing which requires 1 year of training. They also must have passed an examination given by the State of New Jersey, and been licensed by the State. Aides who work on the floors with the LPNs need pass only a state certification course; they are not required to be high school graduates.

RN and LPN wing nurses have the same responsibilities, except RNs can start intravenous treatments and give shots intravenously while the LPNs cannot. At the beginning of each shift, the wing nurse gets a report from the outgoing wing nurse as to the condition of patients on the floor. Thereafter, the wing nurse gives a report to the nursing staff under her and gives the aides directions as to patient care. For example, aides may be told to limit fluids for one patient, to take another patient's temperature every 2 hours, or not to remove a third patient from bed that day. Aides do not have to be told to do routine functions such as changing bedding, filling water pitchers, or assisting patients in performing various tasks.

Wing nurses must complete paperwork and document their patients' conditions. They also make rounds on their wings to check on ill patients and supervise their care. In addition, wing nurses pass out medications, initiate care plans for patients, and perform patient treatments. They do not perform direct patient care functions such as bathing, showering, cutting nails, or changing soiled clothes; such functions are performed by aides.

LPNs earn between about \$14 and \$18 per hour. As of the hearing date, they had received their last annual pay increase in about October 1993, when the RNs also received pay increases. Aides start at about \$8.75 per hour. They received their last annual increases in about January 1994 when other service employees also received increases.

The Regional Director applied the "empirical community of interest test" the Board applies to nonacute care health care for facilities in these circumstances, set forth in *Park Manor Care Center*, 305 NLRB 872 (1991), and concluded that LPNs may be excluded from the service and maintenance unit found appropriate. Under that test, the Board considers community-of-interest factors, as well as those factors considered relevant by the Board in its rulemaking proceedings on Collective-Bargaining Units in the Health Care Industry, Second Notice of Proposed Rulemaking, 53 FR 33900 (Sept. 1, 1988), reprinted at 284 NLRB 1528, and Final Rule, 54 FR 16336 (Apr. 21, 1989), reprinted at 284 NLRB 1580. The Board further considers the evidence presented during rulemaking with respect to units in acute care hospitals, and prior cases involving either the type of unit sought or the type of health care facility in dispute. In remanding *Park Manor* to the Regional Director in that case for application of this test, the Board observed that if the employees excluded by the Regional Director could not themselves constitute a separate unit they must perforce be included in the broader unit. 305 NLRB at 875 fn. 18.³ See also *Lifeline Mobile Medics*, 308 NLRB 1068 (1992), and *Hillhaven Convalescent Center*, supra (discussing the *Park Manor* test).

In *Hillhaven Convalescent Center*, the Board recently addressed the issue of whether technical employees, consisting of LPNs and a physical therapy assistant, may be excluded from the otherwise overall nonprofessional unit found appropriate at the employer's nursing home. Applying *Park Manor* to the particular facts in that case, the Board found that the technical employees could be excluded from the unit.⁴ In *Hillhaven*, the Board relied on the specialized skills and license which permitted technicals to perform distinct functions, the wide wage gap between the LPNs and certified nursing assistants,⁵ and the adequate size of the technical unit.

We find that under *Hillhaven*, the LPNs in the instant case were properly excluded from the unit. Here, the LPNs, unlike the aides with whom they work, have

³ The instant case actually considers the issue from the opposite perspective: whether technical employees may be excluded from what is otherwise an all nonprofessional unit in a nursing home. The legal issue is the same. See *Hillhaven Convalescent Center*, 318 NLRB No. 105 (Sept. 8, 1995).

⁴ The physical therapy assistant was voted subjected to challenge.

⁵ In *Hillhaven*, the LPNs earned \$10 per hour, while CNAs earned \$5.50 per hour.

specialized training which permits them to perform distinct functions involving the use of independent judgment and requiring specialized educational training and skills. There is a wide wage gap between the LPNs and aides, and the LPNs constitute a sizable group of technicals (approximately 38 LPNs). In *Hillhaven*, the LPNs had some overlapping duties with certified nursing assistants such as assisting patients with hygiene and dress, taking temperatures and blood pressure, assisting patients to get out of bed and transfer to wheelchairs, etc. In this case, there is no evidence that LPNs perform some of the less skilled tasks that aides perform. Nor is there evidence here of cross-training of LPNs and aides, as there was in *Hillhaven*. On the contrary, the duties of the LPNs are almost identical to those of RNs, who also serve as wing nurses. Under these circumstances, the factors favoring the exclusion of LPNs from the nonprofessional unit found appropriate are even stronger than in *Hillhaven*.

II. SUPERVISORY ISSUES

A. Maintenance Supervisor

Jose Salazar is in charge of maintenance on the evening shift at the ICC. Two additional employees also work on that shift. The evening shift has a minimal workload with projects assigned on an as-needed basis.⁶ In addition to performing maintenance work himself, Salazar gives assignments to employees such as changing light bulbs or fixing leaks, and he monitors their performance. Some ongoing maintenance work such as painting rooms may be left from the day shift for him and his crew to finish. Salazar earns over \$11 per hour, about \$2 per hour more than the employees on his shift.

Salazar is also responsible for conducting fire drills throughout the facility on the evening shift and completing reports concerning the drills. Salazar advises employees who participate in the drills as to his observations. If fire evacuation procedures are not adhered to, Salazar insures that the employees involved receive additional in-service training. Additionally, like the director and assistant director of maintenance on the day shift, Salazar is required to monitor the entire facility during his shift to insure security.

The record shows that Salazar has input into employee performance evaluations, but the evaluations are completed by Director of Maintenance for ICC Matthew Otte. He also informs Otte of any incidents on his shift that may result in discipline. Any disciplinary warnings, however, come from the director of maintenance. Salazar may send employees home if they engage in conduct which is threatening to the well being of patients. Otherwise, Salazar reports problems with

employee conduct to Otte, and these are addressed by Otte the following morning. Salazar allows employees to leave the evening shift early only in emergency situations, and may make decisions about granting overtime only when the director or assistant director of maintenance are not present. He is not involved in hiring.

The Employer's assistant administrator at ICC, Elaine O'Keefe, testified generally that Salazar does not make decisions about terminating maintenance employees, although he would be consulted by Otte about a termination on his shift. Although O'Keefe recalled generally that there have been terminations on Salazar's shift, she could not recall a specific incident, and therefore could not elaborate on Salazar's involvement with respect to a particular termination.

Contrary to the Regional Director, we find Jose Salazar not to be a statutory supervisor, because the record does not show that he exercises any indicia of supervisory status. In this regard, we find that Salazar's role in making assignments to the employees on his shift does not require the use of independent judgment. These assignments are limited to performing repairs as needed, or completing work begun earlier by the day shift. Thus, the assignments are routine in nature. Moreover, Salazar's authority to assign overtime is not only limited to situations when the director and assistant director of maintenance are not present, there is no record evidence that he uses independent judgment and discretion in determining whom to assign. Nor is his limited authority to permit employees to leave early because of an emergency sufficient to confer supervisory status.

Salazar's role with respect to performance appraisals is limited to providing input to the director of maintenance, who is responsible for the evaluations. Moreover, there is no evidence that Salazar effectively recommends discipline to Otte. Salazar merely reports incidents to him which may result in disciplinary action at Otte's discretion. It is well established that the mere exercise of a reporting function which does not automatically lead to further discipline or adverse action against an employee does not establish disciplinary authority. *Lakeview Health Center*, 308 NLRB 75, 78-79 (1992), citing *Ohio Masonic Home*, 295 NLRB 390, 393 (1989); and *Passavant Health Center*, 284 NLRB 887, 891 (1987). Finally, although Salazar may send employees home if they engage in conduct which poses a threat to patient safety, we find that exercise of such restricted and sporadic authority limited to specific and predetermined kinds of conduct does not require independent judgment and therefore is insufficient to establish supervisory status. *First Western Bldg. Services*, 309 NLRB 591, 602 (1992); *Dad's*

⁶On the day shift, the maintenance employees have daily duties and are assigned other projects as needed.

Foods, 212 NLRB 500, 501 (1974). Thus, we include Salazar in the unit found appropriate.⁷

B. *Quality Assurance Manager*

Stella Bosits, the quality assurance manager, is in charge of the approximately 9 or 10 quality assurance aides who are employed by the Employer. The main function of the quality assurance aides, who the parties have stipulated should be included in the unit found appropriate, is to monitor nurses aides and orderlies in their daily routine of patient care. They complete reports which contain information such as whether patients have been properly groomed, bathed, and otherwise cared for, as required. Quality assurance aides report directly to the quality assurance manager, or to a nurse, any problems in patient care that they encounter. Bosits reviews the reports provided to her by the quality assurance aides. Bosits has no role in hiring and no authority to give out warnings, or to suspend or terminate employees. The assistant administrator at ICC testified that Bosits evaluates work performance, but that she does not document the performance or give out warnings. Instead, she goes to her immediate supervisor (the supervisor or ADON on the floor) with a problem. She testified that the DON is responsible for the performance evaluations of the quality assurance aides. The record does not show that Bosits' evaluations of employees' performance constitute effective recommendations for promotions, wage increases, or discipline. We therefore find the evidence concerning Bosits' role in performance evaluations to be insufficient to establish supervisory status. *Northcrest Nursing Home*, 313 NLRB 491, 498, 507 (1993). Thus, contrary to the Regional Director, as the evidence does not show that Bosits exercises any indicia of supervisory authority, we find her not to be a supervisor within the meaning of Section 2(11) of the Act.

III. CLERICALS AND RECEPTIONISTS

A. *Nursing Department Secretaries and Nursing Department Payroll Clerk*

Working in the nursing office on the main floor of the ICC is a nursing department secretary, Marie Martin, a nursing department payroll clerk, Loretta MacDonald, and the DON at ICC. A nursing department secretary, Margaret Lee, also works at the nursing home. The Regional Director excluded the two secretaries and the clerk from the unit as business office clericals, noting that they appear to spend most of their time in their offices, which are separate areas from those where the employees in the unit sought by the Petitioner work, that they perform mainly business-type functions, and that their work is not closely relat-

ed to the functions performed by employees in the service and maintenance unit.

Marie Martin, the ICC nursing department secretary, does all the typing for the DON, including revisions to the nursing procedures manual, employee warning notices, and termination letters. She also files these documents, as well as employee evaluations and timesheets. Expired medications are also brought to her by nursing supervisors, and she is responsible for returning them to pharmaceutical companies. Martin does not normally have occasion to leave her office in the performance of her duties. Martin does not attend monthly departmental meetings. She earns approximately \$11 per hour.

Loretta MacDonald, a nursing department payroll clerk, spends approximately 2 to 2-1/2 days per week tallying employees' hours from their timecards and submitting this information to the business office. Her calculations take into account paid sick days, vacation days, and bonus days. MacDonald also maintains an annual master log of employees' attendance, which is submitted about every 2 months to the DON for her review for lateness and absenteeism. Further, MacDonald is responsible for scheduling employees in the ICC nursing department, including nurses, nurses aides, quality assurance aides, and orderlies on a master schedule, which is prepared about a month in advance. This schedule lists the names of employees and the dates and shifts that they are scheduled to work. MacDonald is aware of the set shifts on which the various employees were hired to work and she is given staffing quotas that must be met. Vacation requests, which have been approved by the department head, as well as days off, bonus days, and holidays, are noted on the master schedule. After the schedule is prepared it is given to the DON for review. Once approved, it is posted on bulletin boards for employees to see. Unexpected vacancies, such as when illnesses occur, are filled by announcing overtime opportunities to the staff. Administration approves additional staffing, when required. MacDonald earns approximately \$12 per hour.

Margaret Lee performs typing and filing work for the DON in the nursing home. Lee works with employees' timecards and calculates employees' weekly hours, which are submitted to the business office for payroll purposes. Also, like the payroll clerk in ICC, she prepares master work schedules for nurses aides in the department. Lee does not, however, prepare work schedules for the nursing home nurses, as those schedules are prepared by the DON in the nursing home. Lee also purchases supplies for the nursing department approximately twice a month, or as needed. The supplies are stored by her in a locked central supply area for which she is given a key.

⁷ For the reasons set forth by the Regional Director, Member Cohen would find that Salazar is a supervisor.

In prior cases, the Board has distinguished between business office clericals and other clericals, consistently including the latter in service and maintenance units in hospitals where they have contact with the service and maintenance unit. *Rhode Island Hospital*, 313 NLRB 343, 359 (1993); *Mercy Hospitals of Sacramento*, 217 NLRB 765, 770 (1975); *St. Luke's Episcopal Hospital*, 222 NLRB 674, 676 (1976); and *Duke University*, 226 NLRB 470, 470-471 (1976). In the Board's rulemaking proceedings, the Board also recognized the distinction between business office clericals and other types of clericals. 53 FR 33924-33926, reprinted at 284 NLRB 1562-1565. The Board noted that business office clericals perform distinct functions: handling finances and billing, and dealing with Medicare, Medicaid, and other reimbursement systems. Business office clericals are generally supervised separately in business office clerical departments; this separation has resulted from the almost universal centralization of business office functions. Business office clericals have little interaction with other nonprofessionals as the business office clerical offices are often physically isolated. *Rhode Island Hospital*, supra at 359.

Contrary to the Regional Director, we find that the nursing department secretaries and payroll clerk should not be excluded from the unit as business office clericals. None of these employees performs work associated with business office clericals, such as handling finances and billing, and dealing with Medicare, Medicaid, and other reimbursement systems. Although these employees have limited or no interaction with service and maintenance employees, this is not the result of grouping them together in isolation from other nonprofessionals, unlike the business office clericals described in rulemaking. The nursing department clericals therefore fit within the "other types of clericals" classifications which traditionally have been included in the service and maintenance units, notwithstanding that they do not perform work closely related to the functions performed by employees in the service and maintenance unit.

We also find that the nursing department secretaries are not confidential employees.⁸ It is well established that the Board will exclude employees from a bargaining unit as confidentials only if those employees assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations. *B. F. Goodrich Co.*, 115 NLRB 722 (1956); *Bakersfield Californian*, 316 NLRB

1211 (1995). Moreover, merely having access to files containing confidential material, including records of grievances, does not establish confidential status. *Bakersfield Californian*, supra; *Rhode Island Hospital*, supra. Nor does the typing of disciplinary matters, grievances, or other material relating to personnel problems render an employee confidential. As the nursing department secretaries at most have access to files containing confidential material such as evaluations and timesheets, and may type warnings or termination notices for the DON, we find that these duties are insufficient to establish confidential status.⁹ Thus, neither of the nursing department secretaries performs confidential duties.

B. Receptionists

Four receptionists work at various times in the ICC, and two receptionists work at various times in the nursing home. Both the ICC and nursing home receptionists work in areas of their facilities near the main lobbies. The nursing home receptionist who works on weekdays, Rosemary Ramos, shares an office with the admissions coordinator (a unit employee) and the medical records clerk (excluded from the unit as a confidential employee).

Incoming calls for both ICC and the nursing home come into a central switchboard located in ICC, which is staffed by the receptionists. If the call is for someone in ICC, she will transfer the call to the appropriate extension in that building. If the call is for someone in the nursing home, it will be transferred to the nursing home first, and from there it will be transferred by the receptionist to the appropriate extension. The receptionists in both buildings also greet visitors when they enter the facilities and request that they sign a register.

In addition to her other functions, Ramos is required to do typing for the administrator and for various department heads in the nursing home, who, except for the head of nursing, do not have their own secretaries. She may, for example, type quality assurance reports for other department heads. She does not type grievances or disciplinary actions arising in the business office. Ramos files information related to labor relations. Most (80-90 percent) of her time is spent at her desk in the office.¹⁰

The receptionists in ICC report to the business office manager, who is responsible for their annual performance appraisals and for disciplining them, if necessary. The receptionists in the nursing home report to the ad-

⁸ The Petitioner argued to the Regional Director that the nursing department secretaries are confidential employees because they type warnings and termination letters, and file evaluations and timesheets. The Regional Director found it unnecessary to reach this issue because he excluded the nursing secretaries from the unit as business office clericals.

⁹ We note that the record does not specifically establish that Margaret Lee, the nursing secretary for the DON in the nursing home, files or types confidential information, as does her counterpart, Marie Martin, in the ICC.

¹⁰ Ramos also assists the medical records clerk with medical records, assists with taking people on tours of the building, and delivers supplies to the floor when ward clerks are absent.

ministrator of the nursing home, who also evaluates them. The starting pay for receptionists is about \$7 an hour.

The Regional Director found the receptionists to be business office clericals, noting that they have a relatively minimal amount of contact with employees in the service and maintenance unit, that they are not involved in patient care, that the receptionists in ICC report to and are evaluated by the business office manager, and the receptionists in the nursing home are also supervised differently from employees in the service and maintenance unit.

We find, contrary to the Regional Director, that the ICC and nursing home receptionists are not business office clericals. The receptionists do not handle finances and billing, or deal with Medicare, Medicaid, or other reimbursement systems. They work in areas of the facilities near the main lobbies, and they are not physically isolated in the business office clerical offices. As discussed above, that the receptionists may have minimal contact with unit employees does not preclude them from being in the unit, because this is not the result of grouping them together in isolation

from other nonprofessionals, unlike the business office clericals described in rulemaking. Nor is the Regional Director's reliance on the receptionists' lack of involvement in patient care determinative, because the unit includes employees involved in patient care (e.g., nurses aides) and employees not involved in patient care (e.g., housekeeping, dietary). Thus, we include them in the unit. *Charter Hospital of Orlando South*, 313 NLRB 951 (1994) (receptionist included in non-professional unit excluding business office clericals).

ORDER

The Regional Director's Decision and Direction of Election is affirmed with respect to the exclusion of the Employer's technical employees from the non-professional service and maintenance unit; and is reversed with respect to the exclusion of the evening maintenance supervisor, the quality assurance manager, the nursing department secretaries, the nursing department payroll clerk, and the receptionists. This proceeding is remanded to the Regional Director for further appropriate action, including the opening and counting of ballots cast in the election.