JD–51–21
Livonia, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

METRO MAN IV, LLC d/b/a FOUNTAIN BLEU HEALTH AND REHABILITATION CENTER, INC.

and **Case 07–CA–264407**

SEIU HEALTHCARE MICHIGAN

Donna M. Nixon, Esq.,
for the General Counsel.
Grant T. Pecor* and *David Weldon*, *Esqs.,
(Barnes & Thornburg, LLP), for the
Respondent.
Judy A. Champa* and *Richard G. Mack, Jr., Esqs.,
(Miller Cohen, PLC), for the
Charging Party.

DECISION

Statement of the Case

IRA SANDRON, Administrative Law Judge. This matter arises from a complaint and notice of hearing (the complaint) issued on March 19, 2021, based on unfair labor practice charges that SEIU Healthcare Michigan (the Union) filed against Metro Man IV, LLC d/b/a Fountain Bleu Health and Rehabilitation Center, Inc. (the Respondent or the Company). They relate to the Union's role as collective-bargaining representative for two separate bargaining units: (1) licensed practical nurses (LPNs), and (2) service unit employees, including certified nurse's aides (CNAs).

Pursuant to notice, I conducted a remote trial by Zoom from May 24–26 and June 3 and 4, 2021, during which I afforded the parties a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

Issues

(1) Did the Respondent violate Section 8(a)(5) and (1) of the Act by unilaterally making the following changes without affording the Union notice and an opportunity to bargain:

(A) On April 8, 2020,[1] conferred a $2/hour wage increase on all employees as a Coronavirus disease (COVID-19) (COVID) pandemic (pandemic) incentive?

(B) On June 16, rescinded that wage increase?

(C) In April, began employing individuals classified as noncertified nurses' aides (noncertified aides) to perform patient care duties performed by CNAs?[2]

(2) Did Attorney Grant Pecor (Pecor), on May 25, 2021, threaten employee Kelita Metcalf (Metcalf) with unspecified discipline for attending the trial as a witness for the General Counsel?

A final issue is the Respondent's affirmative defense that the LPNs have been and are statutory supervisors within the meaning of Section 2(11) of the Act, even though the Respondent continued to recognize the Union as their bargaining representative after its purchase of the operation.

Preliminarily, no allegation is before me that either the Respondent or the Union has engaged in bad faith bargaining in negotiating for first collective-bargaining agreements for the two units, in general or specifically regarding pandemic pay or the responsibilities and authority of LPNs over CNAs. Nor is there an assertion that either party withdrew from tentative proposals in bad faith. See *TNT Skypak, Inc.*, 328 NLRB 468, 469 (1999), enfd. 208 F.3d 362 (2nd Cir. 2000). The parties remain engaged in negotiations. Therefore, I will not recite in detail all of the proposals and counterproposals that the parties have exchanged during negotiations, or what occurred at each bargaining session. Instead, I will address only particular aspects of the negotiations that I deem pertinent to the allegations herein.

I rejected as irrelevant the Respondent's proffered evidence relating to contract negotiations between Pecor and the Union concerning seven or eight other nursing home clients of Pecor's in the Detroit, Michigan metropolitan area. I adhere to that determination inasmuch as negotiations for the Respondent's collective-bargaining agreements were conducted on a single-employer basis, and I can draw no inferences from what the parties negotiated with respect to other employers, whose particular situations are unknown.

Witnesses and Credibility

The General Counsel called:

(1) SEIU representatives Larry Alcoff (Alcoff), Serena Everett (Everett), and Saran Walker (Walker).

(2) LPN Metcalf and, as rebuttal witnesses, former LPN Tomika Harris (Harris) and LPN Lanesha Dann-Hightower (Hightower).

[1] All dates hereinafter occurred in 2020 unless otherwise indicated or clear from the context.
[2] Previously, they were titled certified evaluated nurse's assistants (CENAs).

The Respondent called:

(1) Pecor.

(2) Laura Cervi (Cervi), administrator; Zenee Drayton (Drayton), former scheduler; Charles Dunn (Dunn), part owner and chief operating officer; Martha McFadden (McFadden), director of nursing (DON); Cecilia Nugal (Nugal), former DON; and Sherina Rock (Pinkie) (Rock), unit manager (UM).

(3) LPN Majors.

Majors testified that when Pecor conducted a pretrial interview with her, he failed to provide her the assurances required by *Johnnie's Poultry*, 146 NLRB 770 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965). Pecor testified to the contrary, averring that he followed his longstanding practice of reading them to employee witnesses, and I find this more likely. In any event, the General Counsel does not allege a *Johnnie's Poultry* violation.

I will address credibility by section, applying the following well-established judicial precepts. Firstly, a witness may be found partially credible because the mere fact that the witness is discredited on one point does not automatically mean he or she must be entirely discredited. *Golden Hours Convalescent Hospitals*, 182 NLRB 796, 799 (1970). Rather, a witness' testimony is appropriately weighed with the evidence as a whole and evaluated for plausibility. Id. at 798–799; see also *MEMC Electronic Materials, Inc.*, 342 NLRB 1172, 1183 fn. 13 (2004); *Excel Containers, Inc.*, 325 NLRB 17, 17 fn. 1 (1997).

Secondly, when credibility resolution is not based on observations of witnesses' testimonial demeanor, the choice between conflicting testimonies rests on the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. *Taylor Motors, Inc.*, 366 NLRB No. 69 slip op. at 1 fn. 3 (2018); *Lignotock Corp.*, 298 NLRB 209, 209 fn. 1 (1990).

Finally, I have also considered the longstanding principle that "the testimony of current employees that contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests." *Flexsteel Industries*, 316 NLRB 745, 745 (1995), enfd. 83 F.3d 419 (5th Cir. 1996), citing *Gold Standard Enterprises, Inc.*, 234 NLRB 618, 619 (1978), enf. denied on other grounds 607 F.2d 1208 (7th Cir. 1979) and *Georgia Rug Mill*, 131 NLRB 1304, 1304 fn. 2 (1961); see also *Federal Stainless Sink Division of Unarco*, 197 NLRB 489, 491 (1972). This applies to Metcalf and Hightower, who testified for the General Counsel.

Facts

Based on the entire record, including testimony and my observations of witness demeanor, documents, stipulations, and the thoughtful posttrial briefs that all parties filed, I find the following.

Respondent's Purchase of the Facility

Board jurisdiction as alleged in the complaint is admitted, and I so find.

The Respondent, a corporation with an office and place of business in Livonia, Michigan, operates a 108-bed nursing home (the facility) that has four units: one is for new arrivals and is considered transitional, one is for short-term residents and is rehabilitative in nature, and two are joined and are for long-term residents requiring skilled nursing care.

On about October 1, 2018 (all dates hereinafter in this section were in 2018), the Respondent purchased the facility from Wellspring Lutheran Senior Services, which recognized the Union as the representative of two separate bargaining units: (1) all regular and part-time LPNs (the LPN unit); and (2) all regular and part-time CNAs, restorative aides, resident assistants, dietary employees, housekeeping employees, laundry employees, maintenance employees, and activities aide employees (the service unit).

By email of September 6, Pecor notified Everett, a union director, of the pending asset sale (R. Exh. 24). He stated that employees would have to fill out applications for employment and that the Respondent would recognize the Union if a majority of them accepted. He also suggested that the parties set aside dates in October/November for bargaining in that eventuality. See also GC Exh. 27, Pecor's September 25 letter to Everett, enclosing the terms and conditions of employment that would be offered to employees; R. Exh. 9, Metcalf's conditional offer of employment.

Section 18.1 of the above terms and conditions of employment is entitled Role of the Charge Nurse. It provides, inter alia, that charge nurses use their discretion to assign work and responsibly direct all personnel providing patient care; evaluate and, where appropriate, discipline CNAs and others providing patient care; and assume a primary role in making recommendations regarding assigning work, discipline, hiring, firing, directing work, training, and appropriately disciplining employees under their responsibility as directed by the DON. Further, any failure of a charge nurse to appropriately carry out these responsibilities constitutes just cause for discipline, up to and including discharge. Everett testified that the Union was not aware of any charge nurses at the facility, and there is no evidence that anyone has held that title.

By letter of October 15, Pecor notified Everett that a majority of employees of both units had accepted employment and that the Respondent therefore voluntarily recognized the Union. (GC Exh. 2.) He enclosed proposed collective-bargaining agreements for the Union to accept or reject as package offers. His proposal for a new collective-bargaining agreement for the LPN unit was for nurses, excluding supervisors, but it made no reference to "charge nurses." The language in Section 18.1 was repeated, as applying to "every nurse."

General Counsel's Exhibit 23 is the (undated) LPN job description that Metcalf received after the Respondent took over the operation. It states that the LPN is "responsible for the supervision of all nursing activities on the unit" but is silent on the LPN's authority over CNAs or other staff members. This job description is still in effect.

State Pandemic Wage Increase

On July 1, the Governor of Michigan approved a supplemental appropriation in response to the pandemic, providing in relevant part that effective from July1 until September 30, the State would pay direct care workers employed by skilled nursing facilities $2 per hour (GC Exh. 7 at 6). These workers were RNs, LPNs, CNAs, and respiratory therapists.

Respondent's Pandemic Wage Increase

The Respondent suffered a severe staff shortage after the advent of the pandemic in March, with approximately 60–75 percent calling out or not showing up. Management was forced to fill in to provide patient care, sometimes working around the clock.

As a result, Chief Operating Officer Dunn decided to give the employees a $2/hour hazard pay raise as long as COVID patients were in the building. He announced this in the dining hall in the first week of April to all employees who were at work that day. A notice, signed by Dunn, was posted by the time clock, stating that the pay increase was effective April 8 and in effect until further notice. (GC Exh. 17.)

Pursuant to a mandate by the Center for Disease Control, the Company posted daily at the time clock by the employee entrance and exit, a report of what rooms had COVID patients. June 11 was the last day that any patients were COVID-positive, and the posting on June 12 was "COVID free." (R. Exh. 11.) As a result, June 16 was the last day that the $2/hour pay raise was in effect. Nothing was announced to employees about its discontinuance.

Neither when the raise was conferred or rescinded did anyone representing the Respondent attempt to notify the Union. The Union first became aware on August 4 that the Respondent had conferred and then rescinded the $2/hour pandemic wage increase; Alcoff learned this from service unit employees when they were caucusing during contract negotiations. I note that the first discussion the parties had on the subject of pandemic pay was during June 10 negotiations, 2 months after the wage increase was implemented—at which time Pecor said nothing about the April increase.

Everett had no problems communicating with Pecor at any time, either before or after he changed law firms but continued to represent the Company. After the onset of the pandemic, they had phone conversations concerning other employers that he represented.

I do not accept Administrator Cervi's testimony that she did not reach out to the Union regarding the pandemic pay incentive because she had "[a]bsolutely no time."[3] In this regard, she conceded during cross-examination that she was able to use email and company phones in April and June.

Nor do I accept Pecor's testimony that he did not notify the Union of the raise and

[3] Tr. 453.

rescission because of lack of knowledge: "I was not even talking to my client at[sic] that period of time. I couldn't even talk—they were unreachable."[4] Had that been the case, I cannot see how he could have been able to effectively represent the Respondent in conducting the negotiations with the Union that took place.

Hiring of Noncertified Aides

Prior to the pandemic, the Respondent was permitted by the Center for Medicare and Medicaid Services (CMS) to hire noncertified aides. They had to be fully certified (completed all classes/exams) within 4 months of their hire to continue working. They were also required to go to offsite training during their employment, as opposed to in-house training by the employer.

In response to the pandemic, the CMS issued a memorandum on April 8, 2020, waiving those requirements. (R. Exh. 12). The waiver ended on May 10, 2021. (R. Exh. 14.)

Respondent's Exhibit 13 is a list of the 27 noncertified aides whom the Respondent hired after the issuance of the CMS memorandum (not all showed up for work). Twenty-four were hired in April, one in July, and one in August. The last noncertified aide was terminated on November 2.

Cervi testified that these noncertified aides performed the same function as CNAs, were scheduled according to their preferences, and took no hours or overtime from CNAs. They were paid $2/hour less than CNAs but did receive the Respondent's $2/hour pandemic pay. Drayton also testified that no noncertified aides were used in lieu of CNAs and that no CNAs' requests for overtime were denied during the pandemic.

The Respondent never directly notified the Union of the use of these noncertified aides. Rather, Alcoff first learned about them through Pecor's August 4 email response to the Union's information request for a seniority list of maintenance unit employees.[5] The list included about 10–15 individuals working in a job title called "covid noncertified nurse's aides" and a few with the title "nurse tech." (R. Exh. 3.)

Negotiations

At all times, Pecor has been the Company's chief negotiator. Walker was the Union's chief negotiator until June 2020, when Alcoff assumed that role. Separate bargaining sessions, conducted remotely, have been held for the two units.

On August 28, 2019, the Company proposed an article entitled "role of the nurse" (GC Exh. 12 at 14–15), taking the language that I cited from Section 18.1 of the terms and conditions of employment of the "charge nurse" and applying it to "every [n]urse." The

[4] Tr. 972.

[5] Pecor had earlier emailed the list, on June 11, but Alcoff testified that he did not see it. I will consider June 11 the operative date.

Union rejected the proposal, disagreeing with Pecor's assertion that the LPNs had such authority.

At negotiations for both units on June 10, the Union provided an economic proposal, as well as a separate pandemic proposal that included a $4/hour increase plus premium or hazard pay if assigned to a COVID unit. As stated earlier, Pecor said nothing about the April pandemic incentive increase.

In negotiations for the LPN unit on August 4, the first Alcoff attended, Pecor presented the article entitled role of the nurse, discussed above, which the Union again rejected, saying that it did not reflect the LPNs' authority. Pecor stated that it was an initial term or condition of employment for the Respondent as a new employer. The parties have never reached agreement on this article.

In negotiations for the service unit that afternoon, Alcoff raised the Company's conferral and rescission of the pandemic hazard pay increase, about which he had just learned. Pecor responded that the Respondent was not obliged to provide the Union with notice or an opportunity to bargain over them.

On August 7, the Union issued a 10-day strike notice, after which proposals were exchanged "off the record" under the auspices of state mediators; any agreements that the parties reached were not considered to be part of formal negotiations or binding. The strike was later called off after the Union agreed to the Company's first-year wage proposal.

Negotiations continue to the present.

Department of Nursing and Role of LPNs

The General Counsel's main witness on the role and authority of LPNs was Metcalf, who has been an LPN since April 2018. Regarding specific disciplines in the record, the General Counsel called LPN Hightower and former LPN Harris.

Administrator Cervi, DON McFadden, UM Rock, and LPN Majors offered general testimony on the subject for the Respondent. Former DON Nugal testified about a particular discipline in which she was involved, and former Scheduler Drayton about her role in scheduling CNAs.

DON McFadden holds the highest-ranking position in the nursing hierarchy. Under her are two UMs, Rock and Mylene Langcauon; and an admissions nurse manager. Nurses (RNs and LPNs), and then CNAs report to the UMs. Two LPNs are normally assigned to a unit.

The DON and the admissions nurse manager have their own offices; the UMs share one. Nurses work at nurses' stations at the units and record patient care on electronic tablets. They also have keys and access to medical storage rooms and sensitive materials that CNAs and other staff members do not.

There are three shifts, starting at 6 a.m., 2 p.m., and 10 p.m. (the midnight shift), respectively. In the mornings, the RNs and CNAs report at 6 o'clock, and the UMs come in at 8 or 8:30.

Majors is an LPN on the 6 a.m. shift. I credit her uncontroverted testimony as follows. Cervi walks the building after she arrives to see if anyone needs anything. The DON walks around the units in the morning and is available in her office if the LPNs really need her during the day. UM Langcauon comes to the unit when she arrives and asks Majors what is going on; she returns at between 11:30 a.m. and noon to make certain that everything is running properly.

An RN is on duty on the night shift. The UMs are sometimes present on holidays or are on-call. According to Cervi, management has 24/7 responsibility and is on call at all times.

Assignment and Direction of CNAs

The testimony of Metcalf, who works under Rock; Rock; Drayton; and Majors was for the most part quite consistent on this subject. They all appeared candid in their recitation of facts, and I find the following based on a composite of their accounts.

Arrean Davis, the scheduler, prepares monthly schedules, assigns LPNs and CNAs to specific units, and puts out daily sign-in sheets in each unit stating who is working. See GC Exh. 20, an example. Some CNAs generally stay assigned to the same unit; others "float" and go where needed.

The first arriving LPN decides which patients a CNA will service in the unit to which the scheduler has assigned him or her. (Ibid., which Metcalf filled out.) In assigning CNAs rooms, LPNs generally go in room number order. All CNAs do the same work and are interchangeable. On average, three or four CNAs work with an LPN. According to Rock, the practice is for nurses to do a resident count and then try to give the CNAs an equal number of residents to service, and Metcalf and Majors try to give CNAs an equal amount of work when assigning them to particular rooms. According to both Metcalf and Majors, the general practice is that CNAs stay with the same room assignments (and residents with whom they are familiar) unless overall staffing needs dictate otherwise. If that occurs, the LPN can ask a CNA to go another unit. See R. Exh. 21, the assignment sheet that Majors wrote on March 30, 2021, showing that she pulled an LPN from another unit. Moreover, Respondent's Exhibit 22, an assignment sheet that Majors wrote on April 20, 2021, shows that she changed CNA room assignments on her unit that day because a patient had a dispute with the first CNA.

If Metcalf needs to reassign a CNA to another unit because of a no-show there, Metcalf can request but not require him or her to go. If the CNA balks, Metcalf then has to go to UM Rock. Similarly, Majors testified about an incident more than a year ago in which a CNA "blatantly refused" to go to another unit and instead walked off to have a cigarette. Majors filled out a disciplinary form and gave it to Rock to give to the DON. She had no further involvement in the discipline. If Majors is short of CNAs, she can call but not require

them to come in. Rock herself fills in as a CNA when needed.

There is no evidence that assignments of CNAs to particular units or patients have any impact on their pay, promotions, or other benefits or terms and conditions of employment.

When CNAs and other employees have had problems punching in or out or have forgotten to do so, they submit a time clock exception request form to the LPN, who signs approval as the supervisor and then transmits it to the DON or payroll for final approval. See GC Exh. 28, a composite exhibit; see also R. Exh. 23. There is no evidence that Metcalf or other LPNs have denied any such requests before forwarding them on.

Metcalf testified that she has never approved overtime, and Drayton testified that this is the scheduler's responsibility. No other witnesses testified to the contrary, and I credit them.

Discipline

The Respondent has a progressive discipline policy—verbal warning, first written warning, second written warning, and termination. The steps are automatic, with human resources (HR) being consulted to determine the proper step.

There are no written policies concerning when and how an LPN should issue discipline to a CNA or their being subject to discipline if the CNAs who work under them do not properly perform patient care.

The Respondents' witnesses were inconsistent regarding whether and when an LPN is required to write up a CNA. Cervi initially testified that nurses are not required to fill out disciplinary reports when a CNA does not perform his or her duties, and do not always do so, and that Hightower was not required to discipline B.F.[6] for violating rules of patient care (described below). However, she later testified that nurses are subject to discipline for the derelictions of the CNAs who report to them and are required to write up CNAs for not performing their duties. This comported with Rock's testimony that in situations involving patient care, all disciplines are put in writing. However, LPN Majors testified that she does not always write up a CNA for refusing to obey her direct order but instead sometimes engages in a "coaching."

Management has told LPNs at nursing staff meetings that LPNs are responsible if patients do not receive proper care from CNAs, and may be disciplined for such. The only evidence of such is General Counsel's Exhibit 21, a verbal warning which Metcalf received on June 27, 2019.

The record contains several disciplines of CNAs in which Hightower was involved. At the outset, I note the uncertainty of her status as a manager or floor LPN during the times they were issued. She testified that after she started in April 2019, she was temporarily

[6] Initials will be used for CNAs who were disciplined, in the interest of protecting their privacy.

designated "shift supervisor" or "shift manager" and served in that role until early 2020. Moreover, LPN Harris testified that Hightower had an office, was notated on the schedule as a supervisor, and was introduced as a supervisor. No witness of the Respondent offered any testimony clarifying whether Hightower was in fact a unit LPN or an acting UM.

Rock and Metcalf testified consistently and credibly about Respondent's Exhibit 10, a disciplinary report for J.B. in May 2021. When Rock was making her rounds and checking on patients, one of them reported that she had still not been given a shower. Rock approached Metcalf and asked who the CNA was, and Metcalf said she would find him and figure out what was going on. Rock told Metcalf that it was her responsibility to make certain that the CNAs fulfilled their tasks and to write it up. After Metcalf wrote up the discipline (see GC Exh. 19), Rock herself conducted an investigation, wrote in verbal warning, served it on J.B., and gave it to HR. Metcalf was not present when J.B. received it.

Rock's description of her role was consistent with her testimony that she normally investigates a discipline put forward by a nurse and will talk to all sides before issuing it. All disciplinary reports are placed in the employees' personnel files.

Respondent's Exhibits 15 and 16 concern B.F., who received a second written warning on July 28, 2019, and was terminated on August 15, 2019.

As to the written warning, both Hightower and Harris testified that Harris had an issue with B.F. not providing a patient with lunch, Harris brought it to Hightower's attention, and Hightower instructed her how to write up a description of the incident. Harris signed as supervisor but clearly at Hightower's direction. Hightower was there when it was presented to B.F. and signed as a witness. On the other hand, Cervi testified that Harris came to the DON's office with the discipline report because Harris felt intimidated by B.F. and wanted help. They called B.F. in and served him with it. Harris signed as supervisor, but again, it would have been at management's direction.

Regarding the termination, Hightower testified that she was notified by another nurse that a patient had complained that B.F. had not provided her assistance getting into bed. Hightower talked to the patient and took the patient complaint form to Nugal, who said she would talk to the patient. Nugal did not ask her to do anything else. Hightower's next involvement was when she was called to a meeting in Cervi's office on August 15, where she saw Respondent's Exhibit 16 for the first time. She had no involvement in writing the description of the incident. Present were B.F., Cervi, Nugal, and an HR representative. Someone other than Hightower addressed B.F. Nugal directed her to sign as the supervisor. Hightower's description of what occurred comported with her testimony that any write-up by a nurse has to be reviewed by the DON to ensure that there is a valid reason for the discipline.

Nugal did not rebut Hightower's version of their interactions, and from that I draw an adverse inference. See *Daikichi Corp.*, 335 NLRB 622, 622 (2001); *Colorflow Decorator Products*, 228 NLRB 408, 410 (1977), enfd. mem. 583 F.2d 1288 (5th Cir. 1978). Moreover, Cervi's testimony was truncated and was not inconsistent with Hightower's testimony that Nugal directed her to sign the disciplinary report. I therefore credit Hightower's account of the incident.

Nugal testified regarding Respondent's Exhibit 19, a verbal warning report issued to S.S. in May 2019. Nugal's testimony was directly contradictory, and I find it unreliable. Thus, she first testified that Hightower provided her with the write-up and they discussed it before calling in S.S. However, she first testified on cross-examination by the Union's counsel that Hightower talked with her about the write-up before bringing it to her—but then testified that she had no discussion with Hightower before S.S. was called to the meeting and issued the discipline. Moreover, at another point, Nugal testified that Hightower presented S.S. the discipline before Nugal questioned S.S. about what had happened—the reverse of what would have been a logical sequence of events. Finally, Nugal appeared ill at ease and gave answers that were generalized and lacked detail.

I therefore credit Hightower's testimony that she wrote nothing contained in the document, that her signature does not appear therein, and that she had nothing to do with the discipline.

The Respondent's counsel conceded that the Company submitted no disciplinary forms that were signed only by an LPN and not also by someone in management.

Analysis and Conclusions

Unilateral Wage Increase/Rescission and Use of NCAs

An employer violates Section 8(a)(5) and (1) of the Act by unilaterally making substantial changes on subjects of mandatory bargaining; to wit, employees' wages, hours, or other terms and conditions of employment, without first affording notice and a meaningful opportunity to bargain to the union representing the employees. *NLRB v. Katz*, 369 U.S. 736 (1962); *United Cerebral Palsy of New York City*, 347 NLRB 603, 608 (2006). Changes that improve employee conditions are still subject to the same bargaining obligations as adverse changes. *Wightman Center*, 301 NLRB 573, 575 (1991); *ITO Corporation of Rhode Island, Inc.*, 246 NLRB 810, 813 (1979).

Unilaterally conferring pay increases to unit employees and hiring temporary employees to perform bargaining unit work are violations of Section 8(a)(5) and (1). *Alamo Cement Co.*, 277 NLRB 1031 (1985).

The Respondent has raised the "economic exigency exception" to the normal rule that an employer must bargain with the union prior to laying off employees for economic reasons or taking other unilateral actions. (R. Br. 6, et. seq.) The Board has consistently maintained a narrow view of this exception, limiting it to "'extraordinary events which are an unforeseen occurrence, having a major economic effect requiring the company to take immediate action.'" *Seaport Printing & Ad Specialties, Inc.,* 351 NLRB 1269, 1270 (2007), enfd. 589 F.3d 812 (5th Cir. 2009, citing *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995) (citations omitted). The employer bears a heavy burden. 320 NLRB at 81.

It is true that the Respondent faced a crisis in staffing and operations after the onset of the pandemic. However, the Respondent has not demonstrated that there was an exigent need to announce and implement the $2/hour pandemic pay increase on April 8 or to rescind

it on June 16 on the particular dates that such actions were taken, without first having notified the Union. The Respondent has not averred as an affirmative defense that it had an established past practice of giving emergency raises. See *Katz*, above at 746; *Golden Crest Healthcare Center*, 335 NLRB 635, 636 (2001), enfd. 317 F.3d 316 (D.C. Cir. 2003).

Nor, after the CMS issued a waiver of the normal requirements for nurse's aides, allowing employers to use them for more than 4 months, was there any reason the Respondent could not have notified the Union that it was planning to immediately exercise its option of using noncertified aides accordingly. I have to assume that the hiring procedures for the noncertified aides in April 2020 had to entail a series of steps and was not a 1-day process. The Respondent thus had an adequate opportunity to notify the Union at some point prior to their actually beginning work at the facility.

The Respondent contends (R. Br. 18, 22 et. seq.) that it engaged in meaningful bargaining with the Union on pandemic premium pay and the utilization of noncertified aides, but any such bargaining was after the fact.

Indeed, the Union did not learn until August 4 of the premium pay conferred in April and rescinded in June, and this was through unit employees and not directly from the Respondent. Thus, the Respondent never informed the Union of these changes.

Similarly, the Respondent never directly notified the Union of the hiring of noncertified aides starting in April. Rather, the Union received only implicit notice from the Respondent's response on June 11 to a union information request for a seniority list of service unit employees for bargaining purposes.

Of most significance, there is no question that the Respondent's internet and phone communications were operating at all times during the pandemic; indeed, there were email exchanges and virtual negotiations between the Respondent and the Union throughout 2020.

The Respondent also argues (R. Br. 13) that the use of the noncertified aides was merely a continuation of past practice and not a material change. However, as opposed to previous noncertified aides, they were hired without a 4-month limitation (and with different training requirements). The Respondent points out (ibid at 14) that it stopped using the last noncertified aide at the end of October, only 2 additional months beyond the 4-month limit. However, the Respondent had no way of knowing at the time it hired the noncertified aides starting in April what the duration of their employment would be. It thus was in no position to provide the Union with any fixed time frame for their utilization.

The Respondent's witnesses asserted that no CNAs lost hours, regular or overtime, as a result of the Respondent's utilization of the noncertified aides, but this cannot be definitively ascertained without a thorough review of the Respondent's payroll records, a compliance matter.

I therefore conclude that the Respondent violated Section 8(a)(5) and (1) when it unilaterally conferred and then rescinded the $2/hour pandemic pay raise, and when it hired the noncertified aides at issue.

Supervisory Status of LPNs

Legal Framework

Section 2(11) defines "supervisor" as any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment.

The types of supervisory authority are listed in the disjunctive, and possession of any one of them suffices to confer supervisory authority. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001); *Queen Mary*, 317 NLRB 1303, 1303 (1995), enfd. sub nom. *NLRB v. RMS Foundation, Inc.*, 113 F.3d 1242 (9th Cir. 1997); *NLRB v. Quinnipac College*, 256 F.3d 68, 74 (2001). Possession of supervisory authority is enough even if not exercised. *Fred Meyer Alaska, Inc.*, 334 NLRB 646, 649 fn. 8 (2001); *Mid Allegheny Corp.*, 233 NLRB 1463, 1464 (1977).

To be classified a supervisor, an individual must use independent judgement in such a way as to affect employees' terms and conditions of employment. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 688 (2006); *Children's Farm Home,* 324 NLRB 61 (1997). "Independent judgement" will not be found where a result "is dictated or controlled by detailed instructions . . . ." *Oakwood Healthcare*, ibid; see also *Brusco Tug &Barge, Inc.*, 359 NLRB 486, 490 (2012). Likewise, "independent judgement" does not include recommendations to a decision maker who conducts independent investigations of the events and fails to follow the recommendations. *Children's Farm Home,* 324 NLRB 61 (1997).

In *Kentucky River*, above at 711–712, the Court upheld the Board's rule that the burden of establishing supervisory status lies with the party asserting it. The party must establish such status by a preponderance of the evidence. *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003); *Bethany Medical Center*, 328 NLRB 1094, 1103 (1999).

The "Board has exercised caution 'not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied rights which the Act is intended to protect." *Oakwood Healthcare,* above at 688. Thus, the Act protects "straw bosses, lead men, and set up men" even though they perform "minor supervisory duties." Ibid, quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280–281(1974); see also *General Security Services Corp.*, 326 NLRB 312, 312 (1998).

Statutory status is not proven where the record evidence "is in conflict or otherwise inconclusive." *Republican Co.*, 361 NLRB 93, 97 (2014), citing *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989); *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006).

Absent evidence that an individual possesses any one of the statutory indicia, the Board looks to secondary indicia to determine supervisory status; however, secondary indicia

are insufficient by themselves to establish supervisory authority. *Veolia Transportation Services, Inc.*, 363 NLRB 1879 (2016); *Sam's Club*, 349 NLRB 1007, 1014 (2007); *Ken-Crest Services*, 335 NLRB 777, 779 (2001).

LPNs do not hire, fire, issue evaluations, or approve overtime. Following are the indicia of supervisory authority that the Respondent contends they possess.

Assignment of Work

The analysis here is whether the LPNs' role in assignment of CNAs is of a routine or clerical nature or requires the use of independent judgment. To exercise "independent judgment" in making assignments and directing employees, an individual must act or effectively recommend action "free of the control of others," using a degree of discretion rising above "the merely routine or clerical." *Oakwood Healthcare,* above at 692–693; see also *Brusco Tug and Barge, Inc.*, 359 NLRB 486, 490 (2012). Determining what rises to the level of 2(11) authority can be difficult. As the Court recognized in *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 713 (2001), "[T]he statutory term 'independent judgment' is ambiguous with respect to the degree of discretion required for supervisory status. . . . Many nominally supervisory functions may be performed without the 'exercis[e of] such a degree of . . . judgment or discretion . . . as would warrant a finding' of supervisory status under the Act." (citations omitted).

The LPNs play no part in deciding which CNAs will work a particular day or the unit to which they are initially signed. Rather, they assign CNAs to particular rooms on their unit. In doing so, their primary focus is on equalizing the work among the CNAs, who are normally assigned to the same rooms and patients. None of the CNAs have any special training or education that makes them uniquely qualified, and they are interchangeable. In this regard, an LPN can request (but not require) a CNA to move to a unit that is understaffed.

In sum, none of these assignments require independent judgment because they are routine in nature. See *Mercy General Health Partners Amicare Home Care,* 2017 W 5034114 (2017) (assignments to home healthcare aides and LPNs were routine and not based on significant training, education, or particular expertise); *Panaro & Grimes,* 321 NLRB 811, 811 (1996). Moreover, temporary transfers of CNAs to ensure adequate staffing levels do not show requisite independent judgment. See *Frenchtown Acquisition Co., Inc., v. NLRB*, 683 F.3d 298 (6th Cir. 2012). Finally, nothing suggests that the assignments that the LPNs make have any bearing on CNAs' opportunities to be considered for future promotions or rewards. Contrast, *Oakwood Healthcare*, above at 689.

The Respondent cites (R. Br. 38) *Oakwood Healthcare*, above at 695, wherein the Board stated that in the health care setting, "assign" encompasses the responsibility to assign nurses and aides to particular patients, and that decisions affecting place, time or overall tasks can be a supervisory function, including "plum or bum" assignments. However, whereas assignments in that case were on a regular basis, here they are made daily, CNAs are can be transferred during the day to other units as needed, and all CNAs are able to service all residents.

Accordingly, I find that the LPNs assignment of work to CNAs is of a routine nature not entailing the level of discretion rising to "independent judgment."

I note that the LPNs' approval of employees' requests for time clock errors is ministerial and routine, there being no evidence that any such requests are ever denied. In any event, the LPNs turn in those requests to the DON or HR for final approval.

Direction of Work

During the day, various managers, including the administrator, the DON, and UMs periodically come on to the units to monitor how LPNs and CNAs are providing patient care. The DON is available in her office if LPNs need her assistance. There is an RN in charge on the night shift, and managers are on call all the time. Thus, higher authority is normally accessible, either on or off site.

As stated above, LPNs can ask CNAs to go to other units but lack the independent authority to compel them; if they refuse, the LPNs must seek management's intercession. CNAs who refuse to obey the orders of LPNs are not necessarily issued any formal discipline. As previously stated with regard to assignments, all CNAs perform the same patient care functions, which are routine in nature and do not require any special training or expertise, making CNAs interchangeable.

Management has told LPNs at nursing staff meetings that LPNs are responsible if patients do not receive proper care from CNAs, and may be disciplined for such. Despite this, the record contains only one discipline issued to an LPN for this reason—a verbal warning that Metcalf receive in 2019. I cannot believe that in recent years that was the only time management concluded that an LPN had not properly overseen CNAs. The lack of evidence of other disciplines to LPNS for such leads to the conclusion that, regardless of the stated policy, there is no practice of holding LPNs accountable for the shortcomings of CNAs. Moreover, there is no evidence that Metcalf suffered any actual or potential adverse consequences as a result of the verbal warning, either pecuniary or otherwise. Accordingly, the "responsible" requirement under Section 2(11) of the Act is lacking. See *Springfield Terrace, Ltd.*, 355 NLRB 937 (2010); *Golden Crest Healthcare*, above at 731; *Oakwood Healthcare*, above at 691–692; *NLRB v. Saint Mary Home*, 358 Fed.Appx. 255, 255 (2nd Cir. 2009).

In these circumstances, I find that the LPNs do not responsibly direct employees within the meaning of Section 2(11).

Discipline

There are no written policies concerning when and how an LPN should issue discipline to a CNA, and testimony from management witnesses on the subject was contradictory.

Because Hightower may have been an acting UM when she wrote up disciplines in the record, I am unable to conclude that she was a unit LPN on those occasions. Assuming arguendo that she was a unit LPN, I will address those disciplines.

(1) Written warning to B.F. According to Cervi, Harris brought the warning to her and the DON and said she needed help, and they were the ones who actually issued it to the employee.

(2) Termination of B.F. Crediting Hightower's unrebutted testimony, she did not write the description of the incident but rather took the patient complaint form to Nugal, who said she would talk to the patient. Hightower's next involvement was when she was called to Cervi's office, when she saw the written discipline for the first time, and she signed the discipline as a supervisor at Nugal's direction and in Cervi's presence.

(3) Verbal warning to S.S. Crediting Hightower over Nugal, Hightower wrote nothing contained in the document, her signature does not appear therein, and she had nothing to do with the discipline.

Regarding the disciplinary report for J.B., Rock received a patient complaint when she was making her rounds and checking on patients, instructed Metcalf to write it up, conducted an investigation, and presented the discipline to J.B. Metcalf was not present either during Rock's investigation or its service on the employee. Rock normally investigates a discipline put forth by a nurse and talks to all sides before issuing it.

Based on the above, I conclude that LPNs may be required to bring incidents of CNAs' dereliction of duty to management's attention and may write up the descriptions of the incidents, but they are not the final decision makers on whether disciplines are effectuated. Particularly noteworthy, management independently investigates the underlying incidents and handles the issuance of the disciplines to the employees. To confer supervisory status based on authority to discipline, the exercise of disciplinary authority must lead to personnel action without independent investigation by upper management. *The Republican Co.*, 361 NLRB 93, 97 (2014), citing *Starwood Hotels & Resorts Worldwide, Inc.*, 350 NLRB 1114, 1116 (2007). Significantly, too, the Respondent produced no disciplinary forms signed only by an LPN and not also by someone in management.

The mere factual reporting of oral reprimands and the issuing of written warnings that do not automatically affect job status or tenure do not constitute supervisory authority. *Ohio Passavant Health Center*, 284 NLRB 887, 889 (1987). The Respondent has not shown that the warnings LPNs initiated "automatically affect[ed] job status or tenure" of CNAs, absent management's approval. *Ohio Masonic Home, Inc.*, 295 NLRB 390, 393–394 (1989), quoted in *The Republican Co.*, above at 99.

In sum, in the area of discipline, LPNs exercise a primarily reporting role and lack independent authority to issue discipline. See *The Republican Co.*, above at 99; *Ohio Masonic Home*, above at 390.

Accordingly, I conclude that the LPNs do not possess independent authority to discipline CNAs within the meaning of Section 2(11).

Conclusion

As stated earlier, the burden of establishing supervisory status lies with the party asserting it, and the Board is cautious not to construe supervisory status too broadly and exclude those performing "minor supervisory duties." The Respondent has failed to meet its burden.

As the Respondent correctly states (R. Br. 50), any secondary indicia of supervisory authority is insufficient to establish Section 2(11) status in the absence of the existence of any primary indicia. Having found no such primary indicia, I need not address any secondary indicia.

I therefore conclude that the LPNs are employees within the meaning of the Act.

Pecor's Threat to Metcalf on May 25

The General Counsel amended the complaint at trial to assert that Attorney Pecor, on May 25, 2021, violated Section 8(a)(1) by threatening Metcalf with unspecified discipline for attending the hearing as a witness for the General Counsel. Ideally, Pecor would have assured the General Counsel and the Union that Metcalf would suffer no adverse consequences as a result of her testifying at the hearing, which he did not.

Attorney Champa asked Pecor to ensure that Metcalf would not be disciplined for continuing to testify past her scheduled lunch break at work. He replied, "Well, she won't be compensated and *to the extent that she didn't get approval for it, I can't speak to that*." (emphasis added).[7] He subsequently repeated that he could not speak to that "right now" because he did not know what was going on at the facility, and then spoke again about her not getting paid for her time as a witness. An employer is not required to pay a witness against it (see *Gen. Die Casters, Inc.*, 358 NLRB 742, 755 (2012)), and the General Counsel does not contend that Pecor's statements about compensation were violations.

"The Board's well-established test for interference, restraint, and coercion under Section 8(a)(1) is an objective one and depends on 'whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.'" *ITT Federal Services Corp*., 335 NLRB 998, 1002 (2001) (quoting *American Freightways Co.,* 124 NLRB 146, 147 (1959)). Applying this test, the Board has held that an employer violates Section 8(a)(1) by threatening employees with unspecified reprisals for engaging in protected activity. See, e.g., *Alaska Ship & Drydock*, 340 NLRB 874, 878 (2003). Employee testimony at an NLRB hearing is a protected activity. See *J. P. Stevens & Co.*, 167 NLRB 266 (1967).

Pecor's statements were made in my presence and not by a high-level company official in a coercive, closed-door setting. Contrast, *Jo-Del, Inc.*, 326 NLRB 296, 298 (1998). He did not state or even imply that she would receive any discipline but instead simply replied that he did not know. He said nothing further on the subject but instead resumed the matter of her not getting paid for her time as a witness. In these circumstances, I

[7] Tr. 327.

find that his statements were not reasonably coercive, and I dismiss the allegation.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(5) and (1) of the Act:

(a) Conferred a wage increase on employees on April 8, 2020, without providing the Union notice and an opportunity to bargain.

(b) Rescinded that wage increase on June 16, 2020, without providing the Union notice and an opportunity to bargain.

(c) Employed noncertified nurse's aides to perform unit work in and after April 2020, without providing the Union notice and an opportunity to bargain.

REMEDY

Because I have found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The General Counsel seeks an order that the Respondent, upon the Union's request, rescind the above unilateral changes. However, there is nothing for the Respondent to rescind.

The Respondent shall make whole unit employees for any loss of wages or other benefits suffered as a result of the unilateral changes in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, the Respondent shall file with the Regional Director for Region 7 copies of any corresponding W-2 forms reflecting backpay awards, in accordance with *Cascades Containerboard Packaging-Niagara*, 370 NLRB No. 76 (2021). For all backpay awards received by unit employees, the Respondent shall compensate the employees for any adverse tax consequences associated with receiving lump-sum backpay awards and file with the Regional Director for Region 7 a report allocating the backpay award to the appropriate calendar year. See *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016).

The General Counsel also seeks a reinstatement of the wage increase until the parties

reach a negotiated agreement with respect to that change (GC Br. 42), a position echoed by the Union (U. Br. 26). Neither cites any precedent in support of ordering such a remedy. I deem it inappropriate to require the Respondent to restore an unlawfully granted wage increase in the absence of evidence that either its conferral or its rescission was motivated by antiunion considerations. I therefore will not include this in my order.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, Metro Man IV, LLC d/b/a Fountain Bleu Health and Rehabilitation Center, Inc., Livonia, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Conferring or rescinding wage increases, or hiring employees to perform unit work, without providing the Union notice and an opportunity to bargain.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Provide the Union with notice and an opportunity to bargain before implementing any changes in wages, hours, and working conditions.

(b) Make whole employees for any loss of earnings or other benefits they suffered in the manner set out above in the Remedy section.

(c) Within 14 days after service by the Region, post at its facility in Livonia, Michigan, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If during the pendency of these proceedings, the Respondent has gone out of business or closed the Livonia, Michigan facility, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

all current employees and former employees employed by the Respondent at any time since April 8, 2020.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

The complaint is dismissed insofar as it alleges violations of the Act that I have not specifically found.

Dated, Washington, D.C. August 31, 2021

Ira Sandron
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board (NLRB) has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

SEIU Healthcare Michigan (the Union) represents our Licensed Practical Nurses, Certified Nurse's Aides (CNAs), and other classifications of our employees.

WE WILL NOT give you wage increases or rescind those wage increases without providing the Union notice and an opportunity to bargain.

WE WILL NOT hire employees to perform work that employees represented by the Union perform without providing the Union notice and an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL provide the Union with notice and an opportunity to bargain before we implement any future changes in your wages, hours, and working conditions.

WE WILL make our CNAs whole for any loss of earning or other benefits they suffered as a result of our employing noncertified nurse's aides to perform their duties.

Metro Man IV, LLC d/b/a Fountain Bleu Health and Rehabilitation Center, Inc.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation, and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

477 Michigan Avenue, Room 300, Detroit, MI 48226-2543
(313) 226-3200, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/07-CA-264407 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (313) 335-8042.