

Bozeman Deaconess Foundation d/b/a Bozeman Deaconess Hospital and Montana Nurses Association. Cases 19-CA-23519 and 19-CA-23660

February 18, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS
BROWNING, FOX, AND HIGGINS

On August 31, 1995, Administrative Law Judge Michael D. Stevenson issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed a brief in support of the administrative law judge's decision, and the Union filed an answering brief.¹

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.²

We agree with the judge that the registered nurses (RNs) employed by the Respondent are not statutory supervisors, and that the Respondent therefore acted unlawfully in withdrawing recognition from the Union as their exclusive representative and making unilateral changes in terms and conditions of employment. In its exceptions, the Respondent specifically contends that its 120 RNs should be found supervisors based on their authority with respect to the assignment and direction of other employees. The RNs in each department work under the supervision of a stipulated 2(11) supervisor, a head nurse, who is assigned to the day shift but has 24-hour responsibility for the department and is always on call. In most departments, one RN is designated daily as the charge nurse (or team leader) for each shift, particularly when the head nurse is not present. The charge nurse designation typically rotates among all the RNs in the department on a particular shift, with all but newly hired RNs and some who work in-

¹ The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

² We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996). In addition, we shall delete from the recommended Order the requirement that the Respondent provide the Union all relevant information concerning unit employees, because there is no allegation or finding that the Respondent has refused to provide such information.

The Union has requested that the Board order the Respondent to reimburse the Union and the General Counsel for their costs and expenses incurred in the investigation, preparation, presentation, and conduct of these cases. We deny the Union's request, because the Respondent's defense was not frivolous and its unlawful conduct was not so "flagrant, aggravated, persistent, and pervasive" that such a reimbursement remedy is warranted. See *Frontier Hotel & Casino*, 318 NLRB 857, 860-862 (1995).

frequently on a casual-call basis included in the rotation. In contending that its RNs are statutory supervisors, the Respondent does not rely solely on this rotating authority to serve as charge nurse, but rather asserts that the day-to-day responsibilities of all RNs warrant their designation as supervisors under the Act.

The RNs' duties vary to some degree based on the department to which they are assigned. In general, however, the RNs give directions to licensed practical nurses (LPNs), nurses aides, unit clerks, and, when serving as charge nurses, other RNs, in connection with the treatment of patients. As the judge found, tasks are directed in accordance with the legal scope of practice of each of the classifications, which is well defined. In addition, charge nurses make assignments of tasks or patients based on their knowledge of the abilities of the staff members within each classification, as well as considerations of fairness in balancing workload. The record shows that the LPNs and aides are familiar with the tasks they are assigned to perform and require little further instruction in carrying out their duties.

We agree with the judge that the responsibility of the Respondent's RNs to assign and direct other employees is routine and does not require the exercise of independent judgment that characterizes supervisors under Section 2(11) of the Act. Clearly, the RNs' status as professional employees carries with it responsibility for making expert judgments in assessing the conditions and needs of patients.³ Having made those determinations, however, the RNs' additional responsibility for directing employees to perform the appropriate tasks to care for the patients is a routine matter. The Board has found, for example, that assignments of work based on considerations of equalizing workload or known employee skills are routine. See *Providence Hospital*, 320 NLRB 717, 727 (1996). Moreover, as in *Providence Hospital*, the Respondent has not established that the abilities of employees in the same classification vary significantly, such that selecting a particular staff member for a task would require independent judgment. To the contrary, the record demonstrates that the Respondent's LPNs and aides are very familiar with the tasks within their scope of practice. For these reasons, as well as the additional reasons discussed by the judge, we conclude that the RNs employed by the Respondent are not supervisors.⁴

³ We find that an RN's role, asserted by Director of Nursing Larson, in occasionally questioning the treatment of a patient ordered by a physician, would arise from her professional expertise and would not be indicative of supervisory status under the Act. The Respondent, moreover, does not contend that the RNs supervise physicians at the hospital.

⁴ We agree with the judge that it is unnecessary to consider secondary indicia of supervisory status in the absence of the indicia enumerated in Sec. 2(11). We note, however, that a finding that the

Continued

We rely on the judge's alternative analysis, i.e., that the Respondent's conduct would be unlawful even if the RNs were found to be statutory supervisors, but only as it pertains to violations prior to the expiration of the collective-bargaining agreement. In *Gratiot Community Hospital*, 312 NLRB 1075 (1993), enfd. in part 51 F.3d 1255 (6th Cir. 1995), the Board found that the terms of a collective-bargaining agreement apply to supervisors whom the parties have voluntarily agreed to include in the unit, even though an employer cannot be compelled to recognize a union as the representative of a unit including supervisors. In *Gratiot*,

RNs are supervisors would result in an unrealistic supervisor-employee ratio, because the Respondent employs approximately 120 RNs and only 30 LPNs, 20 aides, and several unit clerks.

It is unnecessary for us to decide in this case whether the additional duties performed by the RNs when serving in the capacity of charge nurse entail the exercise of supervisory authority under the Act. Besides the sporadic nature of the rotating charge nurse responsibility, we note that not all unit employees serve as charge nurse. Therefore, even if the duties performed in that capacity were found to be supervisory, they would not render all unit employees supervisors, and the Respondent's withdrawal of recognition, unilateral changes, and direct dealing with unit employees would still be unlawful.

The Respondent argues that the judge erroneously found that, as the party alleging that the RNs are supervisors, it has the burden of proving such status. The Respondent asserts that the Board must establish each element of an unfair labor practice, including that affected employees are not supervisors. The Respondent specifically cites the Sixth Circuit's finding that "[t]he Board always has the burden of coming forward with evidence showing that the employees are not supervisors in bargaining unit determinations," *NLRB v. Beacon Light Christian Nursing Home*, 825 F.2d 1076, 1080 (6th Cir. 1987), a view reiterated by that court in *Health Care & Retirement Corp. v. NLRB*, 987 F.2d 1256 (6th Cir. 1993). Contrary to the Respondent's contention, we note that the Supreme Court, in upholding the Sixth Circuit's decision concerning the Board's application of the statutory phrase "in the interest of the employer," was not presented with and did not address the question of burden of proof. *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571 (1994). The Board has not taken the Sixth Circuit's view on this matter, and other courts have agreed with the Board and placed the burden on the party asserting supervisory status. See, e.g., *NLRB v. Bakers of Paris*, 929 F.2d 1427, 1445 (9th Cir. 1991), enfg. 288 NLRB 991 (1988). Moreover, the portion of the legislative history relied on by the Sixth Circuit in *Beacon Light* for its finding does not mention burden of proof, but does state the legislative concerns that only true supervisors be excluded from the coverage of the Act and that employers be permitted to bargain even with such supervisors and voluntarily include them in collective-bargaining agreements. S. Rep. No. 105, 80th Cong. 19 (1947), reprinted in Committee on Labor and Public Welfare, Legislative History of the Labor Management Relations Act, 1947, 425 (Comm. Print 1974). The cases also cited by the Sixth Circuit similarly do not compel its conclusion. In *Teamsters Local 372 v. NLRB*, 735 F.2d 969 (6th Cir. 1984), the narrow question decided was whether an employer is equitably estopped from asserting that individuals previously recognized as employees are in fact supervisors and not covered by the Act. In *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Court reaffirmed the Board's burden to prove the elements of unfair labor practices, but held that the burden concerning a matter constituting essentially an affirmative defense could be shifted to the respondent. In any event, we find that the preponderance of the evidence establishes that the RNs are statutory employees.

however, the unilateral changes occurred during the term of the contract covering the purported supervisors. Accordingly, we find that this analysis provides an alternative basis for finding that the Respondent violated Section 8(a)(1) and (5) by unilaterally changing the RNs' job description and by dealing directly with the RNs concerning the change, conduct that occurred prior to the expiration of the collective-bargaining agreement.⁵

With respect to the RN job description, which was modified to include a 100-pound lifting requirement, the Respondent argues that the management-rights clause of the parties' collective-bargaining agreement permitted such an action, but the judge found that the clause did not constitute a waiver of bargaining by the Union so as to permit the Respondent's unilateral change. We agree. It is well established that "the waiver of a statutory right will not be inferred from general contractual provisions; rather, such waivers must be clear and unmistakable. Accordingly . . . generally worded management-rights clauses . . . will not be construed as waivers of statutory bargaining rights. [Footnotes omitted.]" *Johnson-Bateman Co.*, 295 NLRB 180, 184 (1989).⁶ The management-rights clause of the parties' contract in this case accords the Respondent the authority, inter alia, to "assign duties to the work force" and to "reclassify positions and carry out the ordinary and customary functions of management." Neither of these general provisions suggests that the parties had even discussed, much less that the Union had waived its right to negotiate, changes in the requirements of the RNs' job such as the specific lifting requirement at issue here. We therefore adopt the judge's conclusion that the Respondent unlawfully implemented this change.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Bozeman Deaconess Foundation d/b/a Bozeman Deaconess Hospital, Bozeman, Montana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition from the Montana Nurses Association as the exclusive bargaining rep-

⁵Member Higgins concurs in the finding that the Respondent has failed to prove that the RNs are supervisors. Accordingly, he finds it unnecessary to pass on whether there would be a violation if the RNs were supervisors.

⁶See also *Gratiot*, supra, 312 NLRB at 1084-1085. In reversing the Board in part and finding that the collective-bargaining agreement authorized the employer to implement one of the unilateral changes, the elimination of a particular shift, the Sixth Circuit relied on a specific provision granting the employer the right to determine the number of assignments to that shift, rather than on the management-rights clause. 51 F.3d at 1260-1261.

representative of its employees in the following appropriate unit:

All registered nurses, sometimes known as professional nurses in nursing service employed at Bozeman Deaconess Hospital in Bozeman, excluding director of nursing services, the assistant director of nursing services, if any, the director of in-service education, supervisors, head nurses, nurses in Central Supply, guards, as defined in the Act, and other employees.

(b) Failing and refusing to bargain with the Union as the exclusive bargaining representative of its employees in the above-described unit for the purpose of reaching agreement on a successor collective-bargaining agreement.

(c) Unilaterally changing the wages, or other terms and conditions of employment of these employees by implementing a rule permitting split shifts; a policy reducing unit employees' right to be scheduled for every other weekend off; a rule restricting holiday time off; a rule requiring notification of the house supervisor of illness 2 hours prior to the beginning of the shift; a rule requiring advance approval to work overtime; a rule permitting the Respondent to assign nurses to any work area/department of the hospital without restriction; and a rule changing bargaining unit employees' job description to include a 100-pound lifting requirement and demanding that employees sign the new job description.

(d) Bypassing the Union and dealing directly with its employees concerning unilateral changes made in position descriptions.

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

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

(a) Make whole employees who have performed work in the bargaining unit covered by the expired collective-bargaining agreement between the Respondent and the Union for the loss of wages and benefits they have suffered by virtue of the Respondent's failure to apply the agreement to them; and also make whole the Union's fringe benefit funds and the Union itself for the failure to make fringe benefit payments and union dues payments under the applicable expired agreement on behalf of the unit employees.

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Notify the Union in writing that it recognizes the Union as the exclusive bargaining representative of the unit employees. On request, bargain with the Union as

the exclusive representative of the employees in the appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(d) On the request of the Union, rescind all unilateral changes made to the terms and conditions of employment of unit registered nurses in August/September 1994.

(e) Within 14 days after service by the Region, post at its Bozeman, Montana facility copies of the attached notice marked "Appendix C."⁷ Copies of the notice, on forms provided by the Regional Director for Region 19, 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. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 10, 1994.

(f) 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.

⁷If 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."

APPENDIX C

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT withdraw recognition from the Montana Nurses Association as the exclusive bargaining representative of our employees in the following appropriate unit:

All registered nurses, sometimes known as professional nurses in nursing service employed at Bozeman Deaconess Hospital in Bozeman, excluding director of nursing services, the assistant director of nursing services, if any, the director of

in-service education, supervisors, head nurses, nurses in Central Supply, guards, as defined in the Act, and other employees.

WE WILL NOT fail and refuse to bargain with the Union as the exclusive bargaining representative of our employees in the above-described unit for the purpose of reaching agreement on a successor collective-bargaining agreement.

WE WILL NOT unilaterally change the wages, or other terms and conditions of employment of these employees by implementing a rule permitting split shifts; a policy reducing unit employees' right to be scheduled for every other weekend off; a rule restricting holiday time off; a rule requiring notification of the house supervisor of illness 2 hours prior to the beginning of the shift; a rule requiring advance approval to work overtime; a rule permitting us to assign nurses to any work area/department of the hospital without restriction; and a rule changing bargaining unit employees' job description to include a 100-pound lifting requirement and demanding that employees sign the new job description.

WE WILL NOT bypass the Union and deal directly with our employees concerning unilateral changes made in position descriptions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole employees who have performed work in the bargaining unit covered by our expired collective-bargaining agreement with the Union for the loss of wages and benefits they have suffered by virtue of our failure to apply the agreement to them; and also make whole the Union's fringe benefit funds and the Union itself for our failure to make fringe benefit payments and union dues payments under the applicable expired agreement on behalf of the unit employees.

WE WILL notify the Union in writing that we recognize the Union as the exclusive bargaining representative of the unit employees. WE WILL, on request, bargain with the Union as the exclusive representative of the employees in the appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL, on the request of the Union, rescind all unilateral changes made to the terms and conditions of employment of unit registered nurses in August/September 1994.

BOZEMAN DEACONESS FOUNDATION
D/B/A BOZEMAN DEACONESS HOSPITAL

S. Nia Renei Cottrell, Esq., for the General Counsel.
Daniel A. Doyle and Monty VanderMay, Esqs., of Salem, Oregon, for the Respondent.
Karl J. Englund, Esq., of Missoula, Montana, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at Bozeman, Montana, on February 28 and March 1 and 2, 1995,¹ pursuant to an order consolidating cases and consolidated complaint issued by the Regional Director for Region 19 for the National Labor Relations Board on January 27, 1995, and which is based on charges filed by Montana Nurses Association (the Union) on August 10 (Case 19-CA-23519), on November 21 (amended charge), and on November 21 (Case 19-CA-23660). The complaint alleges that Bozeman Deaconess Foundation d/b/a Bozeman Deaconess Hospital (the Respondent) has engaged in certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).

Issues

1. Whether the Respondent unlawfully withdrew its recognition of the Union as the exclusive collective-bargaining representative of a unit of registered nurses.

2. Whether the Respondent, acting through a supervisor, Gloria Larson, held meetings with unit employees and told them that after the expiration of the current collective-bargaining agreement, unit employees would receive additional benefits, such as a medical voucher benefit and a paid Christmas Eve holiday, because such benefits were available for the Respondent's nonunion employees.

3. Whether the Respondent unlawfully made one or more of the following changes in work rules, policies, or procedures without giving notice to the Union or affording the Union an opportunity to bargain over these matters which are mandatory subjects of bargaining:

- (a) Changing job description of unit employees.
- (b) Implementing a rule permitting split shifts.
- (c) Implementing a policy reducing unit employees' rights to be scheduled for every other weekend off.
- (d) Implementing a rule permitting the Respondent to assign nurses to any work area/departments of the hospital without restriction.
- (e) Implementing a rule requiring notification of the house supervisor of illness 2 hours prior to the beginning of the shift.
- (f) Implementing a rule requiring advance approval to work overtime.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and to cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel, the Charging Party, and the Respondent.

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

¹ All dates refer to 1994 unless otherwise indicated.

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

The Respondent admits it is a Montana corporation operating an acute care hospital facility in Bozeman, Montana, and further admits that during the past 12 months which period is representative of all material times its annual gross sales of goods and services is valued at in excess of \$500,000. The Respondent further admits that during the same period in the course and conduct of its business operations, it sold or shipped goods or provided services from its facilities within the State of Montana, to customers outside the State, or sold and shipped goods or provided services to customers within the State, which customers were themselves engaged in interstate commerce by other than indirect means, of a total value of in excess of \$50,000. Accordingly, it admits, and I find, that it is a health care institution within the meaning of Section 2(14) of the Act and engaged in commerce and in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent admits, and I find, that Montana Nurses Association is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*²

1. Statement of the case

On or about August 29, 1975, the Union was certified by the Board as the exclusive collective-bargaining representative of the unit. The unit is described as

All registered nurses, sometimes known as professional nurses in nursing service employed at Bozeman Deaconess Hospital in Bozeman, excluding director of nursing services, the assistant director of nursing services, if any, the director of in-service education, supervisors, head nurses, nurses in Central Supply, guards, as defined in the Act, and other employees.

The Respondent and the Union reached agreement on an initial collective-bargaining agreement which was followed by a series of 2-year agreements, the last of which was effective between November 1, 1993, and October 31 (Jt. Exhs. 5, 6).

On July 15, the Union sent a letter to the Respondent enclosing certain proposed changes to be bargained over for

² Sometime before this case began, the General Counsel received authorization from her superiors to seek an order from a U.S. district judge pursuant to Sec. 10(j) of the Act, which order, if granted, would restore the status quo. Restoring the status quo means that the Respondent would recognize and bargain with the Union and would observe and maintain the terms and conditions of the most recent collective-bargaining agreement (Jt. Exh. 5). It also means that on demand of the Union, the Respondent would rescind all unilateral changes in the terms and conditions of employment of the Registered Nurses (RNs). No such court order was ever sought or issued. Instead, the Respondent agreed in writing (document undated) to restore the status quo, pending resolution of the instant case (Jt. Exh. 7).

possible inclusion in a new collective-bargaining agreement. Suggestions were made as to when bargaining could begin (Jt. Exh. 1(a)). In response, the Respondent sent the following letter to the Union which reads as follows:

July 30, 1994

Keven Comer, RN
MNA Local #4 Spokesperson
2985 Tumbleweed Drive
Bozeman, MT 59715

Dear Ms. Comer,

Please be advised that this letter is being sent as the formal written notice pursuant to Article 28, Section A, of the current collective bargaining agreement, that the Board of Trustees of Bozeman Deaconess Hospital has elected to terminate the terms of the contract between Montana Nurses' Association BDH Local Union #04 and Bozeman Deaconess Hospital.

This action is being taken as a result of the recent Supreme Court decision concerning the appropriateness of nursing personnel being included in collective bargaining units.

For the Board,

/s/ Gary Kenner

Gary Kenner
Administrator

cc:

Ray Linder
Labor Relations Director, Helena
MNA Local Unite #04 Bargaining Team
Patty Erickson
Lynnora Jetter

[Jt. Exh. 1(b.)]

On August 25, the Union wrote back to the Respondent requesting clarification as to whether the Respondent "not only intends that the current contract be terminated, but also that the Hospital does not intend to bargain on any terms of a successor agreement with the registered nurses" (Jt. Exh. 1(c)). On August 31, the Respondent made its intent unmistakably clear in a letter to the Union which reads as follows:

August 31, 1994

Raymond P. Linder
Labor Relations Director
Montana Nurses' Association
P.O. Box 5718
Helena, Montana 59604

Dear Mr. Linder:

I have reviewed the letter sent to Gary Kenner on 8/25/94 regarding the hospital's intent to terminate the agreement between the current Nurses Collective Bargaining Agreement.

As you are aware, the recent Supreme Court decision clearly prohibits supervisors from being members of a bargaining unit. It is the Board's position that all the registered nurses at Bozeman Deaconess Hospital are

supervisors and therefore, there is not a need to engage in contract negotiations.

If you have further questions, please contact me at anytime.

Sincerely,

/s/ Gordon L. Davison

Gordon L. Davison
Administrator

[Jt. Exh. 1(d.)]

While this exchange of correspondence between the Respondent and the Union was occurring, the Respondent was also writing a form letter to each of its RNs which letter reads as follows:

August 1, 1994

To registered nurses of Bozeman Deaconess Hospital:

This letter is written to inform you of upcoming changes in our relationship with your bargaining unit. In May, the United States Supreme Court substantially changed the interpretation of "supervisory status" as applied to nursing personnel under the National Labor Relations Act. Accordingly, the Board of Trustees has been advised that you no longer meet the criteria for collective bargaining membership and has elected to exercise the termination clause within the bargaining agreement.

We feel the change will be a step towards the goal of open communication. Our salaries and benefits are competitive with peer hospitals, thus, termination of the bargaining unit will not have a negative impact on you. We also plan to continue to work with you on issues of quality patient care. Hopefully, without third party involvement, we will be able to enhance the relationship between you and the Hospital.

We ask that you, as employees of the Foundation, understand and support this action.

For the Board of Trustees,

/s/ B. Gerlach

Bruce Gerlach, Chair

[G.C. Exh. 4]

The case to which the Respondent referred in its letters above is *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571 (1994), a case decided by the U.S. Supreme Court on May 23. In large measure, my decision in the instant case will be determined by what effect, if any, the Court's decision in *Health Care* has on the facts and circumstances of the instant case as reflected below in the analysis and conclusions segment of this decision. For now additional facts will be helpful.

2. The hospital

The Respondent is organized like all or most other general hospitals. In fact, those witnesses who were asked about their work experience at other hospitals before they came to the Respondent were hard pressed to point out any significant differences in organization. It is an 86-bed facility divided up

into the usual departments including medical/surgical (Med/Surg), obstetrics/gynecology (Ob/Gyn), nursing, intensive care unit (ICU), emergency room (ER), and a home care and hospice unit. The only hospital in the city of Bozeman, the Respondent is a nonprofit facility affiliated with the Methodist Church. Of course, it is open 7 days a week, 24 hours per day. To staff the facility and treat its patients, the Respondent maintains a staff of 70 physicians none of whom are employed by the hospital. It also maintains a staff of employees including 120 RNs, 30 licensed practical nurses (LPNs), approximately 20 nurses aides (aides), and several unit clerks. Many of these employees work less than full time hours and some are casual call, that is, they work as needed.

The Respondent offered into evidence its organizational structure which is reproduced in Appendix A.

At the highest level the Respondent is managed by its executive team only one of whom testified in this case. Members are, the chief executive office, director of finance, director of ancillary services, and director of human resources (Elizabeth Lewis, witness for the Respondent).

The Respondent also offered into evidence its nursing service organizational chart which is also reproduced in Appendix B.

Although not spelled out above, testimony made clear that directly beneath Gloria Larson, the Respondent's director of nursing and its first witness, there is a level of supervisors referred to as "House Supervisors" who are responsible for all nursing functions in all departments on a given shift. According to the respondent witness, Elouise McManis, the Respondent's head nurse on the medical floor, the house supervisor, and head nurse are of equal rank (Tr. at p. 292). In any event, the Respondent maintains a formal group called a "supervisory council" (R. Exh. 130) composed of house supervisors: Nancy Springer, Judy Weigand, Norma Muth, Tina Munday, Kay Kinsman, and Maryann Fender; and the head nurses of inpatient areas such as ER, ICU, Home Care/Hospice Managers, etc.: Vicky Groeneweg, Judy Kornelly, Linda Batchelder,* Nan Luce,* Val Bunkers, Linda Dykstra,* and McManis,* and the cardiopulmonary rehab manager/utilization review discharge planner: Jane Hosteller. The parties stipulated that for all times material to this case, the above-listed persons were statutory supervisors under the Act (Tr. at pp. 113-114). All hospital nursing supervisors must be RNs. (An * denotes a witness in the case.)

3. RNs and LPNs

a. Legal basis for duties/restriction on discretion

The State of Montana regulates the duties and responsibilities for both RNs and LPNs by statute and rules which are contained in the record (Jt. Exh. 6; R. Exh. 103). Neither RNs nor LPNs may lawfully do more than the law allows. Nurses' responsibilities and authority are further circumscribed by duly enacted policies, procedures, and protocols of the hospital. For example, the record contains a written procedure for a patient's preparation for surgery (G.C. Exh. 2) and a protocol for checking a patient into the O.R. (G.C. Exh. 3). The record also contains a listing, albeit not necessarily an exhaustive listing, of the Respondent's other policies and procedures, including nursing policies (Jt. Exh. 8; Tr. at p. 607).

Besides observing these state laws and rules and the general policies of the hospital, nurses are further obligated when performing duties during surgery, to know and to follow standing orders established by staff physicians which may differ depending on the individual physicians. For postsurgery patients or for nonsurgery patients the nurses are also required to follow the physicians' specific orders regarding treatment, medication, diet, exercise, and other relevant matters. In her testimony, Director of Nursing Gloria Larson described a theoretical right on the part of a given RN to intervene in a patient's treatment by a physician, where the RN thought the treatment to be improper. Such intervention consists of bringing the questioned treatment to the attention of the RN's supervisor who might then contact the physician's superior to discuss the matter. No example of such intervention was cited and I place little credence in its theoretical existence as probative evidence of RN supervisory authority under the Act.

Another example of a standing order is called an "emergency standing order" which governs procedures for nurses and others where a patient's life is threatened, by cardiac arrest for example.

If a nurse is still puzzled by a particular problem or issue concerning a patient, the nurse may consult the *Lipincott Manual*, a comprehensive listing of nursing procedures in a textbook format.

Finally, when all else fails, a nurse may consult a supervisor or even a fellow nurse on how to approach a particular problem. Whether a nurse sees fit to consult some or all of the above, it cannot be denied that the discretion of the staff nurse in formulating a plan of care for an individual patient is limited and restricted. This is not to say that nurses lack a basis for making individual judgments in caring for patients. Nor can it be said that RNs and LPNs are equivalent in education and training.

b. Charge nurses

The house supervisors and the head nurses of the various units generally workday shifts and are on call for other times, ready to respond when needed. Even during the days, these undisputed statutory supervisors may be off or unavailable for one reason or another. Accordingly, these supervisors select daily from the ranks of RNs in their departments a person to appoint as a charge nurse.³ A charge nurse is essentially in charge of a given department such as nursing, part of Ob/Gyn or Med/Surg with respect to certain activities. The charge nurse assigns patients to both the RNs and LPNs working on a given shift, calls physicians when questions arise about a patient's treatment or condition, deals with patients' friends or relatives, insures adequate staffing in a department and where additional help in a unit is necessary, and contacts a house supervisor or head nurse to make the request. However, only the supervisors can decide to move staff from one department to another or to call in additional staff from home.

Only RNs can be charge nurses and when selected, they earn an additional 50 cents per hour. Some RNs frequently

³During the hearing of this case, some witnesses used the terminology "Team Leader," to refer to a charge nurse. All agree that the terms are interchangeable (Tr. at pp. 259-260, 281), and I have elected to use the more traditional and familiar "Charge Nurse."

serve as charge nurses, others rarely or never do. No one is required to accept appointment as a charge nurse.

c. RNs

To become an RN, a person must first complete an approved course of studies at a college, university, or school of nursing. The 3- or 4-year program may result in a college degree or certificate of completion of the nursing school program. The graduate nurse must then pass a postgraduate examination leading to the RN designation. Then the educational process begins in earnest.

Once hired by the Respondent, the RN is assigned to one of the units in the hospital such as those recited above, and may work on the day, evening, or night shift. On the Med/Surg floor and elsewhere where the RN is assigned to direct patient care, the RN begins the relationship by conducting a patient assessment. This involves taking the patient's vital signs, breath sounds, incision or wound check, and if the patient is orthopedic, color and movement sensation is taken. In addition, the RN questions the patient regarding pain and what the patient would like the RN to do. Finally, the RN would review any applicable medical records and follow doctor's orders contained therein, regarding administering medications and monitoring IV fluids.

From this initial phase of the nursing process, a plan of care is developed by the RN. This plan of care involves review of medications, diet, exercise, physician's orders, and related activities, all arranged in a meaningful manner for the welfare of the patient. Not the least important activity is documentation of the patient's condition, medication dosage, patient complaints, diagnostic procedures such as X-rays or electrocardiograms and other related information.

Some of the RNs duties can be delegated to the LPN so long as the delegated duties are within the LPN's scope of practice. For example, the RN can request an LPN to perform a patient assessment or an LPN can decide on her own to perform the assessment. An RN can delegate the job of beginning certain types of IVs to LPNs. As noted above, only an RN can be a charge nurse with responsibility for a given unit on a given shift. However, in the instant case, in many or most routine patient care activities, the RN and LPN work together on a given shift in a given unit.

d. LPNs

Several LPNs testified in this case—all for the Respondent. They are Rita Peterson (Med/Surg/Orthopedic), Sherry May (ER), Linda West (Med/Surg), and Cindy Corey, a casual call nurse (Home Care and Hospice). Based on a review of the testimony of these witnesses, I conclude that an LPN has less education and training than an RN but again I reiterate that as to routine patient care matters, the two categories of nurses work side by side. Generally, an LPN has about a year of nurse's training and lacks the college degree possessed by many RNs. An LPN may be either a grade I or II depending on whether she is qualified to set up an advanced type of IV. To qualify for the II rating the LPN must take a series of classes and then demonstrate a set of skills to an RN who checks off these skills on a checklist after observing the LPN satisfactorily perform them.

As noted above, an LPN cannot be a supervisor or charge nurse nor can LPNs give chemotherapy or administer blood.

However, an LPN has a working relationship with the nurse aides similar to that between the RN and the aide, in that the LPN can direct the aide to perform any job the aide is qualified to do, if the job is within the aide's job description.

Perhaps the testimony of Corey is most telling. Employed elsewhere for 35 hours per week, Corey also works for the Respondent primarily to replace RNs who cannot make their skilled nursing care visit to patients at home. Before any RN can contact Corey to fill in for them, the RN must first get permission of the manager of the Home Care and Hospice Unit, Beth Overly, a Respondent witness, or Katrina Montforten, the patient care coordinator.⁴ Then when Corey performs a skilled nursing care visit, her work is billed to the patient or the patient's insurance company for the same amount as if the RN performed the work.

4. Nurses aides and clerks

The Respondent called one nurses aide, Rosalyn Treat (float to different departments), and two unit clerks, Alice Mize (Medical Floor) and Judy Price (OB and Surgical Floor).⁵ According to Treat, she works wherever she is assigned by the house supervisor, but most frequently is assigned to labor and delivery. After 6 years, Treat is well acquainted with her duties such as making beds, giving baths, or delivering breakfast trays. Her duties on a particular day are printed on a worksheet which Treat receives about 7 a.m. During her workday, it is common for both an RN or LPN to ask Treat for help within the unit to which she is assigned. Generally, this is done on an informal as needed basis, but the charge nurse has the authority to assign Treat to help any nurse, RN or LPN with a heavier workload than the others.

Mize and Price generally perform clerical duties within their units and have little patient contact. Among the duties performed by the clerks includes transcribing physician's orders into computer file records for individual patients, completing paperwork admitting new patients to the hospital, assigning patients to hospital beds and related duties.

Mize concluded her testimony by stating that she is evaluated annually by admitted supervisor and Respondent witness, Elouise McManis, the head nurse on the medical floor.⁶

B. Analysis and Conclusions

1. Are all RNs statutory supervisors

The late senator from Louisiana, Huey P. Long, had a campaign slogan, "Every Man A King."⁷ In the instant case, the Respondent poses a variation, "Every Nurse A Supervisor." I leave Senator Long and his slogan to others to

⁴ Both Overly and Montforten are RNs and both hold positions outside the bargaining unit.

⁵ The parties stipulated that if the Respondent were to call all other aides and clerks employed by the Respondent, they would testify substantially the same as the three-named witnesses (Tr. at pp. 407-414).

⁶ Unlike the RN and LPN, the nurses aide in a hospital setting is not governed by state rules and regulations. Such rules and regulations which do exist apply to the nurses aide working in nursing homes (Tr. at p. 566).

⁷ T. Williams, *Huey Long* (Bantam 1970), p. 276. (The complete slogan was, "Every Man a King, But No One Wears A Crown.")

evaluate, but I have little difficulty in finding the Respondent's position to be lacking in merit.

The Board has often stated that it "has a duty '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' [citations omitted]. The burden of proving supervisory status is on the party who alleges that it exists. . . . Moreover, supervisory authority must be exercised with independent judgment, rather than in a routine or clerical fashion." *Chevron Shipping Co.*, 317 NLRB 379, 380-381 (1995). See also *McDonnell Douglas Corp. v. NLRB*, 655 F.2d 932, 936 (9th Cir. 1981).

As pointed out by the administrative law judge in *Chicago Metallic Corp.*, 273 NLRB 1677, 1688-1689 (1985), aff'd, 794 F.2d 527 (9th Cir. 1986):

Section 2(11) of the Act provides:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively 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.

Supervisors are excluded from coverage of the Act.⁶⁴ In enacting Section 2(11), Congress emphasized its intention that only truly supervisory personnel vested with "genuine management prerogatives" should be considered supervisors, and not "straw bosses, leadmen, setup men and other minor supervisory employees."⁶⁵

The status of a supervisor under the Act is determined by an individual's duties, not by his title or job classification.⁶⁶ It is well settled that an employee cannot be transformed into a supervisor merely by the vesting of a title and theoretical power to perform one or more of the enumerated functions in Section 2(11) of the Act.⁶⁷ To qualify as a supervisor, it is not necessary that an individual possess all of these powers. Rather, possession of any one or them is sufficient to confer supervisory status.⁶⁸ However, consistent with the statutory language and legislative intent, it is well recognized that Section 2(11)'s disjunctive listing of supervisory indicia does not alter the essential conjunctive requirement that a supervisor must exercise independent judgment in performing the enumerated functions.⁶⁹ Indeed, as the court stated in *Beverly Enterprises v. NLRB*, 661 F.2d 1095, 1098 (6th Cir. 1981):

regardless of the specific kind of supervisory authority at issue, its exercise must involve the use of true independent judgment in the employer's interest before such exercise of authority becomes that of a supervisor.

Thus, the exercise of some supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner does not elevate an employee into the supervisory ranks, "the test must be the significance of his judgment and directions."⁷⁰ Consequently, an employee

does not become a supervisor merely because he gives some instructions or minor orders to other employees.⁷¹ Nor does an employee become a supervisor because he has greater skills and job responsibilities or more duties than fellow employees.⁷² Additionally, the existence of independent judgment alone will not suffice for, "the decisive question is whether [the employee has] been found to possess authority to use independent judgment with respect to the exercise . . . of some one or more of the specific authorities listed in Section 2(11) of the Act."⁷³ In short, "some kinship to management, some empathetic relationship between employer and employee must exist before the latter becomes a supervisor for the former."⁷⁴ Moreover, in connection with the authority to recommend actions, Section 2(11) of the Act requires that the recommendations must be effective.

⁶⁴Section 2(3) of the Act provides:

The term "employees" shall include any employee . . . but shall not include . . . any individual employed as . . . a supervisor. . . .

Section 14(a) of the Act provides:

Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to the Act shall be compelled to deem individuals defined herein as supervisors for the purpose of any law, either national or local relating to collective bargaining.

See *Florida Power & Light Co. v. Electrical Workers IBEW Local 641*, 417 U.S. 790 (1974); *Beasley v. Food Fair of North Carolina*, 416 U.S. 653 (1974).

⁶⁵S. Rep. No. 105, 80th Cong., 1 Sess. 4 (1947).

⁶⁶*New Fern Restorium Co.*, 175 NLRB 871 (1969); *Food Store Employees Local 347 (G.C. Murphy Co.) v. NLRB*, 422 F.2d 685 (D.C. Cir. 1969); *NLRB v. Bardahl Oil Co.*, 399 F.2d 365 (8th Cir. 1968).

⁶⁷*Advanced Mining Group*, 260 NLRB 486 (1982); *Magnolia Manor Nursing Home*, 260 NLRB 377 (1982); *NLRB v. Southern Bleachery & Print Works*, 257 F.2d 235 (4th Cir. 1958), cert. denied 359 U.S. 911 (1959).

⁶⁸*NLRB v. Ajax Tool Works*, 713 F.2d 1307 (7th Cir. 1983); *NLRB v. Bergen Transfer & Storage Co.*, 678 F.2d 679 (7th Cir. 1982); *NLRB v. Joe & Dodie's Tavern*, 666 F.2d 383 (9th Cir. 1982).

⁶⁹*NLRB v. Wilson-Crissman Cadillac*, 659 F.2d 728 (6th Cir. 1981);

Poultry Enterprises v. NLRB, 216 F.2d 798 (5th Cir. 1954).

⁷⁰*NLRB v. Wilson-Crissman Cadillac*, supra; *Hydro Conduit Corp.*, 254 NLRB 433 (1981); *Federal Compress & Warehouse Co. v. NLRB*, 398 F.2d 631 (6th Cir. 1968).

⁷¹*NLRB v. Wilson-Crissman Cadillac*, supra; *NLRB v. Doctors' Hospital of Modesto*, 489 F.2d 772 (9th Cir. 1973).

⁷²*Federal Compress & Warehouse Co. v. NLRB*, 398 F.2d 631 (6th Cir. 1968); *NLRB v. Merchants Police, Inc.*, 313 F.2d 310 (7th Cir. 1963).

⁷³*Advanced Mining Group*, 260 NLRB 486 (1982); *NLRB v. Brown & Sharpe Mfg. Co.*, 169 F.2d 331 (1st Cir. 1948).

⁷⁴*Advanced Mining Group*, supra; *NLRB v. Security Guard Service*, 384 F.2d 143 (5th Cir. 1967).

See also *NLRB v. Lauren Mfg. Co.*, 712 F.2d 245, 247-248 (6th Cir. 1983), where the court concluded that the disputed employees were leaders, but not supervisors, because none of the functions they perform required them to exercise independent judgment. The court also noted, as is true in the instant case, the disputed employees did not participate in formulating or developing company policy.

To these general principles of Board law regarding supervisors, I add the Board's view of RNs in particular. They "are a highly trained group of professionals who normally inform other, lesser skilled, employees as to the work to be performed for patients and insure that such work is done.

But, their daily on-the-job duties and authority in this regard are solely a product of their highly developed professional skills and do not, without more, constitute an exercise of supervisory authority in the interest of their employer." *Doctors' Hospital of Modesto*, 183 NLRB 950, 951 (1970), enf. 489 F.2d 772 (9th Cir. 1973).

In *Children's Habilitation Center v. NLRB*, 887 F.2d 131, 134 (7th Cir. 1989), the court extended the Board's views regarding RNs, where the issue was the supervisory status only of charge nurses rather than of all RNs in the bargaining unit:

nurses are professionals and their exercise of supervision is guided by professional training and norms. The charge nurses in this case are registered nurses who are highly trained and responsible. Supervision exercised in accordance with professional rather than business norms is not supervision within the meaning of the supervisor provision, for no issue of divided loyalties is raised when supervision is required to conform to professional standards rather than to the company's profit-maximizing objectives.

With that, the court affirmed the Board's view that charge nurses are not supervisors.

By the Board standards existing prior to *Health Care*, supra, 511 U.S. 571 (1994), it would be relatively simple, even in the absence of an established collective-bargaining relationship, to find that the Respondent has failed to prove that all RNs were statutory supervisors, because I find that the RNs give routine directions to LPNs, aides, and clerks and such direction is primarily in connection with patient care.

But the Respondent contends that *Health Care* changes everything. At page 30 of its brief, the Respondent asserts,

the Board must now consider a nurse's authority to assign and direct others with respect to patient care in assessing supervisory status. Indeed, contrary to the Board's long-standing analysis, even if a nurse's assignment and direction duties relate solely to patient care, one of the statutory indicia of supervisory status is present and thus the first part of the Board's test is satisfied.

In *Health Care*, supra at 573-574, the Court stated

As the Board has stated, the statute [defining a supervisor] requires the resolution of three questions, and each must be answered in the affirmative if an employee is to be deemed a supervisor. First, does the employee have authority to engage in one of the 12 listed activities? Second, does the exercise of that authority require "the use of independent judgment?" Third, does the employee hold the authority, "in the interest of the employer?" [Citation omitted.] This case concerns only the third question, and our decision turns on the proper interpretation of the statutory phrase "in the interest of the employer."

In contrast to *Health Care*, the instant case concerns all three questions noted by the Supreme Court above. Because the Respondent takes the position that all 120 of the RNs are statutory supervisors, it is not at all clear that *Health Care*

necessarily controls disposition of this case. In sum, I cannot find on this record that the Respondent has proven that all RNs have authority to engage in 1 of the 12 listed activities while using independent judgment (supra at 1785).

I have noted above the Respondent's undisputed supervisory hierarchy. These RN supervisors share certain common characteristics not shared by the rank and file, such as being paid a salary no matter how many hours they work, being on call 24 hours a day to resolve problems or grievances, being required to attend management meetings and participate in the making of management policy. In addition, these supervisors make an independent investigation of disciplinary cases when an RN recommends that an employee be disciplined. Of course, there is no questions that these RN supervisors have undisputed authority to hire, discharge, transfer, promote, and perform the remaining indicia of supervisor status, including the authority to make effective recommendations to higher supervisors regarding personnel actions. All of this power is clearly in the interest of the Employer. The existence of these undisputed supervisors makes it less likely that all other RNs are also supervisors.

In examining the 12 indicia of supervisor status listed above, I find that the Respondent has failed to prove that all bargaining unit RNs, indeed it has failed to prove that any bargaining unit RN, meet even a single criteria of supervisory status.

To support this conclusion, I note as follows. First, the Respondent presented evidence regarding charge nurses, as described above. Although a charge nurse does not perform a statutory supervisory function, even if she did, the office changes daily and the same person would not necessarily have the job even within the same week. The sporadic exercise of some supervisory authority does not of itself turn an employee into a supervisor. *NLRB v. Lindsay Newspaper*, 315 F.2d 709, 712 (5th Cir. 1963); *McDonnell Douglas Corp. v. NLRB*, supra, 655 F.2d at 936.

In the instant case, the Respondent argues that RNs assign and direct LPNs, aides and clerks. To the extent the evidence shows this to be true, it is no more than meeting the Board's general criteria for a nonsupervisory employee: "an employee with special expertise or training who directs or instructs another in the proper performance of his work for which the former is professionally responsible is not thereby rendered a supervisor. *Golden West Broadcasters-KTLA*, 215 NLRB 760, 762 fn. 4 (1974). See also *International Center for Integrative Studies*, 297 NLRB 601, 602 fn. 7 (1990).

In some cases, particularly on the evening or night shift, or on weekends, the RN is the highest ranking employee in a given unit. However, the Board has held that "the Act does not state or fairly imply that the highest ranking employee on a shift is necessarily a supervisor." *Northcrest Nursing Home*, 313 NLRB 491, 499 (1993). This is particu-

larly true where the undisputed supervisors are available at their homes on 24-hour telephone standby. See *Northcrest Nursing Homes*, supra, 313 NLRB at 499. *NLRB v. KDFN, Inc.*, 790 F.2d 1273, 1279 (5th Cir. 1986) (absence of admitted supervisors from television station does not show that workers must be supervisors, where admitted supervisors were available for consultation, even though not present at station); *Tri-County Electric Cooperative*, 237 NLRB 968, 969 (1978) (jobsite line foremen were employees, even though admitted supervisor appeared at the jobsite "as infrequently as once a month," because employees had a "two-way radio to contact admitted supervisor when unusual circumstances arose").

Similarly, although the supervisory nurses conduct formal evaluations of RNs and others, to the extent, the RNs, in some cases, make recommendations, the authority simply to evaluate employees without more is insufficient to find supervisory status. *Passavant Health Center*, 284 NLRB 887, 891 (1987), and *Geriatrics, Inc.*, 239 NLRB 287, 288 (1978). In sum, there must be a showing that the RNs' recommendations are given controlling weight and no such showing was made here.

In light of the above discussion, I find it is unnecessary to consider in depth the Supreme Court's third question, whether the (RN) holds the authority "in the interest of the employer." That is, I have answered the Court's first two questions in the negative with respect to all bargaining unit RNs.⁸ By implication, I have answered the third question in the negative as well. Not only are the RNs exercising their authority in accord with professional norms, but that authority is limited by a host of state laws and regulations, by management policy, by physician orders, and by standard authoritative books on the practice of nursing. I've noted above, that the rank-and-file RN does not make policy, except in a very attenuated sense, i.e., anyone can make suggestions for management to consider.

To constitute a valid defense to the charges here, the Respondent had to prove that all RN members of the bargaining

⁸ The Court stated in *Health Care*, supra at 582-583:

An examination of the professional's duties . . . to determine whether one or more of the 12 listed activities is performed in a manner that makes the employee a supervisor is, of course, part of the Board's routine and proper adjudicative function. In cases involving nurses, that inquiry no doubt could lead the Board in some cases to conclude that supervisory status has not been demonstrated. The Board has not sought to sustain its decision on that basis here, however. It has chosen, instead to rely on an industry-wide interpretation of the phrase in the interest of the employer that contravenes precedents of this Court and has no relation to the ordinary meaning of that language.

unit, or all save one,⁹ are statutory supervisors. I find that the Respondent has failed to meet its burden of proof.¹⁰

2. Are all RNs statutory supervisors?

Alternative analysis

In the alternative, I assume strictly for the sake of argument that the Respondent has established that all its RNs are statutory supervisors. Even under this unlikely scenario, the Respondent has not achieved its ultimate purpose. In *Gratiot Community Hospital*, 312 NLRB 1075 (1993), enfd. in part 51 F.3d 1255 fn. 2 (6th Cir. 1995), the Board stated,

even assuming arguendo that all the nursing supervisors were statutory supervisors, the unilateral changes regarding them would nevertheless be unlawful. In this regard, we note that the parties have agreed to include all nursing supervisors in the unit, and they were covered by a contract at the time of the changes here. We have held that when parties to a collective-bargaining relationship, as here, have voluntarily agreed to include supervisors in a unit, the Board will order the application of the terms of the collective-bargaining agreement to those supervisors.

The Board went out to affirm applications of the above rule even though the contract's recognition clause excluded "supervisors within the meaning of the National Labor Relations Act." Thus, the Board concluded that because the the Re-

⁹With respect to a bargaining unit of one employee, the Board stated as follow in *Stack Electric*, 290 NLRB 575, 577 (1988):

In *D & B Masonry*, 275 NLRB 1403 (1985), the Board adopted the judge's discussion of this issue at 1408.

It is settled that if an employer employs one or fewer unit employees on a permanent basis that the employer, without violating Section 8(a)(5) of the Act, may withdraw recognition from a union, repudiate its contract with the union, or unilaterally change employees' terms and conditions of employment without affording a union an opportunity to bargain. *SAC Construction Co.*, 235 NLRB 1211, 1230 (1978); *Sunray Ltd.*, 258 NLRB 517, 518 (1981); *Chemetrans Corp.*, 268 NLRB 335 (1983). The basis for permitting an employer to engage in this conduct was explained by the Board in *Foreign Car Center*, 129 NLRB 319, 320 (1960), as follows:

The Board has held that it will not certify a one-man unit because the principles of collective bargaining presuppose that there is more than one eligible person who desires to bargain. The Act therefore does not empower the Board to certify a one-man unit. By parity of reasoning, the Act precludes the Board from directing an employer to bargain with respect to such a unit.

¹⁰It is unnecessary to consider secondary indicia of supervisory status since they alone will not confer supervisory status under the Act. *Triple Fire Protection*, 315 NLRB 409, 412-413 (1994). However, were I to consider these factors which include (1) whether all RNs consider themselves to be supervisors and whether other employees consider all RNs to be supervisors; (2) whether RNs attend management meetings; (3) whether RNs receive a higher wage than fellow employees; (4) whether RNs have substantially different benefits from fellow employees; and (5) whether the ratio of supervisors to employees would suggest supervisory status, II Morris, *The Developing Labor Law* 1454-1455 (2d ed. 1983), I would find factors 1, 2, and 5 count against the Respondent's position, factor 3 counts toward it, and factor 4 is inconclusive. As to factor 5, see *Children's Habilitation Center*, supra, 887 F.2d at 132-134.

spondent could not be compelled to recognize the Union as the representative of a unit containing supervisors, the Respondent could and did agree to a contract covering certain individuals found to be supervisors, citing *NLRB v. News Syndicate Co.*, 365 U.S. 695, 699 fn. 2 (1961). The Board further concluded that the unilateral changes as to the nursing supervisors were unlawful.

The collective-bargaining agreement in this case which expired on October 31, 1994, has a recognition clause like that referred to in *Gratiot Community Hospital*, supra (Jt. Exh. 5, par. 1, p. 1), and I find in accord with the Board's holding above, the recognition clause is irrelevant to the issue at bar. I also find that if the RNs were proven to be statutory supervisors in this case, they were statutory supervisors at the time the Respondent voluntarily agreed to include the nurses in the bargaining unit. In other words, nothing in *Health Care* suddenly transferred the RNs here into statutory supervisors. Moreover, no lawful changes in work rules or job assignments transformed the RNs into statutory supervisors. Essentially, the RNs' job duties now are the same as when the Respondent entered into the agreement. Therefore, the Respondent has no lawful basis to repudiate the collective-bargaining agreement, even if it contains statutory supervisors.¹¹

3. Substantive allegations

Having rejected above the gist of the Respondent's case, I find that the General Counsel has proven the allegations of the complaint by overwhelming evidence. See *Caamono Bros. Inc.*, 304 NLRB 24 (1991). Notwithstanding this fact, some preliminary observations will be helpful.

In *Bonnell/Tredegar Industries v. NLRB*, 46 F.3d 339, 342-343 (4th Cir. 1994), the court stated:

An employer's duty under 8(d) to engage in collective bargaining prohibits it from unilaterally terminating or modifying a collective bargaining agreement during the effective term of the agreement. Section 8(d) provides:

[W]here there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification [complies with certain requirements, including notifying and offering to meet and confer with the other party] . . . and the duties so imposed shall not be construed as requiring either party to discuss or agree to an modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.

Id.; see also *W. R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 757, 771 (1983) ("Absent a judicial determination . . . [the company] cannot alter the collective bargaining agreement without the union's

¹¹Cf. *Desert Hospital*, 316 NLRB 1240 fn. 1 (1995). Moreover, without either Board action or the consent of the parties, the Respondent could not lawfully remove bargaining unit work out of the bargaining unit by "promoting all of the RNs to supervisory positions." See *Hampton House*, 317 NLRB 1005 (1995).

consent. Permitting such a result would undermine the federal labor policy that parties to a collective bargaining agreement must have reasonable assurances that their contract will be honored") (citations omitted).

In sum, what the Respondent did here is make a basic repudiation of the contract and the bargaining relationship. *Williams Pipeline Co.*, 315 NLRB 630, 631-632 (1994). Before an employer is permitted to alter or repudiate the collective-bargaining agreement, the courts require "clear and convincing evidence" indicating a loss of union support. See *NLRB v. Albany Steel*, 17 F.3d 564, 568 (2d Cir. 1994). This high standard "reflects an awareness that an employer's repudiation of the obligation to bargain with incumbent union endangers the stability of the collective bargaining process." *NLRB v. Creative Food Design*, 852 F.2d 1295, 1300 (D.C. Cir. 1988).

In this case the parties' collective-bargaining agreement had expired before the Respondent repudiated its bargaining relationship. Nevertheless, unilateral changes are not permitted before a lawful impasse occurs. *Maramount Corp.*, 317 NLRB 1035 (1995), *Hen House Market No. 3*, 175 NLRB 596 (1969), enfd. 428 F.2d 133 (8th Cir. 1970).

I further find that the unilateral changes at issue in this case were material, substantial, and significant and that the changes were made without notice to the Union or without affording the Union an opportunity to bargain. See *Tel Data Corp.*, 315 NLRB 364 (1994).

In light of the above discussion, I find that by withdrawing its recognition of the Union under the facts and circumstances discussed above, the Respondent violated Section 8(a)(5) and (1) of the Act. Compare *Albertson's Inc.*, 310 NLRB 960 (1993).

I credit the undisputed evidence offered by RNs Betty Austin, Derinda Grimshaw, Patricia Hedrick, and Lenora Jetter regarding a series of meetings held by Larson in August for staff RNs. The purpose of the meetings concerned the Respondent's intent to repudiate the collective-bargaining relationship and how, in Larson's view, RNs would be better off without the Union. Thus Larson explained that while RNs would no longer receive double time for overtime work, on the other hand, they would receive Christmas Eve as a holiday and a \$500 medical voucher bonus to spend on additional health insurance coverage. Larson explained to the RNs that these two benefits had been possessed previously by the Respondent's nonbargaining unit employees.¹²

Prior to hearing, the Respondent also admitted changing its policies and procedures regarding scheduling and assignment of unit RNs by implementing

- (a) a rule permitting split shifts;
- (b) a policy reducing unit employees rights to be scheduled for every other weekend off;
- (c) a rule restricting holiday time off;

¹² Although I find that Larson conveyed information regarding the unilateral changes as part of her presentation, the Respondent asserts at par. 7 of its answer to consolidated complaint and affirmative defenses (G.C. Exh. 1(s)) that Larson made the announcements in answer to an employee's question. However, the information was conveyed, the changes were unlawful.

(d) a rule requiring notification of the house supervisor of illness two hours prior to the beginning of the shift;

(e) a rule requiring advance approval to work overtime.

[Tr. at pp. 22-23]

The Respondent denied implementing a rule permitting it to assign nurses to any work area/departments of the hospital without restriction. I find that the Respondent did implement such a rule and, as urged by the General Counsel, I direct my attention both to the collective-bargaining agreement (Jt. Exh. 5, p. 6, par. (A)) which states that an RN will not be required to accept an assignment to an area she feels she is not qualified to serve in, and to the new policy (Jt. Exh. 3, par. III (a)-(c)) which states that assignment to another area or shift may be necessary to meet staffing requirements. I find this and the other admitted changes are all unlawful unilateral changes in as much as there was no notice to the Union and no opportunity for the Union to request bargaining. See *Duke University*, 315 NLRB 1291 (1995), *Sheraton Hotel Waterburg*, 312 NLRB 304 (1993); *Millard Processing Services*, 310 NLRB 421 (1993); *Ciba-Gergy Pharmaceuticals v. NLRB*, 722 F.2d 1120, 1126-1127 (3d Cir. 1983). The vice of a unilateral change was explained by the court in *NLRB v. McClatchy Newspapers*, 964 F.2d 1153, 1162 (D.C. Cir. 1992):

A unilateral change not only violates the plain requirement that the parties bargain over "wages, hours and other terms and conditions" but also injures the process of collective bargaining itself. Such unilateral action minimizes the influence of organized bargaining. It interferes with the right to self organization by emphasizing to the employees that there is no necessity for a collective bargaining agent.

See also *Page Litho, Inc.*, 311 NLRB 881 (1993).

I turn finally to deal separately with the RNs' job description. The evidence shows that sometime before expiration of the collective-bargaining agreement, RN job descriptions were revised to include a 100-pound lifting requirement. According to Larson, this was done so that the Respondent could be in compliance with the Americans with Disabilities Act (ADA), but was less onerous than the 200-pound lifting requirement which the Human Relations Department had allegedly learned was in effect for RNs employed by certain other (unnamed) hospitals (Tr. at pp. 88, 118-119). Like other unilateral changes, there was no notice to the Union or opportunity for bargaining. When the revised job description was presented to the RNs for signature, some signed and some didn't. Those who refused were not disciplined, at least not up to the time of hearing. To justify its action with respect to the job description, the Respondent first contends (Br. at p. 62) again that all RNs were supervisors, a subject I have dealt with above. Next, the Respondent takes up the ADA defense.

The Board has stated that its duty is to construe the labor laws so as to accommodate the purposes of other Federal laws. *Meyers Industries*, 281 NLRB 882, 888 (1986). Many Board cases reflect this philosophy where an employer argues that it violated the labor laws only because it was merely acting in compliance with another Federal law. See, e.g.,

Swanson Group, 312 NLRB 184 (1993) (employer refused to bargain with union on grounds that Service Contract Act provided defense). *National Fuel Gas Distribution Corp.*, 308 NLRB 841, 844 (1992) (employer relied on sec. 415 of the Internal Revenue Code as a justification for its unilateral repudiation of contractual thrift plan obligations). These defenses have been rejected by the Board.

As to the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq., I am not aware that the Board has considered the ADA so far as it relates to the Act or is in conflict with the Act. However, I have considered a law review article, O'Melveny, *The Americans with Disabilities Act and Collective Bargaining Agreements, Reasonable Accommodations or Irreconcilable Conflicts*, 82 Ky. L.J. 219 (1993-1994). Based in part on a *Memorandum from the Office of the General Counsel of the NLRB on Potential Conflicts Raised by Americans with Disabilities Act*, 158 Daily Lab. Rep. 222(BNA) F-1 (DLR 1992), this article suggests that it is both possible and desirable to reconcile the tensions which exist between the ADA and the (Act). More specifically, the author states (pp. 228-229),

When a statutory duty to bargain exists, an employer cannot make any changes in the terms and conditions of employment that would constitute labor contract "modifications" without the consent of the union.⁴³ Failure to obtain the union's consent to such changes violates section 8(d) of the NLRA.⁴⁴ The NLRB General Counsel's Memorandum soundly reaffirms the employer's duty to bargain with the union when proposing ADA accommodations that would effect any significant change in working conditions:

[I]f an employer unilaterally implements a "reasonable accommodation" for a disabled employee or otherwise alters its employment practices so as to change wages, hours or other working conditions, its action may give rise to a Section 8(a)(5) charge.⁴⁵

Thus, any "change that is inconsistent with an established employment practice such as a seniority system, defined job classifications or a disability plan would more likely be a change in Section 8(d) terms and conditions of employment.

⁴³ *NLRB v. Katz*, 369 U.S. 736, 743 (1962); *Allied Chemical Workers Local 1 v. Pittsburg Plate Glass Co.*, 404 U.S. 157, 179 (1971).

⁴⁴ *NLRB General Counsel's Memorandum*, supra note 17 at *1 ("[N]either party may alter terms and conditions . . . in the agreement without the consent of the other party. Moreover, section 8(d) specifically authorizes parties to . . . refuse to 'discuss or agree to any modification' during the term of the contract").

⁴⁵ *Id.*

To the same effect, see Comment, *The Americans with Disabilities Act and the National Labor Relations Act; a Unionized Employers Road Map to Reasonable Accommodations*, 33 *Duguesne Law Rev.* No. 1, Fall 1994, pp. 105-126. In this decision, I join with the then General Counsel of the Board, and the authors of the articles cited above, to find that the ADA is no defense and the Respondent violated the Act by revising RN's position description without notice to or consent of the Union.

Finally, I turn to the contract's management-rights clause (Jt. Exh. 5, par. 7, p. 7). According to the Respondent (Br. at p. 63), under this clause, it has sole right to assign duties to the work force and to reclassify positions as well as to carry out the ordinary and customary functions of management. The management-rights clause reads as follows:

7. MANAGEMENT RIGHTS

Except as abridged by this Agreement, the Hospital has the exclusive duty and right to manage the Hospital to determine the quality and quantity of patient care, to manage the business and to schedule work, including but not limited, the sole right to the following:

(A) Hire, discipline, discharge, layoff, assign, promote and evaluate employee performance, and to determine or change the starting and quitting time and number of hours worked.

(B) Promulgate rules and regulations.

(C) Assign duties to the work force.

(D) Reorganize, discontinue, or enlarge any department or division.

(E) Transfer employees within departments or to other departments, to other classifications, and to other shifts.

(F) Introduce new or improved methods or facilities.

(G) Reclassify positions and carry out the ordinary and customary functions of management whether or not possessed or exercised by the hospital prior to the execution of this Agreement. SUBJECT ONLY to the restrictions and regulations governing the exercise of these rights as are expressly provided in this Agreement.

(H) The Association, on behalf of its members, agrees to cooperate with the Hospital to attain and maintain full efficiency and maximum patient care. The Hospital recognizes and agrees to receive and consider constructive suggestions submitted through the Conference Committee toward these objections.

(I) In the event economic or practical considerations justify the contracting out of any of its operations, the Hospital agrees to notify the Association sixty (60) days prior to the date the contract becomes effective, of the nature of the work to be so contracted, the number of employees affected and the name and address of the contractor. The Hospital agrees to meet and discuss with the Association the impact of any such subcontract. The Hospital further agrees to use its utmost influence to see that the contractor hires those employees affected by the contracting. If as a result of subcontracting an individual member of the bargaining unit is displaced from his/her position, and if there is no other vacant position available for which the employee is qualified, then said employee shall be entitled to exercise his/her bargaining unit seniority, (Based on 11B) for the purpose of bidding to the position held by the least senior bargaining employee in a department or unit for which the bidding employee is qualified.

I find that the management-rights clause quoted above is not effective to waive the Union's right to notice and the opportunity to bargain. See *Gratiot Community Hospital*, supra,

312 NLRB at 1084-1085, and *KIRO, Inc.*, 317 NLRB 1325 (1995). Compare *Chicago Tribune Co. v. NLRB*, 974 F.2d 933 (7th Cir. 1992).

For the same reasons suggested above, I find that the Respondent violated Section 8(a)(5) and (1) of the Act by directly dealing with employees with respect to the revised position description. See *Silverado Mining Co.*, 313 NLRB 827 (1994).

CONCLUSIONS OF LAW

1. The Respondent, Bozeman Deaconess Foundation d/b/a Bozeman Deaconess Hospital, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

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

All registered nurses, sometimes known as professional nurses in nursing service employed at Bozeman Deaconess Hospital in Bozeman, excluding director of nursing services, the assistant director of nursing services, if any, the director of in-service education, supervisors, head nurses, nurses in Central Supply, guards, as defined in the Act, and other employees.

4. Bargaining unit registered nurses employed by the Respondent at its Bozeman, Montana hospital are not statutory supervisors, as defined in the Act.

5. The Respondent violated Section 8(a)(1) and (5) of the Act by

(a) Withdrawing recognition from the Union and repudiating the collective-bargaining agreement.

(b) Unilaterally changing the terms and conditions of its bargaining unit employees by implementing

- (1) a rule permitting split shifts;
- (2) a policy reducing unit employees' right to be scheduled for every other weekend off;
- (3) a rule restricting holiday time off;
- (4) a rule requiring notification of the house supervisor of illness 2 hours prior to the beginning of the shift;
- (5) a rule requiring advance approval to work overtime;

(6) a rule permitting the Respondent to assign nurses to any work area/department of the hospital without restriction;

(7) a rule changing bargaining unit employees job description to include a 100-pound lifting requirement and demanding that employees sign the new job description;

(c) And by bypassing the Union and dealing directly with unit employees with respect to the position description described immediately above.

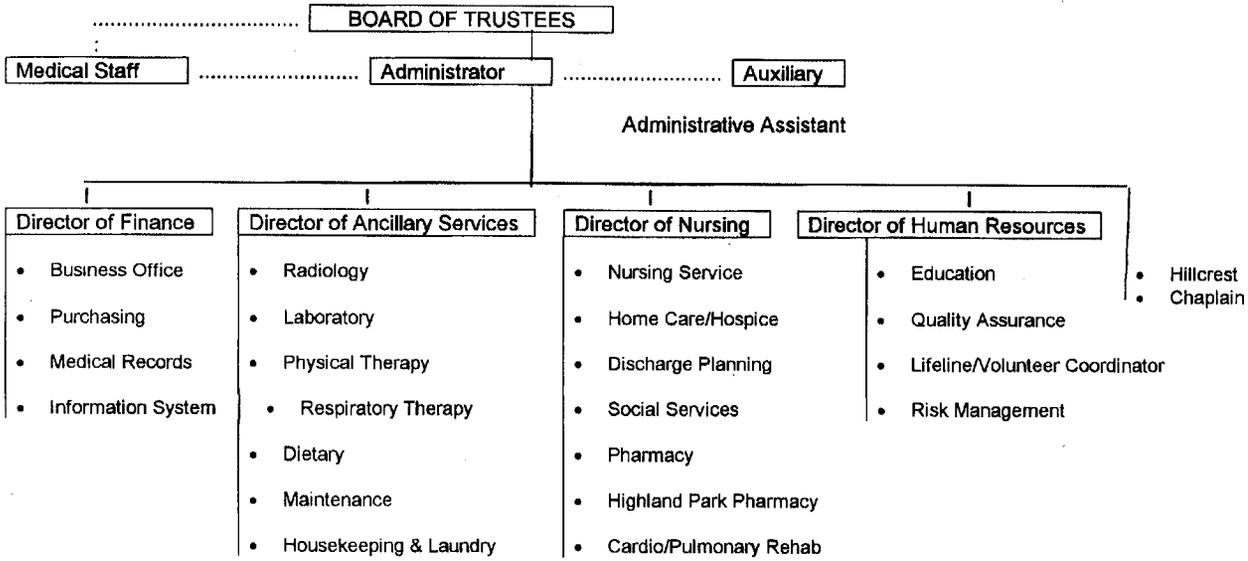
THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Principally, I shall recommend that the Respondent be ordered to recognize and, on request, bargain with the Union over the terms and conditions of employment of the registered nurses at the facility and, on the request of the Union, bargain in good faith for a successor contract and rescind all unilateral changes that it granted to its registered nurses on or about August/September 1994. The Respondent shall be ordered to make whole all employees for any losses sustained by them by virtue of the failure to apply the agreements to them, make the union benefit funds whole for moneys owed to them under the agreements, and make the Union whole for any loss of dues as a result of the failure or delay in giving effect to dues-checkoff authorizations by employees.¹³ However, nothing shall be construed as requiring the Respondent to revoke the Christmas Eve holiday day off or a \$500 medical voucher bonus granted to the employees, absent the written consent of the Union.

[Recommended Order omitted from publication.]

¹³The make-whole remedy shall be computed in accordance with Board law. Wages owed shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Fringe benefit payments shall be computed in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979); and *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1983), and the funds are to be made whole under *Stone Boat Yard*, 264 NLRB 981 (1983), enfd. 715 F.2d 441 (9th Cir. 1983), cert. denied 466 U.S. 937 (1984). Union dues are to be computed in accordance with *Parkview Furniture Mfg. Co.*, 284 NLRB 947, 974 (1987).

APPENDIX A
BOZEMAN DEACONESS FOUNDATION
ORGANIZATIONAL STRUCTURE



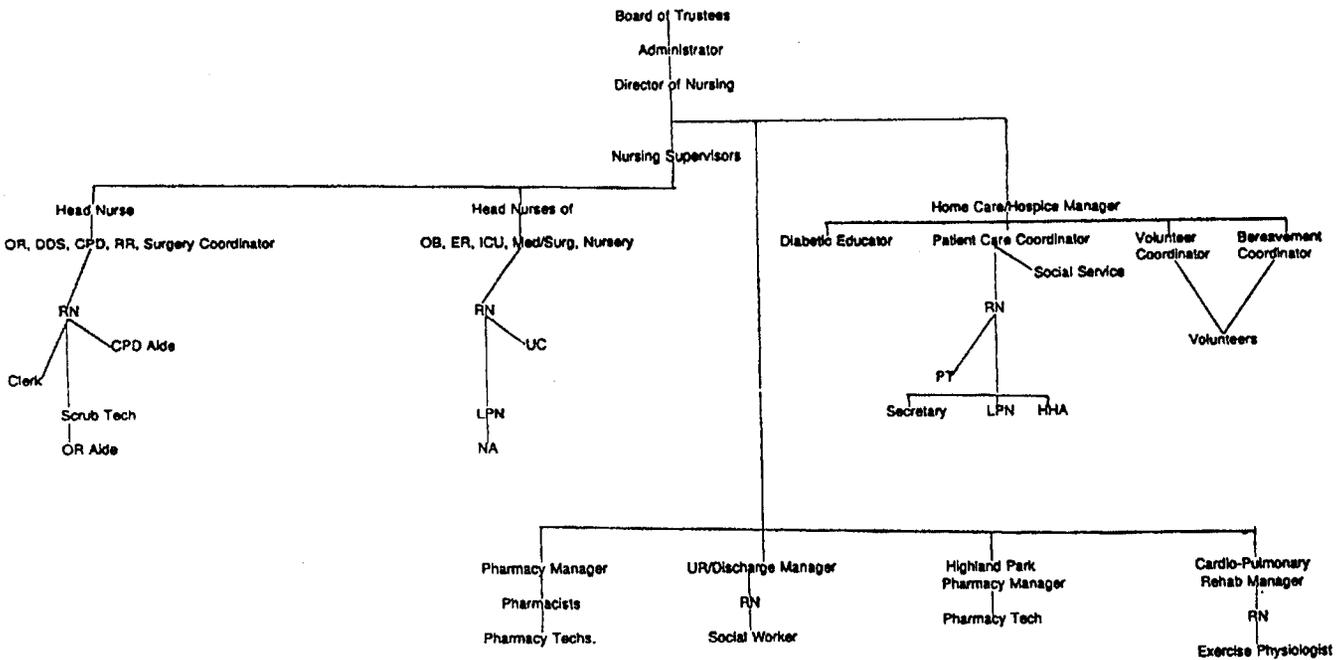
Effective 2/1/94

(Resp. Ex. 101)

NOTE: In the absence of the Administrator,
the Director of Finance is the designated
person in charge.

APPENDIX B

BOZEMAN DEACONESS HOSPITAL
NURSING SERVICE ORGANIZATIONAL CHART



9/94

(Resp. Ex. 102)